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ENFORCING INTERNATIONAL HUMAN RIGHTS TREATIES IN NIGERIAN COURTS: NEW FRONTIERS FOR INTERNATIONALIZATION

This paper has discussed the various kinds and nature of international treaties as well as their enforcement methods. It has raised and examined Nigerian attitude towards implementation of international treaties particularly by its courts. It has equally made the case that Nigerian courts should be more conscious of the need to enforce international treaties to which Nigeria is a signatory including those that Nigeria in under obligation as a member of the international community to implement within its territorial jurisdiction.

Keywords: International law; domestic jurisdiction; enforcement mechanism; territorial jurisdiction.

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Забезпечення дотримання міжнародних договорів з прав людини в нігерійських судах: нові можливості для інтернаціоналізації

У статті проаналізовано природу та види міжнародних договорів, процеси їх імплементації на міжнародному і внутрідержавному рівнях, виконання міжнародних угод нігерійськими судами, а також визначено механізми, які можуть використовуватися для більш ефективної реалізації міжнародних договорів відповідно до нігерійського законодавства. Зроблено висновок, що нігерійські суди повинні розуміти необхідність забезпечення дотримання міжнародних договорів, стороною яких виступає Нігерія, в тому числі й тих, які Нігерія, як член міжнародного співтовариства, зобов'язана виконувати в межах своєї територіальної юрисдикції.

Міжнародний договір, по суті, є угодою, укладеною на міжнародному рівні між державами, і стосується головним чином відносин між ними. Саме на основі таких договорів і здійснюється в основному міжнародне співробітництво. Договори в міжнародному праві мають обов'язкову силу і є еквівалентом документа про передачу прав чи майна, муніципального права чи законодавчого акта. Деякі договори створюють правове підґрунтя тільки для тих держав, які є їх учасниками, інші кодифікують звичайне міжнародне право, що раніше існувало, а також деякі спеціальні норми, які в кінцевому підсумку перетворюються на звичайне міжнародне право і є обов'язковими для всіх держав, як, наприклад, конвенція щодо геноциду. Міжнародні громадські організації іноді також можуть укладати між собою договори та угоди. Договори є не лише справжнім джерелом міжнародного права, а й роблять значний внесок у його прогресивний розвиток.

Сторони, які беруть участь в укладенні договорів, мають можливість вибору будь-якого зручного для них методу, оскільки в міжнародному праві не існує певної або встановленої процедури для цього. Договори можуть бути укладені між державами, урядами, главами держав або урядовими установами, які завжди виявляються найбільш придатними й доцільними з урахуванням мети або цілей, які конкретний договір має досягти.

Ключові слова: міжнародне право; внутрішня юрисдикція; механізм застосування; територіальна юрисдикція.

Introduction. Treaties, alternatively referred to as Convention, Protocol, Declaration, Charter, Covenant, Pact, Act, Statute, Agreement, Concordat, Modus Vivendi, Exchange of Notes (or Letters), Process Verbal, Final Act, General Act, Accord, Arrangement, Understanding, Compromise, Regulation, Provision and so forth,[1] constitute the principal media through which international transactions are consummated. By a simple definition, a treaty is basically an agreement at the international forum between States and are concerned essentially with relations between such States. International co-operation has been carried out principally through such treaties. A treaty may be bilateral as between two States or multilateral as involving more than two States. A contract treaty merely regulates a specific relationship between two or more States while a law making treaty lays down rules for a number of States.

Treaties are binding in international law and provides the equivalent of municipal law contract, conveyance, or legislation. Some treaties create law only for those States that are parties to them, some codify pre-existing customary international law, and some propound rules that eventually develop into customary international law that are binding upon all States, like the Genocide Conventions. Public international organizations are sometimes in a position to enter into treaty obligations.[2]

Treaties are not only a veritable source of international law but contribute immensely to its progressive development. This article takes a critical look at the nature and dimensions of international treaties, their implementation processes at both international and domestic fora, international treaties before Nigerian Courts, and avenues that are exploitable to foster improved implementation of international treaties in the Nigerian context particularly as it affects international human rights treaties.

[1] Umozurike, U.O. (1993). *Introduction to International Law*. Ibadan: Spectrum Law Publishing. Pgs 17, 163.

[2] Martin, A.E. ed. (2002). *A Dictionary of Law*, 5th Ed. Oxford: Oxford University Press. Pg 507.

The Making and Incidents of International Treaties. Parties engaged in the making of treaties have the option of choosing any method convenient to them as there is no definite or prescribed procedure for doing so in international law. Treaties may be drafted as between States, Governments, Heads of State, or governmental departments which ever appears most suitable and expedient bearing in mind the purpose or purposes the particular treaty is intended to accomplish.[1]

In spite of this, certain principles have evolved in international law in relation to the formulation of international conventions and this concern especially the capacity to do so. Treaties are usually negotiated by accredited representatives. Under Article 7 of the Vienna Convention on the Law of Treaties, a Head of State, Head of Government, or foreign minister is not required to furnish full powers before negotiating for his State. Likewise, a head of diplomatic mission need not produce full powers before adopting a treaty between his own State and his host State. The same applies to a representative to an international conference or organization.[2] However, any act relating to the making of a treaty by a person not authorized as required will be without any legal effect, unless the State involved afterwards confirms the act.[3] Under Article 46 of the treaty convention, a representative acting in manifest violation of the provisions of municipal law in relation to the making of treaties provides good cause for invalidating the treaty.

Once the capacity to negotiate a treaty is present, it remains to adopt the text, sign and subsequently ratify the same or otherwise have it acceded or adhered to by parties that had not signed it. Under Article 26 of the treaty convention, every treaty in force is binding upon the parties to it and must be performed by them in good faith. The article draws inspiration from the customary law rule of *Pacta Sunt Servanda*.

Another area that has often induced controversy in the implementation of treaties is the question of reservations.[4] Article 2(1)(1) of the treaty convention defines reservation as a *unilateral statement made by a state when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*. In a general sense, where a State is satisfied with most of a treaty, but is uncomfortable with specific provisions, it may in certain circumstances refuse to accept or be bound by such provisions while consenting to the rest of the agreement. Some of the salutary consequences of reservations include that States may agree to be bound by a treaty which otherwise they might reject in its entity. In multilateral treaties, this privilege may work to induce as many States as possible to accede to the treaty and by doing so encourage harmony among States of widely differing social, economic, and political systems. Contrariwise, uncontrolled reservations may frustrate the

[1] Shaw, M.N. (1997). *International Law,* 4th Ed. Cambridge: Cambridge University Press. Pg. 636.

[2] Umozurike, U.O., Op. cit

[3] Article 8 of the Vienna Convention on the Law of Treaties.

[4] See also Redgewell, C. (1993). *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties".* 64 BYIL: pg. 245; J. K. Gamble, "*Reservations to Multilateral Treaties: A Macroscopic View of State Practice*", 74 AJIL, 1980. Pg 372.

entire exercise, dislocate the purpose of the agreement and complicate relationships among States. This problem seldom arises in bilateral treaties since a reservation by one party may be viewed as a counter-offer requiring re-negotiation and acceptance.

A treaty enters into force when and by the procedure decided by the contracting parties. However, in the absence of any agreement or provision on this, it becomes operative soon after consent to be bound by the treaty has been established for all the negotiating States.[1] To draw instances, the Geneva Convention on the High Seas 1958, provide for entry into force on the thirtieth day following the deposit of the twenty- second instrument of ratification with the United Nations Secretary-General, while the Vienna Convention on the Law of Treaties itself came into effect thirty days after the deposit of the thirty-fifth ratification.[2] By application, a treaty does not operate retroactively unless the treaty expresses a contrary intention. By Article 28 of the Law of Treaties, its provisions will not bind a party as regards any facts, acts, or situations prior to that State's acceptance of the treaty.

There are a number of circumstances upon which a contracting party may avoid a treaty. This may include error, fraud or corruption, coercion, breach by the other party or parties, or otherwise impossibility of performance. Article 48 of the treaty law declares that a State may only invoke an error in a treaty as invalidating its consent to be bound by the treaty, if the error relates to a fact or situation which was assumed by that State to exist, but did not, at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty. But if the State knew or was in a position to know of the error, it cannot subsequently avoid the obligation imposed upon it by the treaty by using the error as justification. That was why the International Court of Justice rejected the argument of Thailand in the *Temple of Preah's Case,*[3] that a map which was in issue contained a basic error and as such it was not bound to observe it. Taking the circumstances into account the court held that Thailand's plea of error cannot be allowed as an element vitiating consent more so as the party advancing it contributed by its own conduct to the error, or could have avoided it.[4]

A State that is induced by fraud or corruption to consent to a treaty may have such consent invalidated. This is based on Article 50 of the Law of Treaties providing that if the expression of a State's consent to be bound by a treaty which has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating the treaty. Furthermore, coercion is an excuse for avoiding a treaty where directed against the State or against its representatives to the negotiations. Where consent has been obtained by coercing the representative of a State, whether by acts or threats directed against him, it shall, in line with Article 51 of the treaty law, be

[1] Article 7 Vienna Convention on the Law of Treaties.
[2] Shaw M. N., op cit. Pg 650.
[3] *Cambodia vs. Thailand*, ICJ Reports 1962.
[4] Among other things the court felt that Thailand's argument was not sustainable considering the character and qualifications of the men on their negotiating team.

without any legal effect.[1] If directed against a State, Article 52 provides that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the charter of the United Nations.[2] Again, impossibility of performance in the same way as a fundamental change in circumstances may provide ground for revoking, withdrawing from, or suspending a treaty.[3] Equally, save with regard to humanitarian treaties such as the Genocide Convention, 1948, the Geneva Red Cross Conventions, 1949, and their Additional Protocols, 1977, a material breach of a treaty entitles the other parties to regard the treaty as terminated in regard to the party that caused the breach.

Article 53 of the Vienna Convention on the Law of Treaties provides that a treaty is void if at the time of its conclusion it conflicts with a peremptory norm of general international law. It goes ahead to explain a peremptory norm of general international law as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character. By Article 64, if a new peremptory norm of general international law emerges, any existing treaty, which is in conflict with that norm becomes void and terminates.

Apart from the circumstance enumerated above, a treaty may only come to an end in accordance with a specific provision in that treaty or otherwise at any time by consent of all the parties after due consultation. A treaty may, of course, determine by performance or by effluxion of time where it was time bound. The tribunal in the *Rainbow Warrior Case*[4] held that the breach of the New Zealand – France Agreement, 1986, concerning the two captured French agents who had sunk the vessel in harbour in New Zealand in 1985, had commenced in 1986 and run continuously for the three years period of confinement of the agents stipulated in the agreement. Accordingly, the period concerned had expired on 22 July 1989 which was enough time to exculpate France from breach of its international obligations after that date. An invalid treaty is void and requires that the parties be placed, as much as possible to the position they would have been had the treaty not been concluded. Furthermore, acts performed in good faith before the invalidity was invoked are not rendered unlawful only by reason of the invalidity.[5]

International Treaties and Nigerian Courts. Nigeria's Treaties (Making, Procedure Etc.) Act of 1993 classifies treaties into three categories, namely: those that must be enacted into law to be operative such as law-making treaties which affect or modify existing legislation or powers of the National Assembly; those that

[1] *First Fidelity Bank N. A. vs. Government of Antigua and Barbuda Permanent Mission* (1989), 877 F 2nd 189, 192; 99 ILR, pgs. 126 & 130.

[2] All international instruments prohibiting the threat or use of force in international relations are pertinent here. See also Article 2(4) of the UN Charter, the *Fisheries Jurisdiction Case*, ICJ Reports, 1973, pg. 384.

[3] See for instance, The Russian Indemnity Case (1912) Hague Court Report 277.

[4] 82 ILR, pgs 499, 564 – 6; Shaw M. N. Op cit

[5] Umozurike, U. O. Op cit. Pg 171.

must be ratified such as agreements which impose financial, political, and social obligations or have scientific or technological importance; those that deal with mutual exchange of cultural and educational facilities and require no ratification. The Federal Ministry of Justice is the depository of treaties and keeps a Register of Treaties which is open for inspection on payment of a token fee.[1]

The fate of international treaties in Nigerian courts have generated quite some animated controversy among writers and publicists. Nigerian courts themselves have not helped matters as they have, when faced with opportunity, sounded discordant voices. The reason for these differences of opinion is not far-fetched. International law appears strange and enigmatic to some even at the Bench and those who possess indepth understanding of it are far between among judicial officers who most of the time are quite at home with municipal law with its simplicity and clear rules of application. Further reason is that some members of the Bench together with the lawyers who persuade them are prone to conservatism and view international law with apprehension and caution, being somewhat content with the ever alluring theories of state sovereignty.[2]

It is not proper to say that enforcing international treaties of whatever hue could impinge on sovereignty and there are many arguments in support of this position. The most important of them is that acceding to a treaty by a State has the same import as an individual entering into a binding contract. If an individual does not dispense of his general rights and liberties by entering into a binding contract whether of service or of trade, then a State does not dispense of its sovereignty merely by accession to a treaty. All that is required of both the State and the individual is to be faithful to their commitments and obligations under the treaty or contract as the case may be. Failure to do this amounts to breach of international obligation or of contract and remedies are expectedly available to the other parties who have suffered the consequence of breach. A *locus classicus* for the enforcement of international treaties in Nigeria remains, to date, the case of *Abacha vs. Fawehinmi*[3] and it is to this case we turn our attention to deepen our discourse.

Chief Gani Fawehinmi, a Lagos based Legal Practitioner was on Thursday, 30 January 1996, at about 6a.m. arrested at his residence in Ikeja without warrant. He was first detained at the State Security Service detention centre at Shangisha, Lagos, and subsequently at Bauchi prisons where he was held incommunicado.

On February 1, 1996, his Counsel sought and obtained Leave of the Federal High Court, Lagos, to enforce his fundamental rights. Subsequently, on a motion on notice he sought a number of reliefs, which included a declaration that his arrest and detention constituted a violation of his fundamental rights guaranteed under the 1979 Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria,

[1] This Act previously came as Decree No. 16 of 1993, and provides, among other things, for treaty-making procedure and the designation of the Federal Ministry of Justice as the depository of all treaties entered into between the Federation and any other country.

[2] Article 3(1)(a)(b)(c) of Treaties (Making Procedure, Etc) Act, 1993

[3] (2000) 77 LRCN 1254

1990. The others were a mandatory Order to compel the Respondents to release the detainee, an injunction and damages of Ten million naira. The Attorney-General of the Federation on behalf of the other Respondents filed a notice of preliminary objection challenging the competence of the court to entertain the action on grounds among other things that the Federal Military Government (Supremacy and Enforcement of Powers) Decree No.12 of 1994 and the Constitution (Suspension and Modification) Decree No 107 of 1993 ousted the jurisdiction of the court to entertain any civil proceedings that arise from anything done pursuant to the provisions of any decree; further, that the court lacked the jurisdiction to entertain any action relating to the enforcement of the provisions of Chapter IV of the 1979 Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

The learned trial judge held that the Inspector-General of police was empowered to issue the order with which the applicant was detained and that such detention order having been made by the appropriate authority under the decree, could not be legally questioned. On the effectuality of the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, he held that Decree No 107 of 1993 represented the *grundnorm* of Nigeria at the material time and that any of the provisions of the Act which are inconsistent with that decree were void to the extent of the inconsistency. He therefore, struck out the action on the ground that the court was incompetent to entertain it. The applicant appealed to the Court of Appeal. In its Ruling on the status of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, all the 3 justices of the Court of Appeal sitting were unanimous that the trial judge was in error when he held that the African Charter contained in Cap. 10 of the Laws of the Federation of Nigeria., 1990, was inferior to the decrees of the Federal Military Government. The Court of Appeal in a lead judgment read by Musdapher J. C. A., further held that it is common knowledge that no Government will be allowed to contract out by local legislation, its international obligations and that notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in 1983, it was a legislation with international flavour and the ouster clauses contained in Decrees 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria. Again, that provisions of Cap. 10 of the Laws of the Federation, 1990, were provisions in a class of their own. That while the Decree of the Federal Military Government may override other municipal laws, they cannot oust the jurisdiction of the court whenever properly called up to do so in relation to matters pertaining to human rights under the African Charter. Despite this bold step, however, the Court of Appeal allowed itself to be swayed by the arguments of the Respondents' Counsel that the Appellant adopted a wrong procedure for seeking relief by relying on the Fundamental Rights (Enforcement Procedure) Rules, 1979, and consequently remitted the case back to the High Court for retrial. Both the Applicant and Respondents appealed to the Supreme Court. In the main appeal, the Appellants who were Respondents at the Court of Appeal complained against those parts of the judgment of the court below that relate to findings on the status of the African Charter on Human and Peoples' Rights and the

Order remitting the case to the High Court for retrial. The Respondent formerly Appellant at the Court of Appeal appealed against parts of the decision relating to the power of the Inspector-General of police to sign and issue a detention order, mode of enforcement of fundamental rights under the African Charter, procedure for tendering detention order, and immunity of the Head of State.

In its judgment delivered by Ogundare *JSC,* the Supreme Court unanimously dismissed the main appeal and allowed the cross appeal by a majority of four against three justices. The Court decided among other things that, one, by S. 12 (1) of the 1979 Constitution,[1] international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly; two, that where the treaty is enacted into law by the National Assembly as was the case with the African Charter, it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts; three**,** that although the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act will prevail over any other municipal law in case of conflict on account of its international flavour same does not make it superior to the constitution, and that its international flavour cannot prevent the National Assembly or the Federal Military Government from removing it from the body of our municipal laws by simply repealing Cap. 10, nor is the validity of another statute necessarily affected by the mere fact that it violates the African Charter or any other treaty.

All said, the Federal High court ignorantly denied itself an opportunity to stand up for liberty and respect for human dignity, a trend that is fast growing worldwide having support in sundry international treaties and conventions as well as international customary law. The decision of the Court of Appeal in relation to the status of the African Charter commendably captured the spirit of international law. They held, rightly in our view, that the provisions of the charter are in a class of their own and did not fall within the classification of the hierarchy of laws in Nigeria in order of superiority. That notwithstanding the fact that Cap 10 was promulgated by the National Assembly, it was a legislation with international flavour and the ouster clauses contained in Decree 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria. This position, gratefully, is in line with the doctrine of *Pacta Sunt Servanda* and also accords with the *Draft Declaration on Rights and Duties of States, 1949,* as well as the *Vienna Convention on the Law of Treaties, 1969*. In concurring with the judgment, Pats-Acholonu JCA, pointed out that the tenor and intendment of the preamble of the charter seems to vest the Act with a greater vigour and strength than a mere Decree for it has been elevated to a higher pedestal. Again this view accords with the monist theory, which is growing in popularity, and in the practice of States.

However, the decision of the Supreme Court is more confounding, disparate, and controversial. In one breath they acknowledge that *the Charter gives to citizens of member states of the Organization of African Unity rights and obligations which rights and obligations are to be enforced by our courts, if they must have any meaning.*

[1] The same section is re-enacted in the 1999 Constitution.

In another, it said that the international flavour of the charter cannot prevent the National Assembly, or the Federal Military Government from removing it from our body of laws, *...nor also is the validity of another statute be necessarily affected by the mere fact that it violates the African Charter or any other treaty.* By express implication, the Supreme Court gave the constitution superior powers over the African Charter. In this judgment, the Supreme Court failed to take advantage of the trend towards enforceability of international obligations in treaties and charters, irrespective of domestic bottlenecks. In fact, a State party to any treaty or convention is obligated to adjust its domestic laws to accord with effective and unfettered implementation of those treaties or conventions.

Notwithstanding the above misadventure, it is commendable that certain aspects of the court's decision namely ratio 7 and ratio 8 respectively held that the ouster of court's jurisdiction is not a matter of course and that for the court's jurisdiction to be ousted it must be clearly shown that a particular action falls within the ouster clause; again, that Cap. 10 which is the African Charter is preserved by sections 16 and 17 of Decree 107 of 1993. And by virtue of the Preambles of Decree 12 of 1994 and S.I thereof, Cap 10 is equally preserved by the said Decree. We also find inspiring some aspects of the dissenting judgment of Uwaifo, JSC. In ratio 16, the learned justice admonished that where we have a treaty like the African Charter on Human and Peoples' Rights and similar treaties applicable to Nigeria, we must be prepared to stand on the side of civilized societies the world over in the way we consider and apply them. He went further to say that t*his will necessarily extract from the judiciary, so much so in a military regime, its will and resourcefulness to play its role in the defence of liberty and justice....*

Finally, while dismissing the main appeal and allowing the cross-appeal by a narrow margin the Supreme Court laid down the following principles regarding the African Charter namely, that the African Charter is a special genus of law in the Nigerian legal and political system; that the charter has international flavour and in that sense, it cannot be amended or watered down or sidetracked by any Nigerian law; that the effect of the charter in Nigeria may be completely obliterated by an express repeal of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

In response to the above, we salute the Supreme Court for its pronouncement in principles (a) and (b) which tend towards the dualist school of thought. At any rate, however, we submit that as it relates to principle (c) and similar improper views expressed in the judgment, the Supreme Court betrayed a lack of proper appreciation of international law especially with regard to its purposes, application, and political and moral implications. Even a State that has not ratified or domesticated the African Charter is at least bound by its underlying principles if it must avoid obvious repercussions at the international scene. It is therefore incorrect to assume as they did that a repeal of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act would *completely obliterate* the effect of the charter in Nigeria.

Conclusion. We conclude simply that as it concerns superiority between international and domestic laws, the present practice of States favours municipal law in national courts and international law in international tribunals. However, as has been pointed out, international Agreements by whatever name called are meant to be observed and, apart from international customary law, there are a plethora of such treaties and conventions that make it mandatory for State parties to implement same within their jurisdictions. Furthermore, the movement is growing universally in favour of international law even in municipal courts, which lends weight to the strengthening of international law for the overall benefit of humankind. Nigerian courts therefore, ought to join up with other civilized societies to effect the unfettered implementation of our international obligations. Understandably, attention has often been over focused on the economic provisions of the African Charter and critics readily point out that Nigeria has not the economic capacity to implement same. To this group, we say, firstly, that Nigeria's economic potentials when properly harnessed through sustainable economic and political structures, accountability in public affairs, absence of corruption and visionary, focused, responsible and selfless leadership could more than carry the weight of full implementation of the African Charter; secondly, economic rights are not the only rights contained in the African Charter, for there are civil and political rights that deserve unfettered application in our domestic jurisdiction.

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Обеспечение соблюдения международных договоров по правам человека в нигерийских судах: новые возможности для интернационализации

В статье проанализированы природа и виды международных договоров, процессы их имплементации на международном и внутригосударственном уровнях, выполнение международных соглашений нигерийскими судами, а также определены механизмы, которые могут использоваться для более эффективной реализации международных договоров в нигерийском контексте, особенно касающихся международных соглашений по правам человека.

Ключевые слова: международное право; внутренняя юрисдикция; механизм применения; территориальная юрисдикция.

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