

IMPLEMENTATION OF TREATY AS BASIS FOR REGIONAL COOPERATION VIS-À-VIS ABSOLUTE SOVEREIGNTY: NIGERIA IN PERSPECTIVE¹

Abstract

Virtually all states of the world belong to some regional cooperation organization and nearly all regions of the world have at least one organization, which aims, *inter alia*, at establishing a free trade area amongst its members, promotion of economic integration, monetary integration, improvement of regional infrastructure for communication, transport and energy systems, regional security and natural resource management. In this process of cooperation and integration, States voluntarily limit their sovereignty and hand over part of their decision-making powers to a supranational level and establish a new level of political power, which supersedes the State. Compromising State authority is, however, not a new phenomenon. States have limited their powers throughout their history both voluntarily and involuntarily, for example, by signing international treaties. This paper explores the concepts of regional cooperation and sovereignty with a focus on treaty as the basis for regional and international relations. The paper reviews section 12 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) in relation to the promotion of absolute sovereignty. The researchers also examine the constitutional implications of some domesticated treaties and the attitude of Nigerian courts in the implementation of treaty obligations. The writers adopt doctrinal, analytical and jurisprudential approach with the use of statutes, case law, related literatures, journal articles and certain international conventions. At the end, the writers conclude that it is manifest from the relevant provisions of the Constitutions x-rayed in this paper that the nation's sovereignty is more important and is ascribed greater primus than any cooperation scheme whatsoever. The writers recommend that the Constitution be amended to incorporate a role for either Houses of the National Assembly in the making or ratification process of treaty in a manner similar to what obtains in the United States of America and Ghana.

Key words: *International Law, Implementation of Treaty, Regional Cooperation, Absolute Sovereignty.*

1. Introduction

The fundamental principle of treaty law is the proposition that treaties are binding upon the parties to them and must be performed in good faith. While treaty provisions in some states, automatically acquire the force of law upon ratification, some countries insist that treaties must have been domesticated by a legislative instrument before same becomes enforceable within the municipal legal order. Nigeria adopts the latter approach. Consequently, no treaty is enforceable in Nigeria except same has been 'transformed' or domesticated via a legislative enactment.

2. Conceptual Clarifications

Sovereignty

Sovereignty refers to the right of a State to use the highest authority within its territory.² This right has two dimensions - external and internal. Internal sovereignty refers to the legitimate authority of the State and its institutions to use the highest authority within the territory of the State. External sovereignty on the other hand, refers to the State's right to judicial equality and territorial integrity in the international system, which is based on the recognition of the internal sovereignty of the State by other States.³ A classical definition of sovereignty as postulated by Morgenthau is as follows: 'Sovereignty is the supreme legal authority of the State to give and enforce the law within a certain territory and, in consequence, independence from the authority of any other state and equality with it under international law'.⁴

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² Regional Integration and the States, *ibid*.

³*Ibid*.

⁴ Hans Morgenthau, *Politics among Nations* (New York: Alfred Knopf, 1950) p. 249; cited in *ibid*, p. 10.

Regional Cooperation

According to the *Oxford Advanced Learner's Dictionary*,⁵ the term 'regional' is defined thus: '...of or relating to a region'. What then is a 'region'? The same *Oxford Advanced Learner's Dictionary* defines a 'region' as 'a large area of land, usually without exact limits or borders'; 'one of the areas that a country is divided into, that has its own customs and/or its own government'.⁶ In the view of these writers, the foregoing definition in the context of our discussion is unsatisfactory. This is so because, the definition limits the understanding of a region to a country and does not in any way contemplate the continental regional groupings. *The New International Webster's Comprehensive Dictionary of the English Language*⁷ defines 'regional' in these words; 'of or pertaining to a particular region; sectional...' It is 'of or pertaining to an entire region or section, especially a geographic one. Similarly, it defines 'region' as 'a portion of territory or space; a country or district; also, realm; especially, one of the *strata* into which the air or the sea is divided by imaginary boundaries.' This definition appears not to be helpful either. However, it gives some insight into the terms: 'region' and 'regional'. On the other hand, 'cooperation' has been defined as 'an association of individuals who join together for a common benefit.' It is also seen as 'a unity of action to a common end or result, not merely joint or simultaneous action.' It is 'the voluntarily coordinated action of two or more countries occurring under a legal region and serving a specific objective.'⁸

Contextually, the terms 'regional cooperation' or 'regional integration'⁹ implies the involvement of neighbouring countries in collaborative ventures. However, regional cooperation is organized in an *ad hoc* or temporary basis through contractual arrangements of some sort, around projects of mutual interest, while regional integration involves something more permanent.¹⁰ Regional cooperation is not without some benefits and disadvantages. First, it enables participating economies to overcome the small size of their domestic markets and achieve economics of scale and greater specialization in production, thus increasing the competitiveness of their products. Secondly, access to a larger market enables developing countries both to expand existing industries and to set up new export industries, diversifying exports and reducing their vulnerability to setbacks in a specific product market. Thirdly, regional cooperation can enhance the capacity of developing countries to meet emerging challenges, including the application of new technologies. Fourthly, it is clear that regional trade facilitation measures offer significant benefits by reducing the cost of transactions across international borders and removing non-border obstacles.¹¹ Cooperation at the regional level offers other advantages. It focuses on addressing the region's priorities and leaves countries which join the process less scope for backsliding. Changes in the global economy and the emerging complementarities among developing countries also provide a rationale for regional cooperation. Such arrangements can help countries to develop a common understanding on international issues but do not prevent countries from other regions from contributing to this effort.¹²

3. Treaty as a Basis for Regional Cooperation

Although the word 'treaty' can be etymologically traced back to the Latin '*tractus*', meaning treatment, handling, discussion and management, there was no Latin word with that root having the notion of an (international) agreement. If anything, *tractus* sometimes had the sense of a disagreement, of a violent handling of affairs, such as the dragging by the hair of the priestess of Apollo. A common Latin word for treaty is *foedus* - interestingly, a word that also meant the unseemly, horrible and detestable,

⁵ A S Hornby, *Oxford Advanced Learner's Dictionary* (6thed, Oxford: University Press, 2000) p. 985.

⁶ *Ibid.*

⁷ A W Read, *The New International Webster's Comprehensive Dictionary of the English Language* (Encyclopedic Ed, USA: Typhoon Media Corporation, 2010) p. 1061.

⁸ B A Garner, *Black's Law Dictionary* (8thed, USA: St. Paul's Minn West Publishers, 2004) p. 359.

⁹ Both terms, that is, 'regional cooperation' and 'regional integration' are used interchangeably in this paper.

¹⁰ Real Lavergne, 'Introduction: Reflections on an Agenda for Regional Integration and Cooperation in West Africa' in Real Lavergne (ed) *Regional Integration and Cooperation in West Africa: A Multidimensional Perspective* <<http://www.idrc.ca/EN/Resources/publications/openebooks/812-O/index.html>> Accessed on 14 June, 2016.

¹¹ *Regional Cooperation: Conceptual Framework and Asia-Pacific Experience* <www.unescap.org/sites/default/files/ch2_o.pdf> Accessed on 14 June, 2016.

¹² *Ibid.*

probably depicting in the mind of the users the forced circumstances and unholy power deals that led to the conclusion of some. Another Latin word for 'treaty' is *conventio*, from which the English word 'convention' is derived, a term currently used as a synonym for treaty, especially when following long multilateral negotiations. Convention has in addition the meaning of an assembly and is a word that literally translates '*sumbasis*', an ancient Greek word for treaty.

A treaty is basically an agreement between parties on the international scene. Although treaties may be concluded, or made between States and international organizations, they are primarily concerned with relations between States.¹³ In this wise, the 1969 Vienna Convention on the Law of Treaties defines a 'Treaty' as: 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'¹⁴ From the wordings of the Convention, States and entities proximate to States are accorded treaty making capacity and such extension was granted to constituent instruments of international organization.¹⁵ In contrast, the capacity of an individual to enter into treaty was finally laid to rest in the *Anglo-Iranian Oil case*¹⁶ to the effect that individuals lack capacity to make a treaty.

According to the *Black's Law Dictionary*,¹⁷ 'treaty' can be defined as 'an agreement formally signed, ratified or adhered to between two nations or sovereigns, an international agreement concluded between two or more States in written form and governed by international law'. Like the definition of the Vienna Convention,¹⁸ the above definition is restrictive as it does not take into cognizance treaties entered into between international organizations and States.¹⁹ A seemingly comprehensive definition of treaty was proffered by Schwarzenberger George when he conceived treaty as 'a consensual engagement which subjects of international law have undertaken towards one another with the intent to create legal obligation under international law.'²⁰ Treaties, therefore, are agreements under international law entered into either between States or between States and international organizations. Broadly speaking, they embrace all aspects of international relations; to facilitate cross border trade and investment, to track and prosecute cross jurisdictional criminal activity, human rights, the many environmental related conventions and others. The International Labour Organization (ILO) conventions similarly fall for mention here.²¹

The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith. This rule is encapsulated in the maxim – *pacta sunt servanda* and is arguably the oldest principle of international law. Shaw had posited that in the absence of a certain minimum belief that States will perform their treaty obligations in good faith, there would be no such obligation with each other.²² The terms Treaty, Convention, Agreement, Accord, Act, Statute, Pacts, Covenant, Charters, Declarations, Protocol, Concordat, *etcetera*, are generic terms used interchangeably to define international agreement concluded between States. A treaty can be contractual, legislative or aspirational. A contractual treaty can be likened to a contract in municipal

¹³ M N Shaw, *International Law* (5thed, UK: Cambridge University Press, 2003) p. 811.

¹⁴ Article 2 (1) (a) of the Vienna Convention on the Law of Treaty, 1969.

¹⁵ Article 4, *ibid*.

¹⁶ (1952) ICJ Rep. 93.

¹⁷ B A Garner, *op cit*, p. 1540.

¹⁸ *Ante*.

¹⁹ C D LongJohn, *Implementation and Application of Treaties in Nigeria* <www.nials-nigeria.org/projects/IMPLEMENTATION_PROJECT.pdf> Accessed on 30 May, 2016.

²⁰ Schwarzenberger Georg, 'International Law as Applied by International Courts and Tribunals' (London: Stevens & Sons, 1968) p. 438 in A G Hamid, *Treaty Making Power in Federal States with Special Reference to the Malaysian Position* (2003) 30 *Journal of Malaysian and Cooperative Law (JMCL)*, 65-68.

²¹ O Adebambo, Nigeria: *Treaties and Conventions in the Context of Industrial Relations: The Enforceability of International Agreement Locally* <<http://www.mondaq.com/Nigeria/x/203988/employee+rights+labour+relations/Treaties+And+Conventions+In+The+Context+Of+Industrial+Relations+The+Enforceability+Of+International+Agreements+Locally>> Accessed on 29 May, 2016.

²² M N Shaw, *op cit*, pp. 811-812.

law where parties agree to confer on themselves certain rights and obligation.²³ When a treaty is legislative, it is regarded as a law-making treaty. A law making treaty usually creates general principles or norms for the future conduct of the parties and obligation created therein binds all the parties. It is usually declaratory in nature since it creates rules of conduct. However, it cannot bind a non-party to it.²⁴ An aspirational treaty stipulates the desires of the parties as regard their conduct with one another.²⁵ There are other types of treaties outside contractual, aspirational or legislature treaties. An example is the treaty establishing the International Criminal Court.²⁶ Such treaties are constitutive in nature since they established an institution with powers. No matter the classification, treaties are binding. This is anchored on the doctrine of *pacta sunt servanda*.²⁷ Parties to treaties may conclude their treaties in virtually any manner they wish.²⁸ There is no prescribed form or procedure on how a treaty is to be made or concluded. However, certain rules apply in the formation of treaties. In this regard, the Vienna Convention provides as follows:

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
 - a.) he produces appropriate full powers;²⁹ or,
 - b.) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their States:
 - a.) heads of State, head of Government and ministers for foreign affairs, for the purpose of performing all acts relating to the conclusion of treaty;
 - b.) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited.
 - c.) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.³⁰

Once a treaty has been drafted and agreed by authorized representatives, a number of stages are then necessary before it becomes a binding legal obligation upon the parties involved. The text of the agreement drawn up by negotiators of the parties has to be adopted and the Vienna Convention³¹ provides that adoption in international conference takes place by the vote of two-thirds of the States' present and voting, unless by the same majority, it is decided to apply a different rule.³² In cases other than international conference, adoption will take place by the consent of all the States involved in

²³ For instance, a constituent part of a Federal State can enter into treaty with an international organization or other nations either for the purpose of loan taking or other service, usually joint venture agreement.

²⁴ See the North Sea Continental Shelf Case ICJ Reports (1969) p. 3 wherein the Court held that *Article 6 of Geneva Convention on Continental Shelf* which lays down the equidistance rules cannot bind the Federal Republic of Germany which has not ratified the treaty.

²⁵ An example is the Kellogg-Briand Pact otherwise called the Pact of Paris. This Pact was concluded in 1928 and State parties to it promised not to use war to resolve dispute or conflicts of whatever nature or of whatever origin there may be which may arise among them. The Pact renounced the use of war and called for the peaceful settlement of disputes.

²⁶ Statute of the International Criminal Court, 1998.

²⁷ For monist States like France, it is binding internationally and locally once it is ratified. Whilst, for dualist States (e. g., UK), it is binding internationally upon ratification and locally only when it is domesticated.

²⁸ M N Shaw, *op cit*, p. 815.

²⁹ 'Full Powers' refers to document certifying status from the competent authorities of the State in question. This provision provides security to the other parties to the treaty that they are making agreements with persons competent to do so. The requirement of 'full powers' presentation, however, do not apply to some people, for example, heads of States and government, foreign ministers, head of diplomatic missions and representatives accredited to international conferences and organizations. See generally, M N Shaw, *op cit*, pp. 815-816.

³⁰Article 7.

³¹Article 9.

³² M N Shaw, *op cit*, pp. 816 – 817.

drawing up the text of the agreement.³³ There are, however, a number of ways in which a State may express its consent to an international agreement. It may be signaled by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession.³⁴ It may also be accomplished by any other means, if so agreed.³⁵

The need for treaties has grown over the years with the intensification of the world's interdependence. Hence, treaty is the ubiquitous instrument through which all kinds of international transactions are conducted. It thus forms the bedrock of contemporary international law and the legal framework upon which regional cooperation schemes are built.

4. Treaty Implementations in Nigeria Vis-a-Vis the Promotion of Absolute Sovereignty

While Presidents and various representatives of government express the desire to see a unified regional order at virtually every diplomatic forum, there is hardly any national Constitution which has provided for the relaxation of the relevant country's hitherto absolute sovereignty to pave the way for meaningful cooperation. Nigeria, for instance, has operated three civilian Constitutions - the 1963, 1979 and the current 1999 Constitutions.³⁶ The relevant provisions of the three Constitutions will briefly be x-rayed to discover Nigeria's Constitutional provisions vis-à-vis her sovereignty, participation in regional cooperation schemes and treaty implementations. A consideration of the three different Nigerian constitutions will be undertaken *seriatim*.

1963 Constitution

The preamble to the 1963 Constitution provides a system for 'the purpose of promoting inter-African cooperation and solidarity', etc. However, treaty making power was not vested directly in any arm of government. The 1963 Constitution merely provided for the implementation of treaties. It provides that:

Parliament may make laws for Nigeria or any part thereof with respect to matters not included in the legislative lists for the purpose of implementing any treaty, convention or agreement between the federation and any other country or any arrangement with or decision of an international organization of which the federation is a member; provided that any provisions of law enacted in pursuance of this section shall not come into operation in a region unless the Governor of that region has consented to its having effect.³⁷

Suffice it to note that the effect of this provision is such that any decision reached at any international, regional or pan-African forum, whether for the purpose of promoting African integration or for any other purpose whatsoever, will remain unenforceable until parliament has enacted it into law and even its operation in a region was also made subject to the consent of the Governor of such region. As rightly pointed out by Akintayo³⁸, under the 1963 Constitution, implementation of treaties was made subject to the exercise or otherwise of Nigeria's sovereignty.³⁹

1979 Constitution

The preamble to the *1979 Constitution*⁴⁰ provides thus: 'we the people of Nigeria, having firmly and solemnly resolved to live in unity and harmony as one indivisible and indissoluble sovereign nation under God and dedicated to the promotion of inter-African solidarity, world peace, international cooperation and understanding....' It is to be noted that while the 1963 Constitution provided for the

³³*Ibid*, p. 817.

³⁴ See Articles 11, 12, 13, 14 and 15.

³⁵ M N Shaw, *op cit*, p. 817.

³⁶ The Constitution of the Federal Republic of Nigeria, 1999 (as amended) – hereafter called "*The Constitution*".

³⁷ S. 74 of the 1963 Constitution.

³⁸ AIwilade, *Nigeria's Constitutional Provisions on African Integration*<http://www.punch.ng.com/feature/the-law-you/nigerias-constitutional-provisions-on-african-integration>> Accessed on 29 May, 2016.

³⁹*Ibid*

⁴⁰ Note that the preamble to the 1999 Constitution is the same as that of the 1979 Constitution without any alteration whatsoever.

promotion of inter-African cooperation and solidarity, the preamble to 1979 Constitution edited out the word ‘cooperation’ and merely provided for the promotion of inter-African solidarity. Chapter 1, Part 1 of the 1979 Constitution dealt with general provisions. Accordingly, there are provisions that impliedly and expressly provided for the primacy of the sovereignty of the Federal Republic of Nigeria. It provided that ‘the Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the government of Nigeria or any part thereof except in accordance with the provisions of this Constitution’.⁴¹ It further provides that ‘if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of its inconsistency be void.’⁴² It further states that Nigeria is one indivisible sovereign state to be known by the name of the Federal Republic of Nigeria.⁴³

The foregoing reveals the supremacy of Nigeria’s sovereign status above any other agenda, be it international or regional cooperation schemes. Interestingly also, the 1979 Constitution provides that ‘the State shall promote African unity, as well as total political, economic, social and cultural liberation of Africa and all other forms of international cooperation conducive to the consolidation of peace and mutual respect and friendship among all peoples and States and shall combat racial discrimination in all its manifestations’. This provision, though non justiciable, was an indication of Nigeria’s foreign policy objective under *the 1979 Constitution*.⁴⁴

1999 Constitution

Nigeria subscribes to the dualism doctrine in the application of treaty obligations in the country. Put differently, treaties are not self-enforcing in Nigeria’s municipal legal system even if the country is signatory to them. To be applicable, they are required to be enacted by the parliament as part of the municipal laws of the country.⁴⁵ The method and procedure for implementing treaties are matters flowing directly from State sovereignty and are governed exclusively by municipal laws. Hence, both the 1979 and 1999 Constitutions⁴⁶ fully set out procedure for transforming a treaty into a municipal law. The relevant section of the 1999 Constitution provides as follows:

- 12 (1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
- (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the Federation.⁴⁷

⁴¹ S. 1 (2) of the 1979 Constitution.

⁴² S. 1 (3), *Ibid*.

⁴³ S. 2, *ibid*. Note that Ss. 1 (2) (3) and 2 of the 1979 Constitution are *in parimateria* with Ss. 1 (2) (3) and 2 of the 1999 Constitution.

⁴⁴ See s. 19, Chapter 11 of the 1979 Constitution. There is also a similar provision in s. 19 of the 1999 Constitution; this latter version (i.e., s. 19 of the 1999 Constitution) is more detailed and more elaborate than its equivalent in the 1979 Constitution. See generally, A Iwilade, *op. cit*.

⁴⁵ All treaties, save for those within the purview of customary international law, are unenforceable until they succumb to the country’s national sovereign laws. Therefore, the AU treaty, ECOWAS treaty, NEPAD, AEC treaty and others were unenforceable until it conforms with the extant constitutional provision.

⁴⁶ S. 12 (1) (2) (3) of the 1979 Constitution is *in parimateria* with the extant provisions of s. 12 (1) (2) (3) of the 1999 Constitution.

⁴⁷ S. 12 of the 1999 Constitution.

One of the exclusive powers conferred on the Federal Government is the power over ‘external affairs’.⁴⁸ This legislative power is the municipal normative foundation for treaty making in Nigeria.⁴⁹ However, the Constitution does not clearly state which arm of government has the power to conclude treaty on behalf of the country. It equally failed to provide under what circumstances a treaty would be entered into.⁵⁰ It has been suggested by Nwabueze⁵¹ that section 12 (1) of the 1999 Constitution reflects the inherited common law position that treaty making is a purely executive act that requires subsequent implementation within the country by way of legislation enacted by the legislature. He explains that treaty-making and its implementation are two separate functions, the former for the executive and the latter for the legislature. In other words, the President as the ‘Chief Executive of the Federal Government’ has the prerogative to conclude treaties on behalf of the country.⁵² Indeed, this power could be delegated to the President’s subordinates following the constitutional provision which vests executive powers of the federation on the President and goes on to stipulate that this power can be exercised ‘by him either directly or through the vice President and Ministers of the Government of the federation or officers in the public service of the federation’.⁵³ The President or his subordinates need not involve members of the legislative branch in the process of treaty making. The States are not competent to participate in the process of making a treaty even in areas within their legislative competence.⁵⁴ Notwithstanding, the States are required to be involved in the process of municipal transformation or domestication of a treaty which covers an otherwise residual or concurrent State competence.⁵⁵ Omoregie puts it more succinctly when he stated thus:⁵⁶

In enacting an Act to implement a treaty ratified by Nigeria, the National Assembly need not involve the States at all where the subject matter of the treaty is in respect of matters within the legislative competence of the Federal Government contained in the Exclusive Legislative List.... Furthermore, where an Act of the National Assembly is passed to transform a treaty which subject matter is in respect of a matter falling within the concurrent Legislative List... without the ratification of the States, such legislation is not applicable in any State except the Federal Capital Territory of Nigeria. This is the net implication of section 12 (2) and (3) when read together. Since subsection 2 confers power on the National Assembly to make laws “with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty”, it impliedly means that the power extends to making laws with respect to matters in the Concurrent Legislative List and matters which are otherwise residual for the States, not being listed in the exclusive or concurrent lists. As subsection 3 requires the ratification of such law made by the National Assembly pursuant to subsection 2, it means that without such ratification

⁴⁸ See item 26 of the Second Schedule, Part 1 made pursuant to s. 4 of the 1999 Constitution.

⁴⁹ E B Omoregie, *Implementation of Treaties in Nigeria: Constitutional Provisions, Federal Imperative and the Subsidiarity Principle*, p. 3, Being text of a paper delivered at the International Conference on Public Policy held 1-4 July, 2015 in Milan, Italy www.icpublicpolice.org/conference/file/response/1433585864.pdf Accessed on 29 May, 2016.

⁵⁰ B I Olutoyin, ‘Treaty Making and its Application under Nigerian Law: the Journey So Far’ (2014) 3 (3) *International Journal of Business and Management Innovation*, 7-18, cited in E B Omoregie, *ibid*, p.3.

⁵¹ B O Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (London: Sweet & Maxwell, 1983) pp. 255-256. This is unlike the system operating in certain other jurisdictions, such as the USA and Ghana where the Constitutions specifically requires that no treaty be ratified, unless it is approved by a specified majority in the federal legislative arm (see Article 11, s. 2 of the United States Constitution and s. 75 of the Constitution of Ghana). See also, Edwin Egede, *Bakassi: Critical Look at the Green Tree Agreement* <[www.nigerianlawguru.com/articles/international law/BAKASSI, A CRITICAL LOOK AT THE GREEN TREE ARGEMENT.pdf](http://www.nigerianlawguru.com/articles/international-law/BAKASSI_A_CRITICAL_LOOK_AT_THE_GREEN_TREE_ARGEMENT.pdf)> Accessed on 29 May, 2016.

⁵² C Nwapi, ‘International Treaties in Nigerian and Canadian Courts’ (2011) 19 (1) *African Journal of International and Comparative Law*, 38-65.

⁵³ S. 5 (1) (a) of the 1999 Constitutions.

⁵⁴ E B Omoregie, *op cit*, p. 3.

⁵⁵ *Ibid*, p. 4.

⁵⁶ *Ibid*, p. 10.

by the Houses of Assembly of the States, the law is unenforceable since subsection 3 prohibits its enactment.⁵⁷

While nations reasonably desire some form of cooperation, the issues of absolute exercise of sovereignty is one that remains jealously guarded by parties to the various treaties across the continent. Within the context of ‘absolute sovereignty’, therefore, a state can enact and validly enforce laws within its territorial boundaries even if such laws are contrary to the laws of other States or contrary to international law.

5. Domesticated Treaties in Nigeria and their Constitutional Implications

Child Rights Act 2003

The Child Rights Act⁵⁸ was promulgated in 2003 in an effort by Nigeria to domesticate the Convention on the Rights of the Child, 1989 and the African Union Charter on the Rights and Welfare of the Child. This Act was enacted principally to protect the rights of the Nigerian child whose rights were prior to this enactment, not comprehensively provided for by any statute in Nigeria. The Act was passed by the National Assembly without prior ratification of State legislatures as required by the Constitution. It is important to state here that many of the provisions of the Act are within the residual powers of the State legislature, such as adoption of children, care and supervision of children and other sundry matters. Consequently, the Act took effect as a federal legislation which operates only in the Federal Capital Territory and not in the thirty-six (36) States. However, this Act is now being passed on State by State basis. Presently, about twenty-four (24) States of the Federation have enacted it into State law.

African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act⁵⁹

The African Charter on Human and Peoples’ Rights was adopted in 1981 and domesticated by Nigeria in 1983 (pursuant to section 12 (1) of the 1979 Constitution) as the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act No. 2 of 1983. The ACHPRA is one of the most litigated treaty enabling statutes in Nigeria. Almost on a daily basis, lawyers in Nigeria rely on its provisions to enforce the fundamental rights of individuals.⁶⁰ Hence, there are plethora of cases hinged on the ACHPRA. Notable amongst these cases is *Abacha v. Fawehinmi*.⁶¹ This writer proposes to discuss this case more elaborately in the next sub-heading. The ACHPRA ‘occupies a position far above other municipal statutes and is subject only to the Constitution’.⁶²

Environmental Legislations

Although Nigeria is hailed as one of the countries which have ratified many international conventions on the environment, this status has not manifested in effective application of the conventions in the country’s municipal policy or its legal system.⁶³ Consequently, Nigeria continues to grapple with the challenges of translating treaty obligations undertaken under these international instruments into meaningful implementation strategy at municipal level. The primary reason for this is that ‘environment’ as a legislative item is not listed *per se* in the Exclusive or Concurrent list of the Constitution. It is therefore a legislative item within the legislative competence of the States in their exercise of residual powers. In effect, many treaties directly dealing with environmental matters require State legislative input to become binding municipal legislations in Nigeria. These include Conventions on Biological Diversity 1992; Rio Declaration on Environment and Development 1992; among many others.⁶⁴ As rightly captured by Omoregie, these treaties, despite their strategic importance in

⁵⁷See generally, ss. 297-304, particularly, s. 299 of the 1999 Constitution.

⁵⁸Hereinbelow called ‘the Act’.

⁵⁹ Cap A9, LFN, 2004 (hereinafter called ‘ACHPRA’).

⁶⁰C D LongJohn, *Implementation and Application of Treaty in Nigeria* < www.nails-nigeria.org/projects/IMPLEMENTATION_PROJECT.pdf> Accessed on 30 May, 2016.

⁶¹ (2000) 6 NWLR (Pt. 660) 228.

⁶²*Abacha v Fawehinmi (supra)*.

⁶³ E B Omoregie, *op cit*, p. 12.

⁶⁴ E B Omoregie, *op cit*, pp. 12-13.

environmental jurisprudence, have remained in abeyance in Nigeria, mainly because they have not scaled the huddle of State legislative ratification.⁶⁵

Highlights of some other domesticated treaties in Nigeria include the Geneva Conventions Act,⁶⁶ Armed Forces Act,⁶⁷ Nigerian Red Cross Society Act,⁶⁸ Diplomatic Immunities and Privileges Act,⁶⁹ National Commission for Refugees, Etc, Act⁷⁰ and Arbitration and Conciliation Act.⁷¹

International Labour Conventions

The Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 constitutes a watershed in the history of the National Industrial Court of Nigeria in that it ushered in a number of radical innovations on the structure, powers, status and jurisdiction of the Court. The Constitution (as amended) provides as follows:

Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified⁷² relating to labour, employment, workplace, industrial relations or matters connected therewith.⁷³

As can be observed, section 254 (C) (2) of the Constitution⁷⁴ begins with the word ‘**notwithstanding**’. The Supreme Court in *N.D.I.C v Okem Ent. Ltd.*⁷⁵ per Uwaifo, J.S.C. held succinctly that: ‘When the term ‘notwithstanding’ is used in a section of a statute, it is meant to exclude an impinging or impeding effect of any other provision of the statute or other subordinate legislation so that the said section may fulfill itself’.⁷⁶

Commenting on this constitutional innovation, Atilola posited as follows:

This provision is unique in that it renders impotent, as far as international labour standards, Conventions or Treaties is concerned, the constitutional requirement that no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty have been enacted into law by the National Assembly. The implication of this provision is that claimants can invoke, before the National Industrial Court, the relevant provisions of international treaties ratified by Nigeria notwithstanding that same has not been domesticated by an Act of the National Assembly. It is, however, important to

⁶⁵*Ibid.*

⁶⁶ Cap G₃ Vol. 7, LFN, 2004.

⁶⁷ Cap A₂₀ Vol. 1, LFN, 2004.

⁶⁸ Cap N₁₃₀ Vol. 12, LFN, 2004.

⁶⁹ Cap D₉ Vol. 5, LFN, 2004.

⁷⁰ Cap N₂₁, LFN, 2004.

⁷¹ Cap A₁₈, LFN, 2004.

⁷²Suffice it to say that it is yet unclear in what sense the word ‘ratifies’ or ‘ratified’ is used in this provision. However, ‘ratification’ according to the Black’s Law Dictionary, *op cit*, p. 1290, connotes ‘the final establishment of consent by parties to a treaty to be bound by it’. P T Akper explains it as ‘an international act whereby a country signifies its intention on the international plane to be bound by provisions of a treaty’. It is usually an act of the executive arm of government. On the other hand, ‘domestication’ according to same P T Akper is the ‘subjecting of treaties made on behalf of the Federation to the legislative process, as is the case with other municipal legislation’. It is simply the transformation of treaties into municipal law. See C D Long John, *op cit*.

⁷³ See s. 254 (C) (2) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

⁷⁴*Ibid.*

⁷⁵(2004) 10 NWLR (Pt. 880) 107 at 182, para. H.

⁷⁶See also, *NECO v Tokode* (2011) All FWLR (Pt. 574) 105 at 120, paras. B – D.

note that this provision relate only to international conventions or treaties related to labour, employments, workplace or industrial relations....⁷⁷

6. The Position of Nigerian Courts in the Implementation of Treaty Obligations

The *locus classicus* on judicial attitude in the implementation of treaty obligations in Nigeria is the Supreme Court decision in *Gen. Sani Abacha & 3 Ors. v Chief Gani Fawehinmi*.⁷⁸ In that case, the Applicant/Respondent was arrested without warrant at his residence by men of the State Security Service (SSS) and Policemen. He sought to enforce his fundamental rights pursuant to the *Fundamental Rights (Enforcement Procedure) Rules, 1979* and in accordance with Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. Accordingly, the apex Court held, inter alia:

An international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by the National Assembly, it has no such force of law as to make its provisions justiciable in our Courts. This was the tenor of section 12 (1) of the 1979 Constitution now re-enacted in section 12 (1) of the 1999 Constitution.⁷⁹

In effect, where an international treaty entered into by Nigeria is re-enacted into law by the National Assembly, it becomes binding and our Courts must give effect to it like all other laws falling within the judicial powers of the Court.⁸⁰ However, a domesticated international treaty (otherwise called ‘treaty enabling law’) has been held to be a statute with ‘international flavour’. Being so, therefore, if there is a conflict between it and another statute, its provisions will prevail over those other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. It possesses a greater vigour and strength than any other domestic statute. Albeit, a treaty enabling law is not superior to and does not override the Constitution.⁸¹ This writer is of the view that the judicial pronouncement on the supremacy of the Constitution over treaties is well founded. This is so because it is in consonance with the sovereignty of the Nigerian State as enshrined in the Nigerian Constitution.⁸² With respect, the position of the apex Court on the relationship of treaty enabling statutes to other municipal laws in Nigeria appears flawed. In the words of Enabulele⁸³:

Since statutes implementing treaties are Acts of the National Assembly, they must maintain parity with all other Acts of the National Assembly. If Cap A9 is not an Act of the National Assembly, then it is simply a treaty, and if it is a treaty, no Nigerian Court can take cognizance of it; it will remain an obligation between independent States.

Thus, the preferred and most laudable view is the dissenting opinion of Achike JSC when he stated thus:

The general rule is that a treaty which has been incorporated into the body of the municipal laws ranks at par with the municipal laws. It is rather startling that a law passed to give effect to a treaty should stand on a ‘higher pedestal’ above all

⁷⁷ B Atilola, National Industrial Court and Jurisdiction over International Labour Treaties under the Third Alteration Act <nicn.gov.ng/publications/National Industrial Court and Jurisdiction over International Labour Treaties under the Third Alteration Act.pdf> Accessed on 29 May, 2016.

⁷⁸*Supra*.

⁷⁹*Abacha v Fawehinmi (supra)* p. 288 paras. F. G.

⁸⁰*Abacha v Fawehinmi (supra)* pp. 289, paras.B-C, 299, para. G.

⁸¹*Abacha v Fawehinmi (supra)* p. 289, paras.D-F.

⁸²See s. 1 of the Constitution.

⁸³A O Enabulele, ‘Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts’ (2009) 17 (2) *African Journal of International and Comparative Law*, p. 326.

other municipal laws, without more, in the absence of any express provision in the law that incorporated the treaty into the municipal law.⁸⁴

It has been rightly observed that elevating treaty enabling statutes over other municipal legislation not only defeats the aim of dualism or the transformation theory but also ‘diminishes a country’s sovereignty and undermines her independence’.⁸⁵ In *MHWUN v Minister of Health and Productivity & Ors.*,⁸⁶ the Court of Appeal held that the provisions of an international labour convention cannot be invoked and applied by a Nigerian Court until same has been re-enacted by an Act of the National Assembly. Similarly, the Supreme Court in *Registered Trustees of National Association of Community Health Practitioners of Nigeria v. Medical Health Workers Union of Nigeria*,⁸⁷ the International Labour Organization Convention 98 on ‘Right to Organize and Collective Bargaining’⁸⁸ was in issue; it has been ratified, but not domesticated. Among the questions for determination was its applicability status. The brief facts are that the 1st Appellant sought registration with the Registrar of Trade Unions. However, for reasons tied to the existence of similar Union, the application was refused. Aggrieved, the Appellant approached the Court. One of the conclusions of the trial Court (which incidentally was a judgment in the Appellant’s favour but overturned on appeal (the lower court had directed registration)), was that ‘in so far as the ILO convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria...’ Upholding this judgment, the Supreme Court held, *inter alia*, that: ‘... for a treaty to be valid and enforceable, it must have the force of law behind it, albeit it must be supported by a law enacted by the National Assembly, not bits and pieces found here and there in other laws of the land, but specifically so enacted to domesticate it, to make it a part of our law...’ In other words, the view earlier expressed in *Abacha v. Fawehinmi*⁸⁹ was re-stated and followed.

7. Conclusions and Recommendations

The importance of treaty in regional and continental arrangements cannot be overemphasized. It forms the legal framework upon which all cooperation schemes are based. In the Nigerian jurisprudence, save for the provisions of section 254 (C) (2) of the Constitution, all treaties to which the nation is a signatory must be domesticated for it to have the force of law in the country. Since treaty making powers vest on the Executive, the process of domestication not only gives the legislature the opportunity to make an input, but accords with the legislative powers as enshrined in the Constitution. To say otherwise will be tantamount to divesting the legislature of its constitutional role. Thus, it appears that the legislative powers vesting exclusively on the National Assembly has been diluted to the extent of section 254 (C) (2) of the Constitution. Currently, the position of the law in Nigeria as it relates to the status of treaties vis-à-vis the Constitution and other municipal laws is pending when the Supreme Court overrules itself as stated per Ogundare JSC in *Abacha v. Fawehinmi*, to wit: that except the Constitution, treaties are of a higher status than other municipal laws. Therefore, it logically follows that even at the State government levels, statutes with ‘international flavour’ supersedes other State legislations. Hence, the Child Rights Laws already passed by most States of the federation are to supersede other State laws in the event of conflict.⁹⁰ Finally, it is manifest from the relevant provisions of the Constitutions x-rayed in this paper that the nation’s sovereignty is more important and is ascribed greater primus than any cooperation scheme whatsoever. Nonetheless, the Constitution still successively provided for safe havens for any government wishing to lead or join viable regional cooperation or integration schemes. Nigeria is merely a case study but the Constitutions of virtually other African countries have revealed

⁸⁴*Abacha v Fawehinmi (supra)* p. 316 paras G-H. Nevertheless, until the Supreme Court overrules itself, the dissenting judgment of Achike JSC is not a binding decision. See *Agedah v Nkwocha* (2001) FWLR (Pt. 57) 868 at 874 paras. B – C. See also, *Clement v Nwuanyanwu* (1989) 3 NWLR (Pt. 107) 39.

⁸⁵A O Enabulele, *op cit*, p. 341.

⁸⁶ (2005) 17 NWLR (Pt. 953) 120.

⁸⁷ (2008) 2 NWLR (Pt. 1072) 575. Note that the cases of *MHWUN v Minister of Health and Productivity & Ors.* And *Registered Trustees of National Association of Community Health Practitioners of Nigeria v. Medical Health Workers Union of Nigeria* were both decided before the Constitution (Third Alteration) Act, 2010.

⁸⁸ Hereinafter called ‘ILO Convention’.

⁸⁹ *Supra*.

⁹⁰ C D LongJohn, *op cit*, p. 59.

similar obsession and preference for undilution of their sovereignty against any form of integration whatsoever.⁹¹

In the light of the foregoing, the researchers hereby recommend as follows: The Constitution should be amended to incorporate a role for either Houses of the National Assembly in the making or ratification process of treaty in a manner similar to what obtains in other jurisdictions. It is advocated that the relationship between treaties and National laws be entrenched in the Constitution or clearly stated in the specific treaty enabling laws such that both will be at par. Mass literacy programme and enlightenment campaigns in radios, televisions and other social networks should be designed to educate and/or sensitize the general populace on their rights and the remedies available to them under certain treaty enabling legislation. Again, in view of the paucity of information on treaties to which Nigeria is signatory to, there is an urgent need for the Federal Government to design a website to enable both Nigerians and foreigners and the general populace have useful and ready information on the existence or content of specific treaties. There is also need for collation and regular publication of Nigeria's treaties in force by the Federal Government in order to equip legal practitioners and the general public with requisite information concerning Nigeria's treaty obligations cannot be overemphasized.

⁹¹AkinitayoIwilade, *op cit.*