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THE STATUS OF INTERNATIONAL TREATY VIS-À-VIS MUNICIPAL LAWS UNDER THE 1999 CONSTITUTION OF NIGERIA

By

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Abstract

This paper examined international treaty, its phases and procedures and interrogated its status within the domestic laws in country such as Romania, Russia, France, Germany, Denmark and Nigeria. Specially, it focused on the procedure of incorporating international treaty as part of domestic law in Nigeria in the light of the vertical and horizontal separation of power. The paper also examined relevant statutory and judicial decisions on the subject with a view to finding whether international treaty ranks above domestic laws in Nigeria, including the Constitution. The paper found the existence of legal uncertainty in the status of international treaty vis-à-vis Nigerian laws, and recommended among others, the amendment of section 12 of the Constitution with a view to clarifying the position. The paper also recommended that treaty should be make self-executing in Nigeria to make it have force of law without any need for legislative implementation.

1.0 Introduction:

International treaties commonly serve as legal or regulatory instruments for creating international rules or standards that States adopt willingly or consensually to regulate their relationship inter se and with other stakeholders in the international community. Their importance as common legal and regulatory instruments among states in promoting trade, economic integration, advancement of human

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rights and combating crimes etc. cannot be overemphasized. The Preamble to the Vienna Convention on the Law of Treaties¹ echoed the fundamental role of treaties in the history of international relations and especially the importance of treaties for developing peaceful co-operation among nations. In emphasizing the importance of treaties as a fundamental source of international law and legal relations between nations, Malcom N. Shaw aptly reiterated that:

States transact a vast amount of work by using the device of the treaty, in circumstances which underline the paucity of international law procedures when compared with the many ways in which a person within a state's internal order may set up binding rights and obligations. For instance, wars will be terminated, disputes settled, territory acquired, special interests determined, alliances established and international organizations created, all by means of treaties...Thus, the concept of the treaty and how it operates becomes of paramount importance to the evolution of international law.²

The basic principle of international law demands that a State party to an international treaty must ensure that its own domestic law and practice synchronize or are consistent with the requirement of the treaty, the status of international treaties within the domestic laws, particularly in the determination of conflict between treaties and domestic laws, has elicited different perspectives and the perspectives are still emerging. The position of international treaty within the

¹ Vienna Convention on the Law of Treaties signed at Vienna on 23 May, 1969 and came into force on 27 January 1980.

² Malcom N.S., *International Law* (6TH ed. Cambridge University Press, New York 2008) p. 903.

Nigerian domestic laws is no much clearer as the case in many other states. Therefore, this study seeks to critically explore legislative provisions and judicial authorities to determine whether the status of treaties vis-à-vis domestic laws in Nigeria has been clearly defined.

2.0 MEANING AND IMPORTANCE OF TREATY

The term treaty is a generic term used to embrace convention, agreement, protocol, and exchange of notes.³ It is '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'.⁴ It is usually an agreement formally signed, ratified, or adhered to between two nations or sovereigns⁵ and may be tagged in a variety of ways such as 'conventions' (e.g. Convention on the Rights of Child); 'covenant' (e. g the International Covenant on Civil and Political Rights), or Charter (e. g the African Charter on Human and People's Rights).⁶ These terms can be used interchangeably and the legal weight of each of them is equal.⁷

Just like local⁸ or national legislations, an existing treaty can be modified, amended or supplemented in part by means termed 'protocol'.⁹ Protocols have the same legal force as the treaty¹⁰ they

³ Rebecca W., *International Law* (3rd ed. Sweet & Maxwell, London 1997) p.225.

⁴ Article 2(1) (a) of the Vienna Convention on the Law of Treaties,

⁵ Bryan A.G. *Blacks' Law Dictionary* (9th ed. West Publishing Co., USA 2009) p.1640; See also *Qatar v Bahrain* 1994 ICJ Rep. 112

⁶ Frans V., *International Human Rights Law in Africa* (Oxford University Press, New York 2007), p.5

⁷ *Ibid*, p.20.

⁸ The word 'local' is used loosely in contradiction to international laws to refer to States' (countries) legislations and does not suggest that the legislations relate to or applicable to or concerned with the administration of a city or town or district rather than a larger area.

⁹ *Ibid*.

¹⁰ *Ibid*, p.20.

supplemented.¹¹ In this regard, with reference to the number of parties, a distinction may be drawn between 'bilateral treaty' (between two states or between two organizations of states) and 'multilateral treaty' (between more than two states).

Treaties have been the main instrument of conducting international relations.¹² Of recent, development of international relation has resulted in an explosion of treaties, both bilateral and multilateral and therefore, the trend towards written law is irreversible. Hence, treaties form important sources of international law. Besides the fact that international cooperation has been carried out principally through them,¹³ treaties also clear doubt and ensure a common understanding, at least, among the parties.¹⁴ The law governing international treaty is the Vienna Convention on the Law of Treaties and for this convention¹⁵ to apply to treaties, such treaties must be in writing, reflect the intention of the parties to be bound and must be governed by international law.¹⁶

3.0 THE PHASES IN THE LIFE OF A TREATY

Treaties like states legislations pass through many stages of conception before they are finally birthed into legal instruments. Although these phases (stages) vary according to authors, the popular view among authors favours the following phases in the life of an international treaty¹⁷ namely; elaboration, adoption, adherence, entry into force, operationalization, domestication and internationalization.¹⁸

¹¹ Examples of Protocols include the Optional Protocol to the African Charter on the Establishment of the African Court on Human and People's Rights, the protocol to the African Charter on the Rights of Women in Africa etc.

¹² Umzurike U.O., *Introduction to International Law* (3rd ed. Spectrum Books Limited, Ibadan) p.16

¹³ Rebecca W., *International Law* p. 225-226.

¹⁴ *Ibid.*

¹⁵ Vienna Convention on the Law of Treaties.

¹⁶ Rebecca W., *International Law*, p.225.

¹⁷ Maluwa T., 'International Law-Making in the Organization of African Unity; An Overview (2000) 12 RADIC 201

¹⁸ Frans V., *International Human Rights Law in Africa*, p. 5-6.

What eventually becomes a 'treaty' usually starts with a process of discussion, elaboration and drafting. In other words, these can also be referred to as 'initiation' and 'formulation'.¹⁹ The process starts when a need arises which may be as a result of economic, political, social or simply diplomatic or other necessary requirements of the time. Negotiation and discussions arising from this culminates into 'meetings of experts within the framework of the political or policy making body that aims to adopt the treaty.' Matters from this then proceeds to diplomatic conference, consisting of government representatives of the states making up the political body.²⁰ This is usually followed with numerous drafts prepared and re-drafted as part of process and this may last from months to decades depending on the circumstances. Together, all these drafts and record of deliberations are referred to as the '*travaux preparatoires*' (drafting history).²¹

The finalized draft arisen from the above is then placed before the political body or policy-making organ for its adoption. Upon adoption of the final version of the text, which is done by either the consents of all states or alternatively by the majority vote of 2/3 of states present and voting or by a different procedure if the 2/3 majority so agree.²² Usually, a state can express its consent to be bound by a treaty in many ways and these include signature, signature ad referendum, ratification and accession.²³ Treaties however enter into force in such manner and upon such a date as the treaty may provide or usually as the negotiating states may agree.²⁴ A multipartite treaty normally comes into force upon the receipt of a stipulated number of ratification and accession.²⁵

¹⁹ Frans V., *International Human Rights Law in Africa*, p. 5-6.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Article 9 of the Vienna Convention on the Law of Treaties.

²³ Article 18(a) of the Vienna Convention on the Law of Treaties.

²⁴ Article 16 Vienna Convention on the law of Treaty.

²⁵ By article 85(1), Vienna Convention on the law of Treaty entered into force 'on the thirtieth day following the date of deposit of the thirty fifth instrument of ratification or accession'

Afterwards, the state party can decide to incorporate the text of the treaty as part of their domestic law.²⁶

4.0 TREATY MAKING COMPETENCE

States' treaty-making power is left to the arrangements of each state. Therefore, the constitutional requirements of treaty as regards signature, ratification or accession vary between one state and the other. However, it is noteworthy that a state may not rely on the breach of its constitutional provisions relating to treaty making procedure or processes to invalidate an agreement (treaty) unless such a breach is manifest and objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.²⁷

a. Who can Conclude or Negotiate a Treaty on behalf of a State?

A state representative may conclude a treaty on behalf of a state if the representative possess full power or if from the practice of the states concerned it can be deduced that the representative enjoys full powers. By virtue of article 2(1) (c) of the Vienna Convention on the Law of Treaties, full power refers to 'document emanating from the competent authority of a state designating a person or persons, to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the state to be bound by the treaty, or for accomplishing any other act with respect to a treaty.'

b. Reservation to a Treaty

Unlike states laws, parties to an international treaty can make or enter reservation to the content or text of a treaty. If a treaty allows reservations or particular reservations, such a reservation needs no subsequent approval of other contracting states unless required by the treaty itself.²⁸ However, by virtue of article 19 of the Vienna

²⁶ Nigeria Domesticated the African Charter as part of its domestic laws as African Charter on Human and people Rights (Enforcement and Ratification) Act, Cap A9 LFN 2004 in 1983

²⁷ Article 46, Vienna Convention on Law of Treaty.

²⁸ Rebecca W., *International Law*, p.230.

Convention on the Law of Treaty, for a reservation to a treaty to be valid, the following must occur;

1. The reservation must not be prohibited by the treaty itself;
2. The reservation must not be incompatible with the object and purpose of the treaty; and
3. If a treaty provides that only a specified reservation can be made, reservations outside the specified one is invalid.²⁹

c. Effect of Reservation to a Treaty

The legal effect of reservation to a treaty, especially as regards another party is that, it modifies the provisions of the treaty to which the reservation relates, to the extent of the reservation. It also varies those provisions to the same extent for that other party in its relations with the reserving state.³⁰

5.0 WHAT IS THE STATUS OF INTERNATIONAL TREATIES WITHIN THE MUNICIPAL LAWS?

Discourse on relationship between international and the domestic laws as regards status may not be complete without recourse to the two main principal theories on the discourse. The two main theories as regards the relationship between international and the municipal laws are *dualism* and *monism*. Monism posits that international laws and state laws are concomitant aspect of the one system in general while dualism postulates that both laws represent two entirely distinct legal systems, international law having an intrinsically different character from that of state laws.³¹

The legal status of international treaties in the domestic legal order has therefore generated much intellectual debates. Today, it is such a debate

²⁹ Ibid.

³⁰ See; *Libyan people's Bureau Incident*; The Libya's Reservation to the Vienna Convention on Diplomatic Relations whereby the diplomatic bag could be intercepted in suspicious circumstances, would by the operation of the principle of reciprocity have entitled the UK to exercise the same right.

³¹ Stark J.G. *Introduction to International Law* (8th ed. Butterworth & Co Publisher, USA 1977), p. 82

which has enthused scholars into different schools of thought. In fact, it is not out of place to say that the question is more open than close as there seems to be an agreement of no common conclusion among scholars that have undertaken the study so far. The reason for this, perhaps, owns much to the fact that the attitude of domestic Constitutional actors towards the subject is ambivalent and frequently inconsistent. On one hand, the vertical and horizontal convergence of fundamental norms relating to human rights, the rule of and democracy is visible from the entire debate. On the other hand, a simple hierarchy between international and national constitutional laws, visualized as a pyramid of norms with international law at its apex, is not generally accepted by all players.

The questions are: (i) are international treaties superior to domestic laws of states irrespective of what laws they are? (ii) Or are international treaties superior to other domestic laws of states except their individual constitution? (iii) Or is it at par with domestic legislations and by domestic legislation, does it include the constitution? (iv) Or better still, is international treaty inferior to other domestic legislations including the Constitution or superior to both Constitution and other domestic legislations? With the current changing trend in both domestic and international law today, whatever view one holds, one has to support it with authority if one wants same to hold water.

Given the dynamics international law is taking, coupled with the roles it plays globally, what seems to be in accord with the reality is that international treaty may rank above domestic laws including the Constitutions of nations.³² Taking a lead from the attitude displayed by the African Commission on Human and People's Right in the communication involving *Article 19 v Eritrea*³³ where the Commission has no difficulty pronouncing that any law enacted by the Eritrean government which permits a wholesale ban on the press and

³² *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR) 2007.

³³ (2007) AHRLR 73 (ACHPR) 2007.

imprisonment of those whose view contradict the government is contrary to both the spirit and purpose of article 9 of the African Charter.³⁴ It may not be out of place to assert that the Commission's stance is suggestive of a disposition to declare void a domestic law of a state party which is inconsistent with or contradicts the African Charter. This view is reinforced by the conclusion of the Commission that international law must always prevail over national law.³⁵ However, whether by 'national law', the Commission intended that it includes the Constitution of nations is not clear but the supposition that it includes the Constitution is more assuredly than the proposition that it does not.

6.0 CONVERGENCE OF STATES' CONSTITUTIONAL PROVISIONS ON INTERNATIONAL TREATIES AS REGARDS THEIR STATUS

a. International dimension

Evidence abounds in many constitutions of some countries of the world wherein supremacy of international law over domestic legislations is recognized. A closer instance is article 15(4) of the Russian Constitution³⁶ which recognizes international treaties as a component part of its legal system to the extent that if an international treaty stipulates other rules other than those stipulated by the laws of Russia, the rules of international treaty apply.³⁷ Similar implication is contained in article 28 of the Algeria Constitution which endorses the

³⁴ The court held that permitting state parties to construe the provisions of the Charter so that they could be limited or even negated by domestic law will render the Charter meaningless. The court concluded that international law must always prevail over national law.

³⁵ *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR) 2007.

³⁶ Russian Constitution of 1993 was adopted by national referendum on December 12, 1993 and came into force on December 25, 1993. The Constitution is the second most long-lived in the history of Russia, behind the Constitution of 1936. It was said that at the moment of its official publication, it abolished the Soviet system of government <https://en.wikipedia.org/wiki/Constitution_of_Russia> Accessed on 22nd May 2019.

³⁷ The Russian Constitution of 12 December, 1993.

principles and objectives of the United Nations Charter.³⁸ Furthermore, Algeria balances the situation in such a way that it prevents a situation where the provision of its internal law including the Constitution runs contrary to the provision of international law especially its obligations contained in a treaty it ratifies. Thus, in article 168 of its Constitution, it provides that when the Constitutional Council considers that a treaty, an agreement or a convention is not constitutional, its ratification cannot take place.' This obviously prevents and obviates a situation of conflict between treaty and the Constitution of Algeria. One may nevertheless be compelled to enquire further as regards what the position of Algeria law would be assuming there is a conflict between its internal law and its international obligations embodied in a treaty or under international law. Article 132 of the same Constitution of Algeria provides thus:

Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law.

More so, similar provisions exist in article 20 of Denmark Constitution of June 1953.³⁹ Article 25 of the German Basic Law⁴⁰ is very explicit as regards the primacy of international law over the German internal laws. Article 25 of German Constitution provides:

[Primacy of international law] The general rules of international law shall be an integral part of federal law. They

³⁸ The Algeria Constitution of 19 November, 1976.

³⁹ The Danish Constitution of June 1953 <https://www.constituteproject.org/constitution/Denmark_1953.pdf?lang=en> Accessed on 22 May 2019.

⁴⁰ The Basic Law for the Federal Republic of Germany (German: *Grundgesetz für die Bundesrepublik Deutschland*) is the Constitution of the Federal Republic of Germany. The Basic Law was approved on 8 May 1949 in Bonn, and, with the signature of the occupying western Allies of World War II on 12 May, came into effect on 23 May. <<https://www.btg-bestellservice.de/pdf/80201000.pdf>> Accessed on 22nd May 2019.

shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.'

Furthermore, article 20 of Romania constitution is also explicit on the primacy of international law over the domestic legislation. Article 20 (1) and (2) Romania Constitution provides thus:

Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party.

(2) In case of an inconsistency between domestic law and the international obligations resulting from the covenants and treaties on fundamental human rights to which Romania is a party, the international obligations shall take precedence, unless the Constitution or the domestic laws contain more favorable provisions.⁴¹

Constitutions of other nations include article 11 of the Slovak Constitution,⁴² article 10 of the Constitution of Czeck Republic,⁴³ article 53 of the French Constitution⁴⁴ and article 136 of the Constitution of Lithuania. In the same vein, similar supremacy clauses exist in new Constitutions of states such as Estonia, Armenia, Kazakhstan, Tadzhikistan, Turkmenistan, Belarus and Vereshtin.

It is therefore manifestly established that states party to international treaty are to always interpret their Constitutions in conformity with

⁴¹ The Constitution of Romania of 8 December, 1991.

⁴² The Slovak Constitution of 1st September, 1992.

⁴³ The Constitution of Czeck Republic of 16 December, 1992.

⁴⁴ The French Constitution of July 1999.

international law.⁴⁵ For instance, the treaty of Maastricht of 1992 which founded the EU enjoins the state party to conform to international law. Similarly, article 16 of the Portuguese Constitution of 1976, article 10 (2) of the Spanish Constitution of 1978, article 20 of the Romania Constitution of 1991 and the South African Constitution of 1996⁴⁶ all require that the states' Constitutions should be interpreted in conformity with international human rights law which is principally embodied in treaty and customary international law.

b. Position in Nigeria

As part of its readiness to domesticate international treaties, Nigeria also has its section 12 of the 1999 Constitution (2011 as amended) which allows international treaties to be incorporated as part of the domestic laws of the country.⁴⁷ Though this section only provides that treaty only has force of law when enacted into law by the National Assembly, it is silent on the status of such treaty within the domestic laws when so enacted.

In this regard, the Botswana case of *A-G Botswana v Unity Dow*⁴⁸ and the Ghana case of *New Patriotic Party (NPP) v The Inspector-General of Police & others*⁴⁹ are relevant in this regard. In those cases, the Botswana and Ghana though yet to adopt any specific legislation incorporating the African Charter into their Municipal laws, the Municipal Courts declared the African Charter to be above their Municipal laws.

One reason for the convergence of constitutional provisions on international treaties as seen above is that there is tendency that states have strong political motives to amend and reform their laws,

⁴⁵ *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR) 2007.

⁴⁶ And under its article 223.

⁴⁷ It was in pursuance of this provision contained in 1979 Constitution that the African charter on Human and people's Right was domesticated as parts of the Nigerian domestic laws.

⁴⁸ (1998) HRLRA p. 1.

⁴⁹ No4/93 on 30/11/93.

foreign decisions when identifying customs and interpreting laws, treaties inclusive.⁵⁷ In fact, evidence abounds that when interpreting or applying domestic laws Nigerian courts do make reference to international treaties. The Nigerian Court of Appeal in *Oshevire v British Caledonian Airways Ltd*⁵⁸ applied and gave effect to the Warsaw Convention of 1929 as reproduced in the schedule to the Carriage of Goods by Air (Colonies, Protectorates and Trust Territories) Order 195. So also, in *VAC. (Nig) Ltd. v. Global Transporte SA*,⁵⁹ the Court of Appeal gave effect to the Hague Rules. Again, the application of the Warsaw Convention of 1929 by the Nigerian Court of Appeal in a fairly recent decision in *Ibidapo v Lufthansa Airlines*⁶⁰ was upheld by the Nigerian Supreme Court.⁶¹ In the case, the Supreme Court added that customary international law is automatically incorporated into domestic law and requires no further legislation. Wali JSC, one of the Justices of the Supreme Court that presided over the matter said thus:

Nigeria...inherited the English common law rules governing the municipal application of international law...

In many judicial decisions, apart from considering domestic laws, courts also make recourse to international law as interpretative aids in their functions of interpreting statutes and adjudicating on disputes. This judicial attitude in Nigeria, on international law generally, and treaty specifically became clearer in the *locus classicus* case of *General Sani Abacha & Others v Chief Gani Fawehinmi*,⁶² where reliance was

⁵⁷Jennings R., 'the Judiciary, International and National Law, and the Development of International Law' (1996) 45ICLQ1-14.

⁵⁸(1990) 7 NWLR (Pt. 16) 507.

⁵⁹(1996) 5 NWLR (Pt. 448) 291.

⁶⁰(1997) 4 NWLR (Pt. 498) 124.

⁶¹The apex court in Nigeria land.

⁶²(2000) 4 SCNJ 400.

placed on African Charter on Human and People Rights (Ratification and Enforcement) Act CAP A91FN 2004 to prevent violation of human rights with sheer impunity. The status of international treaties in the Nigerian legal order was considered. In the case, out of five Justices that presided over the matter only 2 Justices categorically provided clear answers regarding the status of international treaties within the Nigerian domestic legal order. Oguntade JSC who read the lead judgment opined that international treaties, in that case, the African Charter, is superior and ranks above other Municipal laws but inferior to the Constitution. Uwaifo, Ejiwumi and Iguh JJSC aligned with the lead judgment. However, Achike, Belgore and Muhammed JJSC dissented.

According to Achike JSC, international treaty, in this case the African Charter, is at par with other municipal laws. Belgore and Muhammed JJSC aligned with Achike's position that international treaty is at par with other municipal laws. From this therefore, what is clear is that there are two opinions. The 1st opinion was that:

1. International treaties are superior to other municipal laws but inferior to the Constitution. This opinion is the lead judgment and was supported by three justices plus the Justice that read the lead judgment making four justices out of seven justices that presided over the matter as indicated above.

However, the 2nd opinion was that:

2. International treaty is at par with other municipal laws. This is the dissenting opinion which is supported by only three justices.

The question now is which of these opinions constitute the judgment/decision of the court for the purpose resolving this issue? Answering this question, one may also need to ask, what is the judgment of the court? Where a single judge presides, the situation does not admit of any difficulty; the judgment of that court is what may be discerned as the *ratio decidendi* or *rationes decidendi* of that case in contrast to the passing remarks, otherwise referred to as *obiter dictum* or *obiter dicta* made by the court in the course of the judgment. The

when viewed with the lens of domestic Constitutional supremacy in the light of section 12(1) of the 1999 Constitution (2011 as amended). It is hoped that the Supreme Court will clarify this position next time it has the opportunity.

9.0 INCORPORATION OF INTERNATIONAL TREATY AS PART OF DOMESTIC LEGISLATION IN NIGERIA UNDER SECTION 12 OF THE 1999 CONSTITUTION

Undoubtedly, domestication or incorporation of international treaty is required before it can have any force of law in Nigeria. The enactment or the incorporation of the treaty as part of the domestic laws shall be done by the National Assembly. Meanwhile, the existence of a vertical separation of power of the legislative arm of the government in Nigeria and the balkanization of the legislative powers between the state and the Federal legislature poses a serious legal issue regarding the power of the National Assembly to make law to give effect to or incorporate into law an international treaty. Legislative powers in Nigeria are majorly but constitutionally divided into the Exclusive Legislative and Concurrent Legislative lists. Exclusive Legislative lists are those items set out in the first column of Part II of the Second Schedule to this Constitution and only the National Assembly can make law in respect of them. The Concurrent lists on the other hand are the lists set out in the first column of Part II of the Second Schedule to the Constitution. The question now is, what happens if the international treaty to be incorporated as part of the domestic law in Nigeria deals with or concerns an item not included in the Exclusive Legislative List, who will have the power to legislate, the State House of Assembly or the National Assembly?

Section 12(2) of the 1999 Constitution which provides:

- (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.

Thus, going by the above provisions, the National Assembly can still enact an international treaty and incorporate same as part of domestic law of Nigeria even though it deals with an item not included in the Exclusive Legislative List. However, section 12(3) of the same Constitution provides that:

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.

Therefore, from the foregoing provisions, it can be submitted that only the National Assembly has the power to enact into or incorporate as part of domestic laws an international treaty whether or not it is in the Exclusive or Concurrent Legislative List. However, where the international treaty is in respect of an item or subject that falls on the Concurrent Legislative List, then the ratification of the majority of the State House of Assembly is required before the Bill for such an Act can be presented to the president for assent. In effect, if the National Assembly has passed such a law pursuant to section 12(1) of the Constitution especially if it is in respect of a subject which falls under the Exclusive Legislative List, by virtue of section 4(1), (2) and (3) of the Constitution, the treaty incorporated into the domestic law becomes applicable to the entire federation without any need for the State to specifically adopt same in their respective states to be applicable. However, if the treaty to be incorporated is in respect of a subject that is not included in the Exclusive Legislative list, by virtue of section 12(3) of the Constitution, before such a bill is presented to the President

for assent, the majority of the State House of Assembly must ratify it. And after it becomes an Act, by virtue of section 4(7) and (8) of the Constitution, the state will need to specifically incorporate it into their own state laws before it becomes applicable to them unless the passage is done in a way that the doctrine of covering the field is made applicable.

10.0 REFLECTION ON THE PROCEDURE FOR THE INCORPORATION OF TREATY AS PART OF DOMESTIC LAWS IN NIGERIA

There is no doubt that the procedure for domesticating international treaty in Nigeria is somehow cumbersome and has the potential of creating Constitutional jurisprudential logjam between the Constitutional position of Nigeria as a country and its obligation as a member of the various international organizations. For instance, what happens in a situation where Nigeria ratifies an international treaty dealing with a subject that falls under the Concurrent Legislative List and the National Assembly could not get the ratification of the required 2/3 majority of the State House of Assembly to be able to incorporate the treaty into domestic law? At the international scene, can Nigeria rely on the difficulty or failure of the National Assembly to get the required number of ratifications from State as a justification for its failure or inability to implement or incorporate such a treaty?

This same question presented itself in the dispute between Bakassi and Nigeria. The argument of Nigerian government was that Bakassi Peninsula could not be yielded to Cameroun on the ground that section 12 of the Nigerian Constitution would need to be complied with so as to effectively delete Bakassi as a Local Government by way of Constitutional amendment which would of course require the ratification of or by the majority of the State of House Assembly. Notwithstanding the beauty of the argument, it was roundly rejected by the International Court of Justice. Thus, following the decision of the

International Court of Justice in the case of *Cameroon v Nigeria*⁶⁸, Bakassi Peninsula, formerly of Cross-River State of Nigeria, is no more a Nigerian territory even without any Constitutional amendment prescribed/implicit by section 12 of the 1999 Constitution. Interestingly, the Nigerian Supreme Court has somewhat accepted this as a correct representation of the law. A practical demonstration of this acceptance was made manifest in the case of *Attorney-General of Cross-Rivers State v Attorney-General of the Federation & Anor*⁶⁹ where the effect of the ICJ judgment on the erstwhile littoral State of Cross-Rivers state was captured thus;

The effect of the judgment of the International Court of Justice dated 10/10/2002 on the land and maritime boundary between Nigeria and Cameroun is that it has wiped off what use to be the estuarine sector of Cross River State as a result of which the State is hemmed in by the new international boundary between Nigeria and Cameroun. That being the case, there seems to be any estuarine boundary between Akwa Ibom State and Cross River State with the result that Cross River no longer has a seaward boundary.

In a later case of *Attorney-General of Cross-Rivers State v Attorney-General of the Federation and Anor*, the Supreme Court,⁷⁰ per Rhodes-Vivour, JSC., was more punchy when it eloquently declared with a tone of finality that;

This Court has no jurisdiction to decide ownership of oil wells located on oil-rich

⁶⁸ ICJ Reports, 2002, pp. 303, 346.).

⁶⁹ (2005) 15 NWLR (Pt.947) p. 71.

⁷⁰ (SC.250/2009).

Bakasi Peninsula for the simple reason that Bakasi Peninsula is foreign territory. It is Cameroun land. Supreme Court jurisdiction is restricted to Nigeria land.

11.0 WHAT DOES THE LAW SUGGEST AS AT TODAY?

In *Haka Air Service v Keazor* (supra), it is not clear whether the court's silence on this issue means that the court did not want to make international treaty rank above the Constitution or that this fact is too obvious and glaring that it needs not be gainsaid. What appears justifiable to assume from the decision in *Haka Air Service* (supra) is the tendency to hold international treaty ranks above the domestic laws including the Constitution except if Constitution is not taken as part of domestic legislation within the pyramidal hierarchy of laws with international law at the apex. However, this view would be contrary to the decision of the court in *Abacha v Fawehinmi* (supra). But from all indications, what is certain about the status of international treaties within the domestic legal order is that today, in Nigeria, international treaties rank above domestic legislations and if any domestic legislation is in conflict with any of the provision of international law or treaty such provision of the domestic legislation is void to the extent of its inconsistency. But the question whether or not international treaties rank above the constitution is still an open question that leaves much to grind in the mouths those who care to ask and until precedents or law further clarifies or answers the question. The position is more vague than clear.

12.0 Conclusion

It is crystal clear from all the above analysis that international treaties remain important and relevant not only at the international scene but also within the domestic legal system. Domestic courts have found respite in international treaties as interpretative aids over time when deciding issues within the domestic courts. Nonetheless, the position

which it occupies within the domestic legal order has generated intellectual debates among scholars in as many jurisdictions as is the case in Nigeria. In Nigeria today, while the position of the law is clear that international treaties rank above any other domestic legislation, its status vis-à-vis the constitution remains unclear. There is however hope that this position will be clarified soonest by the Nigerian Courts.

13.0 Recommendations

This paper recommends the following:

1. The National Assembly should use the opportunity of constitutional amendment to amend section 12 of the constitution to clearly clarify the status of international treaty within the municipal laws vis-à-vis the constitution itself.
2. The National Assembly should endeavour to make international treaty self-executing with a view to making it applicable and enforceable in the country without the need for any additional legislative implementation.
3. The Federal government should thoroughly review existing international treaty to which Nigeria is a party and assess whether adherence to treaty is profitable to Nigeria.
4. The Federal government should also ensure that international treaty are adequately negotiated and thoroughly review its domestic impact before signing, ratifying or acceding to such treaty.
5. Nigerian courts, especially the Supreme Court, should use every opportunity to clearly clarify the position of the law on the status of international treaty vis-à-vis the Constitution.