IV

Treaties and International Customs in Nigeria

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Abstract

Nigeria moved with quiet dignity to take her place on the world stage on the first day of October 1960. On this day, Nigeria became an independent sovereign nation, thus making her one of the subjects of international law. The roles of international law in the global village cannot be overemphasized, and the benefits accruing to subjects of international law cannot be gainsaid. International law, however, regulates the behavior of her subjects. These regulations are carried out through treaties, and international customs. Treaties and customs are applied by various States in various ways and these ways translate into two major theories namely monism and dualism. Nigeria appears to be a dualist State by virtue of the provision of section 12 of her Constitution. However, the recent amendment to the Constitution appears to alter the whole process. On the other hand, the position of customary international law was never addressed by any Nigerian enactment. These various issues as regards our relation with the international community with respect to treaties, and international customs would be examined in the light of judicial decisions and practices obtainable in other jurisdictions.

Ends of International Law

International law plays various roles ranging from promotion of relationship among States, maintaining peace in the world, promotion of justice, regulating international transactions etc. It is said that rules of international law cover every facet of inter - state activity. There are laws regulating the

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use of the sea, outer space and Antarctica.[1] International law concerns itself with rules governing international telecommunication, postal services, conduct of international trade, carriage of goods etc. International law is also involved with extradition, the use of force, human rights, nationality, security of nations and environmental protection.[2]

International law has laid down rules, principles and standards that govern nations and other participants in international affairs in relation with one another.[3] It also plays roles in the resolution of problems of regional or global scope, resolution of international tension and prevention of needless suffering during wars.[4] International law addresses the issue of peace-keeping forces, the claims for independence by groups around the world, the changing social and political situation in the world, increase interdependence in the international community by analyzing the legal principles arising from interactions between States, actions by States and certain actions by individual corporations, international organizations and other actors on the international plane.[5] Thus, International law has relevance to our daily lives. For example, International law enables international telephone calls to be made, overseas mails to be delivered and travel by air, sea or land to occur relatively easy.[6] From the foregoing, it is clear that International law plays various roles in the functioning of States. It does not only benefit the States by this enormous role but also benefits the citizens of the States concerned.

It has been said that modern international law does not only facilitate the functioning of international community but also seeks to control States by inhibiting or directing their conducts in their relation with one another e.g. law prohibiting the use of force.[7] International law thus has graduated or is graduating from a system that was or is concerned with facilitating international corporation to a system that seeks to control its subjects.[8] International law achieves these various roles highlighted above by way of treaties and international custom. A brief discuss will be undertaken to

[1] M Dixon et al *Cases and Materials on International Law* (5th edn, Oxford: Oxford University Press, 2011) p.1.
[2] *Ibid.*
[3] E.A Oji, 'Application of Customary International Law in Nigeria' (2010) NAILS Law and Development Journal, 151.
[4] *Ibid.*
[5] M Dixon *et al, op. cit,* p.1.
[6] *Ibid.*
[7] 'M Dixon *et al*, *op. cit,* p.3.
[8] *Ibid.*

ascertain what these treaties and international customs are and how States apply them.

Treaties

The Vienna Convention defined treaty to mean 'an international agreement concluded between States in a 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'.[9] This definition excludes any agreement between international organizations and private parties. It further excludes unwritten agreements between States from becoming a treaty. However with the ever-increasing role of international organizations, we now have the Vienna Convention on the Law of Treaties between States and international organizations or between international organizations which defined treaty as 'an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[10]

The importance of treaty cannot be overemphasized, bearing in mind that it is an explicit agreement between the parties and it constitutes the most visible evidence of consent. Treaties can be bilateral, in which case it is between two States.[11] It may also be multilateral: that is treaty entered into by many States.[12] A treaty goes by different names ranging from Conventions,[13] Agreement,[14] Covenant,[15] Charter,[16] Protocol,[17] Declaration [18] etc. A treaty which is an agreement for regulation of relations between States can be

[9] Vienna Convention on the Law of Treaties 1969, article 2(1)(a).
[10] Vienna Convention on the law of Treaties between States and International Organizations or between International Organizations 1986 art.2. it must be pointed out that this convention has not come into effect due to the obvious reason that it has not been ratified by the number of States required by article 85 of the charter.
[11] E.g. is USSR-Afghanistan Bilateral Treaty of Friendship 1978.
[12] E.g. is The Convention on the Elimination of all Forms of Discriminations against Women 1979.
[13] Example is The Geneva Convention on the High Sea 1958.
[14] Example is The Agreement Establishing the World Trade Organization 1994.
[15] Example is The International Covenant on Civil and Political Rights 1966.
[16] Example is The United Nation Charter 1946.
[17] Example is The Protocol Relating to the Status of Refugees 1967.
[18] American Declaration of the Rights and Duties of Man 1948.

contractual, legislative or by aspiration. A contractual treaty is usually bilateral in nature and it can be likened to a contract in municipal law where parties agree to confer on themselves certain rights and obligation. 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. Law-making treaties usually involve a large number of participants, and obligation created therein binds all the parties. It is usually declaratory in nature since it creates rules of conduct.[19] It is pertinent to note that law-making treaties cannot bind a non-party to it as illustrated in the *North Sea Continental Shelf case.*[20]

Treaty can also be aspirational. Such treaty stipulates the desires of the parties as regards their conduct with one another. An example is the The Kellogg–Briand Pact[21] officially called the Pact of Paris. This pact was concluded in 1928 and State parties to it promised not to use war to resolve disputes 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. There are other types of treaties outside contractual, aspirational or law-making treaties; example is the treaty establishing the International Criminal Court.[22] Such treaties are constitutive in nature since they establish an institution with powers. Treaties, no matter the classification are binding[23] and they operate or constitute a chunk of the sources of international law due to the fact that States started entering into treaties from time immemorial. In fact, Philip Allot opined that treaties are older than the idea of International Law.[24] This assertion may not totally be wrong considering the mention of same severally in the book of all books; the Holy Bible.[25]

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[19] Examples of such law making treaties are Vienna Convention on Diplomatic Relation 1961; The UN Charter 1945.

[20] ICJ Reports (1969) p.3 the Court held in this case that Article 6 of Geneva Convention on Continental Shelf which lays down the equidistance rules cannot bind Federal Republic of Germany which has not ratified the treaty.

[21] Kellogg-Briand Pact 1928. It is named after its authors: United States Secretary of State Frank B Kellog and French Foreign Minister Aristide Briand.

[22] Statute of the International Criminal Court 1998

[23] This is rooted on the principle of *pacta sunt servanda* which means agreement must be obeyed. For monist States, it is binding internationally and locally once it is ratified. However, for dualist States it is binding international upon ratification and binding locally only when it is domesticated.

[24] P Allot, 'The Concept of International Law' (1999) 10 No.1EJIL, 42

[25] I Kings 5 v 12 witnesses a treaty between King Hiran of Tyre and King Solomon of Israel.

International Custom

International Custom has been described as a constant and uniform usage accepted as law.[26] It is a response to the lack of unified legislature in international law and it fills the vacuum created by treaties. It postulates that the way things have always been done becomes the way things must be done. International custom is one of the ways of enforcing international rules although it has been criticized as being complex and uncertain unlike treaties[27] and can be difficult to prove conclusively since it entails study of different practices of as many States as possible.[28]

Article 38[29] captures customary international law when it provides for 'international custom as evidence of general practices accepted as law'. From this provision, two constituent but distinct elements of customary international law must be pointed out, namely 'general practice' and 'accepted as law'. These two elements are referred to as objective or empirical element and subjective or psychological element respectively.[30] These two elements must co-exist for the Court to apply customary international law.

General practice, as an element of international custom, deals with what States actually do, that is how State behaves internally or externally which is generally termed State practice. The behavior of a State is important here, and it can take the form of affirmative action, affirmative assertion or non-objection, or acquiescence in a situation the State ordinarily ought to have objected. State practice can be determined by having recourse to official manuals on legal question of the State concerned, opinions of national legal advisors, newspaper, policy Statements, press releases, diplomatic correspondence etc.[31]

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[26] *Asylum Case* (1950) ICJ Report 266.

[27] J.W Dellapana, 'The Customary International Law of Transboundary Fresh Waters (2001) 1 No. 14 International Journal on Global Environmental Issues, 266.

[28] C. Schreuer, 'Sources of International Law: Scope and Application' available at <http://www.univie.ac.at/intlaw/wordpress/pdf/59_sources.pdf> accessed on 4th October, 2014.

[33] Art.38 (1) *ibid.*

[30] Bederman, *op.cit,* p.33; Brownlie, *op. cit,* pp. 7-8; Shaw *op. cit,* pp.74-75; 'International Law outline 2009' available at <https://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__students__student_bar_association/documents/documents/ecm_pro_063686.pdf> accessed on 4th April 2013.

[31] Shaw, *op cit,* p.82.

General practice entails the duration, consistency, uniformity and generality of practice among the international actors. The question now is; what should be the duration of the State practice sought to be proved? Must same be consistent or uniform among State actors? There are no hard and fast rules to determining these various constituents of what amounts to general practice; thus as regards duration, it can take a considerably long time or a short time. On consistency, Shaw declared that some degree of continuity must be maintained but it depends on the context of operation and the nature of the usage.[32] Uniformity on the other hand needs not be complete but should be substantial as held in the *Fisheries case*.[33] The need for generality does not mean universality of practice but that a large number of States must have adopted the uniform practice as held in *Fisheries Jurisdiction case*.[34] Finally, generality of practice does not preclude local or regional custom among a group of States or two States only as the International Court of Justice held in *Right of Passage case*.[35]

The second element of custom is that the practice must be accepted as law or as binding on the States. This is as opposed to a habit or usage which is as a matter of convenience or courtesy and is devoid of any legal obligation e.g. ceremonial salute at sea, shaking hands when Heads of States meet etc. This legal obligation that transforms usage into a custom is known as *opinio juris sive necessitates* (*opinio juris*) literally meaning opinion that an act is necessary by rule of law. This legal obligation in custom is different from moral obligation, thus the Court in the *North Sea Continental Shelf* stated that:

> …not only must the act concerned amount to a settled practice, but they must also be such or be carried out in such a way or to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it… the State

[32] *Ibid,* p.80; AE Robert, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' American Journal of International Law available at <https://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__students__student_bar_association/documents/documents/ecm_pro_063686.pdf> accessed on 4th April 2013; Bederman *op cit,* p. 33, Brownlie *op cit,* pp.7-8.

[33] *Fisheries Case* [*United Kingdom v Norway* (1951)] ICJ Report, 116 wherein the Court refused to accept the existence of a ten mile rule for bays because there was no uniformity of practice; *Paquette Habana* (1990)175 US 677.

[34] *Fisheries Jurisdiction Case* [*United Kingdom v. Iceland*] (1973) ICJ Report 3.

[35] *Right of Passage Case* [Merit (1960)] ICJ Report where the Court found a custom to exist between India and Portugal.

> concerned must therefore feel that they are conforming to what amounts to a legal obligation….[36]

These two elements i.e. general practice and *opinio juris* must be proved by a party urging the Court to apply customary international law. However the proof of customary international law does not make it binding for all purposes on the other party. This is because two States can agree to contract out of custom provided that the custom has not attained the status of *jus cogens.*[37] A State can also unilaterally contract out of customary international law by rejecting the so called custom during its formation. This rejection must be clear and unambiguous as held in *Anglo- Norwegian Fisheries case.*[38] Such States are referred to as "persistent objectors". When a custom has crystallized, objection may also be entertained in which case we have "subsequent objectors" which often occur upon the creation of new States.[39]A State that successfully objected to customary international law whether as a persistent objector or subsequent objector is exculpated from liability and cannot be bound like any other State which did not oppose the custom. It is pertinent to note that a party who asserts the existence of custom must prove same to the satisfaction of the Court.[40]

Relationship between International Law and Municipal Law

The affinity between international law and municipal law is of paramount importance. This is due to the fact that both seek to regulate certain conducts and promote peace. There are bound to be conflict between the two systems in pursuing its various objectives, and the role of one in actualizing the goal of the other cannot be overemphasized. In ascertaining how both systems work together, two major theories namely dualism and monism have emerged.

The proponents[41] of dualism posit that municipal law and international law constitute two distinct and separate legal systems. Borchard quoted Oppenheim as saying that international law and municipal law are two totally

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[36] (1969) ICJ Report p.40

[37] *Jus Cogens* (compelling law) is a peremptory norm accepted by international community of State as a norm from which no derogation is ever permitted e.g. genocide, slavery, torture, maritime piracy etc. see Vienna Convention of Law of Treaties 1969, art.59.

[38] (1951) ICJ Report 131.

[39] There is a presumption that new States are bound by the rules of International Law and it is immaterial that they did not take part in forming the custom. This is because they cannot pick and choose the rule to be bound by unless they object to same unequivocally.

[40] *Lotus Case* [1927] PCIJ (ser. A) No.10 p.28.

[41] Oppenheim, Triepel, Anzilotti, Virally etc.

and essentially different bodies of law which have nothing in common except that they are both branches – but separate branches of law.[42] Dualists argue that the two systems differ as regards their subject i.e. while individuals are subjects of municipal law; States are subjects of international law. They further argue that both systems differ as to their judicial origin; that is, whereas parliamentary statutes reflect the will of the State in municipal law, on the other hand, treaties and custom representing the common will of States are sources of international law.[43] Consequent upon these distinctions drawn by the dualist is that the validity of each legal system does not rest on a legal rule belonging to the other and that each legal system cannot condition the other.

The implication of the argument of the dualist is that the rule of one cannot be applied in another system e.g. international law rules cannot be applied in municipal law unless such International Law rule has been transformed into the legal system of the jurisdiction concerned.

On the other hand, the proponents[44] of monism deny the validity of the argument of the dualists. They maintain that both systems regulate the conduct of the individual regardless of their subjects and that both systems bind their subjects independent of their will. They thus conclude that international law and municipal law is one and the same thing. Monists assert the supremacy of international law over municipal law due to the fact that international law determines when a State is sovereign, who is or not a State, territorial waters of the State, when a State is immune from local jurisdiction etc.[45] On this issue, Kelsen opines that the municipal Constitution derives its validity from international law. For the monist, once there is a conflict between both systems in their relation, International Law would prevail.
Keeping these two theories in view, an exposition would now be made on the application of international law in municipal courts.

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[42] E.M Borchard 'Relation between International Law and Municipal Law' (1940) 27 Virginia Law Review 139 available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4498&context=fss_papers> accessed on 5th October 2014.

[43] 'Relationship of Municipal Law and International Law: Monism or Dualism', unpublished mimeograph lecture of University of Nigeria Enugu Campus.

[44] Kelsen, Lauterpatch, Verdross, Jellinek etc.

[45] Borchard, *op. cit,* p.140.

International Law before Municipal Court

It is worthy to note that the application of municipal law before an international court is certain owing to the fact that international tribunals are one and operate within the same plane. The position is different when international law is raised in municipal court which differs in its Constitution and laws. The position of international law before municipal law varies with different States as there are different laws governing the States. The position of a monist State as regards the application of international law must necessarily vary with the position of a dualist State. Consequent upon this fact, the position of treaties and customs in Nigeria would be undertaken and reference would be made to various States' practices like China, Argentina, United Kingdom, United States of America and the Republic of Ghana.

International Law in Nigeria

Nigeria, just like every other nation, is obliged to obey International Law. The extent to which Nigeria conforms to this rule will be discussed herein. Nigeria is said to be a Dualist State; that is to say, the rules of international law cannot be applied in our municipal courts except such rules or principles have been transformed and enacted into our laws.[46] Consideration will now be given to the position and practices of international law in Nigeria with respect to treaties and customary international law.

Application of International Law in Nigeria With Respect To Treaties

The position of any treaty entered into by the Nigerian government can be found in section 12 of the Nigeria Constitution.[47] The section provides thus:

> (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

[46] *Abacha v Fawehinmi* [2000] 4 SC (pt 11) 1 at 70 *per* Ejiwunmi JSC wherein the learned justice Stated 'I think the above ought to be accepted as representing the position of our law with regard to International Treaties entered into by the Federal Government of Nigeria. If such a treaty is not incorporated into the Municipal Law, our domestic Courts would have no jurisdiction to construe or apply it. Its provisions cannot therefore have any effect upon citizens' right and duties'.

[47] Constitution of Federal Republic of Nigeria 1999 Cap C23 LFN 2004.

> respect to matter 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 Houses of Assembly in the Federation.

From this sole provision on treaties, it must be pointed out quickly that the Constitution did not vest the power of concluding treaty in anybody. This is an obvious lacuna in the Constitution unlike the practices obtainable in other States.[48] However, Enemo argued that bearing in mind that Nigeria is a Federation, the Federal Government should have the responsibility of concluding treaties in Nigeria as opposed to State Governments since treaty is an item within the Exclusive Legislative list.[49] Flowing from this view is the fact that the President who is the Head of the Federation has the power of concluding treaties.

It is worthy of note that it is only the National Assembly that can domesticate a treaty. However section 12 of the Constitution drew a distinction between treaties entered into by the Federation which affect the legislative competence of the National Assembly and treaties that affect the legislative competence of State Assemblies. In the former, the National Assembly can domesticate it without more, whereas in the latter, majority of the State assemblies must ratify the treaty before the National Assembly can domesticate same. Thus, various State legislatures in Nigeria have a role to play in domesticating a treaty so long as it affects their legislative competence.[50]

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[48] Art.II s.2 of US Constitution vest the power to enter into treaties with the president; see also art.75(2) of Ghanaian Constitution; art.38 of Chinese Constitution; s.99(11) of Argentine Constitution.

[49] I.P Enemo, 'International Law and the Nigeria Foreign Policy Under the 1989 Constitution' (1991) JUS Vol.1 No.12 p.29.

[50] The legislative competence of the State Assembly can be found in Second Schedule Part II of Nigeria Constitution while the legislative competence of the National Assembly can be found in Second Schedule Part I.

The position represented in the foregoing section depicts Nigeria as a dualist country with respect to international law. It follows therefore that a treaty entered into by Nigeria cannot be applied in Court except if such treaty has been domesticated. In *Abacha v Fawehinmi*[51] the Supreme Court of Nigeria had the opportunity to deal with this issue and they held that only treaties incorporated into our municipal law would have effect in Nigeria. In the words of Ejiwunmi JSC the Court stated:

> It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly; this position is generally in accord with the practice in other countries.

At the lower Court, Pat Acholonu JCA of blessed memory had this is to say: 'where there is no enactment to give effect to the spirit of a treaty notwithstanding its adaption and recognition and due regard by a sovereign government, it cannot be justifiable in a municipal court'[52] The Court both at the Court of Appeal and Supreme Court applied the African Charter[53] which Nigeria has domesticated. Also, the Court *per* Akanbi JCA in *Ibidapo v Lufthansa Airlines*[54] applied the provisions of the Warsaw Convention[55] which was incorporated into our law by virtue of the Carriage by Air Order.[56] The position of treaties and its application in Nigeria has been said to be straight forward,[57] however, the recent amendment of Nigeria Constitution[58] makes the position of treaties very unclear. The amendment provides in S.254(C)-2:

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[51] *Supra.*

[52] *Fawehinmi v Abacha* [1996] 9 NWLR (pt 475) 710 at 756.

[53] African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap A9 LFN 2004, art.4, 5, 6, 7, and 12.

[54] [1994] 8 NWLR (pt 362) 355 following the Supreme Court decision in *Oshevire v British Caledonian Airways Ltd*. [1990] 7 NWLR (pt163) 489 *per* Ogundare JSC.

[55] Warsaw Convention for the Unification of Certain Rules Regarding Air Transport 1929.

[56] Carriage by Air (Colonies, Protectorates and Trust territories) Order 1953 (Public Notice No.73 of 1953).

[57] E.A Oji, 'Application of Customary International Law in Nigeria' (2010) NAILS Law and Development Journal, 151.

[58] Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010. This amendment was with respect to the jurisdiction of the National Industrial Court which over the years, there has been a debate as to the status of the Court and its jurisdiction. This amendment laid the argument to rest upon the signature of the President by way of assent on 4th March 2011.

> 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 ratified relating to labour, employment, working, industrial relations and matters connected therewith.

It appears from the provision above that a municipal court, namely the National Industrial Court, can apply labour treaties ratified by Nigeria. From this provision, the domestication of such treaty is of no moment. It should be noted that there is a wide gulf of difference between ratification and domestication. For Dualist States, ratification of a treaty makes the State to be bound by its contents internationally whereas domestication makes the treaty to be applicable domestically. However, for Monist States, ratification without more makes the treaty to be binding both locally and internationally and there is no need for domestication. Nigeria can be classified as a dualist State by virtue of section 12 of her constitution which makes domestication necessary after ratifying a treaty. The amendment is thus surprising and worrisome.

The new amendment to the Constitution raises several questions, viz, can the National Industrial Court apply any treaty ratified by the Nigeria Government which has not been domesticated by the National Assembly? Can one, considering the foregoing, conclude that Nigeria is a Monist State? It is very clear that the amendment is in dogged conflict with section 12 of Nigerian Constitution.[59] However a careful consideration of the amendment would reveal that the provision was made to be notwithstanding anything in the Constitution (section 12 inclusive) and by virtue of the Supreme Court decision in *NDIC v Okem*[60] on the meaning of the phrase notwithstanding, it follows that the amendment overrides Section 12 of the Constitution. Consequently, it is our considered view that the National Industrial Court can apply treaties ratified by the Nigerian Government as it relates to labour without waiting in futility for our legislators. We are not ignorant of the fact that Nigeria has ratified over 30 labour treaties and has domesticated none. The new provision, it must be noted, cast doubt on dualism as it is believed to be practiced in Nigeria.

[59] CFRN 1999.
[60] [2004] 10 NWLR (pt 880) 107.

Further on treaties, the Nigerian Constitution, unlike that of some countries like the Argentine[61] and United States Constitutions,[62] never provided the place of treaties under our law. The ultimate question now is: are treaties at par or subject to the Nigerian Constitution? Or are treaties above, or at par or below other local enactments? The obvious lacuna in the Constitution will necessarily compel one to consider our case laws.

In *Abacha v Fawehinmi,*[63] the issue arose as to the status of treaties. The learned Justices of the Supreme Court all agreed that the Constitution is above every other law in Nigeria including treaties which when domesticated form part of our laws, considering s.1(1) and 1(3) of Nigerian Constitution. On the issue of treaties vis-a-vis other laws, the learned Justices were divided. Ogundare JSC who read the lead judgment was of the view that treaties override any other law apart from the Constitution that is inconsistent with it. On the other hand, Mohammed, Achike and Uwaifo JJSC disagreed with this view and held that treaties are at par with other municipal laws and cannot override any Act or Decree. The three other justices, to wit, Belgore, Iguh and Ejiwunmi JJSC made no comment on this issue.

In Nigerian jurisprudence, the binding decision or *ratio decidendi* for purposes of judicial precedence is the lead judgment. Put differently, the lead judgment constitutes the decision of the Court as opposed to the concurrent judgment or dissenting opinions. Keeping this principle in view, it is submitted that in Nigeria, treaties are higher than Acts of the National Assembly and override any inconsistent legislation. However the Constitution on the other hand overrides any provision of any treaty that is in conflict with it.

Application of Customary International Law in Nigeria

It is quite unfortunate that the position of customary international law in Nigeria is as clear as mud. The Constitution neither provided for its application nor the application of international law by the Nigerian Court from where customary international law can be inferred. The only place that made reference to international law was section 19 of the Constitution on Nigerian foreign policy objective. The section provides: 'the foreign policy objectives shall be…(d) respect for international law and treaty obligations as

[61] Constitution of Argentine Nation 1994, s.75(22).
[62] United States Constitution Amendment XXVII 1992, art.IV s.2(2).
[63] *Supra.*

well as the seeking of settlement of international dispute by negotiation, mediation, conciliation, arbitration and adjudication.

This section is not enough to warrant the application of customary international law in Nigeria. The section is dedicated to the foreign policy objectives which Nigeria as a State pursues and nothing more. The obvious lacuna in the Constitution is capable of keeping one in the dark as regards the applicability or otherwise of customary international law. There is a dearth of Nigeria cases on the issue. The only Nigeria authority[64] that dealt with customary International Law is the case of *African Continental Bank v Eagles Super Pack Ltd*.[65] In that case, the issue for determination was whether the Uniform Customs and Practice (UCP) for documentary credit were applicable in Nigeria. The UCP was made by the International Chambers of Commerce with headquarters in Paris with a view of having a universal standardization of letters of credit in banking and commercial transactions. At the trial Court, it was held *per* Ononuju J that UCP is not applicable in Nigeria in the following words:

> Exhibit 5 is Uniform Customs and Practice for documentary credits and from the evidence before me it does not apply in this case. I hold the view that it can operate in a country that subscribes to it and there is nothing to show that Nigeria has done so.

However at the Court of Appeal, Onalaja JCA held that UCP constitutes customary international law and can be judicially noticed. In the words of the learned justice he declared:

> …the result is that UCP is an international custom of trading by banks in the international trade of payment by letters of credit. To sustain it having regard to s. 14…the Court in Nigeria can take judicial notice that UCP is applicable in Nigeria.

The Supreme Court in *Akinsanya v United Bank for Africa*[66] applied the provisions of UCP although it was neither argued nor decided that UCP amounts to an international custom and whether same is applicable in Nigeria by virtue of that. From the foregoing, it appears that the Nigerian Court can

[64] This is to the best of the knowledge of the researcher of this work.
[65] [1995] 2 NWLR (pt 379) 590.
[66] [1986] 4 NWLR (pt 35) 273.

judicially notice an international custom under the Evidence Act.[67] However, it is doubtful whether the Court in Nigeria can take judicial notice of custom considering the definition given to custom in our law. Section 258 of Evidence Act[68] defines custom to mean 'a rule which in a particular district has from long usage obtained force of law'. District, for clarity, has been defined in Oxford dictionary[69] to mean 'area of a country or town especially one that has a particular feature.' Juxtaposing these two definitions, it can be seen that a custom for purposes of judicial notice in Nigeria as found in the Evidence Act must be restricted to a locality in Nigeria. The draftsman never intended any custom outside Nigeria. In fact the draftsman meant indigenous customs that was why the words 'a particular district' were used in the definition of custom and it would be uncharitable to ascribe to the draftsman what he never intended. Thus the position taken by the Court of Appeal above is of doubtful validity.

Custom as seen from the foregoing is not alien to Nigerian legal system. Various ethnic customs form part of the sources of law in Nigeria provided the custom passes the validity test *videlicet*: It must not be repugnant to natural justice, equity and good conscience;[70] it must not be incompatible either directly or by implication with any law for the time being in force,[71]and it is not contrary to public policy.[72] Once a custom passes these tests, the Nigerian Court can apply it to the given circumstances. An ebullient international law writer, after analyzing the position of ethnic customs in Nigeria, argued that customary international law forms part of Nigeria law. The Jurist stated: 'if ethnic customary law forms part of the body of Nigerian law so also does international customary law'.[73]

The Jurist further opined that the requirement of passing the first test will not constitute a problem. This is because customary international law must have passed a stiffer test, namely acceptability by a large number of international community. The jurist however asserted that customary international law must necessarily pass the two other tests, that is; the customary international

[67] Evidence Act 2011, s.17 formerly Evidence Act cap E14 LFN 2004, sec. 14 which provides for judicial notice of custom.
[68] *Ibid.* This section is *ipsisima verba* with s. 2 of the repealed Act.
[69] A.S Hornby, *Oxford Advance Learners Dictionary* (7thedn, Oxford: Oxford University Press, 2006) p.426.
[70] *Mojekwu v Iwuchukwu* [2004] 11 NWLR (Pt.883) 196.
[71] *Agbai v Okogbue* (1991) NSCC 422.
[72] *Mbamara v Iwuagwu* (2002) WRN 82.
[73] Oji, *art cit,* p.165.

law must not be inconsistent with either the Constitution or any Municipal Law, and that it must not be contrary to Nigerian public policy.[74]

The erudite view above on application of customary international law in Nigeria has been severely criticized on four grounds.[75] Firstly, Azoro argued that the position taken above raises the jurisprudential question of basis of the obligation of customary international law. He maintained that the common will of States from which the custom emanated should be considered and not the will of Nigerian people deducible from their public policy. He further argued that application of customary International Law will be hindered in Nigeria because of the difficulty in ascertaining the Nigerian public policy. In his words:

> Since *opinio juris* is a vital element for international custom, it follows that unless Oji's 'public policy' is arrived at, international custom is inapplicable in Nigeria.… The plurality cum heterogeneity of the Nigerian socio-ethnic polity and the resultant differences in opinion on most issues will mean a difficulty in ascertaining the 'common will' of Nigerians on most subject matters of international custom and will invariably, affect its applicability.[76]

Secondly, Azoro asserted that the view taken by the international law writer cannot be traced to the Nigerian Constitution which is the alpha and omega of Nigerian legal system. He submitted that importing rules of customary international law by the judiciary without Constitutional backing goes contrary to the principles of separation of powers. Thirdly, Azoro suggested that the view appears to reduce customary international law to the same status as indigenous customary law and this position goes contrary to the dictum of Ogundare JSC in *Abacha v Fawehinmi*[77] wherein the Court held that international law prevails over any local rule of law though subject to the Constitution.[78] Fourthly, the repugnancy test under the Evidence Act[79] remains the Nigerian standard and not the standard of the international community. This is due to the fact that some practices accepted in most

[74] *Ibid,* pp.167-168.
[75] C.J.S Azoro 'The Place of Customary International Law in the Nigerian Legal System: A Jurisprudence Perspective, (2014) International Journal of Research, 1(3), 74-100.
[76] *Ibid.*
[77] *Supra.*
[78] Azoro, *art cit,* p.18.
[79] *Ibid* s.18(3).

civilized nations e.g. same-sex marriages are repugnant to Nigerian customary and statutory laws.[80]

Lastly, Azoro opined that since customary international law is part of common law and by virtue of s.32 of Nigeria Interpretation Act,[81] common law forms part of our law, it follows by parity of reasoning that customary international law is part of Nigeria law and should be applicable in our Courts to the same extent as common law. He concluded that customary international law is part of Nigeria law following the English doctrine of incorporation, provided it is not inconsistent with the Constitution or any local enactment.

Meritorious as this argument may seem, it may not be totally correct considering the following reasons. First, the position in England as regards the application of customary international law is not settled. Some judicial decisions support the doctrine of incorporation[82] whereas others favour the doctrine of transformation.[83] These two doctrines are in conflict with each other and make the position very unclear. If this unclear position is transported to Nigerian jurisprudence, it follows that the position of customary international law in Nigeria will be uncertain and its application will be at the will of the Nigerian Judge. This will necessarily make the status of customary international law in Nigeria to vary with the length of the Judge's foot.

Secondly, common law of England which is applicable in Nigeria are settled principles of law which the Nigerian Courts can have recourse to in cases of lacunae in our laws. Common laws are principles of law as opposed to an approach. The Nigerian Courts are only enjoined to apply common law principles as opposed to an approach adopted by the English Court in reaching its principles. The doctrine of transformation or incorporation is merely an approach in applying customary international law in England as opposed to being a principle of law thus; the Nigerian Courts are never obliged to follow the transformation or incorporation approach by section 32 of interpretation Act. More importantly, if we accept this view by Azoro, only rules of customary international law which have been accepted as

[80] Azoro, *loc. Cit.*
[81] Cap I 23 LFN 2004.
[82] *Trendex Trading Corporation v Central Bank of Nigeria* (1977) 2 WLR 356.
[83] *Commercial and EState Co. of Egypt v Board of Trade* (1925) 1 KB 295; *Chung Chi Cheung v R (1939) AC 16.*

common law principles can the Nigerian Courts apply. If this is the case, what happens to other rules of customary international law which have not been applied in English Courts? Moreover customary international law changes from time to time and Nigeria will be hamstrung from applying new rules of customary international law. To this extent, the view taken by Azoro may not augur well with the application of customary international law in Nigeria.

The obvious truth from the foregoing is that there is a lacuna as to the application of customary international law in Nigeria. To make a headway, the implications of various States' practices as with respect to International Customary Law would be examined and recommendations would be made thereafter.

Implications of Various Practices

The starting point of this discourse is the fact that international law does not prescribe how its rules will be applied by different States. International law only requires that its rules and principles be obeyed by State actors, thus a State determines the manner international law will be applied by its municipal court.

The United States of America, in obeying the principles of international law with respect to international custom, adopted the doctrine of incorporation; that is, once a customary international law emerges, it automatically forms part of the law of the land and the US Courts will be at liberty to apply the relevant custom provided that there is no controlling legislative Act. The position in the Federal Republic of Ghana, the Peoples Republic of China and the Argentine Nation appears to be the same. Although the Argentine Constitution and the Chinese Constitution did not make reference to international law, it can be seen from judicial authorities in these two States[84] that the Court applies the doctrine of incorporation like the US. The obvious

[84]For the judicial authorities in China that followed this approach we have *Tung-Tzu* no. 1589 Interpretation; *Public Procurator v Wang and Sung* (1965) Criminal Judgment No.54 shu-2107; *Frères v Soviet Mercantile Fleet* (1926) Civil Judgment No 15 - 4885 ; Gazette of the Judicial Yuan (1969) Nov. Vol.11 No. 11 pp.30-31.The Judicial authorities in Argentina are *The Arancibia Clavel* decision of the Argentine Supreme Court' available at http://law.uoregon.edu/org/oril/docs/10-1/Brunner.pdf accessed on 21st March 2013 and *Military Junta Case* Cited in L.M Henckart and L Dosward-Beck *Customary International Humanitarian Law Volume 1: Rules* (Cambridge: Cambridge University Press, 2005) p.49. In these two decision, the Argentine Supreme Court applied customary International Law.

implication taken by the States above is that when it comes to the application of customary international law, the legislative arm of government which represents the interest of the people has no say. Reliance is placed only on the judicial arm of government and the executives are shut out too. This position will invariably affect the sovereignty of the State involved and the right to determine what laws that govern the State by the legislature will be lost.

Another implication that will becloud the practice of incorporation is uncertainty of laws. This is as a result of the vagueness of custom. This is due to the fact that customs are generally unwritten and custom changes from time to time. The unpredictability of customary international law will definitely pose a great problem to legal practitioners in those States. However, the various States from the foregoing will be at less risk of violating the inviolable principles of international law. This position promotes the good of all and accords with the objectives of international law. The Court applies international Law as it were without waiting for the legislature to pronounce on the international custom which may never happen.

Nigeria will be visited with these implications once we follow the doctrine of incorporation. Moreso, this approach has the effect of making the content of treaties not domesticated in Nigeria to be applied by our Courts; that is, once a person can prove that the content of a treaty amounts to customary International Law, the Courts will apply it as such without determining whether Nigeria has ratified such treaty or not. Example, Nigeria has ratified The Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) but has not domesticated it for reasons best known to her.

However if one can prove that the provisions of CEDAW amount to customary international law, it follows that the Nigerian Court will apply the provision not as a treaty but as customary international law. This will of course defeat the reasons for the non-domestication of the treaty by Nigeria.

It is of general knowledge that Nigeria is a dualist State due to the principle of domestication adopted by Nigeria with respect to treaty obligations within the State. However, the implication of this approach is that it will portray Nigeria as a monist State because rules of customary international law will be applicable directly in our Courts without legislative interference. It follows therefore that Nigeria will be a dualist State with respect to treaties

and a monist State with respect to customary international law. This position invariably casts doubts as to the concept of monism and dualism in the description of a State[85]. This doubt is further stretched by the fact that some State that are seen as monist e.g. US provide for the superiority of the Constitution over international law which contradicts the theory of monism to the effect that international law is higher than municipal law. Thus the adoption of this doctrine may not agree with the Constitution which provides for legislative interference at least with respect to treaties.

Furthermore, this doctrine of incorporation agrees with the decision of the Court of Appeal in *African Continental Bank v Eagles Super Pack Ltd*.[86] wherein the Court judicially noticed the Uniform Customs and Practice (UCP) for documentary credit after declaring same to amount to customary international law. This decision although erroneous as pointed out above still represents the position of international custom in Nigeria until same is overruled by the Apex Court. More so, the approach agrees with the position Nigerian Courts are prepared to take with respect to customary international law as evident in the dictum of Ogundare JSC in *Abacha v Fawehinmi*[87] when he declared thus '…it is presumed that the legislature does not intend to breach an international obligation'.

On the other hand, the practice of customary international law in Britain is quite different. The Courts usually adopt two approaches; that is, the incorporation approach or the transformation approach. The purport and implications of the incorporation approach are the same as in US, Ghana, China and Argentina. However by transformation, the British Courts cannot apply customary international law unless there is an enabling Statute or the rule has been adopted by the Courts. This theory obviously affirms the sovereignty of the British Parliament to determine laws that will govern the rights and obligations of persons in Britain.

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[85] No wonder Bogdandy had this to say on the concept of monism and dualism: 'Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. Perhaps they can continue to be useful in depicting a more open or more hesitant political disposition toward international law. But from a scholarly perspective, they are intellectual zombies of another time and should be laid to rest, or deconstructed.' See AV Bogdandy 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' in *International Journal of Constitutional Law* (ICON), 2008, p.400.

[86] [1995] 2 NWLR (pt 379) 590.

[87] [2000] 4 SC (pt 11) 1.

The doctrine of transformation unlike the incorporation theory involves the legislature in the application of international law. The judiciary is not the sole determinant of the rules of international law to apply because a rule of customary International Law will have to pass through the scrutiny of the legislature before it will be applied by the Court. This will enable the British Parliament to jettison any rule of customary international law that appears to be inconsistent with its laws. However, discarding certain rules of customary international law domestically will lead to State responsibility[88]. It follows therefore that the doctrine of transformation most times leads to State responsibility and may attract sanctions both formal and informal.

The obvious implication of the doctrine of transformation in Nigeria cannot be overemphasized. It establishes a nation as sovereign and our legislature will play a part in application of any International Law in Nigeria be it treaty or custom. It will prevent the application of principles of customary international law evident in some treaties which the Nigerian Parliament has rejected by neither ratifying those treaties nor domesticating them. However considering how the legislature functions in Nigeria, it is doubtful whether the legislature will ever consider domesticating rules of customary international law. Our experience of non domestication of treaties is enough.

Having considered the implications of these various practices adopted by nations and their obvious consequences on the sovereignty of the State concerned, it is strongly recommended that the amendment of the Nigerian Constitution should be carried out to provide for the application of customary international law in Nigeria. Nigeria as a nation that has respect for International Law cannot continue to be vague as regards the application of customary International Law by her Courts.

The said amendment of the Constitution should include the status to be placed on customary international law and the status to be placed on treaties vis- a-vis the Constitution and other local enactments as seen in other jurisdictions like Argentina and United States of America. It is our view that the incorporation approach should be adopted with respect to customary international law in the constitution despite its adverse implications.

[88] This is when a State is held liable for breach of international obligation or law.

Conclusion

Nigeria is a member of the international community and has as one of her foreign policy objectives, the promotion of international co-operation for the consolidation of universal peace and mutual respect among all nations and elimination of discrimination in all its manifestations. The aspirations and objectives of Nigeria as a State can only be met by abiding with international law polices and principles and this cannot be achieved by applying treaties and shutting out the application of the rules of customary international law domestically. The need for these customary law rules cannot be overemphasized and it is hoped that the recommendation presented in this work will go a long way to help Nigeria achieve its aims as a nation and to portray Nigeria as a State that has respect for international law.