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THE NEW TERRITORIAL WATERS (AMENDMENT) ACT 1998 – COMMENTS ON THE IMPACT OF INTERNATIONAL LAW ON NIGERIAN LAW

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1. INTRODUCTION

Recent events in Nigeria show the impact of International law on the municipal law of Nigeria in one way or the other. One of such ways is the Territorial Waters (Amendment) Decree. This statute was enacted by the military regime of the late General Sani Abacha and came into force on 1 January 1998.

The purport of the legislation is to change the width of the Nigerian territorial sea to 12 nautical miles. Prior to this enactment the applicable law was the Territorial Waters (Amendment) Act, 1971. Under this law the width of the territorial sea was 30 nautical miles. This was the position for about 27 years until the Territorial Waters (Amendment) Decree 1998 was promulgated despite the momentous change in the international law of the sea on the issue of the width of the territorial sea through the Law of the Sea Convention (LOSC) 1982. After many years of controversy about the width of the territorial sea, the LOSC 1982 provided in Article 3 as follows:

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baseline determined in accordance with this Convention.

Nigeria on its part signed and ratified the LOSC, 1982, a multilateral treaty, on 14 August 1986. However, the Territorial Waters (Amendment) Act 1971

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1 Decree No. 1 of 1998.
2 S. 2.
3 Cap. 428 Laws of the Federation of Nigeria, 1990. This was also a Decree promulgated by the Federal Military regime of Yakubu Gowon. However by virtue of section 274(1)(a) of the 1979 Constitution of the Federal Republic of Nigeria, which is in pari materia to section 3 15(1) of the present 1999 Constitution, it is deemed to be an Act of the National Assembly.
4 S. 1(1).
5 This Convention was adopted on 10 December 1982 at Montego Bay, Jamaica by overwhelming votes of 130 to 4 with 17 abstentions but came into force on 16 November 1994. See Art. 308, LOSC 1982.

12 RADIC (2000)
remained on the statute book until 1998 when it was amended by the Territorial Waters (Amendment) Decree 1998. Though this Decree is in line with the LOSC it does not on the face of the statute mention the fact that it was made in accordance with Nigeria’s treaty obligation under the LOSC. However it would not be illogical to presume that it was to bring Nigeria’s municipal law in line with its valid international obligation under the LOSC. Certain critical questions arise from the 1998 Decree. Did the Nigerian territorial sea become 12 nautical miles from 14 August 1986 when Nigeria signed and ratified the LOSC 1982 or from 1 January 1998 when the Territorial Waters (Amendment) Act came into force? In other words, what law governs the width of the Nigerian territorial sea between 15 August 1986 and 30 December 1997? Is it the international treaty validly entered into by Nigeria, the LOSC 1982, or is it the existing municipal law, the Territorial Waters (Amendment) Act 1971? What is the status of the LOSC in Nigeria in relation to the Territorial Waters (Amendment) Decree 1998? Can Nigeria by a municipal law subsequent to the Territorial Waters (Amendment) Decree 1998, increase the Nigerian territorial sea above 12 nautical miles? These numerous questions bring to fore the issue of the relationship between municipal law and international law under Nigerian law. The purpose of this paper is to critically comment on the relationship between Nigerian municipal laws and its international treaty obligation before the municipal court of Nigeria vis-à-vis the Nigerian territorial waters law and the LOSC 1982.

II. STATUS OF DECREES IN NIGERIA UNDER THE MILITARY REGIME

For a better part of Nigeria’s existence as an independent State the country has been under one military regime or the other. Under the military regime in Nigeria the Federal Military Government ruled by Decrees. Decrees are legislation, enacted by the Federal Military Government. One of such Decrees is the Territorial Waters (Amendment) Decree 1998.

By virtue of the Constitution (Suspension and Modification) Decree, 1993 (hereinafter-called Decree No. 107 of 1993) Decrees under the military regime were superior to any other law inclusive of the unsuspended parts of the Constitu-


8 Decree No. 107 of 1993. This decree was enacted by the military regime of the late General Sani Abacha (1993-1998). It has always been the practice of military governments in Nigeria upon taking over government to enact similar decrees suspending and modifying the existing Constitution and making it subject to decrees. See for example the Constitution (Suspension and Modification) Decree No. of 1966; the Constitution (Suspension and Modification) Decree No. 5 of 1966; The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970; Constitution (Basic Provisions) Decree No. 32 of 1975; Constitution (Suspension and Modification) Decree No. I of 1984.
tion, Decree No. 107 of 1993 modified section 1(1) of the 1979 Constitution of the Federal Republic of Nigeria as follows:

The Constitution as amended by the Constitution (Suspension and Modification) Decree 1993 or any other Decree is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.\(^9\)

The effect of this provision was to make Decrees superior to the 1979 Constitution and all other municipal laws. Therefore under a military regime in Nigeria the status of municipal laws in order of superiority are as follows:

1. the Decree suspending and amending the existing Constitution;
2. all Decrees of the Federal Military Government;
3. the unsuspended provisions of the existing Constitution;
4. the Laws made by the National Assembly before the coup or having effect as if so made;
5. the Edicts\(^11\) of the Governor of the various States;
6. The Laws enacted by the House of Assembly of the various States before the coup or having effect as if so made.\(^12\)

### III. STATUS OF DECREES IN NIGERIA UNDER THE PRESENT CIVILIAN REGIME

With the recent change of government from the military regime to the civilian regime,\(^13\) a new Constitution, the Constitution of the Federal Republic of Nigeria, 1999,\(^14\) was promulgated by the outgoing military government.\(^15\) Section 1(1) and (3) of the Constitution states:

This Constitution is supreme and its provisions shall \((sic)\) force on all authorities and persons throughout the Federal Republic of Nigeria. If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

The Constitution therefore assumes supremacy over any municipal law, inclusive of all Decrees.

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9 By virtue of section 1(1) of the 1979 Constitution, the Constitution was the supreme law of Nigeria prior to the military coup of 31 December 1983.
10 See section 1(3) and the second schedule of Decree No. 107 of 1993.
11 Edicts are legislation enacted by the military Governor of a State in a military regime.
12 See *Dokun Ajayii Labiyi v. Alhaji Mustapha Moberuagba Anretiola & Ors.* [1992] 8 N.W.L.R. (part 258), 139 at 162 per Karibi Whyte JSC.
13 This was done with the swearing in of President Olusegun Obasanjo on 24 May 1999.
14 Decree No. 24 of 1999.
15 See S. 1(2) of Decree No. 24 of 1999, which states that the Constitution would come into force on 29 May 1999.
The New Nigerian Territorial Waters Act

Under this Constitution all Decrees enacted by the military regime, which were not repealed are deemed to be Acts\textsuperscript{16} of the National Assembly.

Section 315(1)(a) of the Constitution says:

Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be –

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and

(b) ... 

One such Decree which has not been repealed and is an existing law by virtue of section 315(1) quoted above and deemed to be an Act of the National assembly is the Territorial Waters (Amendment) Decree 1998 \{hereinafter called the Territorial Waters (Amendment) Act\}.

IV. COMMENTS ON THE NIGERIAN STATE PRACTICE ON THE RELATIONSHIP BETWEEN THE NIGERIAN TERRITORIAL WATERS (AMENDMENT) ACT (MUNICIPAL LAW) AND LOSC (INTERNATIONAL LAW)

With the growing inter-dependence of States as a result of improved communication and mutual consciousness of the need for co-operation amongst States, virtually any action any State takes has a repercussion in the international community. However despite this, the interest of the State in enacting its municipal law is sometimes different from the interest of the international community as a whole. A littoral State may be interested in exercising sovereignty over as large an expanse of the sea as territorial sea as possible while the international community may be interested in promoting free navigation in as much of the seas as possible.\textsuperscript{17} The littoral State may therefore enact a law extending its territorial sea

\textsuperscript{16} These are legislation by National Assembly, the Federal legislative arm of government in a civilian regime. Under section 4 of the 1999 Constitution the National Assembly is exclusively empowered to make laws on all matters contained in the exclusive legislative list in the second schedule of the Constitution. While together with the various State House of Assemblies it can concurrently enact laws on matters contained in the concurrent list also contained in second schedule of the Constitution. While the State House of Assembly have powers to the exclusion of the National Assembly to enact on matters not contained in both the exclusive and concurrent list. Such matters are not expressly mentioned in the Constitution. Section 4(5) of the Constitution then goes on to state: "If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law of the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void"

\textsuperscript{17} See footnote 6 above. See for example the Fisheries Jurisdiction Case \textit{(United Kingdom v. Iceland)} ICJ Reports (1974), 3 at 24 where an Icelandic Fisheries zone of 50 miles in breadth was held not to be valid against the United Kingdom because of the bilateral Agreement between the parties entered into in 1961.
beyond the limits accepted by the international community.\(^8\) In such a situation, will the Courts of the littoral State apply its internal laws or international law?

This therefore brings one to the crucial question of how the Nigerian courts treat a treaty such as the LOSC, a multilateral treaty signed and ratified by Nigeria. Will the Nigerian courts regard the LOSC, inclusive of the provision concerning the width of the territorial sea, as part of Nigerian law? Would the Nigerian Courts regard the width of the territorial sea of Nigeria as 12 nautical miles by virtue of LOSC (International law) or by virtue of the Territorial Waters (Amendment) Act 1998 (Municipal law)?

The Nigerian State practice as regards the application of treaties such as the LOSC is contained in section 12 of the 1999 Constitution of the Federal Republic of Nigeria.\(^9\) Section 12(1) says:

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.\(^10\)

The provisions of section 12(1) of the present Constitution is exactly the same as that of section 12(1) of the 1979 Constitution. This latter provision has been subject to interpretation by several decisions of the Nigerian Court of Appeal. In the case of Chief Gani Fawehinmi v. General Sani Abacha \& ors.,\(^21\) the court sought to explain the import of section 12(1) of the 1979 Constitution. The central issue before the Court of Appeal was the status of the African Charter on Human and Peoples' Rights (a multilateral treaty signed and ratified by Nigeria) \(\text{vis-à-vis}\) the Decrees of the government of the day (municipal law). This Charter which had been signed and ratified by Nigeria had also been enacted as law in Nigeria viz, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.\(^22\) Here Chief Gani Fawehinmi, a prominent lawyer and human rights activist, was arrested and detained by the security agents during the regime of the late military dictator, General Sani Abacha. Chief Fawehinmi through his lawyers proceeded to court and filed an application against General Sani Abacha, the Attorney-General of the Federation, the State Security Service and the Inspector-General of Police for the enforcement of his fundamental human rights. In

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\(^8\) Shaw, *International Law*, 4th edition, p.100 (1997); Also see Brown, *op.cit.,* pp.6-11 on the age long battle between proponents of *mare liberum* and those in support of *mare clausum*.


\(^21\) \[1996]\ 9 NWLR (part 475), 710. See also Court of Appeal decisions of *Comptroller of Nigerian Prisons v. Adekanse* [1999] 10 NWLR (part 623), 400; *Ubani v. Director, State Security Service, SSS* [1999] 11 NWLR (part 625), 129. Also the High Court decisions of *Mohammed Garuba \& Ors v. Lagos State Attorney-General \& Ors* (Unreported, Suit No. 1D/559M/90; *Bamidele Opeyemi \& Ors v. Professor Grace Adele-Williams*, (Unreported, suit No. B/6M/89) and *Gani Fawehinmi \& Ors. v. The President* (Unreported, suit no. M/349/92) where certain High Judges applied the African Charter on Human and Peoples' Right to exercise jurisdiction in spite of ouster clause provisions in the relevant Decrees.

\(^22\) Cap. 10, Laws of the Federation of Nigeria 1990.
this action he claimed *inter alia* that his arrest and detention was contrary to the provisions of the 1979 Constitution, which was the existing Constitution and also the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. The Government lawyers immediately filed a preliminary objection challenging the jurisdiction of the court to hear the suit since the jurisdiction of the court to entertain any action relating to the enforcement of any of the fundamental human rights provisions under the 1979 Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act had been ousted by various Decrees. In the course of the argument on the preliminary objection one crucial argument raised by the counsel for Chief Fawehinmi was that the provisions of the relevant Decrees were inferior to the provisions of the African Charter on Human and Peoples' Rights and therefore could not override the provisions of the Charter under which he was seeking relief. The learned trial judge after hearing arguments from both sides on the preliminary objection held that the jurisdiction of the Court was ousted and accordingly struck out the suit. The applicant, Chief Gani Fawehinmi, then appealed to the Court of Appeal. The Court of Appeal upheld his appeal on the grounds *inter alia* that the African Charter having been enacted into Nigerian law assumes a superior position to all other municipal laws. The Court of Appeal in deciding this matter had to rightly consider the provisions of section 12(1) of the then 1979 Constitution. In the words of Pats-Acholonu, JCA, the effect of section 12(1) is that "Where there is no enactment to give effect to the spirit of a treaty notwithstanding its adoption and recognition, and due regard by a sovereign government, it cannot be justiciable in a municipal court".

The position of Nigeria in this regard appears to be the same as that in the United Kingdom. Lord Oliver explained the position of the United Kingdom in the English case of *Maclaine Watson v. Dept. of Trade*, when he said as follows:

... as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only

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because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

It must be pointed out that in the United Kingdom customary international law is treated differently from treaties. Customary international law is automatically regarded as a part of the law of the United Kingdom by the process of incorporation, even though there is no Act of Parliament giving effect to such international custom. The attitude of Nigeria on customary international law is not, to the knowledge of this writer, contained in any statute. Section 12 of the 1999 Constitution specifically deals with treaties and not customary international law. However the Supreme Court decision of Ibidapo v. Lufthansa Airlines shows that the Nigerian courts would apply the same position as Britain, in that customary international law will be regarded as being automatically part of the laws of the land. In this case Wali JSC said:

Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law.

The doctrine of transformation of treaties to municipal law is also the practice of Canada, Italy, and Belgium. However in other jurisdictions such as France, Switzerland, Argentina, Spain, Cuba, Germany, the Netherlands, the Russian Federation and Japan, treaties which have being duly, signed and ratified by the State, automatically become part of the law of the land without the need for a municipal law.

The American practice on the application of treaties appears to be different from the Nigerian and British position. The Constitution of America provides in Article VI section 2 as follows:

All Treaties made or which shall be made with the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding.
The American practice however categorises treaties by making a distinction between “self-executing” and “non-self-executing” treaties. Self-executing treaties entered into by the American Government apply automatically within the United States without the need for any municipal legislation. While non-self-executing treaties need to be enacted in a municipal legislation before they are enforceable in the United States. Whether or not a treaty is self-executing or not appears to be determined by whether or not it grants rights and imposes duties on individuals in the country. In the early America case of *Foster & Elam v. Neilson*, Mr. Chief Justice Marshall said:

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislative must execute the contract before it can become a rule for the court.

Malcolm Shaw in explaining the difference between “self-executing” and “non-self executing” treaties in America said:

This would seem to mean that an international convention would become a law of the land, where its terms determine the rights and duties of private citizens, and contrasts with the position where a political issue is involved and the treaty thereby treated as non-self-executing.

It is interesting to point out that on 21 January 1993 the military government of Nigeria promulgated the Treaties (Making Procedure, Etc.) Decree, which seemed to adopt the America style of categorising treaties. Section 3(1) of this Decree says:

Treaties shall be classified into –

(a) law-making Treaties being agreements constituting rules which govern inter-state relationship and co-operation in any area of endeavour and which have the effect of altering or modifying existing legislation or which affects the legislative powers of the National Assembly;

(b) agreements which impose financial, political and social obligations on Nigeria or which are of scientific or technological import;

34 2 AILC 412.
35 *Supra* at 427.
36 See Shaw, *op.cit.*, p.118. Also see *Edye v. Robertson* 112 US 580 (1884); *Sei Fuji v. California* 38 Cal (2d) 718 (1952).
37 Decree No. 16 of 1993.
Edwin Egede

(c) agreements which deal with mutual exchange of cultural and educational facilities.

Section 3(2) of this Decree then goes on to state:

The Treaties/Agreements specified in –
(a) paragraph (a) of subsection (1) of this section need to be enacted into law;
(b) paragraph (b) of subsection (1) of this section need to be ratified;
(c) paragraph (c) of subsection (1) of this section may not need to be ratified.

This Decree in effect classified treaties entered into by Nigeria into three categories. By stating emphatically that category (a) must be enacted into law it seems to imply that categories (b) and (c) above can apply in Nigeria without being enacted into law. If this is the intention, in the opinion of this writer, this categorisation is inconsistent with section 12(1) of the 1999 Constitution. This section does not make any distinction in treaties and also clearly states that no treaty can have force of law except enacted as law. Therefore in the view of this writer the provisions of section 3(1) and (2) of the Treaties (Making Procedure, Etc.) Decree would, to the extent of this inconsistency be void under section 1(3) of the Constitution.

It is pertinent to point out that under section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria, the provisions of the LOSC, inclusive of that on the width of the territorial seas, though signed and ratified by Nigeria since 1986, cannot have any force of law in Nigeria until it has been enacted into law by the National Assembly. Fortunately the National Assembly has enacted the Territorial Waters (Amendment) Act 1998 which has brought the Nigerian territorial sea in line with the LOSC.

Section 12(1) appears to incorporate the dualist theory and the process of transformation. The question that arises is whether the National Assembly under section 12(1) can enact another amendment to the Territorial Waters (Amendment) Act 1998 and increase the territorial sea of Nigeria beyond 12 nautical miles. If the strict dualist position is adopted which advocates the superiority of municipal law, it does appear that the National Assembly can by an Act of the National Assembly increase the width of the territorial sea of Nigeria. According to Felice Morgenstern:

Transformation is thus effected by a legislative act which is the basis for validity of each individual rule of international law.

38 See status of Decrees under the 1999 Constitution above.
39 By virtue of S. 315 (1) of the 1999 Constitution.
40 Morgenstern, op. cit., pp. 48-57.
41 This would raise the issue of whether the rule of lex posterior derogat priori would apply.
However, the Nigerian court of Appeal in the case of Chief Gani Fawehinmi v. General Sani Abacha in interpreting section 12(1) appear to give a treaty which has been enacted into law a superior position to other laws. In interpreting this provision in relation to the African Charter on Human and Peoples Rights treaty, Musdapher, JCA said:

It is an international obligation to which the nation voluntarily entered and agreed to be bound ... All these indicate that the provisions of the Charter are in a class of their own and do no (sic) fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in Labiyi v. Anretiola (1992) 8 NWLR (Pt. 258) 139 ... It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained in Cap. 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government. It is commonplace, that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap. 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria.

Another Justice of the Court of Appeal in this same case, Pats-Acholonu JCA, said:

The sovereign State of Nigeria pursuant to the convention or Charter on Human and Peoples rights enacted a legislation incorporating it as our law ... Nigeria incorporated the African Charter on Human and People's (sic) Rights into our Statute Law because it is signatory to the convention. By signing same and incorporating it into our laws, it is evident that it seeks to act in accord with the dictates of section 12(1) of the Constitution of the Federal Republic of Nigeria ...

He went on to say as follows:

... By not merely adopting the African Charter but enacting it into our organic law, the tenor and intendment of the preamble and section seem to vest that Act with a greater vigour and strength than mere decree for it has been elevated to a higher pedestal ... The intention of Cap. 10 is that it be accorded full force of law by which Nigeria is seen as a country that not only signs, respects and adopts the full contents and import of the convention or charter but has gone the extra mile of incorporating same into our municipal law.

43 Supra, note 22.
44 Supra, p.747.
45 Supra, p.755.
46 Supra, p.758.
The combined effect of the above statements of the learned Justices seems to suggest that a treaty when enacted into law becomes superior to all other municipal laws. The interpretation to this decision seems to be that when a treaty has not been enacted as a municipal law the courts cannot enforce it, this in essence means that at this stage the existing municipal laws would be regarded as superior to the treaty. However the decision goes on to state that once a treaty has been enacted as a municipal law it assumes superiority over other municipal laws, inclusive of subsequent municipal laws.\footnote{This is contrary to the \textit{lex posterior derogat priori} rule.} The purport of this decision is that once it can be established that the Territorial Waters (Amendment) Act 1998 was made pursuant to Nigeria’s treaty obligation under the LOSC 1982,\footnote{This has to be established by evidence because there is nothing on the face of the Territorial Waters (Amendment) Act 1998 to show that it was enacted pursuant to the provisions of LOSC 1982.} it would be inviolable. The Court of Appeal in support of their decision cited several cases, inclusive of the earlier Court of Appeal decision of \textit{Oshevire v. British Caledonian Airways Ltd}.\footnote{\cite{Supra}.} Here the Plaintiff/Appellant filed an action against the Defendant/Respondent claiming damages for his JVC Video recorder which got missing during the Defendant/Respondent’s flight from London, England to Kano, Nigeria. The Defendant/Respondent promptly raised the defence that the action was statute barred since it was not filed within two years as required by the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 which incorporated the Warsaw Convention as amended by the Hague Protocol. This defence was upheld by the trial Court. On appeal, the Court of Appeal upheld the decision of the trial Court and dismissed the appellant’s appeal. In the course of his judgement, Ogundere, JCA, who read the lead judgement, said:\footnote{\cite{Supra}. pp.519-520.}

\begin{quote}
In this regard, it is useful to appreciate that an international agreement embodied in a Convention or treaty is autonomous, as the high contracting parties have submitted themselves to be bound by its provisions which are therefore above domestic legislation. Thus any domestic legislation in conflict with the Convention is void.
\end{quote}

The Court of Appeal in this case did not specifically consider the provisions of section 12(1) of the 1979 Constitution, which is exactly the same as section 12(1) of the 1999 Constitution. Rather the Court went on an excursion to consider certain foreign cases, inclusive of that of the Paris Court of Appeal, a Zurich Court and the New York Supreme Court,\footnote{The Court referred to \textit{Aeroflot v. Aircargo Egypt} decided by the Court of Appeal of Paris on 25-3-86 and reported in the Uniform Law Review Biannual 1987, vol.2, p.669; case by the Zurich Court in Switzerland on 11/11/83 and \textit{Jova Kahn v. Transworld Airlines Inc.} 16 Avi. p.18, 041. Decided on October 5,1981 by the New York Supreme Court on Appellate division.} without seeming to appreciate that the provisions of these Countries’ Constitutions on the application of treaties in their
Countries are not the same as the provisions of the Nigerian Constitution. The Oshevire case\textsuperscript{52} seems to give the impression that treaties would apply in Nigeria even without a law enacted by the National Assembly and thereby appears to adopt a monist approach.\textsuperscript{53} This is contrary to the clear provisions of section 12(1) of the Constitution.

The Court of Appeal in Fawehinmi v. Abacha,\textsuperscript{54} however does not go as far as the Oshevire\textsuperscript{55} case. In this case the Court of Appeal acknowledged that a treaty had to be enacted as municipal law to be justiciable. Nonetheless they go on to confer superiority on such laws \textit{vis-à-vis} other municipal laws. This case has been followed with approval in the subsequent Court of Appeal cases such as Controller of Nigerian Prisons & 2 Ors. v. Adekanye & 26 Ors.\textsuperscript{56} Here the respondents had been detained for about 30 months in connection with certain offences allegedly committed by them under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree.\textsuperscript{57} The respondents then instituted an action in the High Court by way of a writ of \textit{habeas corpus}. The appellants immediately filed an objection challenging the jurisdiction of the court to hear the action under the relevant Decree which ousted the jurisdiction of the court. The trial court held that it had jurisdiction to hear the action on the ground that the Decree did not oust its jurisdiction and dismissed the objection. However the trial judge in his ruling made no reference to the African Charter on Human and Peoples' Rights which the respondent's counsel had relied upon. On appeal the Court of Appeal held that though the provisions of the Decree clearly ousted the jurisdiction of the court, the court would still be able to exercise jurisdiction under the African Charter on Human & Peoples' Rights (Ratification and Enforcement) Act which was superior to Decrees of the then Federal military government. In this case Oguntade JCA, reading the lead judgement, agreed with the decision of Mustapher JCA in the Fawehinmi v. Abacha\textsuperscript{58} and said:

One of the enduring attributes of a nation State under international Law is the sovereignty of the law makers in a Nation State to make laws within its defined borders on matters in general. Occasions do arise however, when a Nation State for the collective good of a larger Community of States including the particular Nation State voluntarily sheds a part or surrenders aspects of its sovereignty. When this happens, its true import is the assertion of the sovereign National state to limit its sovereignty.\textsuperscript{59}

\textsuperscript{52} Supra, note 46.
\textsuperscript{53} Morgenstern, \textit{op.cit.}, pp.58-66.
\textsuperscript{54} Supra, note 22.
\textsuperscript{55} Supra, note 46.
\textsuperscript{56} Supra, note 22.
\textsuperscript{57} Decree No. 18 of 1994.
\textsuperscript{58} Supra, at note 22.
\textsuperscript{59} Supra, pp.420-421.
He then went on to say:

From the totality of what I have said above, it is manifest that Decree No. 18 of 1994, in many respect is inconsistent with the letter and spirit of the African Charter of Human Rights. This being the position, section 26 and perhaps in a constructive sense, sections 4(2) and 5(1) of the same Decree are invalid.\(^6\)

Also in the case of *Chima Ubani v. Director, SSS*,\(^6\) a human rights activist, Chima Ubani, was arrested and detained by the State Security Services (SSS). He then instituted an action in court against this arrest and detention. The counsel for the SSS then filed a preliminary objection to the suit claiming that the jurisdiction of the court had been ousted by Decree. The Court of Appeal in this case followed its decision in *Fawehinmi v. Abacha*\(^5\) and held that though the Decree ousted the jurisdiction of the court, the court could still exercise jurisdiction under the African Charter of Human and Peoples’ Rights (Ratification and Enforcement) Act which is superior to any Decree. Oguntade, JCA in this case went on to emphasise this position by saying:

… that the African Charter of Human and Peoples Rights, Cap. 10, Laws of the Federation 1990 is superior to all municipal laws of Nigeria including the Decrees of the Military Government …\(^6\)

These cases appear to be introducing a new position, which could be tagged a “modified dualist position”.\(^6\) Here the Court of Appeal applies the dualist characteristic of superiority of municipal law over international law for situations where the treaty has not been enacted into municipal law. However in situations where the treaty has been enacted as law the court appears to go on to apply the monist characteristic of superiority of international law over “ordinary” municipal laws. This hybrid, in the opinion of this writer, appears to be an extension by the Court of Appeal of the clear provisions of section 12(1). The provisions of section 12(1) of the Constitution do not in any way make a distinction between municipal laws incorporating treaties and other municipal laws. While the desire of the learned Justices of the Court of Appeal to ensure that Nigeria carries out its international obligations is commendable, this writer is of the opinion that the decision of the Court in the light of the clear provisions of section 12(1) amounts to judicial law making. According to Iguh JSC in the Supreme Court of Nigeria case of *Chukwuemeka Agwuna v. the Attorney General of the Federation & Anor*:\(^6\)

\(^{60}\) *Supra*, p.424.
\(^{61}\) *Supra*, note 22.
\(^{62}\) *Supra*, note 22.
\(^{63}\) *Supra*, at 149.
a court of law is concerned with law, as it is, and not with law, as it
ought to be. Accordingly, it is not the business of a court of law,
indeed, a court of law is not permitted to ascribe meanings to the
clear, plain and unambiguous provisions of a statute in order to make
such provisions conform with the court’s own views of their meaning
or of what they ought to mean in accordance with sound tenets of
sound social policy ... I do not conceive that it is the duty of the
courts by means of ingenious arguments or propositions to becloud,
change, qualify or modify the clear meaning of the provisions of a
statute or Decree once such provisions are plain, unequivocal and
unambiguous.

The Court of Appeal decisions in the Fawehinmi v. Abacha,\textsuperscript{66} Comptroller of
Prisons v. Adekanye\textsuperscript{67} and Ubani v. SSS\textsuperscript{68} also appear to be per incuriam in the
light of the Supreme Court case of Ibidapo v. Lufthansa Airlines.\textsuperscript{69} In the latter
case the appellant was a passenger on the respondent’s aircraft from Lagos to
Frankfurt. On arrival at Frankfurt the appellant discovered that his baggage
containing an IBM typewriter which he claimed to have bought in the United
States of America for $1,785.00 was missing. The respondent having made
fruitless efforts to locate the baggage offered the appellant the sum of 749
Deutsche Marks as compensation, which the appellant rejected as being inade-
quate. The appellant then instituted an action in the Nigerian Court. The
respondent relied upon Article 29(1) of the Warsaw Convention annexed as
schedule to the Carriage by Air (Colonies, Protectorates and Trust Territories)
Order 1953 that the action was statute barred since it was not filed within two
years. At the Supreme Court of Nigeria this defence was upheld. Here Wali JSC
said:\textsuperscript{70}

\begin{quote}
The practice of our courts on the subject matter is still in the process
of being developed and the courts will continue to apply the rules of
international law \textit{provided they are found not to be over-ridden by}
\textit{clear rules of our domestic law}. Nigeria, as part of the international
community, for the sake of political and economic stability, cannot
afford to live in isolation. It shall continue to adhere to, respect and
enforce both multilateral and bilateral agreements where their provi-
sions are not in conflict with our fundamental law. \textit{(Italic mine for}
emphasis)}
\end{quote}

This statement of Wali JSC makes the rules of international law subject and
inferior to the rules of domestic law provided the latter rules are clear and
unambiguous. This therefore contradicts the various decisions of the Court of

\textsuperscript{66} Supra, note 22.
\textsuperscript{67} Supra, note 22.
\textsuperscript{68} Supra, note 22.
\textsuperscript{69} Supra, at note 28.
\textsuperscript{70} Supra, p. 150.
Appeal,\textsuperscript{71} which is a lower Court to the Supreme Court of Nigeria in the Nigerian hierarchy of Courts.\textsuperscript{72}

Further Wali JSC in this case pointed out that the practice of Nigeria in this regard is the same as in England when he said:\textsuperscript{73}

Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law.

The position of England is reflected in the House of Lords decision in \textit{Collicco Dealings Ltd v. Inland Revenue Commission}.\textsuperscript{74} Here Viscount Simonds said:

A somewhat similar argument was, however, pressed upon your Lordships and was perhaps more strongly than any other relied on by the appellant company. It was to the effect that to apply section 4(2) to the appellant company would create a breach of the 1926 and following agreements, and would be inconsistent with the comity of nations and established rules of international law: the subsection must accordingly, be so construed as to avoid this result.

My Lords, the language that I have used is taken from a passage at p. 148 of the 10th edition of "Maxwell on the Interpretation of Statutes" which ends with the sentence: "But if the statute is unambiguous, its provisions must be followed even if they are contrary to international law ..." but I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, give ear.

Also in this same case Lord Guest said:\textsuperscript{75}

Assuming that section 4(2) involves a breach of a treaty with the Republic of Ireland, as to which I have some doubt, it must be given effect to, notwithstanding its effect on international agreements, if its language admits no doubt: Maxwell on the Interpretation of Statutes, 10th ed., p. 154.

The interpretation by the Court of Appeal giving superiority to treaties enacted into law is an extension of section 12(1) of the Constitution and would in the view of this writer create certain problems. For instance in a democratic setting as is

\textsuperscript{71} See note 22 above.
\textsuperscript{72} See sections 6(3) and 233 of the 1999 Constitution.
\textsuperscript{73} See note 28 above.
\textsuperscript{74} \textit{[1962] AC. 1.}
\textsuperscript{75} \textit{Supra}, p.24.
the case in present day Nigeria the question would be what is the status of the Constitution vis-à-vis the treaties that have been incorporated into law. Are such laws superior to the Constitution in the eventuality of conflict or is the Constitution superior to such laws? Ordinarily by virtue of section 1(1) and (3) of the 1999 Constitution, the Constitution should be superior, but would the Court of Appeal on the same grounds it ascribed superiority to such law over Decrees of the then military government also ascribe the same superiority of such laws over the Constitution. Professor Ajomo rightly expressed this fear in relation to section 12 of the 1979 Constitution where he said:

... it is disappointing that the 1979 Constitution has not been more categorical in a more forthright manner on the true position between treaties and municipal law (including the Constitution itself).\(^6\)

To avoid such possible problems perhaps it is time for the Constitution to expressly state the status of a treaty vis-à-vis other laws in Nigeria.

V. SUGGESTIONS FOR AMENDMENT.

In view of the importance of international law and its growing influence, this writer is of the opinion that it is time for international law to apply automatically in the domestic sphere of Nigeria. However, there is a need to amend section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria to expressly and automatically incorporate treaties validly entered into by Nigeria as part of its domestic law. Further such treaties could be expressly stated to be superior to other municipal laws.\(^7\) This has been done in certain jurisdictions. Article 55 of the French Constitution of 1958 provides that “treaties or agreements duly ratified or approved shall upon their application, have an authority superior to that of laws, subject for each agreement or treaty to its application by the other party”.\(^8\) Also in the Netherlands, Articles 93 and 94 of the 1983 revised Constitution make it clear that treaties entered into would have precedence over domestic laws whether made prior or subsequent to the treaty. Any provision of a municipal law contrary to such treaty under the Netherlands Constitution would be regarded as invalid.\(^9\) The Russian Federation under its new Constitution of 1993 provides that “the generally recognised principles and norms of international law and the international treaties of the Russian Federation shall constitute part of its legal system. If an international treaty of the Russian Federation establishes other rules than those stipulated by the law, the rules of the international treaty shall apply”.\(^10\) The basic law of the Federal Republic of Germany in Article 25 provides that

\(^{76}\) Ajomo, Development in International law and International relations in The Challenge of the Nigerian Nation, op.cit., p.199.
\(^{77}\) See D.A. Ijalaye, Nigeria and International Law: Today and Tomorrow, Inaugural Lecture delivered at the University of Ilorin on 6 March 1978, pp. 9-11.

\(^{80}\) Ibid., p. 126.
“the general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory”. 81 Also the Constitution of Cyprus by virtue of Article 169(3) states that treaties have “superior force to any municipal law on the condition that such treaties, conventions and agreements are applied by the other party thereto” if the treaties have been published in the official Gazette of the country. 82 Holland by a constitutional amendment of 1953 obliged the courts to determine the validity of municipal legislation by reference to treaties binding on Holland. 83 Even in certain African Countries this is the position. Article 147 of the Constitution of the Republic of Benin says “Treaties or agreements lawfully ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party”. 84 Article 123 of the Constitution of the Democratic People’s Republic of Algeria says: “The treaties ratified by the President of the Republic under the conditions specified by the Constitution are superior to the law”. 85 In the Constitution of Cape Verde, Article 11 provides as follows:

(1) International law shall be an integral part of the Cape Verdian judicial system, as long as it is in force in the International legal system.

(2) International Treaties and Agreements validly approved and ratified, shall be in force in the Cape Verdian judicial system after the official publication as long as they are in force in the international legal system,

(3) ...

(4) Rules, principles of International Law, validly approved and ratified internationally and internally, and in force, shall take precedence over all laws and regulations below the Constitutional level” 86

Also Article 144 of the Constitution of the Republic of Namibia says, “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”. 87

Perhaps Nigeria needs to borrow a leaf from these countries by amending section 12(1) of the 1999 Constitution to automatically incorporate into Nigerian

81 Ibid., p.123.
82 Ibid., p.122.
83 Ijalaye, op.cit., p. 9.
87 The Constitution took effect from 21 March 1990 and is quoted in Christof Heyns, op.cit., p.269.
The New Nigerian Territorial Waters Act

law all treaties which have been signed and ratified by Nigeria and confer upon them a superiority over other municipal laws, except the Constitution. To ensure however the input of the National Assembly in the case of treaties the Constitution should also be amended to state that no treaty would be ratified by the President except approved by two-thirds of the National Assembly. This is the position in the United States of America where under Article II of the Constitution any international Agreement entered into by the President is required to be approved by two-thirds of the Senate before it is ratified by the President. Also in Ghana while the President is empowered to execute treaties on behalf of the nation, section 75(2) of the Constitution requires as follows:

A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by –
(a) Act of Parliament; or
(b) A resolution of Parliament supported by the votes of more than one-half of all the members of the Parliament. 88 (italic mine for emphasis)

Approval by a two-thirds majority is suggested for Nigeria rather than a simple majority, as in the case of Ghana, because in this writer’s view a treaty which would apply automatically and affect the citizens is of such gravity that a greater majority of the National Assembly’s approval should be required before the treaty is ratified.

With such amendment of section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria, the LOSC 1982 provisions, inclusive of that dealing with the width of the territorial sea, would apply automatically in Nigeria whether or not there is a municipal legislation to that effect. This would also ensure that the National Assembly would not enact any law increasing the width of the territorial sea beyond 12 nautical miles. This would certainly be in line with Articles 27 and 46 of the Vienna Convention on the Law of Treaties 1969. 89 Article 27 of the Convention on the Law of Treaties provides as follows:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.

Article 46 of the Vienna Convention goes on to provide as follows:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

88 Approved by referendum on the 28 April 1992 and took effect on 7 January 1993 and quoted in Christoff Heyns, op.cit., p.160.
89 1155 U.N.T.S. 331.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

The proviso of Article 46(1) and its subsection 2 would certainly not apply because to the knowledge of this writer Nigeria has at no time disputed its consent to the LOSC. Nigeria not only signed but also ratified the LOSC, thereby indicating its consent to be bound by the LOSC.

Under international law there is an obligation upon every member of the international community, inclusive of Nigeria, to conform to its valid treaty obligation. Nigeria, as a member of the international community should be seen to be conforming to its international treaty obligation.

VI. DUTY UNDER INTERNATIONAL LAW TO CONFORM TO TREATY OBLIGATION

The fundamental rule of international law on treaties is that treaties bind parties and parties thereto should perform them in good faith (*Pacta sunt servenda*). According to Shaw:

> This rule is known in legal terms as *pacta sunt servenda* and is arguably the oldest principle of international law ... In the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.\(^90\)

In the Nuclear Test Cases, *Australia v. France; New Zealand v. France*,\(^91\) the ICJ stated:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.\(^92\)

This is codified in Article 26 of the Convention on the Law of Treaties.\(^93\) Article 26 says as follows:

> Every treaty in force is binding upon the parties to it and must be performed in good faith.

Therefore Nigeria by virtue of the principle of *pacta sunt servenda* is required to carry out its obligation under the LOSC 1982 and other treaties in good faith. The

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\(^92\) *Supra*, at 457.

\(^93\) See footnote 100 above.
The New Nigerian Territorial Waters Act

Vienna Convention on the Law of Treaties\(^4\) under Article 16 of the Vienna Convention on Treaties provides:

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) their exchange between the contracting States;
(b) their deposit with the depositary; or
(c) their notification to the contracting States or to the depositary, if so agreed.

Nigeria has since 14 August 1986 signed and ratified without any reservations the LOSC 1982, and thereby indicated its consent to that treaty. Though the provisions of the treaty did not come into force until 16 November 1994, Nigeria was obliged immediately it signed and ratified the LOSC to refrain from acts that would defeat the object and purpose of the treaty. Article 18 of the Vienna Convention on the Law of Treaties says:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.\(^5\)

Shearer explains this provision as follows:

The effect of this rule is not to make an unratified treaty, or one not yet in force, in all respects binding, for that would be to deprive those steps of meaning. Rather, a state is bound by good faith not to take up or persist in an action or posture fundamentally at variance with the treaty until it has definitively disavowed its intention to proceed to the ratification of the treaty that it has signed.\(^6\)

It is observable that Nigeria for a long while after it signed and ratified the LOSC retained the Territorial Waters (Amendment) Act 1971, which stated that the Nigerian Territorial Water was 30 nautical miles, though it had signed and ratified the LOSC since 1984. This appears to be contrary to Article 18 of the Vienna Convention on treaties. It is arguable that the LOSC, which was adopted in 1982, was unduly delayed in its entry into force and therefore Nigeria was not obliged to refrain from acts which defeat the object and purpose of LOSC. Nevertheless, this writer is of the opinion that due to the nature of the LOSC, a

\(^4\) Ibid.
\(^5\) See Certain German Interests in Polish Upper Silesia Case (1926), PCIJ, Series A, No.7.
treaty which has been described as “without doubt one of the most complex treaties in the whole history of international relations”,97 and the extremely political nature of the part of the treaty dealing with the seabed resources,98 the fact that it took about 12 years99 to come into force is not an undue delay. However, it is noteworthy that Nigeria has in line with her treaty obligations under the LOSC 1982 enacted the Territorial Waters (Amendment) Act 1998100 which states that the territorial waters of Nigeria shall be 12 nautical miles from the baseline.101 This may seem belated inasmuch as Nigeria signed and ratified the LOSC 1982 since 14 August 1986. However Nigeria’s compliance with its international obligations as regards the width of the territorial sea is better late than never.

VII. CONCLUSION

There is no doubt that international law is increasingly assuming prominence as the world becomes more and more a global village. It is accordingly likely that international law would have more and more influence in the domestic sphere of Nigeria. The current trend in certain countries whereby international law, especially international treaties validly entered into by the country, becomes automatically part of the municipal law and even superior to other municipal laws is therefore commendable. However section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria as it presently stands does not in the opinion of this writer permit this. The logic and fairness of treaties freely and voluntarily entered into by Nigeria automatically applying within the confines of the territory of Nigeria in the view of this writer cannot be denied. Therefore this writer has in the body of this paper advocated that section 12(1) of the Constitution be amended to make all treaties signed and ratified by Nigeria automatically part of Nigeria law and superior to other municipal laws with the proviso that the ratification of such treaty be with the approval of a two-thirds majority of the National Assembly. This as has been pointed out in the body of the paper is the position in certain countries such as the United States of America. Such amendment would necessarily mean that all provisions of the LOSC 1982 including the provisions of the width of the territorial sea and other international treaties signed and ratified by Nigeria would automatically apply to Nigeria. There is no reason why a treaty such as the LOSC 1982, which has not only been signed but also ratified by Nigeria should not automatically be part of the laws of Nigeria. To borrow the words of Hon. Justice Pats-Acholonu JCA,102 it is time for Nigeria to be seen as a country that not only signs but respects and adopts the full contents and import of conventions or charters.

97 Brown, *op.cit.*, p.5.
99 It was adopted in 1982 and came into force in 1994.
100 See note 1 above.
102 Fawehinmi v. Abacha, *supra*, p.758 see note 22.