

THE USE OF INTERNATIONAL LAW IN THE DOMESTIC COURTS OF GHANA AND NIGERIA

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I. INTRODUCTION

Ghana and Nigeria have been participating in international law by incorporating customary regional practices and recognized international legal concepts in their domestic judicial systems from their pre-colonial era until the present. International law has traditionally proved to be the foundation of domestic legal concepts and the application of law in the domestic courts; even during the colonial and immediate post-colonial periods when the sovereignty of both countries was severely limited by the illegalities of the British invaders that included duress, intimidation, fraud, and other vitiating factors. Though some problems remain, important indicators suggest that Ghana and Nigeria are uniquely positioned to be innovators and generators of institutions and rules of international law, rather than their passive recipients.

A. Traditional Western View of International Law: Eurocentrism

Much of academic discourse traditionally associates the development of international law with the Western world. This Eurocentric position is evident in the definition of international law itself, which confines international law to “civilized nations.”¹ The appropriation of the paraphernalia of international law by Europeans is done in clear disregard of the dissatisfaction of post-colonial states, and forms one of the grounds for European colonization of the non-

¹ Seth Gordon, *Indigenous Rights in Modern International Law from a Critical Third World Perspective*, 31 AM. INDIAN L. REV. 401, 406 (2006-07).

Western states.² This Western view seems to permeate all aspects of international law. History thus, perhaps for the sake of convenience and to separate ancient origin from the time of European international law,³ traces the origin of modern international law to the two treaties that established the Peace of Westphalia and which saw the emergence of independent nation states in Europe.⁴ The treaties were concluded in the European cities of Münster and Osnabrück, which are located in modern-day Germany.⁵ Notions of sovereignty are also not exempt from this Eurocentric domination in the sense that they are immersed in Western claims of superiority and a higher level of civilization.⁶ Multilateral relations have shown evidence of this Eurocentrism. In this regard, it is noted that the West's liberal ideology forms the substratum of the International Bill of Rights.⁷ Concepts such as *jus gentium* and natural law are given a European undertone and all the major historical elements of international law have ingrained Eurocentric metaphor.⁸ In matters of statehood, it is the same European power, through international law creation, that determines which entities qualify as state in order to be entitled to sovereignty.⁹ It has been observed that conceiving international law as only a Western enterprise is a claim that does not affect the inherent character of international law since it does not sweep under the carpet the contributions of the non-Western world toward the development of international law.¹⁰ However, this observation seems to be a cold comfort for non-European

² See Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOK. J. INT'L L. 1, 2 (2008).

³ See Martti Koskenniemi, *Histories of International Law: Dealing with Eurocentrism*, 19 Zeitschrift des Max-Planck-Instituts für Europäische Rechtsgeschichte [RG] 153-54 (2011) (Ger.), available at [http://www.helsinki.fi/eci/Publications/Koskenniemi/Rg19\(2011\)-koskenniemi.pdf](http://www.helsinki.fi/eci/Publications/Koskenniemi/Rg19(2011)-koskenniemi.pdf).

⁴ See LORI F. DAMROSCH, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* xx (5th ed. 2009).

⁵ Koskenniemi, *supra* note 3, at 153-54. Such history has been described as "profoundly Eurocentric." *Id.* at 154.

⁶ See James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 184, 187 (1998).

⁷ See Grahn-Farley, *supra* note 2, at 9, 31 (noting that the European flavor in the U.N. Convention on the Rights of the Child is evident in the fact that "the only States parties to object to reservations are European, and twenty-one of the twenty-three parties against whom these objections were directed are postcolonial States").

⁸ See Koskenniemi, *supra* note 3, at 155; DAMROSCH, ET AL., *supra* note 4, at xx ("[J]us gentium contained many principles of general equity and 'natural law,' some of which are similar to certain 'general principles of law recognized by civilized nations.'").

⁹ See Makau Mutua, *Africa: Mapping New Boundaries in International Law*, 104 AM. J. INT'L L. 532, 533 (2010) [hereinafter Mutua, *Africa*].

¹⁰ See Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1095, 1099 (2008) ("[A]lthough international law is global, upon examination it appears to be solidly within the Western legal tradition. This is not to suggest that international law has not grown in other regions

states considering that the existing practice of international law and relations is patterned along this European bias.¹¹ Writers from non-European countries, for example third world countries, seem to be influenced in their writings by this Eurocentrism. Thus, Mickelson, in his explanation of Richard Falk's view, has observed that "even the most explicitly anti-Western' work by non-Western international legal scholars 'has relied on Western approaches in a relatively uncritical manner,' a state of affairs that he attributes both to Western dominance of international law scholarship and the Western training many of these scholars received."¹² Even with international law's acquisition of some universalism in the nineteenth and twentieth centuries,¹³ owing in part to the agitations of the non-Western states, international law has not yet been disrobed of its Eurocentric cloak. Perhaps this is what has made Mutua, in describing the acclaimed universalism of human rights movement as undermined, note that "the human rights corpus, though well meaning, is fundamentally Eurocentric, and suffers from several basic and interdependent flaws. . . . [F]irst, the corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions."¹⁴ It is questioned if or when this Western view of international law will become unpopular.

B. Distorted Western View of Africa

As noted earlier, the Peace of Westphalia has been chosen as the origin of modern international law. However, this seems to disregard the fact that international law has in fact existed since antiquity in states outside the Western world, such as Egypt and China. In these states, practices existed such as diplomatic relations, declaration, and cessation of hostilities; these practices coincide with the modern concepts of international law.¹⁵ For example, in about 1,000 B.C., Ramses II of Egypt and the king of the Hittites entered into an

and at other times in the absence of the Western legal tradition. Indeed, some of the earliest international legal norms developed in decidedly non-Western legal environments.").

¹¹ See *id.* at 1099-1100; Gordon, *supra* note 1, at 424.

¹² Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353, 354 (1998) (citing Richard Falk, *Preface to B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* 9, 9 (1993)).

¹³ See Koskenniemi, *supra* note 3, at 158-59; see generally Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the Nineteenth-Century International Law*, 40 HARV. INT'L L. J. 1 (1999); see also U.O. UMOZURIKE, INTRODUCTION TO INTERNATIONAL LAW 7 (3d ed. 2005). Umozurike identifies the universalism of the present international law, and observes that while it sets some stricture on the freedom of some international law actors, it bolsters the participation of others. *Id.*

¹⁴ See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 204 (2001).

¹⁵ UMOZURIKE, *supra* note 13.

agreement that provided the terms on which the two nations would interact peacefully and assist each other in matters of defense.¹⁶ Egypt's relations with Israel were done based on some conflict of laws rules in the area of inheritance.¹⁷ The Western world has failed to recognize and has minimized African participation in, and contributions to, international law by obscuring their true African origin. Africa is often removed from mainstream international law. This Western attitude has its foundation in colonialism. Right from the onset of colonialism, Africans were denied humanity, civilization, and history and were viewed as incapable of ruling themselves. Africa could only be governed by the West because only the Europeans could lead Africans to the "promised land" since Europeans, in their own minds, embodied civilization.¹⁸ The European thinking was that Africans were inferior and backward and could not participate in international law on their own, except when they had contact with Europeans.¹⁹ Such contact could only take place by colonialism. Colonialism took place with impunity and was given legitimacy by extant positivist international law on the basis that colonial entities lacked sovereignty; they were at the whims and caprices of the Europeans.²⁰ The colonialists set out on a journey to accomplish a task which they felt they had an obligation to execute: to civilize the colonized.²¹ European descriptions of Africans were done with metaphors of backwardness and other terms consistent with primitiveness.²²

Makau has argued that because of (1) Colonialism, (2) a negation of sovereignty, and (3) a requirement for participation in international law, with the exceptions of Ethiopia and Liberia (owing to their recognition as sovereign entities by the Europeans), no African state took part in the formation of international law until the decolonization era.²³ However, this position is objectionable in view of the fact that sovereignty as a requisite for participation in international law is merely formal and does not obscure the actual contribution of these African states, albeit as colonial entities. Makau himself even observed that evidence abounds of interstate relations between pre-colonial African states and European countries with the Middle East in the areas of commerce and

¹⁶ See A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 1-2 (1954).

¹⁷ See Richard F. Opong, *Private International Law in Africa: The Past, Present, and Future*, 55 AM. J. COMP. L. 677, 688 (2007).

¹⁸ See Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1128 (1995) [hereinafter Mutua, *Why Redraw the Map of Africa*]; Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 832-33 (2000).

¹⁹ Gordon, *supra* note 18.

²⁰ See Anghie, *supra* note 13.

²¹ See R. J. Vincent, *Racial Inequality*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 239, 248 (Hedley Bull & Adam Watson eds., 1984).

²² For some of the negative and degrading expressions used by the Europeans to describe Africa and Africans, see Mutua, *Africa*, *supra* note 9, at 534-35; see also generally Mutua, *Why Redraw the Map of Africa*, *supra* note 18.

²³ See Mutua, *Why Redraw the Map of Africa*, *supra* note 18, at 1122.

diplomacy.²⁴ To the extent that these interactions were governed by some form of regulation and that they involved different entities across borders, they could only be seen as international, or at least transnational, and not domestic. They are therefore subsumed under international law. Viewed in the context of the present international law jurisprudence, such relations would also amount to international relations. In fact, lack of statehood or refusal to recognize some entities as states no longer diminishes the status of such entities and the weight of their participation in international law. For example, even though Palestine's statehood is mired in controversy, it would be assailable to argue that Palestine does not participate or contribute to international law since states are no longer the only subjects of international law.

The history of international law, which is fashioned along Western thinking, considers Africa as an object, not a subject, of international law.²⁵ This point of view should be rejected as improper and unjustified. The evolution of international law should not be exclusively credited to sovereigns who were seen as the only entities that had standing to participate in international law. Rather, it is a shared honor between the so-called sovereigns and those "groups, peoples, tribes, genders, races, and even individuals who during the same period, in terms of power, wealth, and dominating influence, may have been subordinate to the above sovereigns and national elites."²⁶ In a more realistic sense, Africans are the precursors of the western society.

If Africa's contributions to the earliest formation of international law are disputed, the same cannot be said in respect to her contribution to and participation in contemporary international law. The malignant Western view of Africa can no longer stand in the presence of strong and compelling evidence; Africa's contributions to international law can be seen in all areas of international law. In the area of international criminal law, South Africa, through a customary African approach, has set an example for how to draw from the fountain of domestic justice in addressing the issue of international crimes. The modalities

²⁴ See Mutua, *Africa*, *supra* note 9, at 534.

²⁵ Henry J. Richardson notes that:

the legal history of international law and American legal history have treated most African-heritage peoples as objects and not subjects of law when they have not ignored them altogether. Such legal history has been written to equate African-heritage peoples' lack of standing and legal personality in this historical struggle to evolve legal principles with a lack of capacity, intelligence, consciousness, and perception to define interests and push claims and advocate rights under the same law. This is especially the case for international law which evolved during this same historical period of the 16th through the 18th centuries.

Henry J. Richardson III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* 22, 23 (2008).

²⁶ *Id.* at 22.

adopted under the South African Truth and Reconciliation Commission ensure that international justice is obtained not by confrontation, but by dialogue in carrying out a deeper analysis of the causes of human rights violations and international crimes.²⁷ This translates to a complete redress for victims of international crimes.²⁸ By transporting its traditional criminal justice apparatus to the international community for appropriation, South Africa has shown that she, nay Africa, is an important innovator in international law.

As another example, Africa has added its voice to the international campaign for the protection of women's rights. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, which is the first of its kind, is an attestation to this. The Protocol strives to raise the status of women to an internationally recognized standard. For example, Article 5 of the Protocol calls for the "prohibition through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them."²⁹

Africa is charting a new course in the field of human rights, intervention, and armed conflict by relaxing the traditional principle of non-interference.³⁰ This is achieved through successful interventions in states that are experiencing human rights abuses occasioned by despotic rule. In this regard, through the instrumentality of the Economic Community of West African States (ECOWAS), the African Union, the Mission for the Implementation of the Bangui Agreement, and the Southern African Development Community, Africa has intervened to restore democracy in Liberia, Sao Tome Principe, Central African Republic, and Lesotho, among other states.³¹ These interventions are necessitated by a U.N. system that ineffectively contains the problems of illegal seizure of power, humanitarian crises, and armed conflicts.³²

This section proves that the exclusive credit claimed by European states for the evolution and continued development of international law is in total disregard of the contributions of Africa, including Ghana and Nigeria, and is utterly wrong and misconceived. The Eurocentric claim is a mere doctrinal hypocrisy. Africa is a subject, not an object, of international law; it is a legal market place, not a lawless basket case.³³ Any account of international law that

²⁷ See Pacifique Manirakiza, *Customary African Approaches to the Development of International Criminal Law*, in *AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW* 35, 36-38 (Jeremy I. Levitt, ed., 2008)

²⁸ See *Book Annotations*, 42 N. Y. U. J. INT'L L. & POL. 311, 341 (2009).

²⁹ See Mutua, *Africa*, *supra* note 9, at 536; PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA, art. 5 (2003), available at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf.

³⁰ See Mutua, *Africa*, *supra* note 9, at 536,

³¹ See Manirakiza, *supra* note 27, at 105.

³² *Id.* at 103-04.

³³ *Id.* at 1.

wittingly or unwittingly denies Ghana and Nigeria their participation in the formation of international law is a distortion of history.

II. THE COLONIAL AND COMMON LAW BACKGROUNDS OF GHANA AND NIGERIA

A. The Colonial Experiences of Ghana and Nigeria

Ghana and Nigeria are both progenies of the British colonial administration having been under the control of an imperial power until 1957 and 1960, respectively.³⁴ Ghana, originally called the Gold Coast, was a conglomerate of different regions, namely the settled colony of the coastal areas, (the conquered colony of) Asante, (the Protectorate of) the Northern Territories, and the (Trust Territory of British Togoland) Southern Togoland.³⁵ The entity that is today known as Nigeria consisted of diverse tribes and is said to be a creation of the British.³⁶ As early as the fifteenth century, Europeans had started making inroads into Ghana and Nigeria as well as other parts of Africa. In the case of Ghana, the Portuguese led these incursions, followed by the Dutch, British, Danes, and Swedes. In Nigeria, the Portuguese were the first intruders, followed by the British, French, and the Dutch.³⁷ These incursions initially appeared to have been for trading purposes because the presence of large reserves of gold in Ghana and mineral resources in Nigeria was an irresistible attraction to Europeans. It was not long before stiff competition for trading activities ensued among the European visitors, and, by the late nineteenth century, only the British maintained a presence in Ghana and Nigeria.³⁸

It is generally said that the Berlin Conference of 1885 marked the formal beginning of colonialism in Africa,³⁹ although before that date Europeans had

³⁴ Ghana was the first British territory in sub-saharan Africa to attain the status of an independent state. See Samuel O. Gyandoh, Jr., *Tinkering with the Criminal Justice System in Common Law Africa*, 62 TEMP. L. REV. 1131, 1141 (1989).

³⁵ T. O. ELIAS, GHANA AND SIERRA LEONE: THE DEVELOPMENT OF THEIR LAWS AND CONSTITUTIONS 3 (1962) [hereinafter ELIAS, GHANA AND SIERRA LEONE].

³⁶ A Nigerian nationalist, late Sarduana of Sokoto, asserted that "God did not create Nigeria, the British did." Ema Orji, *Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective*, 25 FORDHAM INT'L L.J. 431, 436 (2001); Remigius N. Nwabueze, *Historical and Comparative Contexts for the Evolution of Conflict of Laws in Nigeria*, 8 ILSA J. INT'L & COMP. L. 31, 35-36 (2001).

³⁷ *History of Ghana*, GHANAWEB, <http://www.ghanaweb.com/GhanaHomePage/history/> (last visited May 31, 2011); LAWRENCE O. AZUBUIKE, PRIVATIZATION AND FOREIGN INVESTMENTS IN NIGERIA 25 (2009). For further reading on the arrival of the Europeans in Ghana, see F. Nii Botchway, *Land Ownership and Responsibility for the Mining Environment in Ghana*, 38 NAT. RESOURCES J. 509, 510 n.2 (1998) (gathering sources).

³⁸ *History of Ghana*, *supra* note 37.

³⁹ UMOZURIKE, *supra* note 13, at 9.

already started meddling with the affairs of Africa. In Ghana, the local southern chiefs and the British signed the Bond of 1844, under which the people transferred part of their sovereignty to the British, who in turn offered protection.⁴⁰ The Bond was a product of the squabbles between the Asante and the Fante, and paved the way for subsequent British colonization of Ghana.⁴¹ The British African Company of Merchants carried out its trading activities and maintained the backing of government, and this accelerated colonialism.⁴² In Nigeria, the British put to good use the Royal Niger Company to achieve their administrative objectives.⁴³ Although the Bond of 1844 did not confer unlimited power on the British, and in fact required the British to not exercise additional judicial powers without the consent of the local kings and chiefs, the British were able to forcibly secure additional powers against the wishes of the kings and chiefs.⁴⁴ In 1874, the Gold Coast Colony was created, and following the defeat of the Asante particularly in the Anglo-Ashanti War of 1900, the British acquired more territories and extended the sphere of their colonial mandate. This was achieved by imposing various treaties of friendship and protection on the people to the extent that, by 1901, three Orders in Council were made under which Asante was annexed and declared a colony, and the Northern Territories Protectorate came into being.⁴⁵ The remaining region of the Trust Territory of Togoland, which was allotted to the British after World War I under the Treaty of Versailles of 1919, became a British protectorate under the mandate of the League of Nations in 1922. In 1946, the United Nations made it a British Trust Territory—a status it maintained until its incorporation into Ghana following its independence in 1957.⁴⁶

The British administration over Ghana initially was done by the governor with the assistance of the Executive Council and the Legislative Council, consisting of Europeans. However, by 1900, Africans and local chiefs were

⁴⁰ Justice Modibo Ocran, *The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa*, 39 AKRON L. REV. 465, 465 (2006).

⁴¹ See Britain and the Gold Coast: The Early Years, at <http://www.country-data.com/cgi-bin/query/r-5199.html>.

⁴² See *Ghana: Arrival of the Europeans*, WORKMALL, http://workmall.com/wfb2001/ghana/ghana_history_arrival_of_the_europeans.html (last updated July 4, 2002).

⁴³ AZUBUIKE, *supra* note 37, at 26; Ronald J. Daniels et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111, 132 (2011).

⁴⁴ See *Ghana: The Colonial Era*, WORKMALL, http://workmall.com/wfb2001/ghana/ghana_history_the_colonial_era_british_rule_of_the_gold_coast.html (last updated July 4, 2002).

⁴⁵ MAXWELL OPOKU-AGYEMANG, CONSTITUTIONAL LAW AND HISTORY OF GHANA 67-68 (2009); ELIAS, GHANA AND SIERRA LEONE, *supra* note 35, at 4.

⁴⁶ OPOKU-AGYEMANG, *supra* note 45. See also CHARLES PARKINSON, BILLS OF RIGHT AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN'S OVERSEAS TERRITORIES (2007).

brought into the fold of the Legislative Council which later culminated in the emergence of centralized administration.⁴⁷

In Nigeria, by 1861, Lagos had become a British colony by virtue of a treaty extracted by the British from King Dosunmu under duress; the King transferred absolute dominion and sovereignty over the island of Lagos to the Queen of Great Britain.⁴⁸ Following the formation of the colony of Lagos, a governor was assigned to administer Lagos, an event that marked the beginning of a permanent British administration of Nigeria.⁴⁹ The Oil Rivers Protectorate (which metamorphosed into the Niger Coast Protectorate) was subsequently established and later became merged with the Lagos Colony, which was renamed the Southern Protectorate.⁵⁰ In 1900, the British created the Northern Protectorate, making Nigeria a dual protectorate colony. A union of the Southern and Northern Protectorates was achieved in 1914 by the British through their representative, Frederick Lugard, in what has come to be known as the Amalgamation.⁵¹ This union implied the central administration of the two protectorates; however, the British employed different administrative machinery for each region.⁵²

In both Ghana and Nigeria, the British employed a system of indirect administrative rule for the sake of convenience and economy. There were not enough British officials to exercise control over the colonies, a situation that made the colonialists fall back on the traditional chiefs as conduits for administering the African colonies. Moreover, there was the argument that the system of indirect rule would civilize the African traditional rulers and inculcate them to the values of British politics.⁵³ The indirect rule system reduced the traditional chiefs to British subordinates and in turn placed them above their local counterparts. This increased the egos of the traditional rulers who started seeing themselves as aristocrats.⁵⁴

⁴⁷ OPOKU-AGYEMANG, *supra* note 45, at 66.

⁴⁸ Chris N. Okeke, *The Debt Burden: An African Perspective*, 35 INT'L LAW 1489, 1491-92 (2001) [hereinafter Okeke, *Debt Burden*].

⁴⁹ See Nwabueze, *supra* note 36, at 58; T. O. ELIAS, NIGERIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 7 (1967).

⁵⁰ See Orji, *supra* note 36, at 437.

⁵¹ Philip C. Aka, *The "Dividend of Democracy": Analyzing U.S. Support for Nigerian Democratization*, 22 B.C. THIRD WORLD L.J. 225, 229 (2002).

⁵² Thus while the Northern protectorate was administered through the aid of traditional rulers, a system known as indirect rule, the southern part was ruled directly. See Okechukwu Oko, *Partition or Perish: Restoring Social Equilibrium in Nigeria through Reconfiguration*, 8 IND. INT'L & COMP. L. REV. 317, 330 (1998) [hereinafter Oko, *Partition*]. Indirect rule as a tool used by the British in administering Ghana and Nigeria is discussed in the succeeding paragraph.

⁵³ See *Colonial Administration*, ALLGHANADATA (Apr. 11, 2008), <http://www.allghanadata.com/?id=757-160-1&t=Colonial-Administration>.

⁵⁴ Allison D. Kent, *Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights under Customary Law in Africa*, 28 MICH. J. INT'L L. 507,

While indirect rule was applied in the whole of Ghana, in Nigeria it operated mainly and successfully in the Northern Protectorate because pre-colonial arrangement of that region was very compatible to the system.⁵⁵ The British administered the Southern Protectorate through direct rule because the political setting of the region was not suitable for indirect rule.⁵⁶ Therefore, indirect rule had little or no success in the Southern Protectorate. British administration of her colonies in Africa was dominated by gradual process of infiltration, ruthlessness, pillage, bribes, brutal force, and deceit, which initially overpowered the resistance of the colonies.⁵⁷ However, as the agitations of the African people gathered momentum, especially with the growth of the Pan African Movement,⁵⁸ a time came when the African intelligentsia could no longer bear the brunt of colonialism. This eventually culminated in the independence victories of the colonized people, with Ghana blazing the trail in sub-Saharan Africa.

B. The Common Law Origins of Ghana

Ghana, a unitary state,⁵⁹ inherited its common law system⁶⁰ from the British. When the British entered Ghana, like in other colonial African states, they met a system of customary laws practiced by different ethnic groups. The tasks faced by the British were to impose their own Western system of laws on the people and “civilize” the Africans, as well as protect British possessions—tasks they executed through the dual mandate.⁶¹ The British common law became

513-14 (2007). Another feature of the British indirect rule was the existence of parallel court systems: one, the native courts for the adjudication of disputes between indigenous, non-European people, and the other, colonial courts, which took care of specific matters that were governed by British law. See Daniels et al., *supra* note 43, at 133.

⁵⁵ The North already had a centralized system of administration which was lacking in the Southern Protectorate. See OLUWOLE I. ODUMOSU, *THE NIGERIAN CONSTITUTION: HISTORY AND DEVELOPMENT* 11 (1963).

⁵⁶ The British also brought bitterness and rancor among the ethnic groups through their “divide and rule” administrative style. This they did to pave way for their pillage of the resources of the people. See Oko, *Partition*, *supra* note 52, at 328.

⁵⁷ Orji, *supra* note 36, at 436.

⁵⁸ Some of the members of this Movement, who fought and liberated Africa from colonialism, were *Osagyefo* Kwame Nkrumah of Ghana, Nnamdi Azikiwe of Nigeria, *Mwalimu* Julius Nyerere of Tanzania, Modibo Keita of Mali, *le Grand Silly* Sekou Toure of Guinea, Houphouet-Biogny of la Cote d’Ivoire, *Mzee* Jomo Kenyatta of Kenya, *Ngwazi* Kamuzu Banda of Malawi, and Kenneth Kaunda of Zambia. See H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L.Q. 761, 784 (2008).

⁵⁹ See CONST. OF THE REP. OF GHANA 1992, art. 4(1).

⁶⁰ Most colonized states that are common law jurisdictions have other systems of law, but the common law dominates over those other systems.

⁶¹ See Ocran, *supra* note 40, at 468.

operational through the enactment of the Supreme Court Ordinance No. 4 1876, which provided that “the common law, doctrines of equity, and statutes of general application which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court.”⁶² As it was not practical for the British to completely eliminate customary law, they had to recognize it and allow its application alongside the common law. However, it was still subject to the repugnancy test.⁶³ Thus, the Supreme Court of Ghana was required to enforce customary law in situations where the parties were Africans, provided the law was “not . . . repugnant to natural justice, equity and good conscience,” or to any other enactment.⁶⁴ In simple terms, customary law was subordinate to British common law.

With the dawn of independence, Ghana, alongside many African countries that had been victims of colonialism had to grapple with the challenge of retaining externally imposed common law and reclaiming their shattered traditions.⁶⁵ Ghana went along with the British common law. This was done with the formal reception of English statutes and other aspects of the English common law, supplemented by the decisions of local courts.⁶⁶ At some point, Ghana seems to have imported the principles of English common law into customary law issues.⁶⁷ In fact, the legal landscape of Ghana reflects an oscillation between extricating customary law from the strongholds of the British common law and modifying it to meet a civilized standard, which in any case still coincides with the common law repugnancy clause. As a way of illustration, Ghana has moved

⁶² See Gold Coast Supreme Court Ordinance, 1876, 439 & Vict. 1, § 14 (Eng.).

⁶³ The essence of the repugnancy test was to purge customary law of its inconsistency with British law. See Ocran, *supra* note 40, at 475.

⁶⁴ Gold Coast Supreme Court Ordinance, 1876, 39 & 40 Vict. 1, § 19 (Eng.).

⁶⁵ This situation is well captured by Allott, who notes that:

On the one hand, they, as African governments, feel it essential to reject those parts of their legal systems which appear to be an alien imposition, and to go back to a more “African” law relying on indigenous cultural and moral values; on the other hand, the same governments are prepared ruthlessly to sweep away any of their old institutions which seem to hold up progress or national unity.

ANTONY ALLOTT, *NEW ESSAYS IN AFRICAN LAW* 14 (1970).

⁶⁶ See Julie A. Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective*, 26 ARIZ. J. INT’L & COMP. L. 303, 307 (2009).

⁶⁷ The examples that have been cited in this regard include the application of the equitable doctrine of laches to customary law, the supervision of traditional courts by superior courts by means of prerogative writs and certiorari, mandamus and prohibition; the application of the principles of natural justice to customary law; and the introduction of writing to traditional adjudication. See Samuel K. B. Asante, *Over a Hundred Years of a National Legal System in Ghana: A Review and Critique*, 31 J. AFR. L. 70, 91 (1987).

away from the common law position of treating issues in customary law as questions of fact to now recognizing them as questions of law.⁶⁸ It has also, at least in principle, discarded the repugnancy test.⁶⁹ On the other hand, the hitherto general customary law in Ghana that had deprived a man's spouse of a right over his property if a man died intestate, has been abolished by both the 1981 Intestate Succession Law and the 1992 Constitution of Ghana.⁷⁰ Furthermore, portions of the Constitution of Ghana that provide for fundamental rights⁷¹ constitute a threshold for assessing the appropriateness of a particular custom. It was on this basis that the Trokosi⁷² system became criminalized in Ghana.⁷³

An interesting aspect of Ghana's legal system is its drive towards developing a "common law of Ghana." Yet, there is a view that this "new" common law is no different from the already existing laws of Ghana.⁷⁴ If that is the case, the attempt is therefore not revolutionary. On the whole, Ghana has not substantially truncated its colonial attachment to the British common law system, although it has not really kept pace with the development of common law in the United Kingdom.⁷⁵ The hierarchy of norms established by its Constitution suggests that it still considers customary law subordinate to superior courts

⁶⁸ See Courts Act, 1993, § 55 (Ghana); Davies & Dagbanja, *supra* note 66, at 306.

⁶⁹ See E.S. Nwauche, *The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana*, 25 TUL. EUR. & CIV. L.F. 37, 46 (2010) (observing that it has been argued whether, considering the provision of Section 54, Rule 6 of the Ghana Courts Act 1993, which mandates courts to give decisions that meet the requirements of justice, equity and good conscience, there can be said to be a difference between the old repugnancy test and the task of the courts under this provision).

⁷⁰ See Intestate Succession Law, 1985, §§3, 4, 5, 17 (Ghana); CONST. OF THE REP. OF GHANA, 1992, ch. 5, art. 22; Nwauche, *supra* note 69, at 53; Gordon R. Woodman, *Ghana Reforms the Law of Intestate Succession*, 29 J. AFR. L. 118 (1985).

⁷¹ See CONST. OF THE REP. OF GHANA, 1992, ch. 5. Article 26(2) provides that "customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited." *Id.* art. 26(2).

⁷² Under the Troko practice, young girls—usually virgins—are forced to appear before fetish shrines to atone for the transgressions of their relatives. Although the Troko appears to be mainly a religious practice, it has some coloration of custom. Besides, traditional religion cannot be wholly divorced from culture. See E. K. Quashigah, *Legislating Religious Liberty: The Ghanaian Experience*, 1999 B.Y.U.L. REV. 589, 602-03 (1999).

⁷³ See Criminal Code (Amendment) Act No. (554) (1998), § 314(A).

⁷⁴ Nwauche, *supra* note 69, at 57.

⁷⁵ For instance, while the common law position rendering a husband incapable of committing rape on his wife has been abolished in England, it is still retained under sections 31(j) and 42 the Criminal Code of Ghana. See Nancy K. Stafford, *Permission for Domestic Violence: Marital Rape in Ghanaian Marriages*, 29 WOMEN'S RTS. L. REP. 63, 65, 75 (2007-08) (arguing that Ghana should follow the British example and abrogate the marital rape exemption as its continued retention subjects women to domestic violence and also constitutes a violation of human rights and the constitution of Ghana).

decisions, which are most times handed down in accordance to English law.⁷⁶ The litmus test for customary law provided under the present Constitution technically corresponds with the repugnancy doctrine applied by the British colonialists.

C. The Common Law Traditions of Nigeria

Like its Ghanaian counterpart, the central legacy bequeathed to Nigeria by her British colonizers is the common law system combined with the doctrines of equity and statutes of general application, enacted in England on January 1, 1900.⁷⁷ Imperial legislation operating before independence has been extended to Nigeria, Nigerian legislation, customary law, and perhaps Islamic law,⁷⁸ making up the modern Nigerian legal system.⁷⁹ When the British made Lagos a colony, the newly passed Applying Laws of England to the Settlement Ordinance No. 3 of 1863 allowed English law to govern the Colony. This ordinance was followed by the Supreme Court Ordinance 1863.⁸⁰ At its independence, Nigeria still had a substantial connection with the British under the 1960 Independence Constitution, and it was not until 1963 that it officially detached itself from the colonial grip. However, this historical link continues to dot the legal landscape of Nigeria.⁸¹ In Nigeria, the common law sits uneasily against the customary law to which the people had been accustomed even before the beginning of colonialism. This has given rise to a clash and conflict of laws. This conflict has been exacerbated by the plural nature of the Nigerian society.

Traditional societies perceive English law as alien to their way of life and as an imposition by the foreign power. On the other hand, those who have assimilated to the western life tend to embrace English law and feel obligated to it.⁸² There is no other area in which the clash of legal cultures is more manifest than the interaction of common law and customary law in the post-colonial African states. In Nigeria, the existence of a custom is a matter of fact, rather than

⁷⁶ CONSTITUTION OF THE REP. OF GHANA 1992, art. 11(1).

⁷⁷ Pursuant to the Foreign Jurisdiction Act of 1830, the British enacted the Interpretation Act for the whole of Nigeria, under which all laws that were in force in England on January 1, 1900 became applicable to Nigeria.

⁷⁸ There is a debate as to whether Islamic law possesses a distinct status or is a subset of customary law. See Alkamawa v. Bello [1998] 6 SCNJ 127, 129 (Nigeria); A.A. Oba, *Islamic Law as Customary Law: The Changing Perspective in Nigeria*, 51 INT'L & COMP. L.Q. 817 (2002); M. Ozonnia Ojielo, *Human Rights and Sharia'h Justice in Nigeria*, 9 ANN. SURV. INT'L & COMP. L. 135, 151 (2003).

⁷⁹ See Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L.J. 569, 576-77 (2004) [hereinafter Oko, *Lawyering*]. For a detailed study of the sources of law in Nigeria, see generally A. O. OBILADE, *THE NIGERIAN LEGAL SYSTEM* (1979); JOHN O. ASEIN, *INTRODUCTION TO NIGERIAN LEGAL SYSTEM* (1998).

⁸⁰ OBILADE, *supra* note 79, at 18.

⁸¹ *Id.* at 4.

⁸² Oko, *Lawyering*, *supra* note 79, at 601-02.

of law. Thus, customary law can only be established by evidence, unless it has been judicially noticed.⁸³ The Evidence Act declares provisions as to how customary law is proved.⁸⁴ The rationale for requiring proof of customary law seems to be tied to the nature of customary law itself. Customary law is generally said to be flexible and subject to change.⁸⁵ Moreover, owing to the diverse nature of Nigeria with its more than 200 ethnic groups, it may be difficult to have portions of customary law that apply to all the areas. A portion of customary law is applicable in only specific localities or communities. The requirement of proof of customary law is a vestige of colonialism,⁸⁶ and that is bad enough.⁸⁷ The only concession given to customary law in Nigeria seems to be the fact that the customary law of a geographic area is considered a question of law where it is adjudicated by a customary court having jurisdiction in that area and versed in the customary law.⁸⁸ In Nigeria, there seems to be only one area where the legal system, though structured in accordance with the common law system, has given recognition to the traditional institutions of the indigenous people. This is in the area of criminal law administration in Northern Nigeria. Thus, the Penal Code that applies to the North enunciates more of the religious tradition of the North through its recognition of some Muslim offenses, like adultery, insult to the chastity of a woman, and drunkenness.⁸⁹ It is not surprising then why some courts, in their decisions, appear to be influenced by the traditional background of the North.⁹⁰

Unlike in Ghana, where the yearnings for a Ghanaian common law are reflected in the Constitution, the Nigerian case is different even if only in principle. Discussions on Nigerian common law remain academic,⁹¹ with the result that the different systems of law remain intact. The difference in the

⁸³ Evidence Act (2004) ch. 112, § 14 (Nigeria), available at <http://www.nigeria-law.org/EvidenceAct.htm>.

⁸⁴ OBILADE, *supra* note 79, at 85-86.

⁸⁵ See Lewis v. Bankole [1908] 1 NLR 81, 100-01 (Nigeria).

⁸⁶ Ugo v. Obiekwe [1989] 1 NWLR (Pt 99) 566, 583 (Nigeria).

⁸⁷ See Nzekwu v. Nzekwu [1989] 2 NWLR (Pt 104) 373, 428 (Nigeria).

⁸⁸ Ababio II v. Nsemfoo [1947] 12 WACA 127 (West Africa). However, in actual practice, those presiding over customary courts in respect of the customary law of an area still call for evidence from parties, even when they are from that area and presumably familiar with the customary law.

⁸⁹ See G.N.K. Vukor-Quarshie, *Criminal Justice Administration in Nigeria: Saro-Wiwa in Review*, 8 CRIM. L.F. 87, 107 (1997). This is not the case in Southern Nigeria where the Criminal Code administered there is to a large extent patterned along the English common law system.

⁹⁰ *Id.* at 107-08.

⁹¹ See T. O. ELIAS, GROUNDWORK OF NIGERIAN LAW 25 (1954); T. O. Elias, *Towards a Common Law in Nigeria*, in LAW AND SOCIAL CHANGE IN NIGERIA 254 (T. O. Elias ed., 1972); T. A. Aguda, *Towards a Nigerian Common Law*, in FUNDAMENTALS OF NIGERIAN LAW 29 (1989); A. N. ANIAGOLU, THE MAKING OF THE 1999 CONSTITUTION OF NIGERIA (M. A. Ajomo ed., 1993); I. O. Agbede, *Legal Pluralism: The Symbiosis of Imported Customary and Religious Laws: Problems and Prospects*, in FUNDAMENTALS OF NIGERIAN LAW, *supra* at 235 n.104; N. TOBI, SOURCES OF NIGERIAN LAW (1996).

dispositions of the two countries in this regard is not unconnected to the difference in their legal configuration: Nigeria is a federal state and more pluralistic than Ghana. Interestingly, or perhaps unfortunately, while Nigeria has failed to make any remarkable forward leap to harmonize its law sources or fashion an indigenous common law, it has also been unable to keep pace with the development of common law in England. English enactments that have been repealed and discarded in England still apply in Nigeria.⁹² The common law-customary law dichotomy and the inherent discord between the two systems continues to thrive, thereby sustaining the basis for the criticisms of the Nigeria legal system.

A prediction into the future of the legal system of Ghana, especially regarding the interaction of the common law and customary law is gloomy, and even gloomier in the case of Nigeria. Yet, E.S. Nwauche has observed that Ghana has shown greater response than Nigeria towards the problem of legal pluralism by her aspiration to achieve a common law of Ghana.⁹³ The veracity of this assertion seems to be reflected by the extent of Ghana's inclusion of its common law bid in the 1992 Constitution of Ghana, a project Nigeria is yet to achieve.

III. HISTORICAL ANALYSIS OF GHANA'S AND NIGERIA'S PARTICIPATION IN AND CONTRIBUTIONS TO INTERNATIONAL LAW

A. Pre-colonial Period

Ghana and Nigeria are not new entrants in the system of international law. Despite the connivance among the Western countries to deny the whole of Africa credit for participation in the formation of international law, genuine history still indicates that African countries, including Ghana and Nigeria, are associated with the development of international law and have been associated since before the infiltration of Europeans. Long before European colonization of Ghana, Ghana had secured for itself a strong trading position in the international scene. As a country with rich reserves of gold, Ghana had traded in gold not only with traders from North Africa but also with traders from European countries who were in need of gold.⁹⁴ It also traded in other items such as grains, kolanuts, and salt on the Timbuctoo and Maghreb axis.⁹⁵ These trading relations would not have been possible without some form of legal regulation, no matter how rudimentary. In the area of administration, Ghana's constitutional monarchy, coupled with an array of "jurists and scholars" and a long standing army, formed a

⁹² Oko, *Lawyering*, *supra* note 79, at 613.

⁹³ See Nwauche, *supra* note 69, at 38.

⁹⁴ BASIL DAVIDSON, WEST AFRICA BEFORE THE COLONIAL ERA: A HISTORY TO 1850 26, 31 (1998).

⁹⁵ See UMOZURIKE, *supra* note 13, at 7.

model that European nations developed, and upon which international law became patterned.⁹⁶ Among the local populace, there were pressure groups that coincide with today's civil society groups that performed the duty of a watchdog on the administration. For example, in the Akan kingdom, there was a group—the “young men”—whose duty was promoting, “protecting and instilling the basic tenets of human rights and democracy in the community by holding the government accountable to the people.”⁹⁷ These groups helped shape Ghana's commitment to human rights and prepare Ghana to join the rest of the international community in espousing human rights under various instruments. In the area of private international law, it is discernible from an economic point of view that the *lex fori* rule was at some point applicable in transactions between European traders on the one hand and Ghanaians on the other, before the latter moved to stop its application in the period preceding British colonization.⁹⁸

International law deals primarily with the relations of states or entities, who interact with the sole aim of meeting their needs.⁹⁹ The characterizations of these entities may not matter so much. As is noted elsewhere, the theory of statehood, upon which international law is based, is a creation of positivist international law, and positivism did not precede international law; rather, positivism is a tool used to explain international law. It is against this backdrop that Nigeria's contribution to the formation of international law is assessed. There is record giving insight into the relations of the Nigerian kingdoms with the external world that have all the trappings of international law. For example, it has shown how laws of war were developed in the course of the “Fulani wars, the Ijebu and Aro expeditions, and other numerous tribal or inter-village wars” that took place in pre-colonial Nigeria.¹⁰⁰ These laws of war were to be reflected in the 1949 Geneva Conventions.¹⁰¹ Diplomatic activities were carried out between the Benin Empire of Nigeria and Portugal, evidenced in the exchange of diplomatic notes and ambassadors between the two parties.¹⁰² Furthermore, the participants in Nigeria's pre-colonial era in the kingdoms of Ekiti, Ijesha, and Igbomina in the old Western Region went as far as entering into a military pact that would ensure a collective defense if any of them were attacked by an external

⁹⁶ See Jeremy I. Levitt, *Introduction to AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW*, *supra* note 27, at 1, 2-3.

⁹⁷ See Kwadwo Appiagyei-Atua, *Civil Society, Human Rights and Development in Africa: A Critical Analysis* (unpublished D.C.L. dissertation, McGill University), available at <http://www.bradford.ac.uk/ssis/peace-conflict-and-development/issue-2/CivilSocietyAfrica.pdf> (last visited Mar. 30, 2015).

⁹⁸ See Opong, *supra* note 17, at 690-91.

⁹⁹ See UMOZURIKE, *supra* note 13, at 6.

¹⁰⁰ Christian N. Okeke, *International Law in the Nigerian Legal System*, 27 CAL. W. INT'L L. J. 311, 324 (1997) [hereinafter Okeke, *International Law*].

¹⁰¹ *Id.*

¹⁰² *Id.* at 326.

enemy.¹⁰³ There is no way these relations can be completely divorced from modern international law.

B. Colonial Period

When colonialism started in Africa, the cohesion that had long existed within African states was shattered,¹⁰⁴ and, like in other African colonial states, the duty of administering Ghana and Nigeria was assumed by the colonizers. The sovereignty of the two countries was questioned, as well as their personality under international law.¹⁰⁵ Thus, the British carried out international relations on behalf of both states. However, it could be argued that, despite the demeaning effect of colonialism on the status of Ghana and Nigeria, both countries to some extent remained involved in international law as they had been in pre-colonial era. For instance, in Ghana, the local chiefs in the South were able to enter into the Bond of 1844 with the British which obliged local leaders to submit serious crimes, such as murder and robbery, to British jurisdiction in exchange for British protection. It also prepared the ground for subsequent British colonization of Ghana.¹⁰⁶ In Nigeria, the local chiefs and kings concluded agreements with the colonialists. King Dosunmu of Lagos signed a treaty with the British, under which King Dosunmu agreed to “give, transfer . . . and confirm unto the Queen of Great Britain, her heirs and successors forever, the Port and the Island of Lagos . . . freely, fully, entirely, and absolutely.”¹⁰⁷ But the veracity of this argument is affected by the fact that these agreements and the treaty were tainted with illegality as they did not meet the requirements for their conclusion even under the then-existing European law or customary international law.¹⁰⁸ In all, colonialism, though it affected Ghana’s and Nigeria’s sovereignty, never entirely barred the two countries from participating in international law.

¹⁰³ *Id.*

¹⁰⁴ See generally Mutua, *Why Redraw the Map of Africa*, *supra* note 18.

¹⁰⁵ See Okeke, *International Law*, *supra* note 100, at 326 (noting that colonialism reduced the Nigerian chiefdoms and kingdoms to mere objects of international law).

¹⁰⁶ See Ghana—History, MONGABAY.COM, http://www.mongabay.com/reference/country_studies/ghana/HISTORY.html (last visited Mar. 31, 2015); Ocran, *supra* note 40, at 465.

¹⁰⁷ See Mutua, *Why Redraw the Map of Africa*, *supra* note 18, at 1132.

¹⁰⁸ *Id.* at 1132-34; Okeke, *International Law*, *supra* note 100, at 327-28.

IV. GHANA AND NIGERIA TODAY

A. Ghana and Contemporary International Law

1. Membership of International Bodies

An important way a state participates in international law is by being a member of an international body. For the purpose of this article, an international body comprises organizations or entities composed entirely or mainly of states and usually is established by treaties, charters, covenants, or similar instruments, which serve as the body's constituent instrument.¹⁰⁹ Membership of an international organization can be open to all states that meet the conditions required for entry,¹¹⁰ or it can be limited to only states from a particular region.¹¹¹ Being a member of an international body requires that a state show commitment to realizing the organization's objectives. Generally, by joining an international body, a state accepts to be bound by the provisions of the charter establishing that body and to perform its obligations arising under the charter. An international body, by its nature as an association of states, is mainly regulated by the principles of international law. One of the major challenges encountered by states arising from their membership of an international organization is reconciling their obligation under the organization, which is an international law obligation and their obligations under their domestic laws. This is an incidence of the interaction between international law and domestic law; Ghana is not left out in this challenge.

Ghana's commitment to its obligation under the various international bodies to which it is a member has at times come into question, as its local laws and practices are thought to violate its international law obligations. This is mostly in the area of human rights. For example, criticism has followed Ghana's failure to expressly criminalize sexual intercourse between a man and his wife without the consent of the latter, which is described as marital rape—an act considered to constitute violence against women.¹¹² Thus, the marital rape exemption¹¹³ applies under Ghanaian law by virtue of the Criminal Code Act.¹¹⁴

¹⁰⁹ It is this constituent instrument that spells out the powers and organs of that body or organization.

¹¹⁰ For example, the United Nations. See U.N. Charter, art. 4, ¶ 1, available at <http://www.un.org/en/documents/charter/chapter2.shtml>.

¹¹¹ For example, the African Union. Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3, available at http://www.au2002.gov.za/docs/key_oau/au_act.htm; African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, available at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf [hereinafter African Charter].

¹¹² See Stafford, *supra* note 75, at 66.

¹¹³ The law insulating a husband against prosecution for having sexual intercourse with his wife without her consent has its origin in the English common law. The rationale behind this legal position was explained by Sir Matthew Hale as follows: "the husband

Even though the Domestic Violence Act was passed in Ghana in 2007 to provide protection from domestic violence, particularly for women and children and for connected purposes,¹¹⁵ the Act did not repeal either expressly or impliedly Section 42(g) of the Criminal Code Act, which provided for the marital rape exemption. This section offered a justification for the use of force on grounds of consent and prohibited married spouses from revoking the consent they had given by virtue of their marriage.¹¹⁶ The charge against this provision is that it conflicts with Ghana's international law obligations, especially those relating to the human rights of women provided under the following international instruments to which Ghana is a signatory and has ratified: the International Covenant on Civil and Political Rights,¹¹⁷ the International Covenant on Economic, Social and Cultural Rights,¹¹⁸ and the Convention on the Elimination of All Forms of Discrimination Against Women.¹¹⁹ In 2006, following the barrage of criticisms regarding the

cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract." See MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (vol. 1 1976). However, this law no longer has application in England. *Id.*

¹¹⁴ See Criminal Code Act (Act 29), 31(j), 42(g) (1960) (Ghana).

¹¹⁵ Domestic Violence Act (Act 732) (2007) (Ghana), available at http://www.africanchildforum.org/clr/Legislation%20Per%20Country/ghana/ghana_domviolence_%202007_en.pdf.

¹¹⁶ The introductory part of Section 42 provided that "use of force against a person may be justified on the ground of his consent," while Section 42(g) stated that:

a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save that the consent given by a husband or wife at marriage, for the purposes of the marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent Court.

Criminal Code Act (Act 29), § 42(g).

¹¹⁷ See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976; signed and ratified by Ghana Sept 7, 2000) [hereinafter, ICCPR]. Article 7 provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The argument here is that sex between a man and his wife without her consent amounts to torture. See Stafford, *supra* note 75, at 70. One wonders if this interpretation is not overstretched.

¹¹⁸ See International Covenant on Economic, Social and Cultural Rights, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976; signed and ratified by Ghana Sept. 7, 2000) [hereinafter, ICESCR]. Article 12 recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." *Id.* art 12.

¹¹⁹ See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Sept. 3, 1981) (signed and ratified by Ghana July 17, 1980 and Jan. 2, 1986, respectively) [hereinafter CEDAW]. However, there seems to be no provision of CEDAW that specifically relates to marital rape, since the Convention, in the main, deals with

retention of Section 42(g) of the 1960 Criminal Code Act, especially from the feminist crusaders, the Ghanaian Parliament removed the “offending clause” from Section 42(g)—the clause preventing spouses from revoking consent by virtue of their marriage.¹²⁰ By implication, the amended law now separates consent to marriage from consent to sexual intercourse. Although this legislative act has been applauded as a positive development in the protection of women’s rights,¹²¹ it is uncertain if it criminalizes marital rape since it does not expressly say so.¹²² One awaits the day when a wife could come to court to successfully prove that she has withheld her consent to have sexual intercourse with her husband with the marriage still standing. Every law should take cognizance of the socio-cultural background of the people for whom such law is made. Perhaps the law repealing the marital rape exemption in Ghana is one of the laws that are easy to pass but difficult, if not impossible, to enforce. The marital rape exemption in Ghana is seen as a way of safeguarding the sanctity of marriage, and a defense has been made for it.¹²³

Another area in which Ghana’s compliance with its international law obligations has been called to question is in the area of the rights of sexual

discrimination against women. Articles 2, 5, and 16 of CEDAW have been identified as applying to the issue of marital rape. See Stafford, *supra* note 75, at 72. Article 2 is an undertaking by State Parties “to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. . . .” Under Article 5, States are to take appropriate measures “to modify the social and cultural patterns of conduct of men and women,” and “to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children. . . .” Article 16 requires States to eliminate discrimination against women in marital and family relations, and to ensure the equality of men and women. Discrimination presupposes that a preferential treatment is given to men to the detriment of women on the basis of sex. CEDAW would have had more relevance to the issue of marital rape against women if there were a law in Ghana prohibiting a wife from having sexual intercourse with her husband without his consent. Sexual intercourse in marriage is as important to the husband as it is to the wife. Therefore, the issue of consent applies to both spouses. Since there is no such provision, CEDAW cannot conveniently apply to marital rape. Even if it is argued that a wife can refuse her consent to sexual intercourse as a family planning or child spacing measure, it should be remembered that there are other family planning measures a couple can adopt, other than suspension of sexual intercourse. See Stafford, *supra* note 75, at 72 (stating Articles 2, 5, and 16 of CEDAW have been identified as applying to the issue of marital rape).

¹²⁰ See Criminal Code Act (Act 29), § 42(g) (1960) (Rev. 2007) (Ghana).

¹²¹ See *Marital Rape Is Now a Criminal Offence in Ghana*, HUMAN RIGHTS ADVOCACY CTR. (Aug. 1, 2012, 3:27 PM), <http://www.hracghana.org/index.php/component/k2/item/1025-marital-rape-is-now-a-criminal-offence-in-ghana-section-42-g-is-repealed>.

¹²² For a detailed study of marital rape in Ghana and the amended law, see ELIZABETH A. ARCHAMPONG, *MARITAL RAPE—A WOMEN’S EQUALITY ISSUE IN GHANA* (2010), available at <http://theequalityeffect.org/pdfs/maritalrapeequalityghana.pdf>.

¹²³ See Isabella G. Orhin, *Ghana: Domestic Violence Bill Under Siege*, ALLAFRICA (Nov. 19, 2004), <http://allafrica.com/stories/200411220511.html>.

minorities, namely lesbian, gay, bisexual, and transgender (LGBT) individuals. It is thought that Ghana, like many other developing countries, has not been progressive in safeguarding the rights of sexual minorities. Thus, the provision of Ghana's Criminal Code that prohibits sodomy¹²⁴ is seen to conflict with Ghana's obligation under both the African Charter¹²⁵ and the ICCPR, which Ghana ratified.¹²⁶ Despite the foregoing accusation and the agitation for the legal protection or recognition of the rights of sexual minorities, Ghana has not shifted from its position that its domestic laws have primacy over international treaties and conventions that recognize LGBT rights.

There are other areas of human rights where Ghana's compliance with its international law obligation been investigated. Until fairly recently, the Trokosi system has generated a lot of comments from academics and human rights commentators.¹²⁷ Trokosi presents a case of conflict between religion and culture on the one hand and human rights on the other hand. Although freedom of religion is recognized by international instruments, it is limited where it violates the rights of other people. For example, the ICCPR to which Ghana is a signatory, provides that the right to freedom of thought, conscience, and religion is subject to "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."¹²⁸ The Trokosi practice is a form of slavery and therefore violates the rights of children and women. The African Charter on the Rights and Welfare of the Child, the purpose of which is to balance culture and human rights, charges member states to eliminate customs and practices that are detrimental to children and to abolish those customs and practices prejudicial to the health or life of the child.¹²⁹ Other international covenants and instruments that the Trokosi system violates include the Universal Declaration of Human Rights,¹³⁰ the Rome Statute;

¹²⁴ See Criminal Code Act (Act 29) § 104(2) (1960) (Ghana).

¹²⁵ African Charter, *supra* note 111, art. 28 (providing for non-discrimination).

¹²⁶ See Emma Mittelstaedt, *Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations*, 9 CHI. J. INT'L L. 353, 366-68 (2008) (discussing why human rights organizations should focus on changing ideas and norms surrounding LGBT rights rather than simply changing law).

¹²⁷ Quashigah, *supra* note 72, at 589; Amy Small Bilyeu, *Trokosi—The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights*, 9 IND. INT'L & COMP. L. REV. 457 (1999); Robert K. Ameh, *Trokosi (Child Slavery) in Ghana: A Policy Approach*, 1 GHANA STUDIES 35 (1998); INT'L NEEDS GHANA, REPORT OF THE FIRST NATIONAL WORKSHOP ON TROKOSI SYSTEM IN GHANA (1995); A. E. Amoah, *Integrated Approach to Trokosi Menace*, DAILY GRAPHIC, May 27, 1998, at 7.

¹²⁸ ICCPR, *supra* note 117, art. 18(3).

¹²⁹ See African Charter on the Rights and Welfare of the Child, Doc CAB/LEG.24.9/49 (1990) (ratified by Ghana Jun. 10, 2005), available at <http://www1.umn.edu/humanrts/africa/afchild.htm>.

¹³⁰ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) [hereinafter UDHR]. Article 5 provides that "[n]o one

the Convention to Suppress the Slave Trade and Slavery, and the Supplementary Convention on the Abolition of Slavery; the Slave Trade; and Institutions and Practices Similar to Slavery; all of which Ghana ratified.¹³¹ Slavery violates women's and children's rights to dignity of human person and to life.

Following the outcry against the Trokosi practice, and considering Ghana's international law obligations, Ghana took a bold step and criminalized the Trokosi system under its Criminal Code (Amendment) Act of 1998. Anybody who practices Trokosi, upon conviction, shall be liable to imprisonment for not less than three years.¹³² Despite the above provision criminalizing Trokosi, it appears the practice still thrives, with little or no enforcement of the law. Six years after its enactment, there is no evidence that anyone has been prosecuted under it.¹³³

Ghana has demonstrated remarkable efforts in amending its laws so as to comply with its obligations under various international bodies. For example, the Religious Bodies (Registration) Law 1989 passed by the Provisional National Defense Council¹³⁴ put some fetter on religious freedom by requiring every religious body to register with the National Commission for Culture.¹³⁵ This applied to both religious bodies that already existed and future ones, and it made detailed provisions on the process of registration.¹³⁶ The Law was criticized as being in conflict with the "freedom of religion enshrined in the United Nations Charter to which Ghana subscribes."¹³⁷ It also contravened the Constitution of Ghana, which provides for freedom of religion.¹³⁸ In 1992, when the current Ghanaian Constitution came into force, the Constitution by implication rendered the Religious Bodies (Registration) Law 1989 unconstitutional.

shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." However, unlike the other instruments mentioned here, the UDHR is considered aspirational and not binding. See Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 110 (2002).

¹³¹ Bilyeu, *supra* note 127, at 480-94.

¹³² See Criminal Code Act (Act 554), § 314(A) ("Whoever (a) sends to or receives at any place any person; or (b) participates in or is concerned in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labor related to a customary ritual commits an offence and shall be liable on conviction to imprisonment for a term not less than three years. . .").

¹³³ See Robert Kwame Ameh, *Reconciling Human Rights and Traditional Practices: The Anti Trokosi Campaign in Ghana*, 19 CAN. J. L. & SOC'Y, no. 2, 2004, at 51, 66-68.

¹³⁴ PNDCL No. 221 (1989).

¹³⁵ Elom Dovlo, *Religion in the Public Sphere: Challenges and Opportunities in Ghanaian Law-Making, 1989-2004*, 2005 B.Y.U. L. REV. 629, 642 (2005).

¹³⁶ Quashigah, *supra* note 72, at 594-95.

¹³⁷ See Dovlo, *supra* note 135, at 645.

¹³⁸ CONSTITUTION OF THE REP. OF GHANA 1992, ch. 5, art. 21(2).

Similarly, Ghana seems to have shirked its obligation arising from its membership in numerous international bodies¹³⁹ by adopting a system of inheritance that is discriminatory against women. Under the old customary law regime in Ghana, which regulated intestate succession prior to 1985, upon the death of a man who did not leave a will, his self-acquired property devolved to his family. Under traditional definitions, this did not include the wife of the deceased.¹⁴⁰ This system imposed hardships on women who were left with nothing from the estate of their deceased husbands. It is clear from these instruments that international law obligates Ghana to adopt measures toward the elimination of discrimination against women, which includes, but is not limited to, the adoption of appropriate legislation that would guarantee women's equality and eliminate cultural practices and beliefs that undermine the realization of equality in the lives of women.¹⁴¹ In an effort, once again, to live up to its international obligation, Ghana passed the Intestate Succession Law,¹⁴² despite protests from Muslims who were used to a different regime of customary succession under the Marriage of Mohammedans Ordinance.¹⁴³ The primary purpose of the Intestate Succession Law was to "provide a uniform intestate succession law that will be applicable throughout the country irrespective of the class of the intestate and the type of marriage contracted. . . ."¹⁴⁴ One of the salient provisions of the Law is that the surviving spouse and children of the deceased spouse are entitled absolutely to his or her household chattels with regard to self-acquired property.¹⁴⁵ The Law also prescribes punishment for anyone who ejects a spouse or child from the matrimonial home, upon the death of the other spouse, prior to the distribution of the estate, whether or not the deceased died testate or intestate.¹⁴⁶ Although the Intestate Succession Law has statutorily come into being, it has some shortcomings hindering its operation and the achievement of its goals. These shortcomings may exist because many people in Ghana do not know about the existence of the law, such as those in the rural areas who are used to the customary succession law, which they show more preference than to the new law.¹⁴⁷ Moreover, it has been shown that the problem of administration and enforcement surrounding the legislation has consequently marred the realization of gender equality in Ghana.¹⁴⁸ Although the above observations appear valid,

¹³⁹ They include the ICCPR, ICESCR, CEDAW, and the African Charter.

¹⁴⁰ Dovlo, *supra* note 135, at 637-38.

¹⁴¹ See Jeanmarie Fenrich & Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana*, 25 *FORDHAM INT'L L.J.* 259, 266-67 (2001).

¹⁴² Also referred to as the Provisional National Defense Council Law 111 (PNDCL 111) (1985) [hereinafter PNDCL 111].

¹⁴³ Dovlo, *supra* note 135, at 640.

¹⁴⁴ See Memorandum, Intestate Succession Law, PNDCL 111 (1985).

¹⁴⁵ PNDCL 111, *supra* note 142, § 3.

¹⁴⁶ *Id.* § 17.

¹⁴⁷ See Dovlo, *supra* note 135, at 641-42.

¹⁴⁸ See Fenrich & Higgins, *supra* note 141, at 323-41.

Ghana has made positive strides towards conforming to its international law obligations under the various international bodies.

2. Ghanaian Constitution and International Law

A ready source for determining how the national law of a state interacts with international law is the constitution. Such interaction determines the extent to which individuals can employ international law to enforce their rights within the national legal system and also determines the effectiveness of international law itself.¹⁴⁹ Although international law derives from many sources,¹⁵⁰ the proliferation of treaties has continued to make treaties one of the most important sources of law, thus diminishing the status of customary international law as a source of international law.¹⁵¹ This explains why one of the easiest means of determining how much of international law a state recognizes is to assess how much of its treaty obligation it incorporates into its constitution.

In its enumeration of the sources of law in Ghana, Article 11 of the present Constitution of Ghana does not mention international law, either in the form of treaties or other binding international agreements.¹⁵² However, the reference to common law in that Article may include common law rules governing municipal application of international law. Thus, in Ghana, like other common law states, while customary international law is directly applicable in municipal law by the process of incorporation,¹⁵³ treaties generally have no automatic

¹⁴⁹ See Richard F. Opong, *Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa*, 30 *FORDHAM INT'L L.J.* 296, 298-99 (2007) [hereinafter Opong, *Re-Imaging*].

¹⁵⁰ Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, T.S. 993.

¹⁵¹ See UMOZURIKE, *supra* note 13, at 16. This point should not be taken to mean that customary international law has lost its relevance as a source of international law. Rather the position here is that, since treaties are written and are products of long bargaining and negotiation between two or more states, which are considered equal at least in principle, they tend to present much clarity and reduce the doubt and uncertainty that sometimes attend customary international law.

¹⁵² It provides, in part:

The laws of Ghana shall comprise (a) this Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law.

CONST. OF THE REP. OF GHANA 1992, art 11.

¹⁵³ See Brigitte L. Okley, *Legislation and Implementation of International Environmental Law by African Countries: a Case Study of Ghana*, 15 (Dec. 1, 2004)

enforcement in the courts. However, if such treaties are domesticated by an enabling law, they have the force of law, entitling the courts to treat them as part of the law of Ghana.¹⁵⁴ This position as it affects treaties was re-echoed in *New Patriotic Party v. Attorney-General* (CIBA case) by Justice Apiah as an incidence of sovereignty.¹⁵⁵ Also, in *Armon v. Katz*,¹⁵⁶ the Secretary of the Israeli Embassy in Accra, Ghana successfully pleaded diplomatic immunity before a Ghanaian court by placing reliance on the Vienna Convention on Diplomatic Relations,¹⁵⁷ not merely because Ghana acceded to the convention, but by virtue of the fact that, after its accession, Ghana expressly enacted the Diplomatic Immunities Act,¹⁵⁸ which domesticated the Convention.¹⁵⁹ Even if it is argued that the Constitution of Ghana does not expressly mention international law as source of law in Ghana, this does not imply that the Ghanaian Constitution does not recognize or incorporate the principles of international law. There are a plethora of provisions of the Constitution that are in tandem with human rights provisions enunciated in human rights treaties and conventions to which Ghana is a member. For instance, under the Directive Principles of State Policy of the Ghanaian Constitution, Article 40 calls on the Government of Ghana to, in its relations with other states, “promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means.”¹⁶⁰ Further, the Government shall stick to the principles or aims and ideals of the international organizations of which Ghana is a member, including the United Nations, African

(unpublished LL.M Thesis, University of Georgia School of Law), available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1038&context=stu_llm.

¹⁵⁴ Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 125 (2004).

¹⁵⁵ The court passed the following dictum: “International law, including intra African enactments, are not binding on Ghana until such laws have been adopted or ratified by the municipal laws. . . . This is a principle of public international law which recognizes the sovereignty of States as prerequisite for international relationship and law.” *New Patriotic Party v. Attorney-General* (1996-1997) S.C.G.L.R. 729, at 761. It is submitted that the court's reference to international law in that case actually means treaties, since it appears customary international law directly applies to Ghana by virtue of incorporation.

¹⁵⁶ *Armon v. Katz*, 2 G.L.R. 115, 60 I.L.R. 374, 378 (1976).

¹⁵⁷ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force April 24, 1964).

¹⁵⁸ Diplomatic Immunities Act (Act 148) (1962).

¹⁵⁹ Even without Ghana's enactment of the Diplomatic Immunities Act, Ghana would still be bound to accord immunity to the diplomat since it is a treaty obligation. However, in the absence of the Act, the diplomat could have successfully asserted his immunity only before an international tribunal and not under the municipal law of Ghana, since international law has primacy over domestic law before an international tribunal. Besides, the issue of diplomatic immunity can be said to have attained the status of customary international law, which is generally considered as part of municipal law. See UMOZURIKE, *supra* note 13, at 31; Adjami, *supra* note 130, at 109.

¹⁶⁰ CONST. OF THE REP. OF GHANA 1992, art. 40(c).

Union, Commonwealth, and ECOWAS.¹⁶¹ Just as Article 10 of the African Charter and Article 22 of ICCPR provide for freedom of association,¹⁶² the Ghanaian Constitution, in Article 21(1)(e), stipulates that all persons shall have the right to “freedom of association, which shall include freedom to form or join trade unions or other associations, national or international, for the protection of their interest.”¹⁶³ In a similar vein, Article 15 of the Ghanaian Constitution draws inspiration from the provisions of such international instruments as the Universal Declaration,¹⁶⁴ the ICCPR,¹⁶⁵ the African Charter,¹⁶⁶ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶⁷ all of which outlaw torture and cruel and inhumane treatment in order to protect human dignity. Article 15(2) expressly provides that “[n]o person shall, whether or not he is arrested, restricted or detained, be subjected to (a) torture or other cruel, inhuman or degrading treatment or punishment; (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.”¹⁶⁸

There are hardly any of the human rights provisions contained in international human rights treaties that are not reflected in the Ghanaian Constitution. Article 13 on the right to life¹⁶⁹ coincides with Article 2(1) of the European Convention for the Protection of Human Rights,¹⁷⁰ Article 6 of the

¹⁶¹ *Id.* art. 40(d).

¹⁶² Article 10 of the African Charter provides that “[e]very individual shall have the right to free association provided he abides by the law,” while Article 22 of the ICCPR provides that “[e]veryone shall have the right to freedom of association with others. . . .” African Charter, *supra* note 111, art. 10; ICCPR, *supra* note 117, art. 22.

¹⁶³ CONST. OF THE REP. OF GHANA 1992, art. 21(1)(e). Article 21(3), in addition, states that all the citizens of Ghana “shall have the right and freedom to form or join political parties and to participate in political activities subject to such qualifications and laws as are necessary in a free and democratic society and are consistent with this Constitution.” *Id.* art. 21(3).

¹⁶⁴ Art. 5 thereof provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” UDHR, *supra* note 131, art. 5.

¹⁶⁵ ICCPR, *supra* note 117, art. 7.

¹⁶⁶ Article 5 states that “torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.” African Charter, *supra* note 111, art. 5.

¹⁶⁷ For instance, Article 2, which obligates State Parties to take effective legislative, administrative, judicial, or other measures to prevent acts of torture within their territories. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 36/46 (Dec. 10, 1984) [hereinafter Torture Convention] (signed and ratified by Ghana on September 7, 2000).

¹⁶⁸ CONST. OF THE REP. OF GHANA 1992, art. 15(2).

¹⁶⁹ Article 13(1) states that “[n]o person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offense under the laws of Ghana of which he has been convicted.” *Id.* art. 13(1).

¹⁷⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Nov. 4, 1950. The Convention recognizes the right to life except in the execution of a sentence of a court for which the punishment is provided under the law. However, in 2000, a new Charter of Fundamental Rights of the European Union

ICCPR, Article 4 of the African Charter, and Article 3 of the Universal Declaration of Human Rights. The rights to liberty¹⁷¹ and to own property,¹⁷² as well as other rights,¹⁷³ are well articulated in the Ghanaian Constitution. They reflect Ghana's commitment to the international bodies to which it is a member.

The conclusion that can be drawn from the foregoing is that, although the Constitution of Ghana does not expressly incorporate international law into Ghanaian legal system; some of its provisions draw from international law sources, such as conventions. This observation suggests that international law is an integral part of the laws of Ghana and should therefore be recognized by Ghanaian courts.

3. A Monist and a Dualist Assessment of Ghana's Approach to International Law

International law jurisprudence identifies two major approaches to international law, namely monism and dualism.¹⁷⁴ These approaches reflect the manner in which states receive international law into their domestic legal systems. Monism or a monist approach views international law and municipal law as aspects of a single legal order within a national legal system, with international law superior to municipal law.¹⁷⁵ Under this approach, international law applies directly to domestic law, thus dispensing with the need for a domestic law to implement the legislation.¹⁷⁶ On the other hand, the dualist theory posits that international law and municipal law are two separate and distinct systems that can only interact with the consent of both.¹⁷⁷ This approach has two implications. First, international law can have application in domestic law only when it has been incorporated or transformed into the municipal law through implementing legislation. Second, when so incorporated, international law is subordinate to

was adopted by the European Parliament, the Council of Europe and the European Commission, under which death penalty was abolished. *See generally* A. Kodzo Paaku Kludze, *Constitutional Rights and their Relationship with International Human Rights in Ghana*, 41 *ISR. L. REV.* 677 (2008).

¹⁷¹ CONST. OF THE REP. OF GHANA 1992, art. 14.

¹⁷² *Id.* art. 18.

¹⁷³ For a general provision on fundamental rights and freedom, see *id.* ch. 5.

¹⁷⁴ *See* Oppong, *Re-Imaging*, *supra* note 149, at 297. Umozurike identifies a third approach, "inverted monism," which, according to him, affirms the monist theory but gives primacy to municipal law. *See* UMOZURIKE, *supra* note 13, at 29.

¹⁷⁵ JOSEPH G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 75 (10th ed. 1989); Adjami, *supra* note 130, at 108-09.

¹⁷⁶ Hans Kelsen is one of the advocates of monism. *See generally* HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* (1952).

¹⁷⁷ *See* UMOZURIKE, *supra* note 13, at 30.

national law.¹⁷⁸ Generally, civil law countries are monists, while common law states are identified with dualism.¹⁷⁹

Ghana, as a common law state, mainly adopts dualism. The dualist inclination of common law countries is traceable to the doctrine of separation of powers, in adherence to which the British Commonwealth made the ratification of treaties the exclusive concern of the executive organ of government.¹⁸⁰ Ghana, it would seem, has trodden the dualist path in the way its domestic law interacts with international law, especially following the earlier stated point that the present Constitution of Ghana fails to expressly include international law as a source of law. The monist-dualist dichotomy is not free from theoretical problems,¹⁸¹ as there seems to be no state that practices pure monism or dualism. A major tenet of dualism as it pertains to treaty obligations is that a treaty does not become enforceable in the national legal system until it is incorporated by a legislative act. Some treaties may provide that state parties undertake to adopt legislative or other measures to give effect to the provisions of the treaties.¹⁸² This directive may seem to be targeted at dualist states only since monist states need not adopt such legislative incorporation. Can it be said that Ghana is not bound by its obligations under the African Charter since it has not passed any law incorporating the African Charter into its legal system?

As of 2002, among the dualist, common law states in Africa, only Nigeria had domesticated the African Charter.¹⁸³ This is one of the problems of the monist-dualist debate. It is a struggle between state sovereignty and the principle of *pacta sunt servanda*.¹⁸⁴ It could be argued that the catalog of human rights included in the Constitution of Ghana amounts to legislative incorporation of internationally recognized human rights. On the other hand, domestication of international law from a strict, dualist point of view suggests that a law must be specifically passed for the purpose of transforming a particular provision of international law, such as a treaty, into municipal law. It appears many of the human rights provisions in international treaties to which Ghana is a party would be enforced as constitutional rights in Ghanaian courts. This still reflects the dualist tendencies of Ghana since these decisions may not be directly informed by any authority outside the Ghanaian legal system, as the decisions of any court outside Ghana have no binding effect on the Supreme Court of Ghana.¹⁸⁵

However, owing to the universality of some international law provisions—for example, human rights—Ghana and other dualist countries have

¹⁷⁸ See DAMROSCH, ET AL., *supra* note 4, at 653.

¹⁷⁹ See UDOMBANA, *supra* note 154, at 125.

¹⁸⁰ See Melissa A. Waters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 637 (2007).

¹⁸¹ See Okeke, *International Law*, *supra* note 100, at 335.

¹⁸² See, e.g., African Charter, *supra* note 111, art. 1.

¹⁸³ See Adjami, *supra* note 130, at 111.

¹⁸⁴ See Udombana, *supra* note 154, at 126-29.

¹⁸⁵ See Kludze, *supra* note 170, at 700.

moved away, at least a bit, from their dualist approach to international law, and have shown some strands of monism. Specifically, Ghana, or its court, has at least in one case de-emphasized the requirement that an international treaty be incorporated into the domestic legal system to be enforceable in Ghana. Thus, in the Ghanaian case of *New Patriotic Party v. Inspector General of Police*,¹⁸⁶ the court, alluding to Ghana's obligations under the African Charter, noted that Ghana is a signatory to the African Charter and that Member States of the OAU (now AU) and parties to the Charter are expected to recognize the rights, duties, and freedoms enshrined in the Charter and to adopt measures to give effect to the Charter provisions. The court held that the fact that Ghana had not passed a specific legislation to give effect to the Charter did not mean that the Charter could not be relied upon.

The above opinion of the court shows that Ghana is receptive to international law principles, even in areas where its internal laws have not expressly made any provisions; it also confirms the fact that international law has moved away from an era where it applied only between states to this current period where individuals are considered subjects of international law as well. In essence, Ghana—though predominantly dualist—and its common law counterparts have in recent times relaxed their firm hold on dualism and have showed elements of monism—a trend that is described as “creeping monism.”¹⁸⁷ To this extent, any attempt to assess Ghana's perception of international law from only the dualist prism may be inadequate.

B. Nigeria and Contemporary International Law

1. Membership of International Bodies

Like Ghana, Nigeria belongs to various international bodies through which it participates in international law.¹⁸⁸ While membership of an organization confers rights and privileges, it carries with it obligations and duties. As a member state of the United Nations,¹⁸⁹ which is the most important and universal organization, Nigeria is expected to show commitment to the cause of the U.N. Charter. The long occupancy of the military in the corridors of power of Nigeria

¹⁸⁶ *New Patriotic Party v. Inspector General of Police* (1993-94) 2 G.L.R. 459, 466 (Ghana).

¹⁸⁷ See generally Waters, *supra* note 180.

¹⁸⁸ For a comprehensive list of the treaties to which Nigeria is a party, see *List of Treaties by Country: Nigeria*, TREATIES OFFICE DATABASE, <http://ec.europa.eu/world/agreements/searchByCountryAndContinent.do?countryId=3770&countryName=Nigeria> (last visited Apr. 1, 2015).

¹⁸⁹ Nigeria became a party to the United Nations on October 7, 1960. See *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Apr. 1, 2015).

has in no small measure undermined Nigeria's international commitments.¹⁹⁰ It was within this period more than ever that Nigeria deviated from its obligations of the various international treaties and covenants signed or acceded to. From independence, Nigeria's human rights journey was fairly smooth until 1966 when the military promulgated the Constitution (Suspension and Modification) Decree 1 1966. This removed the supremacy of the then-in-operation 1963 Constitution and denied Nigerian courts the competence to entertain any question as to the validity of the Decree or any other Decree or Edict. Consequently, no court had the power to adjudicate over any breach of human rights done by the military.¹⁹¹ The repeated abuses of human rights by the military, which contradicted Nigeria's international obligations, continued unabated and manifested itself in the executions of Ken Saro-wiwa and eight others without affording them a right to a public trial—executions that for some years cost Nigeria its Commonwealth of Nations membership.¹⁹² The United Nations General Assembly, in its Resolution, condemned those executions.¹⁹³ There were other human rights abuses recorded within the military era that conflicted with the international human rights obligations of Nigeria. For example, there were instances of unlawful and arbitrary detention, unfair trials without a right of appeal, torture by the military or their agencies, mass public executions, and extrajudicial executions and public killings; these actions were adjudged to be antithetical to the Universal Declaration of Human Rights, African Charter,¹⁹⁴ ICCPR,¹⁹⁵ ICESER,¹⁹⁶ and the

¹⁹⁰ For a period of sixteen years preceding its Independence in 1960, Nigeria was ruled by the military. However, between 1979 and 1983, there was a brief civilian regime, which was truncated by the military who again took over power and ruled until 1999 when another civilian regime was installed through a general election. To date, the civilian administrations have been grappling with the task of governing Nigeria. It is hoped that the military do not return to power. See Okeke, *International Law*, *supra* note 100, at 339-40.

¹⁹¹ See Okeke, *International Law*, *supra* note 100, at 339-40 (listing other Decrees that were passed by the military which infringed on human rights).

¹⁹² See *id.* at 333 n.91.

¹⁹³ Situation of Human Rights in Nigeria, G.A. Res. 50/199, U.N. Doc. A/RES/50/199 (1995).

¹⁹⁴ Nigeria signed and ratified the African Charter on August 31, 1982 and June 22, 1983, respectively. See *Ratification Table: African Charter on Human and Peoples' Rights*, AFRICAN COMM'N ON HUMAN & PEOPLE'S RIGHTS, <http://www.achpr.org/instruments/achpr/ratification/> (last visited Apr. 1, 2015).

¹⁹⁵ Acceded to by Nigeria on July 29, 1993. See Status of the International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Apr. 1, 2015).

¹⁹⁶ Acceded to by Nigeria Jul. 29, 1993. See Status of the International Covenant on Economic, Social and Cultural Rights, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Apr. 1, 2015).

Torture Convention.¹⁹⁷ During the military junta in Nigeria, the independence of the judiciary was threatened and in fact became extinct, thus fettering the courts' power to apply human rights documents or the U.N. Basic Principles of the Independence of the Judiciary.¹⁹⁸

In the 1980s, when Ghana was facing an economic crisis, there was a massive deportation of Ghanaians from Nigeria. Although the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹⁹⁹ had not yet come into existence, there were other instruments that covered the protection of the human rights of all persons, regardless of nationality or origin.²⁰⁰ Besides, by virtue of Nigeria's membership of the ECOWAS²⁰¹ and its Protocols, especially the Protocol on Free Movement of Persons, Nigeria has an obligation to ensure free flow of migrants into the country and to guarantee them rights of establishment.²⁰² Nigeria has to act in accordance with its African foreign policy, which is centered on peace and good neighborly relations.²⁰³

Nigeria's deviation from its obligations under various international law bodies is not attributable solely to the military, although "the observance and respect for basic human rights has at best recorded minimum improvement in Nigeria during the recent periods of civilian administration."²⁰⁴ Civilian

¹⁹⁷ See Edna E. Udobong, *Multinational Corporations Facing the Long Arm of the American Jurisdiction for Human Rights and Environmental Abuses: The Case of Wiwa v. Royal Dutch Petroleum Co.*, 14 SW ENVTL. L.J. 89, 113-15 (2005). Nigeria signed and ratified the Torture Convention on July 28, 1988 and June 28, 2001, respectively. See Status of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Apr. 1, 2015).

¹⁹⁸ Udobong, *supra* note 197, at 118.

¹⁹⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (July 1, 2003).

²⁰⁰ For example, the UDHR, ICCPR, ICESCR, and CEDAW.

²⁰¹ Treaty of the Economic Community of West African States, May 28, 1975, 14 I.L.M. 1200 (1975). The Treaty establishing ECOWAS was spearheaded by Nigeria and Togo and was signed in March 1975. It was open to all West African States. However, in 1992, the Treaty was reviewed as authorized by Decision A/Dec. 10/5/90. See Revised Treaty of the Economic Community of West African States (ECOWAS), July 24, 1993, I.L.M. 660 (1996).

²⁰² See OLAIDE A. ADEDOKUN, THE RIGHTS OF MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES: NIGERIA 13, 16 (2003), available at <http://unesdoc.unesco.org/images/0013/001395/139534e.pdf>.

²⁰³ See CONSTITUTION OF NIGERIA (1999), § 19, available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>.

²⁰⁴ Chris N. Okeke, *The Contributions of Nigeria to the Progressive Development of International Law in Africa and the World*, NIGERIAN VOICE (Nov. 25, 2010, 11:50 AM), <http://www.thenigerianvoice.com/news/39326/1/the-contributions-of-nigeria-to-the->

administrations are also implicated in this respect. For a long time, the issue of death-by-stoning, introduced under the Muslim Shari'a code in some parts of northern Nigeria in 1999, became a threat to the existence of Nigeria;²⁰⁵ the dust raised by its practice has not yet settled. The sentence of death-by-stoning is a punishment for unlawful sexual intercourse in northern Nigeria, a practice that is rooted in the Maliki School of jurisprudence among Muslim advocates.²⁰⁶ From the perspective of international law, this crude administration of criminal justice is incompatible with Nigeria's obligations under a number of international treaties. Despite attempts to rationalize the sentence of death-by-stoning under the Shari'a penal code²⁰⁷ and the arguments offered to give it a constitutional coloration, the practice still offends the 1999 Constitution of Nigeria, the ICCPR,²⁰⁸ the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,²⁰⁹ and the African Charter.²¹⁰ These provisions represent *jus cogens*, which implies that death-by-stoning is contrary to customary international law. Ultimately, it would be best for Nigeria if the practice of death-by-stoning is stopped and perhaps the Shari'a code amended.

progressive-de.html (originally presented at the Mini Conference on Nigeria at Fifty, Nov. 18, 2010, at Golden Gate University School of Law, San Francisco, California).

²⁰⁵ See Rose C. Uzoma, *Religious Pluralism, Cultural Differences, and Social Stability in Nigeria*, 2004 B.Y.U. L. REV. 651, 661-62 (2004). The introduction of the Shari'a criminal law in northern Nigeria provoked the Christians, who felt marginalized and that their human rights were abused. This led to a conflict that resulted in loss of lives and property. *Id.*

²⁰⁶ See Shannon V. Barrow, *Nigerian Justice: Death-By-Stoning Sentence Reveals Empty Promises to the State and the International Community*, 17 EMORY INT'L L. REV. 1203, 1212 (2003).

²⁰⁷ See *id.* at 1231-34; RUDD PETERS, ISLAMIC CRIMINAL LAW IN NIGERIA 33-34 (2003) (providing some of the pro-Shari'a arguments).

²⁰⁸ For example, Article 6(2) allows countries that are yet to abolish the death penalty to impose death sentence only in respect of the most serious crimes, and in accordance to the Covenant. It has been argued—and rightly too—that, although the ICCPR does not define what constitutes “most serious crimes,” the General Comment of the UN Human Rights Committee and the position of the UN Commission on Human Rights that limit “most serious crimes” to “intentional crimes with lethal or extremely grave consequences and . . . not [to] non-violent acts such as . . . [s]exual relations between consenting adults,” suggests that adultery does not amount to “most serious crimes,” and therefore the sentence of death-by-stoning as a punishment for adultery as provided under the Shari'a code violates the ICCPR. Barrow, *supra* note 206, at 1221-24 (quoting Press Release, Amnesty International, Nigeria: Death by stoning upheld in the case of Amina Lawal (Aug. 19, 2002), available at <http://www.amnesty.org.uk/press-releases/nigeria-death-stoning-upheld-case-amina-lawal>. In addition, death-by-stoning violates Article 7 of the ICCPR, which prohibits torture or cruel, inhuman, or degrading treatment or punishment. *See Id.*

²⁰⁹ See Torture Convention, *supra* note 167, arts. 1, 2, 16.

²¹⁰ See African Charter, *supra* note 111, arts. 4, 5.

Taking a shift away from the area of human rights, Nigeria has also been found wanting in its compliance with other international instruments. For instance, there has been a charge that Nigeria has not provided protection for the biodiversity of its oil rich Niger Delta as required under international treaties such as the 1968 African Convention on the Conservation of Nature and Natural Resources, the Agreement on the Joint Regulation of Fauna and Flora on the Lake Chad Basin, Convention on International Trade on Endangered Species of Wild Fauna and Flora (CITES), the 1992 Convention on Biological Diversity (CBD), and the 1971 Ramsar Convention.²¹¹

Not too long ago, Nigeria also signed a Bilateral Immunity Agreement with the United States under which it agreed not to hand over any citizen of the United States to the International Criminal Court or any authority for prosecution without reference to the United States.²¹² It is noteworthy that Nigeria is currently a party to the Rome Statute,²¹³ which established the International Criminal Court. To this extent, the agreement between the United States and Nigeria violates Nigeria's obligation under the Rome Statute, and may also be illegal under international law.²¹⁴ One wonders how the United States, a non-party to the Rome Statute, easily lured Nigeria into such a transaction that offends international law.

²¹¹ See Kaniye S.A. Ebeku, *Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country*, 16 J. ENVTL. L. 361, 362 (2004).

²¹² Article 4 provides:

When the Federal Republic of Nigeria extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Federal Republic of Nigeria will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.

Agreement Regarding the Surrender of Persons to the International Criminal Court, U.S.-Nigeria, June 30, 2003, T.I.A.S. 03-1006, *available at* <http://www.ll.georgetown.edu/guides/documents/Nigeria03-138.pdf>.

²¹³ Nigeria ratified the Statute on September 27, 2001. Daniel Ehighalua, *Africa and the ICC: Which Way Forward?*, CURRENT ANALYST (MAY 3, 2010), <http://www.currentanalyst.com/index.php/opeds/124-africa-and-the-icc-which-way-forward>.

²¹⁴ The United States has extracted agreements of such nature from other countries, and it seems to justify them on the basis of Article 98(2) of the Rome Statute, which has been interpreted as a prohibition on the ICC from prosecuting a person located within an ICC member state if doing so would cause the member state to violate the terms of other bilateral or multilateral treaties to which it may be a party. However, this interpretation seems to defeat the purpose and object of the Rome Statute. In fact, it is argued that:

Article 98(2) only covers those agreements of bilateral or multilateral character between or among nations (whether party or non-party to the

2. Nigerian Constitution and International Law

The previous Constitutions of Nigeria still provide some insight into the disposition of Nigeria towards international law, even if insufficient.²¹⁵ The current Constitution of Nigeria shows the foreign policy of Nigeria to include the promotion of African integration and support for African unity, 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, respect for international law and treaty obligations, and prioritization of settlement of international disputes by negotiation, mediation, conciliation, arbitration, and adjudication.²¹⁶ However, the provisions on foreign policy are mere guidelines or principles on how a country wishes to relate to the international community and do not reflect a binding commitment to international law on the part of the state.²¹⁷ Perhaps the clearest constitutional provision on the interaction of Nigeria's domestic law and international law is found in Section 12, which stipulates that a treaty entered into by Nigeria and any other country applies in Nigeria only when it has been enacted into law by the National Assembly.²¹⁸ The current provisions of the Nigerian Constitution on treaty making and implementation, and international law in general, are inadequate.²¹⁹ The approach adopted by the present Nigerian Constitution diverges from some African Constitutions that specifically spell out the role of international law in their domestic legal systems. South Africa,²²⁰ Malawi,²²¹ Namibia,²²² and Kenya²²³ are

Rome Statute) and/or international organizations (such as the ICC or the UN) that provide for non-surrender to the ICC of a nation's military or official personnel and related civilian component . . . [and] not intended to cover individuals acting abroad in a private capacity or independently for foreign government or international organization. . . .

David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333 (2005).

²¹⁵ See Okeke, *International Law*, *supra* note 100, at 328-31, 336-37.

²¹⁶ See CONSTITUTION OF NIGERIA (1999), § 19.

²¹⁷ Okeke, *International Law*, *supra* note 100, at 331.

²¹⁸ CONSTITUTION OF NIGERIA (1999), § 12. Where such treaty relates to a matter within the competence of the federal units, its ratification must be by a majority of the State Houses of Assembly. *Id.*; see also UMOZURIKE, *supra* note 13, at 33.

²¹⁹ Okeke, *International Law*, *supra* note 100, at 338.

²²⁰ South African courts are mandated to take into account the provisions of international law when interpreting the South African Bill of Rights. S. Afr. Const., 1996 § 39(1).

²²¹ Article 11(2) of the Constitution of Malawi enjoins the courts to "have regard to current norms of international law and comparable foreign case law" when interpreting the Constitution. MALAWI CONST., 1994, art. 11(2).

²²² Tijanyana Maluwa, *The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Explanatory Survey*, 23 S. AFR. Y.B. INT'L L. 45, 46 (1998).

examples of such countries. An aspect of international law that is contained in the Nigerian Constitution is human rights, to which a whole chapter is dedicated.²²⁴ There were also similar provisions in the past Constitutions of Nigeria. There is no doubting the fact that these human rights provisions are influenced by the international community's perception that they are universal and are an incidence of Nigeria's membership of various human rights treaties. Elias has contended that the human rights provisions under the Nigerian Independence Constitution were heavily borrowed from the U.N. Charter, Universal Declaration of Human Rights, and other sources—a trend that other English-speaking African states had to follow upon securing their independence.²²⁵

There is a view that the emerging human rights jurisprudence is rooted in the institutionalization of human rights constitutionalism and that international human rights instruments have had tremendous influence on the bills of rights in Africa to such an extent that a litigant can successfully rely on those provisions in domestic courts.²²⁶ However, this observation is susceptible to qualifications in view of the fact that constitution-making is a consequence of sovereignty. Most countries, including Nigeria, have refrained from subordinating their domestic laws to international law. As a state evolves, it crafts for itself a constitution that will meet its set objectives, though the international community may have a role in the emergence of a state. The recent case of the Southern Sudan is apposite here.²²⁷ Besides, the universalism-cultural relativism debate is yet to disappear from international human rights discourse.²²⁸ Nigeria, in its treaty practice, has kept faith with the incorporation principle, even though no explanation or justification for such approach appears in sight.²²⁹ Nigeria has domesticated the African Charter by enacting implementing legislation.²³⁰ This could be seen as a precedent, and to ensure some consistency, it is expected that Nigeria should incorporate other international treaties to which it is a party into its municipal law by the same means. Constitutionally speaking, Nigeria's approach to international law cannot be wholly determined from its Constitution, but from the generality of

²²³ See UMOZURIKE, *supra* note 13, at 33-34.

²²⁴ See CONSTITUTION OF NIGERIA (1999), ch. 4.

²²⁵ See T. O. ELIAS, *NEW HORIZONS IN INTERNATIONAL LAW* 89-90 (1979).

²²⁶ Adjami, *supra* note 130, at 115.

²²⁷ On July 9, 2011, South Sudan became an independent state following a referendum conducted in January, 2011 in which South Sudan voted to separate from North Sudan. The independence was the climax of a twenty-three-year civil war between the North and South Sudan, which ended with a 2005 peace accord. See generally Madeleine Morgenstern, *Celebration: South Sudan Splits from the North, Becomes Independent Nation*, BLAZE (July 9, 2011, 7:42 AM), <http://www.theblaze.com/stories/celebration-south-sudan-splits-from-the-north-becomes-independent-nation/>.

²²⁸ For the competing theories of universalism and cultural relativism, see Barrow, *supra* note 206, at 1230-32.

²²⁹ Okeke, *International Law*, *supra* note 100, at 343.

²³⁰ The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No. (2) (2004) Cap. A9 (Nigeria).

its municipal law. A great deal of provisions that are relevant to international law, such as immigration and extradition, are regulated by specific legislation, interspersed with a few constitutional provisions.²³¹

3. A Monist and a Dualist Assessment of Nigeria's Approach to International Law

Generally speaking, Nigeria is a dualist state, a position that is reflected in section 12 of its Constitution, which requires legislative recognition or incorporation of every treaty to which it is a party before such a treaty can be enforced in the national legal system. This is unlike the Ghanaian Constitution, where such a Constitutional provision is absent. Nigeria has exhibited some consistency in this Constitutional provision; a similar provision was featured in the 1979 Constitution.²³² This consistency is not by coincidence but rather demonstrates Nigeria's non-recognition of the concept of self-executing treaties as is practiced elsewhere.²³³ However, in the past, the incorporating enactments had not gone beyond adopting a general and vague language in seemingly domesticating treaties, an approach that is capable of putting Nigeria in the class of "mitigated dualism."²³⁴ Yet perhaps this "mitigated dualism" categorization may since have changed considering the fact that there is at least a full legislation that has incorporated the African Charter into the municipal law. Fundamental rights matters before High Courts in Nigeria are brought not only pursuant to the Nigerian Constitution²³⁵ but also under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.²³⁶

²³¹ For example, in Nigeria, immigration matters are in the main, governed by the 1963 Immigration Act, as amended by the 1972 Immigration (Amendment) Act, while extradition matters are regulated by the 1966 Extradition Act and extradition treaties to which Nigeria is a party. See Okeke, *International Law*, *supra* note 100, at 344, 348.

²³² See CONSTITUTION OF NIGERIA (1979), § 12(1).

²³³ For example, in the United States, a treaty to which the United States is a party can either be self-executing or non-self-executing. The courts of the United States have held that a treaty is "equivalent to an act of the legislature," and is self-executing when it "operates of itself without the aid of any legislative provision." *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Foster v. Neilson*, 27 U.S. 253, 314 (1829)). On the other hand, treaties are not self-executing when "they can only be enforced pursuant to legislation to carry them into effect." *Id.* (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). See also UMOZURIKE, *supra* note 13, at 33.

²³⁴ See Okeke, *International Law*, *supra* note 100, at 343.

²³⁵ Under Section 46(1) of the Constitution of Nigeria, any person who alleges that any of the human rights provisions "has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress." CONSTITUTION OF NIGERIA (1999), § 46(1).

²³⁶ See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No. (2) (2004) Cap. A9 (Nigeria).

Like other states that practice dualism, Nigeria's dualist stance is affected by the universality of human rights that now has a profound impact on the outlook of national legal systems. The current emphasis is on the protection of human rights rather than the categorization of states as monist or dualist. States are obligated to remove all "impediments that would prevent individuals from enjoying guaranteed rights."²³⁷ In essence, Nigeria no longer wears a complete cloak of dualism. The Supreme Court inclined toward this position in the case of *Abacha v. Fawehinmi*,²³⁸ where it agreed with the view expressed by the Privy Council in *Higgs v. Minister of National Security*²³⁹ that unincorporated treaties "might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its act affecting them would observe the terms of the treaty." The Supreme Court held that this position applied to Nigeria.²⁴⁰ Although the issue of "legitimate expectation" referred to by the court is vague and does not raise the status of unincorporated treaties to one of a binding law in domestic legal system, it places some structure for dualism as espoused by many states, including Nigeria. Nigeria's commitment to international law should not be wholly determined by the express incorporation of international law in its Constitution. At present, international law impacts the municipal legal system in many ways, especially in the area of human rights. Thus, the courts rely on the human rights provisions in the national constitutions as interpretive models.²⁴¹ Nigeria is not insulated from the general effect of this development. Perhaps, as this trend continues in the future, the monism-dualism dichotomy will be a thing of the past.

C. Ghanaian Courts and International Law

1. Introduction

The issues so far discussed indicate that the real place of international law in national legal systems cannot be ascertained with certainty. This could have been the reason for the convening of a series of judicial colloquia between 1988 and 1998, the aim of which was to sensitize national courts to the need to strengthen the application of international law in domestic jurisdictions. Attended by judges from the Commonwealth, including Ghana and Nigeria, the colloquia series culminated in the adoption of the Bangalore Principles which direct national courts to regard to international obligations that a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation, or common

²³⁷ See Udombana, *supra* note 154, at 131.

²³⁸ *Abacha v. Fawehinmi*, [2000] 6 NWLR 228 (Nigeria).

²³⁹ *Higgs v. Minister of Nat'l Sec.*, [2000] A.C. 228 (P.C.) (appeal taken from Bah.).

²⁴⁰ *Id.* at 241.

²⁴¹ Oppong, *Re-Imaging*, *supra* note 150, at 324-25.

law.²⁴² In essence, the Bangalore Principles are targeted at breaking the walls of dualism and embracing a monist approach to international law. It is not clear whether these colloquia have influenced the application of international law by the courts of Ghana.

2. Application of International Law in Litigation

Although it has earlier been observed that the numerous human rights provisions articulated under the present Ghanaian Constitution are in *pari materia* with the provisions of human rights treaties to which Ghana is a party, international law is not absent from Ghana's jurisprudence. The courts in Ghana have demonstrated some restraint in their articulation of international law rules and principles. The discussions of international law in available case law are rather scant, not well-detailed, and are at most mere references to international treaties and conventions. This is not unrelated to the dualist stance of Ghana in its approach to international law.

However, the courts are striving to defeat the constraints imposed by Ghana's dualist posture in the course of adjudicating cases. In *Ghana Lotto Operators v. National Lottery Authority*,²⁴³ the court, speaking through Date-Bah, JSC, ruled in favor of a presumption of justiciability of the Directive Principles of State Policy (Chapter 6 of the Ghanaian Constitution), which directs the Government to promote respect for international law and treaty obligations; the court noted that nothing in Ghana's Constitution defeats such a presumption. The court also went further to hold that some dynamism had to be employed when interpreting the Constitution to reflect modern practice. According to Date-Bah, JSC, the Chapter 6 rights, which are mainly economic, social, and cultural rights, are acquiring a status in international and domestic practice no less fundamental than the political and civil rights enumerated in Chapter 5.²⁴⁴ In *New Patriotic Party v. Attorney General (CIBA Case)*,²⁴⁵ the plaintiff, a registered political party

²⁴² See Waters, *supra* note 180, 643-64. See also *supra* note 56 and accompanying text.

²⁴³ *Ghana Lotto Operators v. Nat'l Lottery Auth.*, [2008] S.C.G.L.R. 1088.

²⁴⁴ *Id.* at 1106-09; see also Oswald K. Seneadza, *The Attitude of Ghanaian Courts Towards the Enforcement of Socio-Economic Rights of the Citizenry: A Critical Review*, ARTICLESBASE (AUG. 3, 2009), <http://www.articlesbase.com/national-state-local-articles/the-attitude-of-ghanaian-courts-towards-the-enforcement-of-socioeconomic-rights-of-the-citizenry-a-critical-review-1094081.html>. The same court had in *New Patriotic Party v. Attorney-General*, [1997] S.C.G.L.R. 729 (Nigeria), held that the Directive Policy under the Ghanaian Constitution were in and of themselves not justiciable, although the court qualified this position by stating that the Directive Principles could be justiciable when read together with other provisions of the Constitution that are enforceable. See Seneadza, *supra*.

²⁴⁵ *New Patriotic Party v. Attorney-General (1996-1997)* S.C.G.L.R. 729.

asked the court under Article 2(1) of the 1992 Constitution of Ghana²⁴⁶ for a declaration that the Council of Indigenous Business Associations Law²⁴⁷ was inconsistent with, and thereby in violation of, the Constitution, especially Articles 21(1)(e),²⁴⁸ 35(1),²⁴⁹ and 37(2) (a)²⁵⁰ and (3).²⁵¹ Under Section 3(b) of the Council of Indigenous Business Associations Law, the Council has the power to monitor the operations of the registered associations so as to make recommendations for improvements. Moreover, by virtue of the provision of Section 4(1), the associations listed in the schedule to the Law were mandated to register with the Council. The plaintiff contended that, to the extent that these provisions were inconsistent with the Constitution, the PNDCL was void. The defendant raised a preliminary objection to the action, arguing that Articles 35(1) and 37(2)(a) and (3) of the Constitution being relied upon by the plaintiff were non-justifiable as they fell under Chapter 6 of the Constitution—Directive Principles of State Policy. The defendant also contended that the plaintiff lacked the legal capacity to institute the action under Article 2(1) because only natural persons could institute

²⁴⁶ Article 2(1) provides that:

A person who alleges that (a) an enactment or anything contained in or done under the authority of that or any other enactment; or (b) any act or omission of any person is inconsistent with or is in contravention of a provision of this Constitution may bring an action in the Supreme Court for a declaration to that effect.

CONST. OF THE REP. OF GHANA 1992, art. 2(1).

²⁴⁷ Ghana Refugee Law, PNDCL 312 (1993).

²⁴⁸ See CONST. OF THE REP. OF GHANA 1992, art. 21(1)(e) (providing for freedom of association).

²⁴⁹ *Id.* art. 35(1) (providing that “Ghana shall be a democratic State dedicated to the realization of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom Government derives all its powers and authority through this Constitution”).

²⁵⁰ *Id.* art. 37(2)(a). Under this provision, the State is to enact appropriate laws to assure:

the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realize effective participation in development processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities.

²⁵¹ *Id.* art. 37(3) (providing that “in the discharge of the obligations stated in clause (2) of this article, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes”).

the action under Article 2(1). In throwing out the preliminary objection, the court held that international instruments relating to fundamental human rights are enforceable under the Constitution by virtue of Article 33(5).

The Supreme Court of Ghana, in a similar case—*New Patriotic Party v. Inspector General of Police*²⁵²—took into consideration provisions of an international instrument when handing down its decision. In this case, the plaintiff, a registered political party, brought an action against the defendant challenging the constitutionality of the provisions of Sections 7, 8, 12(a), and 13 of the 1972 Public Order Decree,²⁵³ which required a permit to be granted by the Minister of the Interior or a police officer before public meetings, demonstrations, processions, or celebrations of customs could be held. The plaintiff contended that these provisions were inconsistent with Article 21(d) of the Constitution of Ghana, which guaranteed freedom of assembly, and were therefore void and unenforceable. The plaintiff had obtained a permit from the police to hold a rally in the city of Sekondi. However, before the day of the rally, the police revoked the permit and prohibited the rally from being held. Subsequently, the plaintiff and other registered political parties conducted a peaceful demonstration in protest against the budgetary policies of the Ghanaian government. The plaintiff contended that some of the demonstration participants were arrested by the police and charged to court for demonstrating without a permit—an offense under Section 13 of the Public Order Decree. In a unanimous judgment, the court held *inter alia*, that Sections 7, 8, 12(a), and 13(a) of the Public Order Decree were clearly inconsistent with Article 21(1)(d) of the Constitution and were therefore unconstitutional, void, and unenforceable.²⁵⁴ Relying on the African Charter in the determination of cases, Chief Justice Archer observed as follows:

Ghana is a signatory to . . . African Charter and member states of the OAU and parties to the Charter are expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has

²⁵² (1993-1994) 2 G.L.R. 459 (Ghana).

²⁵³ Public Order Decree 1972 (N.R.C.D. 68) (repealed 1994).

²⁵⁴ Chief Justice Archer asked, rhetorically:

Police permits are colonial relics and have no place in Ghana in the last decade of the twentieth century. . . . Those who introduced police permits in this country do not require police permits in their own country to hold public meetings and processions. Why should we require them?

Joanna Stevens, *Colonial Relics I: The Requirement of a Permit to Hold a Peaceful Assembly*, 41 J. AFR. L. 118, 118 (1997).

not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.²⁵⁵

In *Delmas America v Kisko Products*,²⁵⁶ the court placed some reliance on the provisions of two international treaties—the U.N. Convention on the Carriage of Goods by Sea (Hamburg Rules)²⁵⁷ and the Vienna Convention on the Law of Treaties²⁵⁸—to resolve the contract dispute between the parties; notwithstanding the fact that at the time of the judgment Ghana had signed, but not ratified, the former. The court resorted to the provisions of Article 2 of the Hamburg Rules, which provides the scope of application. Article 18 of the Law of Treaties Convention was the plank upon which Justice Modibo Ocran applied the Hamburg Rules despite its non-ratification by Ghana.²⁵⁹

In *Attorney General v. Faroe Atlantic Co. Ltd.*,²⁶⁰ the apex court of Ghana likened Article 1(2) of Ghana's Constitution, which renders void any law that is inconsistent with the Constitution, to a *jus cogens* public international law. The appellant contended that the transaction between the respondent company and the Government of Ghana did not have the prior approval of Parliament and therefore was void ab initio. Even though the respondent objected to the appellant's argument on the ground that it was raised for the first time at the appellate stage, to which the court agreed, the court upheld that contention.²⁶¹ In its view,

²⁵⁵ *New Patriotic Party v. Inspector General of Police* (1996-1997) S.C.G.L.R. 729, 466.

²⁵⁶ *Delmas Am. v. Kisko Prods* (2005-2006) S.C.G.L.R. 75.

²⁵⁷ United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, 1695 U.N.T.S. 3. Ghana became a signatory to the Convention on March 31, 1978, but is yet to ratify it. See Status of the United Nations Convention on the Carriage of Goods by Sea, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XI-D-3&chapter=11&lang=en (last visited Apr. 1, 2015).

²⁵⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Treaties Convention*]. Ghana signed the treaty on May 23, 1969, but it has yet to ratify it.

²⁵⁹ Article 18 of the *Treaties Convention* provides that:

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.

Id. art. 18.

²⁶⁰ *Attorney Gen. v. Faroe Atl. Co.* (2005-2006) S.C.G.L.R. 271.

²⁶¹ The court observed as follows:

international business or economic transactions should not be treated differently from loan agreements, which require the approval of Parliament in order to be enforceable under Article 181 of the Constitution. On this note, the court held that the transaction was void and unenforceable. It is doubtful there was any basis for the court to think that the Article 1(2) provision of Ghana's Constitution was akin to a preemptory norm. Article 1(2) is a supremacy clause, and, like the supremacy provisions in the constitutions of other states, it is internal to Ghana and should not be raised to the status of *jus cogens*.

In *Republic v. Gorman*,²⁶² the Supreme Court of Ghana used the U.N. Convention partly as a guide when deciding a bail application against illicit traffic in narcotic drugs and psychotropic substances,²⁶³ ultimately refusing the bail application of the accused persons.²⁶⁴ In *Afua Gyan-Baffuor v. British Airways*,²⁶⁵ the court was to decide the award of compensation for the destruction of the plaintiff's baggage by the defendant. The court determined the issue of liability from the content of the parties' contract. It reasoned that the Warsaw Convention was the applicable treaty, especially since Ghana is a signatory to it. After determining that the Montreal Convention applied to carriers on European routes by virtue of the EC Regulation 889/2002, the court remarked on the concept of sovereignty and reasoned that, from the circumstances of the case, to subject the

Generally, where a point of law had not been raised in the trial court and in the intermediate Court of Appeal it might not be raised in the Supreme Court as the final appellate court. However, there are exceptions to the general rule, namely: . . . (iii) where the legal question sought to be raised for the first time was substantial and could be disposed of without the need for further evidence. . . ."

Id. at 279.

²⁶² *Republic v. Gorman* (2004) AHRLR 141.

²⁶³ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 19, 1988, 1582 U.N.T.S. 176, 28 I.L.M. 493, available at http://www.unodc.org/pdf/convention_1988_en.pdf. The Convention was open for signature from December 20, 1988 to February 28, 1989 and thereafter until December 20, 1989. Ghana signed and ratified the Convention on December 20, 1988 and April 10, 1990, respectively. See Status of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en (last visited Apr. 1, 2015).

²⁶⁴ See Emmanuel K. Quansah, *An Examination of the Use of International Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana*, in INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA 43 (Magnus Killander ed., 2010), available at http://www.pulp.up.ac.za/pdf/2010_17/2010_17.pdf.

²⁶⁵ (unreported) Commercial Div., High Court, Suit No. BDC22/09, Feb. 1, 2010. See also *Blay v. Delta Airlines* (unreported) Commercial Div., High Court, Suit No. RPC/303/09, Apr. 19, 2010 (deciding the issue of liability based on some provisions of the Warsaw Convention).

plaintiff to the application of the EU Regulation would be contrary to the principle of sovereignty.

There are, however, instances where the Ghanaian courts failed to rely on international instruments in the resolution of a case. In *Issa Iddi Abass v. Accra Metropolitan Assembly*,²⁶⁶ the court merely referred to human rights conventions without relying on the same or any other international instrument.²⁶⁷ Similarly, in *The Republic v. Attorney General Ex Parte Theresa Cheddah Dogbey*,²⁶⁸ the court was faced with determining whether the refugee status and rights of the applicants to live in Ghana had ceased. The applicants, who were Liberian refugees living in Ghana, had carried out a hunger strike and a protest following an attempt by the Ghanaian government to return them to Liberia. They also pressed for an improvement in their reparation entitlements from the United Nations High Commission for Refugees among other demands. The court did not consider the provisions of the United Nations Convention Relating to the Status of Refugees 1951²⁶⁹ and the Organization of African Union (now African Union) Convention Governing the Specific Aspects of the Refugee Problems in Africa 1969;²⁷⁰ these conventions had been incorporated into Ghana's law by virtue of Ghana Refugee Law.²⁷¹ These conventions would have been relevant to the court's determination of the issues, but the court based its decision on the ground that the condition that led the applicants to secure refugee status in Ghana—the Liberian war—was over and that normalcy had returned to the government. Therefore, the applicants' refugee status and their right to live in Ghana had ceased and they were to return to Liberia.

In *New Patriotic Party v. Ghana Broadcasting Corporation*,²⁷² a case that dealt with the right to information, the court was silent on the provisions of Article 9 of the African Charter that guarantee the right to information. Interestingly, this judgment was delivered on the same day as the decision in *New Patriotic Party v. Inspector-General of Police*,²⁷³ discussed earlier, was given.²⁷⁴ The court in *New Patriotic Party v. Ghana Broadcasting Corporation* decided the case on the basis of Article 21 of the Ghanaian Constitution that, although it

²⁶⁶ *Issa Iddi Abass v. Accra Metro. Assembly*, Misca 1203/2002 (July 24, 2002).

²⁶⁷ *Id.*

²⁶⁸ *Republic v. Attorney Gen. Ex Parte Theresa Cheddah Dogbey* (unreported) Fast Track Div., High Court.

²⁶⁹ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force on April 22, 1954 and acceded to by Ghana on March 18, 1963).

²⁷⁰ Convention Governing the Specific Aspects of the Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (ratified by Ghana Jun. 19, 1975).

²⁷¹ PNDCL 305 (1992).

²⁷² *New Patriotic Party v. Ghana Broad. Corp.* (1992-93) G.B.R. 522.

²⁷³ *New Patriotic Party v. Inspector General of Police* (1993-1994) 2 G.L.R. 459.

²⁷⁴ See Frans Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, 43 J. AFR. L. 1, 6 (1999).

provides for the right to information, states that such a right is “subject to such qualifications and laws as are necessary in a democratic society.”²⁷⁵

In *Adjei-Ampofo v. Attorney General*, the continental doctrines of void-for-vagueness and void-for-over-breadth were raised by the plaintiff, who contended they were implicit in the Constitution of Ghana, and therefore should apply to invalidate a certain provision of the Criminal Code. The first doctrine, void-for-vagueness, stipulates that the provisions of a penal law be sufficiently clear so as to inform those who are subject to it of what conduct is punishable under the law.²⁷⁶ Under the second doctrine, void-for-over-breadth, a law or a part thereof may be rendered invalid if it legitimately outlaws certain conduct while also forbidding or curtailing constitutionally protected conduct.²⁷⁷ The court refused to uphold the plaintiff’s contention and ruled that the plaintiff could not demonstrate which particular provision of the Constitution the Criminal Code was in conflict.²⁷⁸

The foregoing reflects the extent to which the courts in Ghana have brought international law to bear on the domestic law. The cases are more like interpretive tools than a strong institutionalization of international law in Ghana. At least they give a ray of hope that, in the future, international law may be firmly entrenched in Ghana’s legal system.

D. Nigerian Courts and International Law

1. Introduction

Nigerian courts have adjudicated a considerable number of cases with an international law element. The cases applying international law in Nigeria deal mainly with treaty application, with little or no consideration of other aspects or sources of international law, such as customary international law. This may have an explanation, because Section 12 of the 1999 Constitution of Nigeria deals specifically with treaty implementation, leaving out the other aspects of international law.²⁷⁹ Among the treaties to which Nigeria is a party, the African Charter has dominated judicial considerations of the application of international law in the domestic law of Nigeria.²⁸⁰ This arises from the fact that the African

²⁷⁵ *Id.*

²⁷⁶ *See* *Connally v. Gen. Construction Co.*, 269 U.S. 385 (1926).

²⁷⁷ *See* *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491 (1985).

²⁷⁸ *See* Quansah, *supra* note 264, at 44.

²⁷⁹ *See* Edwin Egede, *The New Territorial Waters (Amendment) Act 1998—Comments on the Impact of International Law on Nigerian Law*, 12 AFR. J. INT’L & COMP. L. 84, 90 (2000).

²⁸⁰ *See* Chilenye Nwapi, *International Treaties in Nigerian and Canadian Courts*, 19 AFR. J. INT’L & COMP. L. 38, 45 (2011).

Charter has expressly been domesticated in Nigeria and appears to be the only treaty to which Nigeria is a party that has been so domesticated.

2. Application of International Law in cases

In *Garba v. Attorney-General of Lagos State*,²⁸¹ a case that came before the High Court of Lagos, the determination of the court touched on whether the human rights provisions of the 1979 Constitution of Nigeria were suspended and whether the court had jurisdiction thereof. The application of the applicants was based on the right to life guaranteed by the 1979 Constitution and the African Charter. The respondent contended that the court could not entertain the suit because its jurisdiction had been ousted by Section 10(3) of the Robbery and Firearms (Special Provisions) Decree. The court demonstrated remarkable resiliency and disregarded the respondent's argument. In ruling that it possessed jurisdiction to hear the matter, the court held that the provisions of the African Charter had become part of Nigeria's law by virtue of the 1983 African Charter Act. The court remarked that even if the aspects of the African Charter that were contained in the 1979 Constitution were suspended or ousted by any Nigerian law, its international law aspects were intact and could not be unilaterally abrogated.²⁸²

In *Oshevire v. British Caledonian Airways Ltd*,²⁸³ the appellant invoked the provisions of the 1953 Carriage by Air (Colonies, Protectorates, and Trust Territories) Order. The appellant, as plaintiff before the lower court, alleged that his video recorder got lost in the course of the respondent's flight from London to Kano. He therefore brought an action for damages against the respondent. In defense, the respondent maintained that the action was statute barred as it was not brought within two years from the date the flight arrived at its destination, from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped as required by Article 29(1) of the 1929 Warsaw Convention as amended by the 1955 Hague Protocol, later incorporated into the 1953 Carriage by Air (Colonies, Protectorates, and Trust Territories) Order. The trial court upheld the respondent's argument. The appellate court dismissed the appellant's appeal, holding that the Warsaw Convention and other international agreements embodied in conventions superseded municipal law.²⁸⁴ The Warsaw Convention

²⁸¹ *Garba v. Lagos State Attorney Gen.*, Suit ID/599M/91 (Oct. 31, 1991).

²⁸² *See* Viljoen, *supra* note 274, at 8.

²⁸³ *Oshevire v. British Caledonian Airways Ltd* [1990] 7 NWLR (Pt 163) 507.

²⁸⁴ *Id.* at 519-20. This decision was cited by the Court of Appeal in *UAC Ltd v. Global Transport S.A.* [1996] 5 NWLR (Pt. 448) 291, on the application of the Hague Rules as scheduled to the Carriage of Goods by Sea Act 1926. The court held that the action against the first defendant (a shipping agent to 2nd defendant) for non-delivery of a vehicle from Belgium was statute barred, having not been commenced within one year of the non-delivery of the vehicle as stipulated under Article III of the Hague Rules. *See also*

was also applied in *Ibidapo v. Lufthansa Airlines*²⁸⁵—a case that has great relevance not only to Nigeria’s aviation sector but also to the general application of international law in Nigeria. The case also decided the issue of the effect of an omission of an enactment from the compilation of laws in Nigeria.²⁸⁶ One of the issues the Supreme Court confronted was whether the 1953 Carriage by Air (Colonies, Protectorates, and Trust Territories) Order still had relevance in Nigeria considering the fact that it was not included in the 1990 Laws of the Federation of Nigeria. In deciding this issue in the affirmative, Wali, Justice of the Supreme Court (JSC), observed that:

Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law. 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 provided they are found to be not overridden by clear rules of our domestic law. Nigeria, as part of the international community, . . . shall continue to adhere to, respect and enforce both the multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.²⁸⁷

The court found that the Warsaw Convention was still applicable in Nigeria and validated its application under Section 3 of the 1990 Revised Edition (Laws of the Federation of Nigeria) Act, which gave the Attorney General of the Federation the power to designate certain laws as authorized omissions. Since the Attorney General declared the omission of the 1953 Carriage by Air (Colonies, Protectorates, and Trust Territories) Order an authorized omission, it was declared

Harka Air Services Ltd v. Emeka Keazor (2011) LPELR-SC.262/2005, available at <http://www.lawpavilionpersonal.com/newfulllawreport.jsp?pk=SC.262/2005>.

²⁸⁵ *Ibidapo v. Lufthansa Airlines* [1997] 4 NWLR (Pt498) 124.

²⁸⁶ The court, speaking through Wali, JSC, made the following pronouncement:

I have not been able to find any legislation that repealed the 1953 Order or any court decision that has declared it illegal, irrelevant, or obsolete. An important international Convention like the Warsaw Convention cannot be said to be implied or repealed when this country is still taking advantage of its provision and has not promulgated similar enactment to replace it. The Convention is so important to this country both domestically and internationally to be avoided. A vacuum of such magnitude cannot be tolerated in our legal system.

Id. at 149.

²⁸⁷ *Id.* at 150.

valid and subsisting.²⁸⁸ It is contended, however, that even if the Attorney General had not made the order, the omission of the 1953 Order from the compilation of laws would not have affected its application. This is because a law can be repealed only expressly or by implication through enacting subsequent legislation.

Perhaps the most cited case on the application of international law in Nigeria is *Abacha v. Fawehinmi*.²⁸⁹ In that case, the respondent Chief Gani Fawehinmi, a human rights activist, was unlawfully arrested and detained by the State Security Services during the military administration of General Sani Abacha. Fawehinmi brought an action before the trial court seeking to enforce his fundamental rights as guaranteed under the 1979 Constitution of Nigeria and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap. 10, now Cap. A9). Abacha filed a preliminary objection to the suit, and contended that the jurisdiction of the court had been ousted by such decrees as the State Security (Detention of Persons) Decree,²⁹⁰ the Federal Military Government (Supremacy and Enforcement of Powers) Decree,²⁹¹ and the Constitution (Suspension and Modification) Decree.²⁹² The trial court subscribed to Abacha's argument and held that it lacked jurisdiction to entertain the action, thereby striking the suit. Fawehinmi appealed to the Court of Appeal. In upholding the appeal in part, the Court of Appeal expressed the view that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, which domesticated the African Charter, is superior to, and cannot be overridden by, any other municipal law. Dissatisfied with the decision of the Court of Appeal, Abacha appealed to the Supreme Court, which affirmed the decision of the Court of Appeal and accorded the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act an international flavor,²⁹³ although it remarked that the African Charter is not superior to the Constitution.²⁹⁴ The Supreme Court observed that:

where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of

²⁸⁸ See CALLISTUS E. UWAKWE, AVIATION LAW: INTRODUCTION TO CIVIL AVIATION LAW IN NIGERIA 24 (1st ed. 2006).

²⁸⁹ *Abacha v. Fawehinmi*, [2000] 6 NWLR (Pt. 660) 228.

²⁹⁰ No. (2) (1984).

²⁹¹ No. (12) (1994).

²⁹² No. (107) (1993).

²⁹³ The international flavor of the Act was also recognized in *Ubani v. Dir., State Sec. Service* [1999] 11 NWLR (Pt 625) 129, and *Comptroller Gen. of Nigerian Prisons v. Adekanye* [1999] 10 NWLR (Pt 623) 400.

²⁹⁴ *Abacha v Fawehinmi*, [2000] 6 NWLR (Pt. 660) 228.

Nigeria 1990 (hereinafter is referred to simply as Cap. 10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial power of the courts. By Cap. 10 the African Charter is now part of the laws of Nigeria, and like all other laws, the courts must uphold it. The Charter gives to citizens of member states of the Organization of African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning.²⁹⁵

Although the cases of *Oshevire v. British Caledonian Airways* and, to some extent, *Abacha v. Fawehinmi*, have some convergence, the former seems to have gone as far as investing an unincorporated treaty with superiority over a domestic enactment.²⁹⁶ This marks a point of departure from *Abacha v. Fawehinmi*, which concluded that an international treaty not enacted into Nigerian law by the National Assembly cannot be enforced by the courts.²⁹⁷ What the *Oshevire* case did was to transform Nigeria into a monist state.²⁹⁸ The Supreme Court's agreement with the Court of Appeal's elevation of Cap. 10 (now Cap. A9) above other statutes²⁹⁹ in the *Abacha* case has received severe attack.³⁰⁰ Achike, JSC, one of the panelists at the Supreme Court that decided the case aligned with the minority judgment and disagreed with such elevation.³⁰¹

²⁹⁵ Nwapi, *supra* note 280, at 47.

²⁹⁶ For instance, the court noted that:

In this regard an international treaty, like the Warsaw Convention in the instant case, is an expression of agreed, compromise principles by the contracting states and is generally autonomous of the municipal laws of contracting states as regards its application and construction. 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.

Oshevire v. British Caledonian Airways Ltd [1990] 7 NWLR (Pt 163) 507, at 519-20.

²⁹⁷ See *Abacha v. Fawehinmi*, [2000] 6 NWLR (Pt. 660) 228, at 288.

²⁹⁸ See Egede, *supra* note 279, at 95.

²⁹⁹ Ogundare, JSC, delivering the leading judgment, observed that "I agree with their Lordships of the court below that the Charter possesses 'a greater vigour and strength' than any other domestic statute. . . ." *Abacha*, [2000] 6 NWLR (Pt. 660) at 289.

³⁰⁰ See A. O. Enabulele, *Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?*, 17 AFR. J. INT'L & COMP. L. 326, 336 (2009) (arguing that the Supreme Court's position that the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act is superior to any other domestic enactment, is not supported by any provision of the Nigerian Constitution).

³⁰¹ *Abacha*, [2000] 6 NWLR (Pt. 660) at 316-17.

In *Director, State Security Services v. Agbakoba*,³⁰² the court referred to the African Charter in its judgment, although the case was not directly based on the African Charter. In brief, Agbakoba, a Nigerian human rights lawyer, was invited to participate in a human rights conference in The Hague, Netherlands. When he got to the Murtala Mohammed International Airport Lagos where he was to board a flight to proceed with his journey, an agent of the State Security Services impounded his passport without giving any reasons for the seizure. As a result, Agbakoba could not attend the conference. He therefore brought an application before the High Court of Lagos State to enforce his fundamental rights as enshrined in the 1979 Constitution of Nigeria. Specifically, he asked the court to declare that the forceful seizure of his passport by the State Security Services violated his rights to personal liberty, freedom of thought, freedom of expression, and freedom of movement respectively guaranteed under Sections 32, 35, 36, and 38 of the 1979 Constitution of the Federal Republic of Nigeria and was, accordingly, unconstitutional and illegal.

The trial court dismissed the application, and held that neither the 1979 Constitution nor the African Charter had any provision recognizing the issuance or possession of a passport as a constitutional right of a Nigerian citizen or individual. The court also held that Agbakoba failed to prove to the court that the passport was his personal property. On appeal to the Court of Appeal, Agbakoba contended that the right to travel abroad would be meaningless if it did not confer on a citizen a constitutional right to possess a Nigerian passport. In other words, the right to travel abroad necessarily implied the right to possess a Nigerian passport, which was a *sine qua non* of international travel. The Director of State Security Services, on the other hand, argued that the passport was the property of the Government of Nigeria, and that Agbakoba was not the owner, but only the bearer of the passport. In a well-considered judgment, the Court of Appeal held that the seizure of the appellant's passport by the respondent was a violation of the right to freedom of movement, and that the right, particularly the right not to be refused entry to or exit from one's country, was recognized under the African Charter. In the words of the court:

As has been stated earlier, the human rights provisions of our Constitution contain inter alia a guarantee to any citizen of Nigeria of a right not to be refused entry to or exit from Nigeria (see section 38). Also the African Charter on Human and Peoples Rights (the African Charter) which have force of law in Nigeria by virtue of section 1 of the African Charter on Human and Peoples Rights (Ratification & Enforcement) Act, Cap. 10 guarantees the right of every individual "to leave any country including his own and to return to his country." (See Art. 12(2) [sic]. Earlier, the human right of the citizen to travel abroad had

³⁰² *Dir. of State Sec. Serv. v. Agbakoba* [1999] 3 NWLR (Pt. 595) 314, available at <http://lawaspire.com.ng/2014/10/director-of-state-security-service-anor-v-olisa-agbakoba/>.

been recognized in Article 13(2) of the Universal Declaration of Human Rights.³⁰³

The Court concluded:

I feel no hesitation, therefore, in coming to the conclusion that the right not to have a passport impounded, which is the right with which this case is directly concerned, is a necessary concomitant of the freedom of exit which is guaranteed by section 38(1) of the Constitution and Art 12(2) of the African Charter. I also hold that the statement on the Nigerian passport that “a passport may be withdrawn at any time” is neither in accord with the Constitution nor with any law applicable in Nigeria.³⁰⁴

Aggrieved with the judgment of the Court of Appeal, the Director of State Security Services appealed to the Supreme Court against the said judgment. The court dismissed the appeal and affirmed the judgment of the Court of Appeal.

In *Registered Trustees of Constitutional Rights Project v. the President of the Federal Republic of Nigeria*,³⁰⁵ an application was brought to stop the execution of Zamani Lekwot and six others who had been sentenced to death by the Zango-Kataf Disturbances Tribunal, which was established by virtue of the 1987 Civil Disturbances (Special Tribunal) Decree 2. The complaint alleged that the applicants had been denied a fair trial as provided by Article 7 of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap 10 (now Cap. A9). The respondents opposed the application, and argued that the court’s jurisdiction to entertain the application was ousted by Section 8(1) of the 1987 Civil Disturbances (Special Tribunal) Decree 2 and Section 3(1) of 1992 Decree 55. They further argued that, with the incorporation of the African Charter into Nigeria’s municipal law, the Charter lost its international law status. After determining that Cap. A9 was a decree under Section 3(1) of 1992 Decree 55 and that there was a conflict between the two, the court held that the provisions of the African Charter superseded the ouster clauses and that the jurisdiction of the court was therefore intact by virtue of the African Charter.³⁰⁶ The Supreme Court in *Ogugu v. State*³⁰⁷ was invited to hold that, since the African Charter contained no procedure for its domestic application, a lacuna was created in the law. The court rejected the argument and did not allow the non-provision of the enforcement procedure to hinder the applicant from enforcing his rights under the African

³⁰³ Agbakoba v. Dir. of State Sec. Serv. [1994] 6 NWLR 475.

³⁰⁴ Dir. of State Sec. Serv. v. Agbakoba [1999] 3 NWLR (Pt. 595) 314.

³⁰⁵ Registered Trs. of Constitutional Rights Project v. President of the Federal Republic of Nigeria, Suit M/102/92 (May 5, 1992).

³⁰⁶ See Viljoen, *supra* note 274, at 9.

³⁰⁷ Ogugu v. the State [1994] 9 NWLR (Pt 366) 1, at 26-27.

Charter. The court held that, by virtue of its domestication, the African Charter could be enforced by the courts as provided by the Constitution and all other relevant laws.³⁰⁸

In *Akinola v. General Babangida*,³⁰⁹ 1993 Decree 43 was declared void to the extent of its inconsistency with the African Charter. In order to quell the massive reaction of the press to the annulment of the 1993 election in Nigeria by the Babangida administration, the military government promulgated the Newspaper Decree 43 in 1993. The Decree set out stringent guidelines that all newspapers must follow before they could be registered for operation in Nigeria. A communication was filed at the African Commission, which ruled that the Decree was in conflict with several provisions of the African Charter.³¹⁰ Armed with the decision of the African Commission, the applicant, Akinola, filed an action before the court and contended that the Decree was a violation of the applicant's right to freedom of expression as enshrined in both the Constitution and the African Charter. In overruling the respondent's preliminary objection to the jurisdiction of the court, the court held that it could assume jurisdiction on the ground that the law domesticating the African Charter, which had been held to be a decree, clothed the court with jurisdiction to hear the matter.³¹¹

In *Gbemre v. Shell*,³¹² the African Charter was invoked in environmental rights litigation. The suit was filed by the plaintiff, on behalf of himself and Iwherekan community in Edo State, against Shell, the Nigerian National Petroleum Corporation (NNPC), and the Attorney General of the Federation. The plaintiff argued that the gas-flaring activities carried out in the Iwherekan community by Shell constituted a violation of their right to a healthy environment as provided under Article 24 of the African Charter and the right to life and dignity of persons enshrined under Sections 33 and 34 of the 1999 Constitution,

³⁰⁸ Ogwuegbu, JSC noted that:

By the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap.10, Vol.1 Laws of the Federation of Nigeria, 1990, Nigeria adopted the African Charter on Human and Peoples' Rights as part of their [sic] municipal law. The provisions of that Charter are enforceable in the same manner as those of Chapter 4 of the 1979 Constitution by application made under section 42 of the Constitution.

Bamidele Opeyemi v. Grace Alele-Williams, Suit no. B/6M/89 at 47.

³⁰⁹ Suit no. M/462/93.

³¹⁰ See OBIORA CHINEDU OKAFOR, AFRICAN HUMAN RIGHTS SYSTEM, ACTIVIST FORCES AND INTERNATIONAL INSTITUTIONS 101-02 (2007).

³¹¹ See Viljoen, *supra* note 274, at 10.

³¹² *Gbemre v. Shell Petroleum Dev. Co.*, [2005] AHRLR 151 (Nigeria), available at <http://www1.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html>.

respectively. The Federal High Court, Edo Division, upheld the contention of the plaintiff. However, this decision may not represent the law on environmental rights litigation as it is still on appeal.³¹³

However, in *Wanab Akanmu v. Attorney-General of Lagos State*,³¹⁴ the High Court of Lagos State followed a different course and held that Section 10(3) of the 1984 Robbery and Firearms (Special Provisions) Decree 5 ousted the jurisdiction of the court to determine the application of the applicants. A death sentence had been adjudged against the applicants, and they had applied to the court to stay their execution pending a determination of their application to the African Commission on Human and Peoples' Rights. The court failed to agree with the applicants in their contention that the African Charter was enforceable in Nigeria. It is evident that if the case were to be decided currently, the court would follow the decisions of the Supreme Court and the Court of Appeal, especially the *Abacha v. Fawehinmi* case, in that the African Charter can be enforced by Nigerian courts.³¹⁵ Therefore, this decision does not represent the law in Nigeria.

The Supreme Court, in *Registered Trustees of National Association of Community Health Practitioners of Nigeria v. Medical and Health Workers Union of Nigeria*,³¹⁶ held that, owing to the non-domestication of the International Labor Organization (ILO) by the Nigerian legislature as required under Section 12(1) of the Constitution of Nigeria, the ILO cannot be enforced in Nigeria. The appellant applied to the Minister of Labor and Productivity to be registered as a Senior Staff Trade Union under the Trade Union Act Cap. 437. This application was denied. Following the denial, the appellant brought an action before the trial court against the respondent, asking for a declaration that it is unconstitutional, illegal, unlawful, and, against the provisions of conventions 87 and 89 of the International Labor Organization for the respondents to refuse to register the applicant as a Senior Staff Trade Union. The trial court granted the appellant's relief. Dissatisfied with the decision of the trial court, the respondent appealed to the Court of Appeal, which upheld the appeal and reversed the judgment of the trial

³¹³ See Rhuks Temitope, *The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India*, 3 NAT'L UNIV. JURID. SCIS. L. REV. 423, 437 (2010). But in a similar case, decided earlier by the Court of Appeal, the Federal Government of Nigeria and Shell Development Company had failed to first carry out the mandatory environmental assessment impact before commencing oil explorations and mining in Bonny. See *Douglas v. Shell Petroleum Dev. Co.* [1999] 2 NWLR (pt 591) 466. A private citizen brought a suit under Article 24 of the African Charter (Ratification and Enforcement) Act to challenge the action. *Id.* The trial court dismissed the suit for lack of *locus standi*. *Id.* On appeal, the Court of Appeal held that the matter was justiciable. *Id.*

³¹⁴ Suit No. M/568/91 (Jan. 31, 1992).

³¹⁵ There are other cases in which the African Charter has been referred to or applied, such as *Ekpu v. Attorney Gen. of the Federation*, 1 HRLRA 391 (1998); *Ndigwe v. Ibekwendu* [1998] 7 NWLR 486; and *NNPC v. Fawehinmi* [1998] 7 NWLR 598.

³¹⁶ *Registered Trs. of Nat'l Ass'n of Cmty. Health Practitioners of Nigeria v. Medical and Health Workers Union of Nigeria*, [2008] 2 NWLR (Pt 1072) 575, 623.

court. The appellant was not satisfied with the decision handed down by the Court of Appeal and appealed to the Supreme Court. The Supreme Court aligned with the decision of the Court of Appeal and held that, insofar as the I.L.O. Convention has not been enacted into law by the National Assembly, it has no force of law in Nigeria and it cannot possibly apply.³¹⁷

The above cases reflect the extent to which Nigerian courts are ready to apply international law in adjudication. They show the ability of the courts to enforce the human rights of citizens and to grapple with the repression of the military during the dark days of military regime in Nigeria.³¹⁸ The interaction of the judiciary and the legislature has an impact on the domestic application of international law.

V. COMPARISON OF GHANAIAN AND NIGERIAN COURTS' APPROACHES TO INTERNATIONAL LAW

Ghana and Nigeria, by virtue of their colonization by the British, inherited the common law system. That being the case, both countries are dualist in their approach to international law. Even though they share this common history and fall under this categorization, the levels to which both countries articulate the manner in which their domestic laws interact with international law are not entirely the same. The Constitution of Ghana does not present a clear picture of the application of international law under Ghana's municipal law. It could be argued that, since Ghana's Constitution has enumerated the sources of law in Ghana, and has not expressly included international law as a source, international law may not apply in Ghana (as a matter of course). On the other hand, the lack of an express application provision of international law in Ghana's Constitution may not imply that international law is excluded from Ghana's municipal law. Not surprisingly, the courts of Ghana have not really made a clear statement on the applicability of international law in Ghana. The decisions mainly contain only references to some of the international treaties to which Ghana is a party. For example, in *New Patriotic Party v. Inspector General of Police*,³¹⁹ discussed above, the court merely thought that the non-express domestication of the African Charter by Ghana does not mean that the African Charter could not be relied upon. This is an evasive dictum. Another upshot of the lack of proper articulation in the Ghanaian Constitution of the application of international law in Ghana is that the courts rely on treaties mainly as the interpretative model.

On the other hand, Nigerian jurisprudence gives a slightly clearer picture as to how the two regimes of law interact under municipal law. The Constitution has made provisions on how an international treaty to which Nigeria is a party can become enforceable in Nigeria. And on various occasions, the courts have

³¹⁷ *Id.*

³¹⁸ See Viljoen, *supra* note 274, at 7.

³¹⁹ (1993-1994) 2 G.L.R. 459 (Ghana).

articulated this provision. For instance, as earlier noted, there is hardly any human rights case before Nigerian courts that is not premised on the African Charter. This has brought some clarity to the impact of international law (especially treaties) in Nigeria. However, since what is expressly provided for under the Constitution of Nigeria are only treaties—leaving customary international law to be enforced under common law—the two countries have similar approaches to international law.

There seems to be another divergence in the approaches of the two countries. Although the Constitution of Ghana does not expressly provide for the enforcement of international human rights in Ghana, the Supreme Court of Ghana has held in favor of a rebuttable presumption of the justiciability of the Directive Principle of State Policy,³²⁰ which contains socio-economic rights. This means that if the human rights treaties to which Ghana is a member were to be enforced in Ghana, their enforcement would extend to socioeconomic rights. This is not really the case in Nigeria. The enforcement of a domesticated treaty by the Nigerian courts is subject to the Constitution since the Supreme Court in the *Abacha* case held that the Constitution is superior to a domesticated treaty. It follows that those rights contained in Chapter 2 of the Constitution that are not justiciable by virtue of Section 6(6)(c) of the Nigerian Constitution cannot be enforced by the courts even if they are made justiciable under a human rights treaty, say the African Charter.³²¹ But Nwabueze has added a qualification to this position. While aligning himself with this view, he contends, rightfully so, that the superiority of the Constitution over a domesticated treaty does not absolve Nigeria from its treaty obligation, “as a state cannot plead municipal law in order to escape from its international obligations, but that in no way affects the validity of the legislation in domestic law.”³²² The Supreme Court has, however, held that the Chapter 2 rights of the Constitution can become justiciable by a legislation of the National Assembly.³²³

³²⁰ See *Ghana Lotto Operators v National Lottery Auth.*, [2008] S.C.G.L.R. 1088.

³²¹ See *Socio-Economic Rights and Accountability Project v. Nigeria*, ECW/CCJ/APP/12/07, ECW/CCJ/JUD/07/10 (Nov. 30, 2010).

³²² BEN NWABUEZE, 2 CONSTITUTIONAL DEMOCRACY IN AFRICA 94 (2003).

³²³ This is by virtue of the proviso, “except as otherwise provided by this Constitution.” See *Attorney Gen. of Ondo State v. Attorney Gen. of the Federation*, [2002] 9 NWLR (Pt 772) 222, 382.

**VI. TOWARD THE FUTURE OF NEW NARRATIVES OF JUSTICE TO
MEET THE CHALLENGES OF GHANA AND NIGERIA IN ENSURING
THEIR CONTINUED CONTRIBUTIONS TO CONTEMPORARY
INTERNATIONAL LAW**

A. Striving for Full Reliance on International Instruments when Resolving Cases

It is not enough for the domestic courts in Ghana and Nigeria to make only a passing reference to international law instruments when adjudicating cases before them. International law is the law of all nations. The change of its name from “law of nations” to international law has not affected its widespread reach, which implies that international law is binding on all states and should be enforced by them, subject however to the rules that are applicable to treaties. If the debate as to the binding nature of international law has not totally disappeared from major academic discourse, it has at least lost popularity.³²⁴ Ghanaian courts should make full appropriation of international law rules, principles, and instruments in their resolution of cases, although this does not suggest that Nigerian courts have performed credibly in their use of international law. Since what happens at the domestic level may have some bearing on the international community, and vice versa, it is logical, if not imperative, that the domestic courts of both countries reflect this important relationship between the two systems of law.

B. Creating Awareness About the Intestate Succession Law of Ghana

This article earlier noted that one of Ghana’s achievements in observance of its international law obligations is the elimination of discrimination against women by the enactment of the Intestate Succession Law, which overrides the customary succession rule that worked injustice on women. As the existence of the law is little-known by Ghanaian women, there is the urgent need for the government, Non-Governmental Organizations (NGOs), and human rights advocacy groups in Ghana to sensitize the women, especially those in the rural areas, to the existence and application of the law. Women should be encouraged to embrace the new law so as to put a stop to the oppressive regime of the Marriage of Mohammedans Ordinance that violates women’s rights. By so doing, Ghana would not only be providing justice through equality and non-discrimination for its female population, but it would also project its commitment to its obligations under international law instruments. Discrimination against

³²⁴ Glanville Williams noted that the debate as to the reality of international law is merely a debate about words. See DAMROSCH, ET AL., *supra* note 4, at 6-9 (citing Glanville L. Williams, *International Law and the Controversy Concerning the Word “Law,”* 22 BRIT. Y.B. INT’L L. 146 (1945)).

women is antithetical to justice and international law since one of the objectives of international law is the realization of justice for all manner of people.

C. Abolishing the Sharia Code in Nigeria or Amending it by Removing Sentence of death-by-Stoning

The extension of Islamic law to matters of crime under the Shari'a penal codes adopted by some states in northern Nigeria engenders much concern about Nigeria's compliance with international law. It should be noted that it was because of the harsh consequences of Islamic criminal law that the British colonialists in 1933 interfered to stop the application of the Islamic punishments under the system, such as amputation and death-by-stoning which were repugnant to natural justice and humanity. This the British did by enacting the 1933 Native Court Ordinance.³²⁵ Now that the Shari'a code has been reintroduced in these northern states as part of the criminal law, it constitutes a deviation from the original understanding of the Shari'a as essentially regulating the personal lives of its adherents. There are many objections to the Shari'a code. There is no doubting the fact that Shari'a law is a religious law founded on the Qu'ran. It then follows that adopting and enforcing any religious penal law is tantamount to adopting a state religion, which is prohibited by the Nigerian Constitution³²⁶ and could constitute a violation of freedom of religion—a right that is universally recognized. Under the Shari'a code, anyone accused of committing one of the Qur'anic offenses is presumed guilty until proven innocent.³²⁷ This is contrary to the stipulations of the international human rights instruments to which Nigeria is a party. In fact, it is a deviation from the international standard of criminal justice, which presumes a person innocent until the contrary is proven. Justice cannot be attained in the midst of human rights violations. The sentence of death-by-stoning prescribed under the Shari'a code amounts to torture as defined by the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment,³²⁸ to which Nigeria is a party. Nigeria cannot claim to be a firm observer of international law when the Shari'a code, with the attendant death-by-stoning, is still in force in the

³²⁵ See Barrow, *supra* note 206, at 1210.

³²⁶ See *Britain and the Gold Coast: The Early Years*, COUNTRY DATA, <http://www.country-data.com/cgi-bin/query/r-5199.html> (last visited Apr. 20, 2015); Pavani Thagirisa, *A Historical Perspective of the Sharia Project & A Cross-Cultural and Self Determination Approach To Resolving the Sharia Project in Nigeria*, 29 BROOK. J. INT'L L. 459, 487 (2003).

³²⁷ See Barrow, *supra* note 206, at 1213.

³²⁸ Torture Convention, *supra* note 167, art. 1 (defining torture as "any act by which severe pain or suffering . . . is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession, punishing him for an act . . . , or intimidating or coercing him").

northern region.³²⁹ It is on this note that this paper advocates for an abolition of the Shari'a code or its review so as to remove the harsh and inhuman provisions, including the sentence of death-by-stoning.

D. Eliminating Contradictory Approaches to International Law that Violate Nigeria's Existing Obligations

Nigeria should avoid getting involved in any practice that undermines its existing international law obligations—specifically, Nigeria's conduct in entering into a bilateral agreement with the United States which provides that Nigeria may not submit any U.S. citizen to the International Criminal Court for prosecution without the prior consent of the United States. This clearly contradicts Nigeria's existing obligation under the Rome Statute and jeopardizes the international community's effort to combat international crimes, especially those crimes that shock human conscience. Such conduct is deprecated in absolute terms. It is suggested that Nigeria move to rescind its agreement with the United States through the proper channels provided under international law. After all, the United States withdrew from the Rome Statute. Henceforth, Nigeria should resist any pressure, whether in the form of threat or enticement, by any state whatsoever to lure it into agreement that may be inimical to its international law obligations, or even considered illegal under international law.

E. Ditching the Monism-Dualism Dichotomy

An impediment to the application of international law in municipal jurisdictions is the retention of the two major approaches to international law's application in national law: monism and dualism. If international law has attained some universality as argued or is at least attaining universality, then the monism-dualism dichotomy seems to be incompatible with international law. The universality of international law would tend to presuppose or require that international law apply automatically in national law. This in turn would imply that dualism would no longer have relevance in the application of international law by states. Ghana and Nigeria, being dualist states, should discard their dualist approach to international law, which accounts for why they have not accorded international law a befitting place in their domestic courts. When Ghana and Nigeria drop their dualism garment, they would be uninhibited in their enforcement of international law.

Requiring a state to observe or enforce a provision of international law in its domestic jurisdiction only if that provision has been enacted into its law, as is

³²⁹ See Barrow, *supra* note 206, at 1215. Barrow has noted that the Shari'a code violates human rights provisions and contradicts Nigeria's federal constitution as well as numerous international agreements that Nigeria has signed.

espoused by dualism, would defeat the ends of international law, for it has been noted that:

if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules.³³⁰

VII. CONCLUSION

There is little or no difference in the extent to which the courts in Ghana and Nigeria utilize international law. Any difference is a matter of degree and not substance. That many of the international law matters adjudicated in the courts center around treaties is a feature common to both countries. This is the result of the observation made in this article in support of the proliferation of treaties as a source of international law. The courts in both countries are making efforts toward enforcing international law in the domestic fold. However, these efforts are not satisfactory and are circumscribed by the doctrine of separation of powers. The situation does not reflect the fact that both countries are parties to several international law instruments. While the importance of proactive courts to the development of the law cannot be overstated, the limits of such proactivity may not be exceeded. In Nigeria, Section 12(1) of the Constitution has stipulated the manner in which an international treaty can become enforceable in the courts. The main function of the courts is to interpret, not make, laws; more judicial activism in the enforcement of treaties may portray the courts as usurping the power of the legislature. This being the case, the legislatures in the two countries should complement the role of the courts in enforcing international law in their municipal systems by enacting laws that domesticate international law. Presently, the legislatures of the two countries are moving slower than snails to domesticate international law. This contravenes the universal concern for human rights issues, which constitute the major subjects of treaties concluded on the international plane. It is advocated that the processes to make a particular treaty should immediately be matched with legislative actions to domesticate that treaty, such that as soon as the government of each country concludes any international

³³⁰ FOREIGN RELATIONS OF THE UNITED STATES 753 (1888).

treaty, the treaty would be immediately enacted into the municipal law. Such domestication should be expressly done, and not by inference. This would provide certainty as to when a particular international law obligation has in fact been made part of the municipal system and would give the courts a firm ground upon which to enforce international law in the municipal system.

