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ENFORCEMENT OF HUMAN RIGHTS TREATIES IN A MILITARY REGIME: EFFECT OF OUSTER CLAUSES ON THE APPLICATION OF AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN NIGERIA

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I. INTRODUCTION

One remarkable feature of African countries' political dispensation in the 20th century was the proliferation of military dictatorships and the muzzling of democratic principles.¹ The relics of this scenario still haunt these countries even in this century,² and in spite of the new political climate and awareness,³ the military junta still hold their tyrannical sway in some countries.⁴

The paradox of the foregoing situation however is that many of these African countries belong to international institutions such as the United Nations Organisation (UNO),⁵ and the Organisation of African Unity (OAU)⁶ and

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1 Countries affected include Algeria, Burundi, Burkina Faso, Republic of Congo, Central African Republic, Benin Republic, Ghana, Lesotho, Libya, Mali, Niger, Nigeria, Sierra Leone, Somalia, Sudan, Togo, Uganda, and many of them, more than once.

2 Many democratic governments in Africa met on ground negative socio-economic structures put in place by the Military which are difficult to change; some of these countries had former military heads of States imposed as Presidents, while democratic cultures are generally lacking.

3 The last quarter of the 20th century witnessed a strong wave of democratic changes in the political dispensation of many African countries. With military coups outlawed by the OAU and the latter's determination not to recognise such governments, it dawned on sovereign states in Africa that "military rule" is an unknown concept in civilised societies.

4 Such countries include: Libya, Niger Republic, Republic of Congo and Cote d'Ivoire.

5 The United Nations Organisation (UNO) was founded after World War II in 1945. The main objectives being to avert war and promote peaceful co-existence of sovereign states all over the world, and promote the principles of self-determination and of non-interference in the internal affairs of member states, amongst others. Its Charter reaffirmed faith in Human Rights and the dignity and worth of Human persons. A Committee on Human Rights created pursuant to the UN Charter in 1947 came up with an instrument known as the Universal Declaration of Human Rights (see G. A. Res. 217A (III), UN Doc. A/510 A 71 (1948)) which elevated Human Rights into a universal ideal which ideal was subsequently given the force of law by two covenants, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (see G. A. Res. 2200A (XXI) UN Doc. A/516 1966, 99 UNTS 171 and G. A. Res. 2200A (XXI) UN Doc. A/516 (1966), 99 UNTS 3).

6 The Organisation of African Unity (OAU) was founded in 1963. While reaffirming the principles of the UN Charter and of the Universal Declaration of Human Rights, the organisation is meant to foster unity and co-operation amongst African States, promote self-determination and the principle of non-interference in the internal affairs of member states. Its commitment to Human Rights led to the adoption of the African Charter on Human and People's Rights in 1981.

9 *Revue Africaine des Droits de l'Homme* (2000).

subscribed, or at least pay lip service to furthering the aspirations of these institutions towards the promotion, enhancement and enforcement of Human Rights. It is noteworthy for example that as at October 1986 when the African Charter on Human and People's Rights became operational, over thirty sovereign states had ratified the Charter⁷ many of them under different military dictatorships.

It is not clear whether these military regimes were adequately informed of the implications for their repressive regimes and decrees of being signatories to the Human Rights' pact. Being the antithesis of freedom and reason, military dictatorships suspend the Constitution and suppress provisions on Human Rights while ousting the jurisdiction of regular courts to entertain actions or claims meant to challenge their actions, directives or other operations pursuant to their obnoxious laws.

But having ratified a treaty protecting the Rights of its citizens and incorporated same in her domestic laws, can a country under military dictatorship in the same vein oust a jurisdiction of municipal courts to entertain actions thereunder? Does the suspension of the Fundamental Rights provisions under the Constitution of a sovereign state without more amount to a suspension of her international obligations under a Human Rights Charter? And being a signatory to an international pact, can the sovereign state enact laws which amount to a derogation of her obligations in international law? This paper examines the efficacy or otherwise of the African Charter on Human and People's Rights in a military regime and the potency of its enforcement within the context of ouster clauses.

II. MILITARY REGIMES AND HUMAN RIGHTS IN NIGERIA

A military dictatorship is run not in accordance with pre-determined rules and the popular will of the People but in accordance with the whims and caprices of the junta. The constitution is relegated to a subordinate position and the military decrees superimposed on it. The *grundgesetz* is usually the main decree which gives the junta its efficacy and it is usually the test of validity of any other law including the unsuspended provisions of the constitution.⁸ The rule of law and Human Rights are forgotten nomenclatures under the military dictatorship or that vindication of such rights in any court is a non-issue.

In Nigeria, the battle for enforcement of human rights under a military regime had been lost since the aftermath of the Supreme court decision in the popular

7 The ratifying states as at 31 July 1986 were the Republic of Benin, Botswana, Burkina Faso, Central African Republic, Chad, Cameroon, Congo, Egypt, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Rwanda, Sahara Arab Democratic Republic, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

8 In Nigeria, we have had the Constitution (Suspension and Modification) Decree No. 1 (1982), No. 13 of 1984 and No. 167 of 1993 as gross abuses of power which ouster other Decree and Laws derived their validity.

case of *Lalorin v. Attorney General of Western Nigeria*,⁹ without hope of resuscitation. The courts were incapacitated through ouster clauses and the matter became worse by the inability of the courts to invoke international treaties for the protection of such rights in the absence of local statute enacting same as part of Nigerian law.¹⁰

Under the guise of state security, individual right to liberty was violated and indiscriminate arrests made without justification. In Nigeria, State Security (Detention of persons) Decree was enacted in 1984.¹¹ The decree which was later amended by various decrees in subsequent years¹² empowered different state functionaries to issue a detention order against any person engaged in acts prejudicial to state security under the obnoxious decree which is still retained as part of our laws, the detainee is not entitled to information as to the offence committed and may be detained indefinitely without trial at the pleasure of the State.¹³ The situation is not different in other African States ruled by the Military junta.

The hierarchy of laws under military dispensation does not create room for the existence or enforcement of fundamental rights provisions in any constitution or any other human rights treaty in international law. In a recent decision of the Supreme Court of Nigeria in *Labi v. Anetibia*¹⁴ the order of superiority of laws under the military was laid down as follows:

1. Constitution (Suspension and Modification) Decree 1984
2. Decree of the Federal Military Government
3. Unsuspending provisions of the Constitution.
4. Laws made by the National Assembly before December 31, 1983 or having effect as if so made.
5. Edicts of the Governor of a state.
6. Laws enacted before December 31, 1983 by the House of Assembly of a state, or having effect as if so enacted.

9 (1971) 1 UILR p.201. Following the Supreme Court's decision declaring unconstitutional null and void, a Decree of the Federal Military Government which violated the provision of the Bill of Rights, the Government enacted the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 nullifying the court's decision and establishing the Supremacy of the Decree over the Constitution.

10 International treaties have no binding force unless incorporated into the domestic law. See s. 12(1) of the Constitution of the Federal Republic of Nigeria 1979 cap 62 LFN 1990 as re-enacted in the Constitution of the Federal Republic of Nigeria 1999 ss. 12(1).

11 See Decree No 2 of 1984 now State Security (Detention of Persons) Act cap 414 LFN 1990.

12 See State Security (Detention of Persons) (Amendment) Decree No 12 1986, State Security (Detention of persons) (Amendment) Decree, 1988; State Security (Detention of Persons) (Amendment) Decree Nos 23 and 24, 1990; State Security (Detention of Persons) (Amendment) Decree No 11, 1994. The main amendment concerns executive personnel authorised to sign the detention order.

13 To facilitate this design of the Federal Military Government, the Fundamental Human Rights provisions of the Constitution (CFR) is usually made inoperative, while the court's jurisdiction is kept generally. See s. 4 of Decree No 12, 1984. Although the long title in cap 414 LFN 1990 suggests a maximum detention period of 6 months, this is neither reflected in the body of the Law nor in the attitude of the military government.

14 (1992) RNWLR (pt 258) p.179.

The order of superiority of laws under a military regime as highlighted by the Supreme Court has indeed foreclosed any application of the human rights provisions either under the unsuspending provisions of the Constitution (which ranks third in the hierarchy) or indeed under any treaty as incorporated into Nigerian Law by an Act of the National Assembly (which ranks 4th in the hierarchy) since both the unsuspending provisions of the Constitution if it contains human rights provisions, and the Act of the National Assembly incorporating the treaty as part of Nigerian law, are subject to the provisions of any decree of the Federal Military Government including the Constitution (suspension and modification) Decree of 1984 as the *grundnorm* from which source orders in the hierarchy derive their validity as Laws.

III. THE NATURE OF TREATIES

The 1969 Vienna convention on the Law of Treaties¹⁵ defines a treaty as "an international agreement or by whatever name called, e.g. Act, Charter, concordant, convention, covenant, declaration, protocol or statute concluded between states in written form and governed by international law, whether embodied in a single instrument or in one or more related instruments and whatever its particular designation".¹⁶

One significant feature of any treaty in international law is that it is an agreement between sovereign states; the main subjects of international law. Although it is true that citizens of such sovereign states are not usually subjects of international law and cannot therefore seek to enforce same, following this simple rule of international law without recourse to the main object of the treaty may be misleading. While it is axiomatic that a treaty is basically an agreement between sovereign states, its purport may be to benefit citizens within their territorial jurisdiction, and to the extent that such treaties are adopted as part of the domestic law of sovereign states, it becomes translated into a legal obligation on the part of the latter which may be enforced by the citizens in the regular court.¹⁷

Two basic principles apply in the law of treaties to strengthen parties' commitment and make the treaty effective. The first is the principle of *Pacta sunt servanda*,¹⁸ the second, the principle of estoppel. The principle of *Pacta sunt servanda* may be invoked against a sovereign state party to the treaty where there is a violation or manifest departure from the agreement or where the actions of such sovereign state are adjudged to be inconsistent with obligations assumed

15 The convention was based on the draft Articles proposed by the International Law Commission and adopted at the Vienna Conference on the Law of Treaty.

16 See H. Shure's *Laws of England*, 4th ed. Vol. 18 para. 17(6).

17 See Deeming, MB in *Application des Lois SA v. Taha Perdas Ltd.* (1994) 3 ALER p.51 at p.53; Lord Denning, MR in *S. African Airs Guild v. Hain* (1975) 1 ALER p.152 at p.177; *Gigg v. The State* (1984) 9 NWLR (pt. 366) p.1 at pp.26-27.

18 A Latin maxim which means that "agreements of the parties to a contract must be observed". See Black's Law Dictionary 5th ed. 1106.

under the treaty.¹⁹ This principle is particularly useful in the case of obligations assumed under a treaty such as the African Charter on Human and People's Rights to "impose external constraints on the internal affairs of the state involved".²⁰ The principle of estoppel precludes a subject of international law from denying either the truth of a statement made earlier by a duly authorised representative of a state of affairs in which such representative has by word or conduct led others to believe.²¹ The application and enforcement of these principles in regulating the affairs of sovereign states is usually by declaratory judgments by an independent court or tribunal established for that purpose.²²

But no matter how beneficial to the country or the citizenry a treaty may be, it is unenforceable in the municipal courts if it is not enacted into the law of the sovereign state by the legislature. In a recent decision of the Privy Council in *Higgs & Anor v. Minister of National Security & Ors*,²³ The court held that:

In the law of England and the Bahamas the right to enter into treaties was one of the surviving prerogative powers of the crown. Treaties formed no part of the domestic law unless enacted by the legislature.

Domestic courts had no jurisdiction to construe or apply a treaty nor could unincorporated treaty change the law of the land. They had no effect upon citizens' rights and duties on common or statute law.

They might have an indirect effect upon the construction of statutes or might give rise to a legitimate expectation by the citizens that the government, in its acts affecting them, would observe the terms of the treaty.

The implication of the foregoing pronouncement by the Privy Council is that an unincorporated treaty is not enforceable in the domestic courts and *ipso facto*, its provisions cannot have any effect upon rights and duties of citizens although in civilised political dispensation, such unincorporated treaty might have indirect effect upon the construction of statutes or might underline reasonable expectation of citizens of the sovereign state that "the government, in its acts affecting them would observe the terms of the treaty".²⁴

By virtue of section 12(1) of the Constitution of the Federal Republic of Nigeria 1990, "no treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly". Pursuant to that provision, the African Charter on Human and People's Right to which Nigeria is a signatory was incorporated into

19 See E. Bello: *The mandate of the African Commission on Human and Peoples' Rights*, *The African Journal of International Law* (1988) p.31 at p.62.

20 E. Bello *op. cit.*

21 See Schwarzenberger: *A manual of International law*, 4th ed, Vol. 2 (1960) p.683.

22 Apart from Commissions usually set up under treaties, the International Court of Justice (ICJ), particularly has jurisdiction to entertain matters brought before it by Sovereign states signatories in treaty.

23 *The Times*, 23 December 1999.

24 2000 NWLR (pt 660) p.228.

the Nigerian law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act cap 10, Laws of the Federation of Nigeria, 1990.

The Charter gives to citizens of member states of the OAU, rights, and imposes obligations enforceable in the courts under the judicial powers vested in the courts by the constitution. The scope of the Charter covers many rights already enshrined in the constitution which rights are enforceable under the Fundamental Rights (Enforcement Procedure) Rules.

One pertinent question may give rise to controversy on the scope of the Charter. Since many of the provisions of the Charter are *in pari materia* with those under the Constitutional Rights provisions (i.e. Chapter IV of the Constitution), how apt is it to say that a suspension of such Constitutional Rights by the military government without more amounts automatically to a suspension of the provisions of the Charter since the scope of both provisions are substantially the same? This is very crucial in view of the passing comments of Belgore JSC in a recent decision of the Supreme court in the case of *Ahacha v. Fakehinna*²⁵ that the Charter was suspended by implication when the erstwhile military government suspended the Constitutional provisions of the Fundamental Rights by virtue of Decree 107, 1993 and Decree 12, 1994.²⁶ The view of His Lordship was no doubt informed by a canon of interpretation which seeks not to defeat the intention of the law maker.²⁷ It may be argued that since the law maker intended to suppress civil rights of the citizen for the purpose of application of the decree, it would be defeating that intention of the law maker where similar provisions in another law (even though not expressly suspended) is enforceable by the citizen.

But the Charter as incorporated is not an ordinary statute of the National Assembly; it is a covenant imposing obligations on the state in international law and protects the Rights of citizens *de hors* the Constitution. It provides assurance or safeguard against oppression and violation of the rights of citizens of the signatories to the Charter whether or not the State operates by a constitutional government. It could be argued that lack of absolute trust in each state guarantee of those rights informed the resolve by member states of the OAU to further protect those rights by creating international obligations.²⁸ The Charter having being incorporated into the municipal legal system by cap 10 Laws of the Federation of Nigeria, nothing short of an express suspension or abrogation can make it inapplicable and dormant.²⁹ The law is that any legislation which seeks to take away rights of the citizenry must be construed strictly against the law maker;³⁰ it must not only evince the intention of the lawmaker expressly, the

25 *Ibid.*, at 299 para 'E'.

27 See *Onashile v. Sami* (1952) 1 All NLR p.272.

28 In spite of their membership of the OAU, member states were not buying the Rights of their citizens. For example, there were massacres in Burundi in 1972 and 1973, in Idi Amin's Uganda in 1971-79, Matias Nguema's Equatorial Guinea 1963-74 and Bokassa's Central African Republic Empire 1966-79.

29 See *Chandee v. Jinger Overseas* (1987) 1 ER 7 CP p.178.

30 See *Pyl Granite Co. Ltd v. Ministry of Housing and Local Government* (1960) AC p.260 at 268.

words used must be clear and unambiguous.³¹ It follows therefore that the notion of implied suspension is a strange postulation without legal foundation. A treaty is not deemed abrogated or modified by later statute unless such purpose has been clearly expressed.³²

The interpretation and application of the provisions of a treaty should meet international and civilized legal standards.³³ Only legal concepts that are "widely acceptable and of clear certainty in application"³⁴ shall guide the courts in interpreting and applying the provisions of the treaty and the courts shall not be confined within, or constrained by the State's own legal concepts.³⁵ A contrary approach may lead to an uncertain application which varies depending on the different provisions of laws of Member States. The corollary of the above rule of interpretation is the principle that the provisions of an international treaty prevail over the rules of domestic law when they are incompatible.³⁶

A regrettable lacuna in the Charter is the absence of provisions on the procedure to be followed in enforcing the rights thereunder. The functions of the Commission established by the Charter are the promotion and protection of human rights and the exercise of quasi-judicial function.³⁷ There are no provisions made either by the Charter or its Ratification and Enforcement Act for the procedure to be followed in enforcing the rights within a domestic jurisdiction. But to the extent that the Charter has become part of the domestic laws, the Supreme Court of Nigeria held in several decisions that the enforcement of its provisions fall within the juridical powers of the courts as prescribed by the Constitution and other enabling laws.³⁸ Thus, the High Courts having been empowered in this regard,³⁹ a victim of human rights violation seeking to enforce the provision of the Charter may do so in accordance with the rules, practice and procedure of the court or may come by way of an application under the Fundamental Rights (Enforcement Procedure) Rules 1973.⁴⁰

31. *Ibid.*

32. See *Clark v. United States*, 188 102.

33. See *Uwaifo JSC in Abacha & Ors v. Fawehinmi*, *supra* at p.344 para 'H'.

34. *Ibid.*

35. See *Yora Kahn et v. Transworld Airlines Inc.*, 16 *Avap.*, 18, 641; *Abacha & Ors v. Fawehinmi* (*supra*).

36. See *Aero Frete v. Air Cargo Egypt*, *ULR Biannual*, 1987, vol. 2, p.669; *Attorney General v. British Broadcasting Corporation* (1981) AC p.303.

37. The quasi-judicial function entails an investigation by a State or individual with a view to obtaining relevant information and submitting a formal report on the state of affairs to the Assembly of Heads of States and Governments of the OAU.

38. See *Fajimi v. The Speaker, Western House of Assembly* (1962) All NLR (pt.1) p.206; *Ogucu v. The zone* (1984) 9 NWLR (pt. 366) p.1 at pp.26; *Oshioye v. British Caledonian Airways Ltd.* (1990) 7 NWLR (pt. 163) p.207; *UAC (Nig.) Ltd. v. Global Transport SA* (1996) 5 NWLR (pt. 448) p.291; *Ibidapo v. Lufthansa Airlines* (1997) 4 NWLR (pt. 498) p.104.

39. See section 46 of the Constitution of the Federal Republic of Nigeria 1999. See also section 272(1). The Federal High Court has exclusive jurisdiction where the infringement was by the Federal Government or any of its agencies or representatives. See section 251(1) (q) of the Constitution. The proviso to section 251(1) also empowers a person to seek redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.

40. The Chief Justice of Nigeria is empowered to make these rules. See section 46(3) of the Constitution of the Federal Republic of Nigeria 1999.

Also, where appropriate, the procedure for judicial review, or common law or statutory procedure for obtaining declaration, an injunction or damages may be used.⁴¹

IV. OUSTER CLAUSES AND INTERNATIONAL OBLIGATIONS

An ouster clause precludes the court or any other judicial or quasi-judicial body from entertaining any action or claim brought before it on specific matters highlighted, or on any question pertaining to any act or taken or anything done pursuant to the provision of any decree.

The attitude of the Nigerian courts regarding the dispensation of ouster clauses is that once the provision containing an ouster clause is clear and unambiguous the courts should abdicate jurisdiction and refrain from adjudicating over the case.⁴² The courts are not entitled, even when the ouster has drastic effect on the right of any person, to approach its interpretation by a false or twisted meaning given to it by unacceptable restricted constructions.⁴³

But where the country's international obligations is adopted by the municipal law so that it forms a pact between the government and the citizens, can an ouster clause preclude the court from enforcing the international obligation upon an action or claim brought pursuant to the provisions of the relevant treaty? The law is that every statute is to be so interpreted and applied as far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law.⁴⁴ In many foreign jurisdictions, there is a presumption that a statute will not be interpreted so as to violate a rule of international law.⁴⁵ And where the provisions of a convention or treaty are incompatible with the rules of domestic law, the former prevail.⁴⁶ It follows therefore that an ouster clause contained in the municipal law of a sovereign state signatory to the Human Rights treaty shall be construed strictly so as not to violate her obligations at international law since "we cannot afford to be insulated from the progressive movements manifesting themselves in international agreements, treaties, resolutions, protocols, and other similar understanding as well as in the respectable and respected voices of our learned brethren in the performance of their adjudicating roles in other jurisdictions".⁴⁷

41. See *Garden Cottage Ltd. v. Mill Marketing Board* (1984) AC p.10.

42. See *Oche v. A-G Anambra State* (1992) 1 NWLR (pt. 214) p.60.

43. *Ibid.*, at p. 85.

44. See *Blytham v. Fawcett* (1883) 8 P. D. p.101 at p.107 adopting the opinion expressed in *Maxwell on Interpretation of Statutes*.

45. See *Meunier v. Société de droit Jordanien Alia et Société de droit Saoudi Arabian Airlines* (1986) *Uniform Law Review Biannual* vol. II, p.538; *Aero Frete v. Air Cargo Egypt* (1987) *Uniform Law Review Biannual* vol. 2, p.669; *Attorney General v. British Broadcasting Corporation* (1981) AC p.303 at p.354.

46. See *Aero Frete v. Air Cargo Egypt* (*supra*), *Oshioye v. British Caledonian Airlines Ltd.* (1990) 7 NWLR (pt. 163) p.507.

47. Per Agwu JCA in *Attorney General of Biromana v. Diba* (1998) HRLR p.1 at pp.127-128 cited with approval by Uwaifo JSC in *Abacha & Ors v. Fawehinmi* *supra* at p.342-343 paras 'H' and 'A' respectively.

In a recent decision of the Supreme court of Nigeria in *Abacha & Ors v. Fawehinmi*,⁴⁸ the court had an opportunity of construing an ouster clause contained in the decree vis-à-vis certain provisions of the African Charter on Human and Peoples' Rights. In that case, the respondent, a legal practitioner, was arrested without warrant at his residence on 30 January 1996 at about 6 a.m. by six men who identified themselves as operatives of the state security service (SSS) and policemen, and taken away to the office of the SSS at Shangisha in Lagos where he was detained. At the time of his arrest, the respondent was not informed of, nor charged with any offence. He was later detained at the Bauchi Prisons. Consequently, he applied *ex-parte* through his counsel to the Federal High Court Lagos pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for a declaration that his arrest and detention was a violation of the Fundamental Rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act cap 10 Laws of the Federation of Nigeria 1990 and therefore illegal and unconstitutional. Having been granted leave, the respondent applied by Motion on Notice for the said reliefs. On being served with the Motion papers, learned counsel for the appellant filed a Notice of Preliminary Objection that the respondent could not maintain the action against the appellants on the ground that the court lacked competence to entertain it. The appellant's argument amongst others were that the Federal Military Government (Supremacy and Enforcement) of Power Decree No. 12, 1994 and the Constitution (Suspension and Modification) Decree No. 107 ousted the jurisdiction of the court to entertain any civil proceedings arising from anything done pursuant to the provision of any decree. Consequently it was argued, the court lacked jurisdiction to entertain any action relating to the enforcement of any provisions of Chapter IV of the 1979 Constitution (as amended) and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. The court held, *inter-alia*, that although the Charter possessed a greater vigour and strength than any other domestic statute, it was not superior to the Constitution nor could its international flavour prevent the National Assembly or the Federal Military Government from removing it from the body of municipal laws by repealing the enabling legislation incorporating it; nor is validity of another statute necessarily affected by the mere fact that it violated the African Charter or any other treaty for that matter.⁴⁹ However, to the extent that the decree ousting the court's jurisdiction did not expressly repeal cap 10 LFN 1990 the enabling statute incorporating the Charter, nor oust the court's jurisdiction to entertain actions seeking to enforce the rights under the Charter, the court held that the court's jurisdiction was not ousted.

The gravamen of the Supreme court's decision in the case of *Abacha & Ors v. Fawehinmi*⁵⁰ particularly borders on the construction of the scope and limitation of

an ouster clause to wit: whether the enabling Act incorporating the Charter had been abrogated by the decree. The court noted that while Chapter IV of the Constitution on Fundamental Rights was suspended for the purpose of the Act, no mention was made of cap 10 LFN 1990 incorporating the Charter. Following established principles, the court held that a treaty is not deemed abrogated or modified by later statute unless such purpose has been clearly expressed in the later statute.⁵¹ The court reinforced its position by relying on sections 16(1) and 17 of the Constitution (suspension and modification) Decree No. 107 of 1993 which preserved all existing laws including Acts of the National Assembly until such is altered or modified.⁵²

Taking a *juris de jure* view of the Supreme court's decision in *Abacha & Ors v. Fawehinmi*⁵³ would reveal that the decision basically stands as authority for two main propositions:

1. That the provisions of the Charter are justiciable on the ground that the Act incorporating same has not been abrogated. On this, the court held that the provisions of sections 16(1) and (2) and 17 of the Constitution (suspension and modification) Decree No. 107 1993, cap 10 LFN 1990 remained in force "as it was never at any time altered by the Provisional Ruling Council nor was there any need for its modification to bring it into conformity with the 1979 Constitution (as amended, suspended or modified) or any Decree made after the commencement of Decree No. 107 of 1993".⁵⁴
2. That the ouster clause in section 4(1) and (2) of Decree No. 12 1994 did not apply to the facts of the case as the Appellant never acted or purported to act pursuant to any such Decree. As the court itself pointed out:

Ouster of court's jurisdiction is not a matter of course. For the court's jurisdiction to be ousted, it must be clearly shown that a particular action falls within the ouster clause. That is not the case here. With respect to their Lordships of the court below, I am not impressed by the views expressed by them on the failure of the appellants to tender in evidence the detention order they relied on. The conclusion I reach is that on the record before us, Decree No. 12 of 1994 does not apply.⁵⁵

To the extent that the decision of the court was basically hinged on these two propositions, it cannot be faulted as the court, in different segments of the judgement, merely restated principles as earlier established by the court in line with the rule of *stare decisis*. The position of the court on the question whether an ouster clause where applicable, can bar a victim of Human Right violation from enforcing his rights under the provisions of the Charter is not too clear.⁵⁶

48 *Ibid.*, at p.292 para 'B'.

49 *Ibid.*, at pp.292-93 para 'E', 'H' and para 'A', 'C' respectively.

50 *Supra*.

51 *Ibid.*, at p.291 para 'C', 'D'.

52 *Ibid.*, at p.295 para 'E', 'F'.

53 The argument of Mohamed ISC at pp.301-302 para 'H', 'D' that the Court of Appeal's decision that an ouster clause cannot bar a victim of Human Rights violation from enforcing his rights under the Charter, would elevate the Charter above the Constitution is not too convincing.

48 [2000] 1 WLR (pt. 661) p.278.

49 *Ibid.*, at p.289 para 'E', 'F'.

50 *Supra*.

V. THE REAL QUESTION

The real question is whether an ouster clause has a place in the African Charter on Human and Peoples' Rights. The Charter no doubt imposed international obligations on the member states to promote and protect individual rights of their citizens. The trend in the area of Human Rights is that "the citizen of a particular state is no less a citizen of all other states and each citizen is entitled to due process of law and the equal protection of laws from all State Governments".⁵⁷ It is the realization that human rights are too fundamental to be left to the whims and caprices of those who assume leadership that states declare their common concern and legal interest.⁵⁸

The background to the drafting of the African Charter on Human and Peoples' Rights is instructive. Following the independence of many African States, the gains of independence could not be harnessed and the high hopes of the citizenry dashed with the incursions of military regimes in different parts of the continent. Human Rights abuses by governments against the citizens thrived and was sustained through State sovereignty and the principle of non-interference in domestic jurisdiction "to the extent of excluding external concern for Human Rights breaches".⁵⁹ The pressures from the international community, the increasing demand for the provision of institutional safeguards for human rights at international level by other member states of the OAU and other contributory factors such as the establishment of European and American Commissions on human rights, the Helsinki Final Act of 1975, attempt to incorporate respect for human rights in the EEC-ACP Pact, Lomé II - all culminated in the change in the perception of the OAU.⁶⁰ The idea that domestic jurisdiction ends where international responsibility begins became a norm of international relations amongst member states of the OAU and the need to check human rights abuses within the domestic jurisdiction of member states became a matter for concern requiring firm commitment on the part of member states towards the promotion and protection of their citizens' rights.⁶¹

In the quest to fulfil the reasonable expectation of the citizenry, assure and guarantee their liberty and freedom within the territorial jurisdiction of a member State, States are presumed to submit themselves to a legal order within which they assume various obligations for the common good. Thus, anything done under the municipal system which undermines the guaranteed rights under the Charter or render them nugatory is null and void. This view is buttressed by Article 27 of the 1969 Vienna Convention on the Law of Treaties which provides

⁵⁷ See M. Waaleem "The Domestic Application of International Human Rights Norms in Developing Rights Jurisprudence", *Judicial Colloquium in Bangalore*, 24th-26th February 1988, pp. 103-104.

⁵⁸ See Umozurike O. *Nigeria and the African Charter*, *Constitution* 18 (p. 3) *Journal* vol. 3, No. 24 January-March 1993, p. 26.

⁵⁹ See Umozurike O. *The protection of Human Rights under the Revised African Charter on Human and Peoples' Rights*, *The African Journal of International Law*, pp. 64-67.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

that "a party may not invoke the provisions of its internal law as jurisdiction for its failure to perform a treaty".

Once incorporated into the municipal law of a member state of the OAU, the African Charter on Human and Peoples' Rights is binding irrespective of the character of its government. Such treaties cannot be placed on the same pedestal with other Acts of the National Assembly and cannot be subsumed under the hierarchy of municipal laws for, it is a higher law with international flavour beyond the domestic jurisdiction of any single State. Thus, the Court of Appeal appears to have stated the correct position in the same case⁶² when Mustapha JCA who read the lead judgment held that:

The provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiya v. Aweriata* (1992) 8 NWLR (pt. 258) p. 39. It is the common place that no Government will be allowed to contract out by local legislation, its international obligations ... [and] notwithstanding the fact that cap 10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No. 107 of the 1993 or No 12 of 1994 cannot affect its operation in Nigeria ... while the Decrees of the Federal Military Government may override other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon pertaining to Human Rights under the African Charter. They are protected by the International Law and the Federal Military Government is not legally permitted to legislate out of his obligations.⁶³

Although overruled by the Supreme Court subsequently, the foregoing proposition of law provides the rationale for the enforcement of the Charter in any event. Besides, the Charter is not only an international pact creating obligations as between sovereign states, but essentially a contract between the state and its citizens irrespective of the government in power. A revolution may involve an overthrow of the pre-existing legal order,⁶⁴ but the State remains unaffected and continues to be bound by her obligations under any treaty. It is pertinent for the purpose of clarity to distinguish between a State and its government for, while the latter may change, the former remains unaffected. Not only is the government bound by a treaty contracted by the State where same has been incorporated into the municipal law, any government is estopped from denying the truth of a statement made earlier by a duly authorised representative or a state of affairs in which such representative has by word or conduct led

⁶² (1996) 9 NWLR (pt. 475) p. 710.

⁶³ *Ibid.*, at p. 947. See also the judgments of M.O. Mohamed and P.O. Achifunwa JCA at pp. 596 and 616 respectively in support.

⁶⁴ See Nelson, "General Theory of Law and State" (1945), pp. 111-18.

others to believe.⁶⁵ "The word representative" as used here means the government representing the sovereign state; military or democratic.

There cannot be a conflict between such incorporated treaty and the Nigerian Constitution as pointed out by Mohammed JSC in his judgment,⁶⁶ for not only has the treaty been recognised and its provisions made enforceable through a process contemplated by the Constitution itself,⁶⁷ the latter, having been made subject to military decrees, cannot be the Supreme law under a Military regime.⁶⁸ A stronger argument goes that notwithstanding the Supremacy of Military Decrees, any ouster clause contained therein cannot affect the provisions of an incorporated Charter and the Military government is estopped from denying obligations of the State entered into by its representative; the State being above any government at any time. It also follows therefore that anything done or purported to be done by a government (including the enactment of ouster clauses) in derogation of such treaty is null and void.

The decisions of Nigerian Courts appear to be in support of the foregoing propositions. In *Registered Trustees of the Constitutional Right Project (CRP) v. President of the Federal Republic of Nigeria & Ors*,⁶⁹ the court held that the African Charter on Human and People's Rights being an International treaty, is superior to local legislation including the Decree of the Federal Military Government. And in *Akinola v. Babangida & 3 Ors*,⁷⁰ it was held that the applicant had *locus standi* to institute the action and that the court had jurisdiction to hear the case by virtue of the incorporated African Charter on Human and Peoples' Rights notwithstanding the ouster jurisdiction contained in Decree No. 43 of 1993. The *raison d'être* underlining the decisions of the courts is contained in *Oshievire v. British Caledonia Airways Ltd*,⁷¹ that:

International treaty is an expression of agreed compromise principles by the contracting states and in general autonomous of the municipal laws of contracting states as regards its application and construction. It is useful to appropriate 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 thereafter above domestic legislation. Thus every domestic legislation in conflict with the convention is void.

The Charter and any such treaty is an autonomous body of laws to be construed in the light of its general provisions, object, and context, and its interpretation and application subject to international rules and standards.⁷² Any

65 See Schwarzenberger, *op.cit.*

66 See footnote 55.

67 Sec 12(1) of the Constitution of the Federal Republic of Nigeria 1999.

68 See *Lalji v. Anretick* (*supra*).

69 Suit No. M/102/93 Lagos High Court (unreported).

70 Suit No. M/462/93 Lagos High Court (unreported).

71 (1990) 1 NWLR (pt. 163) p.489.

72 See Uwaiso JSC in *Abacha & Ors v. Fawehinmi* (*supra*).

domestic law which seeks to water down its provisions or impair its enforcement is null and void and should be so declared by a court of competent jurisdiction.

VI. CONCLUSION

It is the position of this paper that when a decree or any other law seeks to oust the jurisdiction of the court with regards to the enforcement of the African Charter on Human and People's Rights or any other Human Rights Charter where incorporated, the actual question is not necessarily a construction of the said ouster clause to ascertain its scope and limitations vis-à-vis the provisions of the Charter, or whether the defendant followed the appropriate procedure in exercising the relevant powers under an obnoxious legislation containing the ouster clause as the Supreme court did in *Abacha & Ors v. Fawehinmi*,⁷³ but to see the ouster clause basically as a conflict and to axe it down without qualms. The decision of the Supreme Court in *Abacha & Ors v. Fawehinmi*⁷⁴ should be construed in the light of the peculiar facts and circumstances of the case.

73 *Supra*

74 *Supra*