



## AN APPRAISAL OF THE INTERNATIONAL LEGAL FRAMEWORK ON THE RIGHT TO STRIKE AND ITS PLACE IN NIGERIAN LAW

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### ABSTRACT

*This article examines the international legal framework on the right to strike and its position in Nigerian law. The article considers the various international conventions and treaties which are applicable in Nigeria and how the right to strike is protected therein. The article argues that while some labor laws are in line with international labor conventions, the right to strike is still not adequately protected in Nigerian law. The article concludes by proposing that Nigerian labor laws should be further amended in order to bring them in line with international labor standards.*

### INTRODUCTION

This article examines the international framework for the protection of the right to strike and their status in Nigerian domestic law. The article focuses, first, on the various international human rights instruments dealing with the protection of the right to strike, the right to freedom of association and the right to collective bargaining. This part of the article demonstrates, in particular, the recognition of the right to strike in international law as a crucial weapon for the protection of workers' rights. This is followed by a discussion of the status of the international legal framework in Nigerian domestic law. This part establishes that, although Nigeria has ratified the relevant international conventions and instruments dealing with the right to strike, these conventions and instruments are not binding on Nigeria until they are specifically incorporated into Nigerian law by enabling domestic legislation. However, it is argued that international conventions and instruments can be applied indirectly by the courts as an aid to interpretation. In addition, international instruments and conventions can also apply automatically where they have reached the point of recognition as part of customary international law. It is further argued that the ILO principles on freedom of association have attained the status of customary international law and should therefore be regarded as part of Nigerian jurisprudence.

### THE INTERNATIONAL LEGAL FRAMEWORK

Nigeria is a member of the International Labour Organization (ILO)<sup>1</sup> and has ratified both the ILO Freedom of Association and Protection of the Right to Organize Convention 1948 (No.

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87) and the Right to Organize and Collective Bargaining Convention 1949 (No. 98).<sup>2</sup> Nigeria has also ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>3</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> Accordingly, Nigeria is bound by these instruments to protect the right to strike.

### **Sources of the Right to Strike in International Law**

International consensus on the status of the right to strike as a fundamental human right has evolved.<sup>5</sup> A number of human rights instruments acknowledge the existence and protection of the right to strike at the international level. The following sections examine the sources of the right to strike in international law.

The International Covenant on Economic, Social and Cultural Rights (ICESCR): The international Covenant on Economic, Social and Cultural Rights (ICESCR) is the major international human rights instrument which explicitly recognises the right to strike in Article 8(1)(d) which provides that ‘The State Parties to the present Covenant undertake to ensure... The right to strike, provided that it is exercised in conformity with the laws of the particular country.’ It is worthy of note that Article 2(1) of the Covenant provides that ‘Each State Party to the present Covenant undertakes to take steps, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including the adoption of legislative measures.’

Although the ICESCR provides for the right to strike, this is not without limitations or restrictions. Article 8(1)(d) ensures the right to strike, ‘provided that it is exercised in

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<sup>1</sup> See: ILO: Alphabetical List of ILO Member Countries, available at <<http://www.ilo.org/public/english/about/iloconst.htm>> (4 January 2009). The ILO was founded in 1919 at the Paris Peace Conference to abolish ‘injustice, hardship and privation’ suffered by workers and to guarantee fair and humane conditions of labour. The ILO was founded in 1919 at the Paris Peace Conference to abolish ‘injustice, hardship and privation’ suffered by workers and to guarantee fair and humane conditions of labour. See ILO Constitution, Preamble and Annex, at <<http://www.ilo.org/public/english/about/iloconst.htm>> (4 January 2009).

<sup>2</sup> Both Conventions were ratified on 17 October 1960. See ILO, List of Ratifications of International Labour Conventions, at <<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?lang=EN&CTYCHOICE=2020>> (2 February 2009). See also: *Official Bulletin of the ILO*, vol. XLIII (No. 7) of 1960, 524.

<sup>3</sup> Ratified by Nigeria on 29 July 1993, available at the Office of the High commissioner for Human Rights <<http://www.unhchr.ch/TBS/doc.nsf/22b020de61f10ba0c1256a2a0027bale/80256404004ff315c125638b005e3739?OpenDocument>> (2 February 2009).

<sup>4</sup> Ratified by Nigeria on 29 July 1993, available at the Office of the High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/ratification/4.htm>> (2 February 2009).

<sup>5</sup> O Kahn-Freund and B A Hepple, *Laws against Strikes: International Comparisons in Social Policy* (Fabian Research Series, 1972), 4; R Ben-Israel, *International Labour Standards: The Case of the Freedom to Strike* (Demeter: Kluwer, 1988), 13 – 33; T Novitz, *International and European Prevention of the Rights to Strike* (Oxford University Press, 2003), 4 – 5.



conformity with the laws of the particular country.’ Thus the right to strike is subjected to the laws of particular countries which can lawfully impose restrictions on its exercise.

The Covenant does not provide for specific purposes or for the extent of such legal restrictions.<sup>6</sup> It seems therefore that the strictness or flexibility that might be imposed will differ from one municipal jurisdiction to the other. It is arguable that such discretion given to the municipal legislature could engender serious limitations or restrictions on the right to strike by a state that is not disposed to allow the right to strike to flourish. However, the ICESCR, Article 8(3) appears to provide some safeguards. It prescribes that state parties to Convention No. 87 are not authorised to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention. By this provision the right to strike may not fall below the ILO standards in the case of States that are bound by these standards. Consequently, any limitations that might be placed on the right to strike by the specific law of particular countries must be in conformity with the standards set by the ILO Conventions and Recommendations.<sup>7</sup> Furthermore, the ICESCR expressly provides that these restrictions should be determined by law and only insofar as they are compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.<sup>8</sup> Mention can also be made of the general safeguard which the ICESCR, Article 5(2) seems to provide. According to Article 5(2), ‘No restrictions on the fundamental human rights existing in any country shall be admitted on the pretext that the Covenant recognises such right to a lesser extent.’ This article is labeled as the ‘most-favourable-to-individual clause’<sup>9</sup> and its purpose is to ensure that the Covenant is not used as a ground for denying other more favourable rights which individuals might otherwise enjoy under international law or under national law and practice. This article seems to secure the ILO standards of the right to strike since it does not allow its denial by any claim that the Covenant’s right to strike is narrower.

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<sup>6</sup> One guideline provided in Article 8(2) is one which permits restriction of the right to strike of members of the armed forces, or the police or the administration of the state. Article 8(2) reads: ‘This Article shall not prevent the imposition of lawful restrictions on the exercise of the rights by members of the armed forces or of the police or of the administration of the state.’

<sup>7</sup> Especially the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention 1949 (No. 98).

<sup>8</sup> Article 4.

<sup>9</sup> Louis B Sohn, ‘The Human Rights Law of the Charter’ [1977] (12) *Texas International Law Journal*, 137; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2000), 8; M Nowak, *The UN Covenant on Civil and Political Rights: CCPR Commentary*, (NP Engel Publishers, 1993), 100; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, 1991), 19.



Right to Strike and the International Labour Organisation (ILO): The ILO is the United Nation's Agency responsible for upholding global labour standards. The ILO was established in 1919 as a specialised agency of the United Nations and it is the most prominent and most important international organisation of representatives of management, governments and labour in the whole world.<sup>10</sup> The ILO's chief role is to formulate international standards in the field of employment and social security for workers, and to monitor compliance by member states.<sup>11</sup> These standards are agreed upon by governments and are acknowledged globally as a code of 'best practice.'<sup>12</sup> In this way, the ILO acts as the global repertory and watch-dog of labour standards.<sup>13</sup> It seems surprising, however, that the right to strike is not expressly recognised or provided for in any of the ILO Conventions and Recommendations.

Gernigon *et al*<sup>14</sup> contend that the word 'right to strike' appears only incidentally in the Convention on the Abolition of Forced Labour<sup>15</sup> which prohibits the use of forced or compulsory labour as a punishment for participating in strikes.<sup>16</sup> The 'right to strike' is also contained in the Voluntary Conciliation and Arbitration Recommendation<sup>17</sup> which declares that none of its provisions is to be interpreted as limiting in anyway whatsoever the right to strike.<sup>18</sup>

However, the absence of explicit provisions does not mean that the ILO disregards the right to strike or refuses to deal with the appropriate means of safeguarding its exercise.<sup>19</sup> The ILO does recognise that workers organisations have several means available to them for the defence of the economic and social interests of their members. These means include the right to strike which can at times cause prejudice to the employer.<sup>20</sup>

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<sup>10</sup> D L Gregory, 'The Right to Unionize as a Fundamental Human and Civil Right' [1988] (9) *Mississippi College Law Review*, 135.

<sup>11</sup> A Wisserkirchen, 'Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience' [2005] (144)(3) *International Law Review*, 253.

<sup>12</sup> *ibid*.

<sup>13</sup> *ibid*.

<sup>14</sup> J Gernigon, Alberto Otero and Horacio Guido, 'ILO Principles Concerning the Right to Strike' [1998] (137)(4) *International Labour Review*, 441; Jane Hodges-Aeberhard and Otero de Dios, 'Principles of the Committee on Freedom of Association Concerning Strikes' [1987] (126)(5) *International Labour Review*, 543.

<sup>15</sup> Convention No. 105, 1957.

<sup>16</sup> See Article 1(d).

<sup>17</sup> No. 92 of 1951.

<sup>18</sup> *ibid*, Para. 7.

<sup>19</sup> The right to strike was mentioned several times in that part of the report describing the history of the problem of freedom of association and outlining the survey of legislation and practice. See ILC, 30<sup>th</sup> Session, 1947, Report VII, *Freedom of Association and Industrial Relations*, 30, 31, 34, 46, 52, 73 – 74.

<sup>20</sup> *ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations: IL Conference*, 69<sup>th</sup> Session, 1983, Para. 199.

Significantly, two resolutions of the International Labour Conference which provided guidelines for ILO policy emphasise recognition of the right to strike in member states. The first resolution; Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation, called for the adoption of ‘laws... to ensure the effective and unrestricted exercise of trade union rights, including the right to strike by workers.’<sup>21</sup> The second resolution, Resolution Concerning Trade Union Rights and their Relation to Civil Liberties, called for action in a number of ways ‘with a view to considering further measures to ensure full and universal respect for trade union rights in their broadest sense’, paying particular attention, *inter alia*, to the right to strike.<sup>22</sup> In addition, the ILO guarantees which extend to workers against acts of discrimination based on their trade union activities is another indication of the protection of the right to strike.<sup>23</sup>

It is not only the above-cited pointers which demonstrate the importance of the right to strike in labour relations. The Freedom of Association and Protection of the Right to Organise Convention guarantees the right of workers without restriction, to organise their administration and activities and to formulate their programmes.<sup>24</sup> The question here is whether strike action constitutes trade union activity. It is submitted that there is little doubt that it does, considering how ineffective trade unions would be without their most potent weapon.

The ILO standards governing the right to strike are also inferred from the decisions of the ILO supervisory bodies, in particular those of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Governing Body Committee on Freedom of Association (CFA).<sup>25</sup> The CFA believes that strikes are part and parcel of trade union activities.<sup>26</sup> The right to strike, both of workers and their organisations, is generally recognised by the CFA, not only as a legitimate means of defending their occupational interests, but as an essential one.<sup>27</sup> As the CEACR has further elucidated:

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<sup>21</sup> ILO, 1957, 783.

<sup>22</sup> ILO, 1970, 735 – 736; B Gernigon, A Otero, and H Guido, ‘ILO Principles Concerning the Right to Strike’ [1996] (137)(4) *International Labour Review* 1; J Hodges-Aeberhard and Alberto Otero De Dios, ‘Principles of the Committee on Freedom of Association Concerning Strikes’ [1987] (126)(5) *International Labour Review*, 543 and 545.

<sup>23</sup> *ILO: Digest of Decisions and Principles of the Freedom of Association Committee* Fifth edition (Geneva: International Labour Office, 2006), Paras. 661 – 662.

<sup>24</sup> No. 87 of 1948.

<sup>25</sup> *ILO: Digest of Decisions and Principles of the Freedom of Association Committee* Fifth edition (Geneva: International Labour Office, 2006), Paras. 520 – 676.

<sup>26</sup> *ibid*, Para. 521.

<sup>27</sup> (n25), Para, 522.

The committee considers that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with obtaining better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.<sup>28</sup>

Furthermore, the ILO Supervisory bodies have always referred to the right to strike when they have considered applications of Articles 3,<sup>29</sup> 8,<sup>30</sup> and 10<sup>31</sup> of the Right to Organise Convention 1948 (No. 87) by the various member states. These bodies have reaffirmed the principle of the right to strike subject only to the reasonable restrictions that might be imposed by the law.<sup>32</sup>

The ILO does not, however, regard the right to strike as an absolute right and has created some exceptions. There are three clear exceptions. The first concerns the right of members of the police and armed forces to strike. The ILO accepts that the members of the police and armed forces can be denied the right to strike. They are thus, excluded from the ambit of Convention No. 87 from which the right derives.<sup>33</sup> The CFA has refused, therefore, to object to legislation banning strikes by such personnel.<sup>34</sup> The second exception is that certain employees in the public sector may be prohibited or restricted from exercising the right to strike provided this only covers those public servants ‘exercising authority in the name of the State.’<sup>35</sup> The CFA and the CEACR have declared, however, that, if public servants are not allowed to strike, they should be given adequate guarantees that their interests will be protected, for example through appropriate impartial and speedy conciliation

<sup>28</sup> *ILO: Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, Report 111(4B), International Labour Conference 69<sup>th</sup> Session (Geneva: International Labour Office, 1983), Para. 200.

<sup>29</sup> Article 3 lays down the right of workers’ organisations to organise their activities and to formulate their programmes freely and states that the public authorities shall ‘refrain from any interference which would restrict this right or impede the lawful exercise thereof.’

<sup>30</sup> Article 8 provides that the law of the land which organisations and their members must respect must not ‘be such as to impede, nor shall it be applied as to impair, the guarantees provided for in this Convention.’

<sup>31</sup> Article 10 stipulates that the term ‘organisation’ means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

<sup>32</sup> *ILO: Freedom of Association and Collective Bargaining*, Report 111, IL Conference, 69<sup>th</sup> Session, Geneva, 1983, Paras. 199 – 223.

<sup>33</sup> Article 9 (I) of Convention 87 allows national laws or regulations to determine to what extent the armed forces and the police are to be covered by the guarantees provided for in the Convention.

<sup>34</sup> *ILO: Digest of Decisions and Principles of the Freedom of Association Committee* (International Labour Office, Geneva, 1985), Para. 227.

<sup>35</sup> *ILO: Digest of Decisions and Principles of the Freedom of Association Committee* Fifth (Revised) edition (International Labour Office, Geneva, 2006), Para. 573.





and arbitration procedures in which the parties concerned are able to take part at every stage, with the arbitration decisions being binding on both parties and being applied in full, and speedily.<sup>36</sup> The third exception relates to employees in ‘essential services’, which are restrictively defined as services ‘whose interruption would endanger the life, personal safety or health of the whole or part of the population.’<sup>37</sup> The CFA has pointed out, however, that, if national legislation denies workers in essential services the right to strike, they should be given adequate protection to compensate for the limitations thereby placed on their freedom of action.<sup>38</sup> Outside these exceptions, a general prohibition or restriction of the right to strike is contrary to international labour law.

Despite the potential of the ILO as a tool to enforce international labour standards, there are significant weaknesses in its practical application. While member states have an obligation to ensure the right to strike and other labour rights, the ILO does not have authority to enforce compliance.<sup>39</sup> Indeed, it has been said that ‘the ILO has no teeth,’<sup>40</sup> because it could not effectively enforce compliance by member states.<sup>41</sup>

Another weakness of the ILO is its susceptibility to political considerations and dynamics.<sup>42</sup> As an international organisation representing states, as well as employee and employer associations, the ILO has often found its deliberations so politicised that effective action became impossible.<sup>43</sup> This is a significant concern which often prevents the ILO from taking stronger measures against those states guilty of freedom of association violations.<sup>44</sup> However, despite the drawbacks, the ILO has been effective in holding governments

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<sup>36</sup> (n35), Paras. 595 and 596.

<sup>37</sup> *ibid*, Para. 583.

<sup>38</sup> *ibid*, Para. 583.

<sup>39</sup> F Maupin, ‘Is the ILO Effective in Upholding Workers’ Rights?: Reflections on the Myanmar Experience’ in P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005), 86; L.A. Visano and N.A. Bastine, ‘Law and the Culture of Capital: A Critical Perspective on Labour’s Right to Associate in Developing Societies’ [2002] (18)(1) *Journal of Developing Societies*. 1; International Standards and Workers’ Rights in APEC Countries <<http://www.dd-rd.calsite/publications!index.php?id 131 4&page=3 &subsection>> (17 February 2009).

<sup>40</sup> F Maupin, ‘Is the ILO Effective in Upholding Workers’ Rights? Reflections on the Myanmar Experience’ in P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005), 86.

<sup>41</sup> *Ibid*.

<sup>42</sup> L A Visano and N A Bastine, ‘Law and the Culture of Capital: A Critical Perspective on Labour’s Right to Associate in Developing Societies’ [2002] (18)(1) *Journal of Developing Societies*, 1; International Standards and Workers’ Rights in APEC Countries <<http://www.dd-rd.ca/site/publications/index.php?i d=1 31 4&page3&subsection>> (17 February 2009).

<sup>43</sup> *ibid*.

<sup>44</sup> See F Maupin, ‘Is the ILO Effective in Upholding Workers’ Rights?: Reflections on the Myanmar Experience’ in P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005), 86.



accountable based upon its ability to investigate and publicize governmental infractions.<sup>45</sup> Indeed, it would appear that the ILO has the capacity not only to bark but also to bite.<sup>46</sup> Where serious complaints are lodged with the ILO by non-state actors, pursuant to Article 26 of the ILO Constitution, the Commission of Inquiry is appointed to examine the alleged violations and to make a report. A state which fails to abide by the decision of the Commission of Inquiry can be sanctioned under Article 33 of the ILO constitution –this could involve some forms of internal sanctions such as a ban on technical cooperation and trade sanctions on the erring state. The threat of, or the implementation of, measures under Article 33 is a serious matter for any state and this will invariably force such a state to redress the alleged violations of human rights.<sup>47</sup> This was the course of action taken against the state of Myanmar in 2000. This action had a measurable impact and succeeded in forcing the state of Myanmar to redress alleged human rights violations.<sup>48</sup>

A similar course of action was taken by the ILO against Nigeria in 1997.<sup>49</sup> Following persistent and serious violations of international labour standards and the harassment of trade unionists, on August 17 1997 a four-person ILO team visited Nigeria for one week of fact-finding in respect of serious allegations of disregard for workers' rights and violations of ILO Convention No. 87.<sup>50</sup> This eventually led to the government dropping charges against 21 strike leaders in Kaduna who had criminal charges pending against them for exercising the right to strike. Indeed the Commission of Inquiry is one of the most serious steps the ILO can take against a government that has failed to observe the provisions of a convention.<sup>51</sup> The Myanmar and Nigerian experiences therefore provide empirical evidence which confirms the preparedness of the ILO not only to bark but also to bite. As Maupin has noted, 'the old lady

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<sup>45</sup> (n44).

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

<sup>48</sup> See Report of the Commission of Inquiry established to examine the complaint concerning the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), made by delegates to the 83<sup>rd</sup> Session (19996) of the International Labour Conference under Article 26 of the Constitution of the ILO, Governing Body, GB.273/5273<sup>rd</sup> Session Geneva, November 1998. For an excellent account of the success story of enforcement of international treaties by the ILO, see F. Maupin, 'is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanniar Experience' in P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005), 85-142.

<sup>49</sup> Nigerian Labour Practices Under Scrutiny: ILO Governing Body Establishes Commission of Inquiry <[http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang--en/WC\\_MS\\_007974/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WC_MS_007974/index.htm)> (17 February 2009).

<sup>50</sup> *ibid.*

<sup>51</sup> The Commission of Inquiry is a final recourse in the ILO supervisory system. The decisions of the Commission are not subject to appeal by any ILO body. In the event of an unfavourable finding on its labour practices, a country's only recourse would be to the International Court of Justice.





[ILO] that appeared to have been born without teeth seemed to be growing them exactly as she passed her 80th year with respect to Myanmar!’<sup>52</sup>

## THE INTERNATIONAL LEGAL FRAMEWORK AND NIGERIAN DOMESTIC LAW

As has been mentioned, Nigeria has ratified the relevant international instruments which guarantee the protection of the right to strike, such as the ILO Conventions Nos. 87 and 98, and the ICESCR. In international law, a treaty ratified by a state becomes binding on that state to fulfil all the obligations arising under that treaty. This is in line with the principle of *pacta sunt servanda*, which provides that, ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’<sup>53</sup> Moreover, a party may not invoke the provisions of internal law as a justification for its failure to perform a treaty.<sup>54</sup> Nigeria is therefore under an obligation to respect, protect and fulfill the rights guaranteed under these international legal instruments in strict fidelity to this principle. However, the question of the domestic application of such international instruments is a different issue altogether. Can individuals invoke international law norms before domestic courts? Can they gain rights under international law which they can enforce within the municipal legal system? This section considers the question of enforceability and the place of international instruments in Nigerian law.

### Theories of Monism and Dualism

The two principal theories regarding the relationship between international and domestic law are monism and dualism.<sup>55</sup> These theories help to articulate the precise status and role of international instruments in municipal law. Monism is the theory that international and domestic law form part of the ‘one legal order or system of norms binding states and

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<sup>52</sup> F Maupin, ‘Is the ILO Effective in Upholding Workers’ Rights? Reflections on the Myanmar Experience’ in P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005), 86.

<sup>53</sup> Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January, 1980 <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)> (15 January 2009).

<sup>54</sup> *ibid*, Article 27.

<sup>55</sup> I Brownlie, *Principles of International Law* (Clarendon Press, 1990), 32-35; I A Shearer, *Starke’s International Law* (Butterworths, 1994), 63-67; M N Shaw, *International Law* (Cambridge University Press, 1997), 98-102; R. Jennings and A. Watts, *Oppenheim’s International Law* (Longman, 1992), 53-54; C J R. Dugard, ‘International Law is Part of Our Law’ [1971] *South African Law Journal*, 36-37; U O Umozurike, *The African Charter on Human and Peoples’ Rights* (Martinus Nijhoff, 1997), 107-109; J G Starke, ‘Monism and Dualism in the Theory of International Law’ [1936] (17) *British Yearbook of International Law*, 70.



individuals alike, their rules being interrelated.’<sup>56</sup> Although this description suggests no hierarchy between international law and domestic law, some jurists, such as those of the Vienna school,<sup>57</sup> understand monism as involving the ultimate primacy of international law over domestic law.<sup>58</sup> For members of the Vienna school, all rules of law depend for their validity on the grundnorm, or basic norm. The basic norm is the norm the validity of which cannot be derived from a higher norm.<sup>59</sup> Since international law determines the sovereignty of states, international law is the basic norm, leading to the conclusion that it has supremacy over domestic law.<sup>60</sup>

Furthermore, modern monist theory also believes that international law is not by its nature inapplicable to individuals. It recognises individuals as bearers of legal rights and duties of the international legal system. As Morgenthern has noted:

The essence of the monist view of the relation of international and national law is that rules of law, international and municipal alike, are applicable to individuals, and that international law can thus be directly operative in the municipal sphere. Modern decisions have affirmed that individuals can derive rights directly from treaties.<sup>61</sup>

Consequently, an express act of transformation of each individual rule of international law is not required before it can be applied to legal relations within the state.<sup>62</sup> Municipal courts can

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<sup>56</sup> D P O’Connell, *International Law* (Stevens and Sons, 1970), 39; H. Kelsen, *Principles of international Law* (Holt, Rinehart and Winston, 1966), 553-584; I Brownlie, *Principles of international Law* (Clarendon Press, 1990), 33-34; D. Walker, *The Oxford Companion to Law* (Oxford University Press, 1980), 852; U.O. Umozurike, *The African Charter on Human and Peoples’ Rights* (Martinus Nijhoff, 1997), 107-108.

<sup>57</sup> Hans Kelsen and Alfred Verdross, for example, See: H. Kelsen, *Principles of International Law* (Holt, Rinehart and Winston, 1966), 553; H. Kelsen, *General Theory of Law and State* (Harvard University Press, 1945), 363; Hersch Lauterpacht, *International Law: Collected Papers* (Cambridge University Press, 1977), 15 1-77.

<sup>58</sup> D M Walker, *The Oxford Companion to Law* (Oxford University Press. 1980), 852.

<sup>59</sup> H Kelsen, *Pure Theory of Law* (University of California Press, 1967)(Max Knight trans ed, 1967), 320-347; Hens Kelsen, *General Theory of Law and State* (Harvard University Press, 1945), 110-111 (Anders Wedberg translated edn., 1945).

<sup>60</sup> P Malanczuk, *Akehurst’s Modern Introduction to International Law* (Routledge, 1997), 63; I Brownlie, *Principles of International Law* (Clarendon Press, 1990), 33; R Jennings and A Watts, *Oppenheim ‘s International Law* (Longman, 1992), 54. As Jennings and Watts note, ‘Since international law can thus be seen as essentially part of the same legal order as municipal law, and as superior to it, it can be regarded as incorporated in municipal law, giving rise to no difficulty of principle in its application as international law within states.’ Ibid, 54.

<sup>61</sup> F Morgenthern, ‘Judicial Practice and the Supremacy of International Law’ [1950] (27) *British Yearbook of International Law*, 50; M N Shaw, *International Law* (Cambridge University Press, 1997), 101.

<sup>62</sup> F Morgenthern, ‘Judicial Practice and the Supremacy of International Law’ [1950] (27) *British Yearbook of International Law*, 58.



therefore invoke and apply rules of international law directly even in matters affecting individual citizens.<sup>63</sup>

In contrast, dualism holds that international and domestic law are separate bodies of law which exist independently of each other.<sup>64</sup> Dualists point out that these two bodies of law regulate different subject matter:<sup>65</sup> ‘International law is a law between sovereign states: municipal law applies within a state and regulates the relations of its citizens with each other and with the executive.’<sup>66</sup> Although municipal law may provide for the application of certain rules of international law within its jurisdiction, under dualism this merely represents an exercise of the authority of municipal law to incorporate or adopt international law.<sup>67</sup> Such adopted international law applies as part of the municipal law and not as international law.<sup>68</sup> Therefore, where the rules of international law and municipal law are in conflict, municipal law prevails.<sup>69</sup>

The predominance of municipal law is predicated on the notion that a state has a sovereign right to determine which rules of international law are to have effect in the municipal sphere.<sup>70</sup> Therefore, international law may create rights for individual citizens and be applied at the municipal level only if it has been incorporated or transformed into municipal law through a legislative process. Consequently the internal validity and application of international law is conditioned by a positive legislative enactment or judicial adoption.<sup>71</sup>

In dualist countries, two further theories explain how international law can become part of domestic law – the so-called incorporation and transformation theories.<sup>72</sup> Under the transformation theory, international law and domestic law are separate bodies of law, and international law only becomes part of the domestic law of a state when it is ‘transformed’ by

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<sup>63</sup> See: *Advisory Opinion on the Jurisdiction of the Courts of Danzig*, P.C.I.J (1928) Series B, No. 15, 17; H Lauterpacht, *International Law and Human Rights* (Garland, 1973), 27-47.

<sup>64</sup> P Malanczuk, *Akehurst 's Modern Introduction to International Law* (Routledge, 1997). 58- 60; D P O'Connell, *International Law* (Oxford: Clarendon Press. 1990), 42; F Morgenstern, ‘Judicial Practice and the Supremacy of International Law’ [1950] (27) *British Yearbook of International Law*, 42- 49; I. Brownlie, *Principles of International Law* (Clarendon Press, 1990). 32-33; M N Shaw, *International Law* (Cambridge University Press, 1997), 102-104; U.O. Umozurike, *African Charter on Human and Peoples Rights. The African Charter on Human and Peoples' Rights* (Martinus Nijhoff. 1997), 107-109.

<sup>65</sup> R Bledsoe and B. Boczek. *The International Law Dictionary* (ABC-CLIO, 1987), 68.

<sup>66</sup> I Brownlie, *Principles of International Law* (Clarendon Press, 1990), 32.

<sup>67</sup> D N Walker, *The Oxford Companion to Law* (Oxford University Press, 1980), 379.

<sup>68</sup> R Jennings and A Watts, *Oppenheim's International Law* (Longman, 1992), 53.

<sup>69</sup> Ibid.

<sup>70</sup> F Viljoen. *International Human Rights Law in Africa* (Oxford University Press, 2007), 536.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.



a discretionary act of that state.<sup>73</sup> Transformation takes place if the provisions of an international agreement are reflected in parts of national legislation; or if provisions of a national legislation are amended or repealed to conform to international norms.<sup>74</sup>

The incorporation theory views international law as part of domestic law.<sup>75</sup> There is no element of discretion. Instead, rules of international law automatically become part of domestic law to the extent that they do not conflict with domestic laws. The incorporation theory therefore entails the wholesale enactment, as part of domestic legislation, of an international instrument.<sup>76</sup>

Some jurists, however, consider the monism-dualism debate unhelpful and argue that both theories wrongly assume that there is a common ground in which both domestic and international law can operate.<sup>77</sup> These theorists regard international law as performing a co-ordination role and as not invalidating domestic laws.<sup>78</sup>

### **The Status of the International Legal Framework in Nigerian Law**

Nigeria operates a dualist system and therefore the legal position is that provisions of treaties and international instruments to which Nigeria is a party are not automatically part of the Nigerian municipal law unless explicitly incorporated into municipal law. To become part of municipal law, treaties in general require legislative incorporation. They could not in themselves create subjective rights and duties for individuals in the absence of legislation. In

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<sup>73</sup> (n72), 536.

<sup>74</sup> *ibid*, 18.

<sup>75</sup> *ibid*.

<sup>76</sup> *ibid*. The incorporation-transformation framework has been criticised in that it only explains the ways international law can be directly applied at a domestic level. According to Walker: ‘it ignores the ways in which international law may influence domestic law without being directly applicable – by influencing the development of the common law, by influencing constitutional interpretation and by potentially giving rise to administrative law remedies.’ See: Kristen Walker, ‘Treaties and the internationalisation of Australian Law’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996), 204.

<sup>77</sup> For example, Sir Gerald Fitzmaurice and Rosseau: see I. Brownlie, *Principles of International Law* (Clarendon Press, 1990), 33-34.

<sup>78</sup> *Ibid*, 34. This has led to the call for a harmonization or co-ordination approach, whereby the rules of international law and municipal law are treated as concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific area, and to some extent, an exclusive area of human conduct, but harmonious in the sense that in their entirety the various rules aim at a basic human good. See: D.P. O’Connell. *International Law* (Clarendon Press, 1990), 43-44. As Shearer has noted, ‘To resolve conflicts of obligations by adhering to a theory that asserts the automatic superiority of the one legal order over the other does not reflect the reality, on the one hand, of legal rules that compel national judges to follow the law commanded by national authority, and on the other hand the leeway of judicial choice open to judges in some circumstances to apply international law as part of national law. What should rather be the approach is to harmonise wherever possible the two competing legal prescriptions so as to avoid a conflict of obligations.’ See: I A. Shearer, *Starke’s International Law* (Butterworths, 1994), 65-66.



this regard, the 1999 Constitution, section 12(1) stipulates that, ‘No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.’<sup>79</sup> Thus, mere ratification of a treaty does not *ipso facto* confer binding effect under Nigerian law. There is a further need to explicitly incorporate such a treaty into Nigerian law in order for it to be enforceable.

The requirement that a treaty must be enacted as a municipal law before it can be enforced in Nigeria appears to be a colonial relic influenced by the practice of the English common law. Both countries share a common law tradition.<sup>80</sup> As a result of years of colonial domination by Britain, Nigeria, on independence, automatically adopted the British practice of requiring a treaty to be transformed into law before it can apply locally.<sup>81</sup> Under British law, the doctrine of parliamentary supremacy has long been held to mean that the making of treaty does not change domestic law.<sup>82</sup> Thus, although the Crown retains the prerogative to negotiate and sign treaties externally, for such treaties to have internal effect they require parliamentary approval.<sup>83</sup> In *Ibidapo v. Lufthansa Airlines*<sup>84</sup> the Supreme Court of Nigeria explained that ‘Nigeria, like any other commonwealth country, inherited the English common law rules governing the municipal application of international law.’<sup>85</sup> The Supreme Court of Nigeria affirmed the dualist position of the application of treaties in Nigerian municipal law under the 1999 Constitution, section 12 in *African Reinsurance Corporation v. Abata Fantaye*<sup>86</sup> where the provisions of treaties ratified by Nigeria, but not yet incorporated into domestic law, were in issue. The court held that a treaty, though ratified by Nigeria, did not constitute part of the law of the land merely by virtue of its ratification. The court further stated that in Nigeria, by virtue of the Constitution, section 12(1), treaties will have the force

<sup>79</sup> See also items 2.6 and 31 of the Exclusive Legislative List in the Schedule Two of the 1999 Constitution.

<sup>80</sup> T O Elias, *Colonial Law: A Comparative Study of the Interaction between English and Local Laws of Dependencies* (Stevens 1962), 4; A E W Park, *Sources of Nigerian Law* (Sweet and Maxwell, 1963), A O. Obilade, *The Nigerian Legal System* (Sweet and Maxwell, 1979); C O Okonkwo, *Introduction to Nigerian Law* (Sweet and Maxwell, 1980).

<sup>81</sup> E Egede, ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ [2007] (51)(2) *Journal of African Law*, 251.

<sup>82</sup> In both the *Parlement Beige Case* [1880] (5) P D 129 and *Walker v. Bird* (1892) AC 491, it was held that unincorporated treaties did not affect private rights. See also: *J H Rayner v. Department of Trade and Industry* (1990) AC 418, 550; Lord McNair, *Law of Treaties* (Oxford University Press, 1986), 81; I. Brownlie, *Principles of International Law* (Clarendon Press, 1990), 47; I A Sheare, *Starke’s International Law* (Butterworths, 1994), 72; R. Jennings and A. Watts, *Oppenheim’s International Law* (Longman, 1992), 58-59; R. Singh QC, ‘The Use of International Law in the Domestic Courts of the United Kingdom’ [2005] (56)(2) *Northern Ireland Legal Quarterly*, 120-121.

<sup>83</sup> *ibid.*

<sup>84</sup> [1997] 4 NWLR (Part 498) 124.

<sup>85</sup> *ibid.*, 150.

<sup>86</sup> [1986] 3 NWLR (Part 32) 811.





of law only after, or to the extent that, they have been enacted into law by the National Assembly.<sup>87</sup>

This legal position was further confirmed by the Supreme Court of Nigeria in *Abacha v. Fawehinmi*<sup>88</sup> which, inter alia, also concerned the status of a treaty under the Constitution, section 12. The court said, ‘Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly.’<sup>89</sup>

Clearly, therefore, international treaties and human rights instruments ratified by Nigeria are not part of Nigerian law until explicitly incorporated into Nigerian law. Thus, in the present context, although Nigeria has ratified the ILO Conventions and the ICESCR dealing with the protection of the right to strike, these instruments do not have direct application in municipal law in the absence of an express and specific incorporation by domestic legislation. This therefore means that these instruments until incorporated into domestic law cannot create private rights and cannot operate as a direct source of individual rights and obligations.<sup>90</sup>

The further implication of Nigeria’s dualist position is that, no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be, it remains unenforceable if it is not enacted into law of the country by the National Assembly.<sup>91</sup> This clearly reduces the effectiveness of international law in the domestic arena and undermines the central objective of entering into such international agreements, which are to guarantee rights and to protect individuals from abuse.<sup>92</sup>

In view of the importance of international law and its growing influence, it is submitted that Nigeria should incorporate into domestic law all international instruments in line with the 1999 Constitution, section 12 in order to strengthen the local application and

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<sup>87</sup> (n86), 834.

<sup>88</sup> [2000] 6 NWLR (Part. 660) 228.

<sup>89</sup> Ibid, 288 – 289.

<sup>90</sup> Indeed, in *Medical and Health Workers Union of Nigeria (MHWUN) v. Minister of Labour and Productivity* (2005) 17 NWLR 120 at 133, the Court of Appeal, relying on the *Abacha* case (see above), held that the International Labour Organisation’s Convention Nos. 87 and 98, even though signed by the Nigerian Government, are not binding and not justiciable in Nigerian courts until enacted into law by the National Assembly.

<sup>91</sup> *Abacha v. Fawehinmi* (2000) 6 NWLR (Part. 660) 228, 356.

<sup>92</sup> The Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights declares that: ‘... all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary...’ See: UN doc. A/CONF 157/24, (1993) 32 ILM 1661; E. Egede, ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ [2007] (51)(2) *Journal of African Law*, 273.





enforceability of the rights and obligations created by them. An alternative approach would be to amend the Constitution, section 12(1), to the effect that all treaties and international instruments ratified by Nigeria automatically become part of domestic law.<sup>93</sup> Nigeria must be seen as a country that not only signs, but respects and adopts the full contents and import of conventions and treaties.<sup>94</sup> As Shaw has pointed out, ‘in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.’<sup>95</sup>

## CONCLUSION

This article has examined the international legal framework for the protection of the right to strike and their status in Nigerian law. It has been shown that the right to strike is recognised in international law as a legitimate instrument for the protection of the economic and social interests of workers. In particular, the ILO attaches great importance to the need to protect the right to strike and has demonstrated its concern to all workers by insisting that this right must be protected at all times and that it can be denied only in very exceptional circumstances in the interest of the community as a whole.

As has been mentioned, Nigeria has ratified the applicable international instruments, particularly the core ILO Conventions, such as Conventions Nos. 87 and 98. Nigeria has also ratified the ICESCR, and is therefore bound by Article 2(1) thereof to provide for the right to strike as enshrined in Article 8(1)(d), through legislative measures or other means. However, as has been shown, Nigeria operates dualism which means that the international instruments do not have the force of law in Nigeria until such instruments are specifically incorporated into Nigerian law. Thus, notwithstanding the beneficial effects and values of these international instruments, they do not confer enforceable rights directly on Nigerian citizens.

Having examined the international legal framework and its place in Nigerian law, it is clear that these instruments recognise that workers and their trade unions should be entitled to a free and conducive environment in which to function as part of the exercise of the right to freedom of association, if the exercise of the right to strike is not to be undermined.

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<sup>93</sup> This is the position in some other jurisdictions. For an analysis, see generally, U Wanitzek, ‘Women’s and Children’s Rights in Africa: A Case Study of International Human Rights and Family Law in Tanzanian Courts’ [2008] (11)(1) *Recht in Afrika*, 33-60; E E Egede, ‘The New Territorial Waters (Amendment) Act 1998 – Comments on the Impact of International Law on Nigerian Law’ [2000] (12) *African Journal of Internal and Comparative Law*, 84-104; E Egede, ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ [2007] (51)(2) *Journal of African Law*, 249-284.

<sup>94</sup> See *Abacha v. Fawehinmi* (2000) 6 SWLR (Part. 660) 758.

<sup>95</sup> M N Shaw, *International Law* (Cambridge University Press, 1997), 633.