COMPARATIVE EXAMINATION OF CONSTITUTIONAL TRENDS IN TREATY IMPLEMENTATION IN SOUTH AFRICA AND THE UNITED STATES OF AMERICA*

Abstract
Treaties form the basis of most parts of modern international law. They serve to satisfy a fundamental need of States to regulate by consent issues of common concern, and thus to bring stability into their mutual relations. As an instrument for ensuring stability, reliability and order in international relations, treaties are one of the most important elements of international peace and security. This is why treaties have always been the primary source of legal relations. From the comparative examination of constitutional trends in treaty implementation in South Africa and the United States of America, it is very clear that the importance of treaty is emphasised in the constitutions of the various jurisdictions. From the comparative examination of constitutional trends in treaty implementation in South Africa and the United States of America, it is very clear that the importance of treaty is emphasised in the constitutions of the various jurisdictions. It is recommended that Nigerians should not be denied the benefits of a treaty to which the country is a signatory by domestic courts by reason of strict adherence to technicalities. Therefore, the courts should always consider the importance of international treaties in reaching decisions on areas covered by them as is the case in South Africa. In such situations, preference should always be given to treaty provisions. Some treaties should be treated as self-executing in Nigeria based on their importance as is the case in the United States of America. Treaties protecting human rights should be treated as self-executing.

Keywords: Treaty, Implementation, Ratification, Domestication, Self-executing

1. Introduction

Just like other foreign States, South Africa and United States of America survive based on cooperation and collaboration with other States. The participation of these countries like others in the international arena is usually effectuated through the instrumentality of treaties. Pursuant to the provision of the Vienna Convention on the Law of Treaties 1969, treaties bind a State party once they are ratified. The practice to be revealed from examination of constitutional trends in treaty implementation in South Africa and the United States of America indicates that the importance of treaty is emphasised in their constitutions. This practice makes the enjoyment of the benefits of the treaties entered into by the countries at the international scene possible.

2. The Nature of Treaty

An international agreement between States is concluded by way of treaty. A treaty establishes a rule of law that is generally intended to govern the particular relations of the states signatory to it. It is an important document at the international scene. Treaties or international conventions as the case may be are a more modern and deliberate method of creating law when compared to custom as a process of creating law.[1] The Statute of the ICJ referred to 'international conventions, whether general or particular, establishing rules expressly recognised by the contracting states'[2] as a major source of international law that is to be considered by the ICJ in the determination of issues brought before it. Treaties are known by a variety of names, ranging from conventions, charters, pacts, international agreements, general acts, statutes, covenants and declarations.[3] Treaties are express agreements and are also a form of substitute legislation undertaken by states.

3. Treaty Implementation in South Africa

The consequence of South Africa being bound at international treaty just like any other States is that other States may seek to hold it responsible for or breaches of treaty obligations in an international forum having jurisdiction in the matter.[4] Therefore, all aggrieved State would need to do is to first establish the facts that South Africa has committed an internationally wrongful act (that is, breach of its international treaty obligations) and that the act complained about was attributable to the State. The international forum seized with the resolution of the dispute will make a determination on this, and the implications of such a finding (in terms of reparations to the injured State in a State-State dispute). This may extend to individuals, in respect of holding South Africa responsible for the domestic fulfillment of their international obligations under human rights treaty bodies in the United Nations (UN) Treaty Body System.[5] There are three major ways in which binding treaty obligations create domestic legal effects for the republic of South Africa to wit; through legislation by the South African Parliament; directly, through self-executing provisions of treaties approved by Parliament; and through the creation of a normative universe for the application of interpretive injunctions guiding courts to (i) prefer a reasonable interpretation of domestic legislation that is in accordance with international law over one that is not, and the injunction to (ii) take into account international law in the interpretation of the Bill of Rights. Section 231 of the South African Constitution 1996 regulates the signing, ratification, and implementation of international agreements (treaties).[6]

The South African constitution encourages an international law friendly interpretation of the legislation in the country when it encourages the court to give preference to any reasonable interpretation of legislation over any other alternative interpretation that is inconsistent with international law provided that it is not inconsistent with international law.[7] Apart from provisions of sections 231 and 233 of the South African constitution referred to above, South African courts and other relevant tribunal or forum are encouraged to consider the

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[1] L Oppenieim, *International Law: A Treatise* (8th edn, Longmans, Green and Co., New York 1955) 31.
[2] Statute of the International Court of Justice 1945, art 38(1)(a).
[3] M N Shaw, *International Law* (6th edn, Cambridge University Press, New York 2008) 93.
[4] Sanya Samtani, 'The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill' [2020] (10) *PIJIP Research Paper No. 61*;18.
[5] *Ibid*.
[6] Constitution of the Republic of South Africa 1996, s 231.
[7] *Ibid*, s 233.

provisions of international law and this include treaty in interpreting the bill of rights.[8] The importance of the principles of international law in the defence of the territorial integrity of South Africa is emphasised in its constitution.[9] These provisions marked a formal turning point in the approach towards international law including treaty in South Africa, especially with regard to the use of international human rights law and treaties as a guideline for interpreting the Constitution. It is important to note that various statutes refer expressly to international law, in accordance with section 233 of the Constitution, which requires ordinary legislation to be interpreted in accordance with international law in South Africa.[10] In some instances the legislation makes it clear that it is to be interpreted in accordance with international law. In other instances, the statute incorporates language that resembles that contained in international instruments and treaties, including the ones that are not binding on South Africa. This enhances the ability of the executive and the courts in South Africa to interpret the legislation in accordance with present and future developments in relation to the relevant area of international law.[11] A good example of a statute that explicitly requires interpretation consistent with international law as a way of implementing treaty obligation in South Africa is the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. This provides that any person or authority interpreting the Act may be mindful of international law.[12] In the same way, the Implementation of the Rome Statute of the International Criminal Court Act provides that a court applying the Act must consider conventional and customary international law.[13] Additionally, another legislative effort promoting treaty implementation in South Africa is the Labour Relations Act which states that one of its primary objects is to give effect to obligations incurred by the Republic as a Member State of the International Labour Organization (ILO) and requires the Act to be interpreted in compliance with the public international law obligations of the country.[14] In fact, it has been submitted that the use of international agreement in section 231 of the 1996 constitution of South Africa is synonymous with the meaning of treaty as provided in the Vienna Convention on the Law of Treaty (VCLT) 1969 which defines the term as 'treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[15]

The above view seems to have been endorsed by the Constitutional Court of South Africa in the case of *Harksen v President of South Africa*,[16] which concerned the attempt by Jürgen Harksen to prevent his extradition to Germany where he was charged with fraud. One of the issues raised and central to the dispute was whether ad hoc extradition under section 3(2) of the Extradition Act 67 of 1962,[17] (where South Africa had not concluded an extradition agreement with the requesting state) should also comply with the constitutional prerequisites for an international agreement. The question was whether the signature (consent) of the President of South Africa to a statement that permitted the extradition of Harksen to Germany constituted an international agreement.[18] The South African Constitutional Court determined that presidential consent in terms of section 3(2) of the Extradition Act was a domestic act, implying that in accordance with South African domestic law Harksen could be brought before a magistrate's court in order to initiate the extradition proceedings.[19] It did not amount to an international agreement in terms of section 231 of the Constitution, as it was not an instrument that intended to create international legal rights and obligations between State parties. Section 231 of the 1996 South African Constitution distinguishes between two types of agreements. The first type of agreement requires parliamentary approval in terms of section 231(2), meaning that both the National Assembly and the National Council of Provinces (parliament) sitting separately have to give approval, before the executive may give its consent to bind the Republic at the international level.[20]

The second relates to technical, administrative or executive agreements that can, in line with the provision of section 231(3) of the 1996 South African Constitution, be concluded by the national executive alone.[21] Although, Parliament has to be notified about these agreements, they are exempt from the sometimes lengthy parliamentary approval procedure. Meanwhile, the South African constitution does not give any indication or clue of which agreements would qualify as technical, administrative or executive.[22] Although, the internal practice in the country is to consider those agreements that do not have major political significance as technical; do not require additional budgetary allocation from Parliament over and above the budget provided by a particular government department; and agreements that do not impact domestic law.[23] They are often of a bilateral nature and concern routine agreements for which a single government department is responsible for their implementation. This covers the vast majority of agreements that South Africa has concluded since 1994.[24] The procedure anticipated for technical agreements in section 231(3) requires an average of three months. In spite of being of an expedited nature, the procedure is not always fast enough to accommodate the requirements of contemporary international relations. In such circumstances, the executive prefers informal agreements because of their flexibility, simplicity, swiftness, and confidentiality. Though, they do not create reciprocal rights as well as duties under international law, even though they are almost always honoured in practice.[25] They are also exempt from the procedures prescribed in section 231 of the constitution since they are of a non-binding nature.[26]

[8] *Ibid*, s 39(1).
[9] *Ibid*, s 200(2).
[10] J Dugard, 'South Africa' in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement* (Cambridge University Press, Cambridge 2009) 449.
[11] E Couzens 'The Incorporation of International Environmental Law and Multilateral Environmental Agreements into South African Domestic Law' [2005] (30) *South African Yearbook of International Law*; 138.
[12] South African Promotion of Equality and Prevention of Unfair Discrimination Act 2000, s 3(2)(a).
[13] Implementation of the Rome Statute of the International Criminal Court Act 2002, s 2.
[14] South African Labour Relations Act 1995, ss 1 and 3.
[15] VCLT 1969, art 2(1) (a).
[16] (2000) (2) SA 825.
[17] South African Extradition Act 67 of 1962, s 3(2).
[18] (n16), para 13.
[19] *Ibid*, para 21.
[20] N Botha, 'Treaty Making in South Africa: A Reassessment' [2000] (25) *South African Yearbook of International Law*;79.
[21] *Hugh Glenister v the President of the RSA* (2011) (3) SA 347, para 89.
[22] Botha (n20) 76.
[23] J Schneeberger, 'A Labyrinth of Tautology: The Meaning of the Term 'International Agreement' and its Significance for South African Law and Treaty Making Practice' [2001] 26 *South African Yearbook of International Law*;4.
[24] *Ibid*, 4-5; Botha (n20) 76.
[25] Schneeberger (n23) 7.
[26] *Ibid*, 28.

The regular use of technical agreements and informal agreements entails that many agreements are excluded from the process of democratic verification. The situation is particularly heightened in relation to informal agreements. While South African Parliament is at least notified about the conclusion of technical agreements in accordance with the provision of section 231(3) of the South African constitution 1996, no such notification takes place in relation to informal agreements.[27] The role of the South African Parliament in the ratification process also has implications for reservations to treaties. In those cases where treaties are subject to the parliamentary process as envisaged in section 231(2) of the constitution, the Parliament will have the opportunity to examine the reservation attached by the executive.[28] Additionally, the South African Parliament may also insist on additional reservations. However, the issue of reservations does not seem to play an important role in South African treaty-making process.[29] Pursuant to the provision of section 231(1) of the 1996 South African constitution, the negotiation and signature of treaties is the exclusive competence of the executive; therefore, Parliament has no role to play at this level. Furthermore, the 2006 Manual on Executive Acts of the Office of the President of South Africa indicates that the provinces may not enter into agreements governed by international law, except as agents of the national executive. Therefore, the individual concerned would have to require specific authorisation to this effect by way of Presidential Minute together with credentials issued by the Department of International Relations and Cooperation.[30]

The provision of section 231(2) and (3) of the 1996 South African Constitution exclusively regulates the conditions under which the country would be bound by international agreements at the international level. In order to allow the domestic application of treaties in the jurisdiction, section 231(4) of the constitution prescribes that these agreements which include treaties must first be enacted into domestic law of the country by way of legislation, except their provisions are self-executing. This constitutional approach was confirmed by the South African Constitutional Court in the cases of *Azanian Peoples Organisation (AZAPO) v President of the* RSA,[31] and *Hugh Glenister v the President of the RSA*,[32] as well as the Supreme Court of Appeal decision in the case of *Progress Office Machines CC v SARS*.[33] The first, that is, the case of *Azanian Peoples Organisation (AZAPO) v President of the* RSA concerned the 1949 Geneva Conventions on the Laws of War, while the second, the case of *Hugh Glenister v the President of the RSA* related to various international as well as regional treaties adopted for fighting corruption. The case of *Progress Office Machines CC v SARS* concerned the World Trade Organization (WTO) Agreement and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.[34]

There are four principle methods employed in the transformation treaties into domestic law in South Africa. The first among them and most easy technique of incorporation is considering the pre-existing legislation sufficient to give effect to subsequent treaty obligations. A good example of this is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973, which was ratified by South Africa in 1975.[35] Secondly, the provisions of a treaty may also be embodied in the text of an Act of Parliament. This was the case with the Implementation of the Rome Statute of the International Criminal Court Act, which implemented South Africa's obligations under the Rome Statute of the International Criminal Court 1998, which was ratified by South Africa in 2000.[36] Thirdly, the treaty may be included as a schedule to a specific statute. An example of such extensive importation is the World Heritage Convention Act 49 of 1999. By way of a schedule, the Act incorporates into South African law the entire Convention concerning the Protection of the World Cultural and Natural Heritage of 1972.[37] Occasionally, this type of incorporations delegate particular powers related to the enforcement of the particular international agreement to the relevant cabinet minister. For instance, the Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 of South Africa incorporates the International Convention for the Prevention of Pollution from Ships 1973 through a schedule. Section 3 of the Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 explicitly provides that the Minister of Transport may make regulations relating to carrying out the provisions of the International Convention for the Prevention of Pollution from Ships.[38]

Lastly, an enabling Act of Parliament in the jurisdiction may grant the power to bring a treaty into effect in municipal law to the executive by way of notice or proclamation in the Government Gazette.[39] A significant example in this regard is the Extradition Act of South Africa as amended in 1996 as it constitutes a legal framework dealing with a specific class of international agreements, that is, those relating to extradition. The Act provides that the President of the Republic of South Africa may enter into agreements with foreign states to provide for the surrender of persons accused or convicted of the commission of extraditable offences, and that this is to be done on a reciprocal basis.[40] The Minister gives notice of the agreement in the Government Gazette once ratified by Parliament.[41] In effect, this proclamation amounts to a simplified incorporation procedure for a large number of similar agreements. Unfortunately, the South African Constitutional Court overlooked the role of the proclamation in the Government Gazette as an element of the incorporation process in the case of *President of the RSA v Nello Quagliani*.[42] This case relates to the validity as well as enforceability of an extradition agreement concluded in 1999 between the United States and South Africa. The court noted per Justice Sachs that the nature as well as number of the extradition agreements makes it desirable that they be implemented in a manner considered effective.[43]

[27] *Ibid*, 7.
[28] Botha (n20) 84.
[29] *Ibid*.
[30] Manual on Executive Acts of the Office of the President of South Africa 2006, 5.25.
[31] (1996) (4) SA 671.
[32] (2011) (3) SA 347 (CC) para 92.
[33] (2008) (2) SA 13 (SCA).
[34] Dugard (n10) 455.
[35] Couzens (n11) 143.
[36] M du Plessis, 'International Criminal Courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute' in J Dugard, *International Law: A South African Perspective* (Juta, 2011) 197.
[37] Couzens (n11) 130.
[38] *Ibid*, 133.
[39] Dugard (n10) 453; (n29), para 99.
[40] Extradition Act 67 of 1962, s 2(1)(a).
[41] *Ibid*, s 3(a).
[42] (2009) (4) 345 (CC), 45.
[43] *Ibid*.

The South African Extradition Act is certainly anticipatory in as far as it makes provision for a simplified procedure for a class of agreements that still have to be concluded. Nevertheless, that does not change the fact that they are dependent on incorporation into domestic law, in the form of ministerial proclamation, as foreseen by Parliament in the Extradition Act.[44] Another area where the issue of expedited implementation by way of secondary legislation is of significance relates to the implementation of Security Council decisions adopted under Chapter VII of the United Nations (UN) Charter 1945. Presently, there is absence of general legislation in South Africa that would facilitate expedited implementation of such decisions. As an alternative, it relies on issue specific legislation, which can result in a fragmented or even conflicting approach to enforcement. It also carries the risk that in areas where no issue specific legislation exists, Security Council decisions will not be implemented on the domestic level or only implemented with great delay.[45] Upon implementation of international agreements in South Africa, it seems that the courts largely follow the international law rules of treaty interpretation as provided in article 32 of the VCLT, when interpreting the incorporated version in the jurisdiction.[46] Though, this is not expressly directed by the South African Constitution or statute, it follows from the fact that the South African rules of statutory interpretation conform to a large extent with those contained in the VCLT. South African law also recognises the textual, intent, as well as purposive approaches to statutory interpretation that constitute the core principles of interpretation in the VCLT.[47]

It is important to emphasise that a treaty enacted into law in South Africa will have the same status in domestic law as the Act through which it is incorporated.[48] This implies that treaties once enacted into law do not merely rank below the Constitution,[49] but can also rank below a Parliamentary Act – depending on the manner of its incorporation. Thus, while a treaty enacted into law by an Act of Parliament will enjoy the same status as other Parliamentary Acts, the one enacted into law through subordinate legislation (for example, a ministerial proclamation in the Government Gazette) will be on par with other subordinate legislation in South Africa.[50] The second part of section 231(4) of the Constitution of the Republic of South Africa 1996 provides that a self-executing provision of an agreement that has been approved by Parliament is law in the country except it is inconsistent with the provision of the Constitution or an Act of Parliament. When considered at first sight, this phrase seems to entail that a clause in a treaty will only be self-executing when the language of the treaty so indicates as well as when existing municipal law is adequate in the sense that it fails to provide for any obstacle in the application of treaty.[51] In actual terms this would imply that the nature as well as content of the relevant treaty provision is such that it is capable of judicial enforcement in the absence of any further measures for implementation (self executing).[52] Additionally, the direct enforcement of treaty ought to result in a conflict with existing domestic law.[53] In an endeavour to give a meaning to what constitute self-executing in South Africa, the Constitutional Court noted in the case of *The Government of the Republic of South Africa & Others v Grootboom & Others*,[54] that where a relevant principle of international law binds South Africa, it may be directly applicable. This case concerns the constitutional right to housing as recognised in South Africa. Meanwhile, the Constitutional Court of South Africa avoided the issue by stating that consideration of the question of the self-executing nature of the agreement was not necessary.[55] Yet, it is essential to note that an unincorporated treaty can be used to challenge as well as invalidate subordinate legislation in South Africa. The Supreme Court of Appeal confirmed this position in the case of *Progress Office Machines CC v SARS*.[56] The question before the court was whether an anti-dumping duty period, contained in secondary legislation issued by the Ministry of Finance, violated the provision of article 11(3) of the World Trade Organization Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade. The Court stated that although South Africa has ratified the World Trade Organization (WTO) Agreement in 1995, it has not yet been enacted into domestic law, nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. Therefore, no rights are derived from these international agreements. However, the South African International Trade Administration Act 71 of 2002 had to be interpreted in accordance with international law, where reasonable, as this is a requirement of section 233 of the 1996 South African Constitution.[57] The Court went further by stating that subordinate legislation such as the one in question must be reasonable and that a court in South Africa may insist that the subordinate legislation be in compliance with international obligations of a state in order to be valid.[58] This meant that subordinate legislation that violated international obligations would as such be unreasonable and to that extent invalid.[59] Accordingly, the Supreme Court of Appeal of South Africa invalidated an anti-dumping duty issued by the Ministry of Finance for exceeding the period provided for by the international agreements.[60]

The Constitutional Court in South Africa has played an important role in the interpretation as well as application of international law including treaty within the domestic legal order since its commencement. The Constitutional Court of South Africa has been known for its recourse to international human rights law as a guideline for interpretation when faced with duty of interpreting the South African Constitution, legislation and the common law. This development has its basis in the constitution,[61] which establishes that courts must

[44] E De Wet, 'The Reception of International Law in The South African Legal Order: An Introduction' in E De-Wet and Others, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press, Pretoria 2015) 33.
[45] H Strydom and T Huarka 'South Africa' in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Martinus Nijfhoff Publishers, Leiden 2004) 430-432.
[46] Dugard (n10) 464.
[47] (n15), art 32.
[48] *President of the RSA v Nello Quagliani* (2009) (4) 345 (CC) 100; Dugard (n10) 463.
[49] *Ibid*.
[50] *Ibid*.
[51] Dugard (n10) 455.
[52] E de Wet 'The Reception Process in The Netherlands and Belgium' in H Keller and A Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, Oxford 2008) 229.
[53] E De-Wet and Others, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press, Pretoria 2015) 34.
[54] (2000) (11) BCLR 1169 (CC) para 26.
[55] *President of the RSA v Nello Quagliani* (2009) (4) 345 (CC) para 36.
[56] (2008) (2) SA 13, para 11.
[57] *Ibid*, para 6.
[58] *Ibid*, para 12.
[59] *Ibid*.
[60] *Ibid*, paras 12, 20.
[61] (n6), s 39(1).

consider international law when faced with the duty of interpreting the Bill of Rights as recognised in the Constitution. In the same way, the Constitution requires courts to ensure the promotion of the spirit of the Bill of Rights when faced with the interpretation of common law or legislation,[62] the Constitution further requires an interpretation of legislation that is in conformity with international law, where reasonable.[63] Due to this mediating role of sections 39 and 233 of the Constitution, it is unlikely that any head-on collision between municipal and international law (whether treaty or custom) will occur. This position was emphasised in the case of *Hugh Glenister v the President of the RSA*.[64] Therefore, South African courts are unlikely to be placed in a position in which they have to retreat behind the dualist veil, in accordance with which the Constitution or a domestic statute trumps international law.[65]

The approach of the Constitutional Court of South Africa has been described to be very progressive in relation to international human rights law which is also expressed by way of treaties.[66] It draws on binding but as of yet unincorporated treaties, as well as on non-binding instruments as interpretive guidelines. Though, the reliance on international treaties and other instruments in areas other than human rights occur less frequently in the court. An example where the Constitutional Court was guided by a decision of an international tribunal in order to develop the common law concerns was that of the *Government of the Republic of Zimbabwe v Louis Karel Fick*.[67]

4. Treaty Implementation in the United States of America

In the United States of America (USA), treaties are considered a serious legal undertaking both in international as well as domestic law. Internationally, treaties once in force are binding on the parties and also become part of international law. At the domestic level, treaties to which the United States (US) is a party are equivalent in status to federal legislation, therefore forming part of the supreme law of the land.[68] However, the word treaty does not have the same meaning in the US and in international law. Under international law, a 'treaty' is any legally binding agreement between nations.[69] In the US, the word treaty is reserved for an agreement that is made 'by and with the Advice and Consent of the Senate'.[70] Thus, international agreements not submitted to the US Senate are known as 'executive agreements' in the US, but they are considered as treaties and therefore binding under international law.[71] The Constitution of US states that the president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.'[72] The convention that drafted the Constitution did not spell out more specifically what role it intended for the US senate in the treaty making process. Most evidence suggests that it intended the sharing of the treaty power to begin early, with the senate helping to formulate instructions to negotiators and acting as a council of advisers to the President during the negotiations, and approving each treaty entered into by the US. The function of the Senate was both to ensure protection of the rights of the states and to serve as a check against the President's taking excessive or undesirable actions through treaties. The presidential function in turn was to provide unity and efficiency in treaty making process as well as to represent the national interest as a whole.[73]

The treaty clause of the US Constitution does not contain the word ratification, which refers to the formal act by which a nation establishes its willingness to be bound by a specific treaty. From the beginning, the formal act of ratification has been performed by the president acting by and with the advice and consent of the senate. The president ratifies the treaty, but, only after receiving the advice and consent of the senate. At the time the US Constitution was drafted, the ratification of a treaty was generally considered obligatory by the nations entering into it if the negotiators stayed within their instructions. Thus, senate participation during the negotiations stage seemed important if the senate was to play a meaningful constitutional role. At the time, such direct participation by the senate also seemed feasible, since the number of treaties was not expected to be large and the original senate contained only 26 members.[74] However, several years later, problems were encountered in treaty making and the practice of regularly getting the advice and consent of the senate on detailed questions prior to negotiations was abandoned by the presidents. As a replacement for such practice, presidents began to submit the completed treaty after its conclusion. Since the senate had to be able to advise changes or deny consent altogether if its role was to be meaningful, the doctrine of obligatory ratification was for all practical purposes abandoned.[75] Although, US senators sometimes play a part in the commencement or development of a treaty, the senate role now is mainly to pass judgment on whether completed treaties should be ratified by the US. The advice and consent of the senate is asked on the question of presidential ratification. When the senate considers a treaty it may approve it as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval. In practice, the US senate has given its advice as well as consent unconditionally to the vast majority of treaties submitted to it by the president.[76] In many cases, the US senate has approved treaties subject to some conditions. The president has usually accepted the senate conditions and completed the ratification process. In a number of cases, treaties have been approved with reservations that were unacceptable either to the president or the other party, and the treaties never entered into force. These include treaties on income taxation with Thailand, signed in March 1965, and Brazil, signed March 13, 1967.[77] Only on rare occasions has the US senate formally rejected a treaty which has been concluded by the president. A well-known example of such situation is the Versailles Treaty, which was defeated on March 19, 1920, although 49 Senators voted in favour and 35 against. This was a majority but not the required two-thirds

[62] *Ibid*, s 39(2),
[63] *Ibid*, s 233.
[64] (n21), para 179.
[65] Wet and Others (n53) 53.
[66] *Ibid*.
[67] (2013) 5 SA 325.
[68] Richard F Grimmett, 'Overview of the Treaty Process' in Congressional Research Service Library of Congress, *Treaties and other International Agreements: The Role of the United States Senate* (U.S. Government Printing Office, Washington 2001) 1 <https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf> accessed 6 January 2022.
[69] *Ibid*.
[70] Constitution of America, art II, s 2, clause 2.
[71] Grimmett (n68) 14.
[72] (n70).
[73] Grimmett (n68) 15.
[74] *Ibid*.
[75] *Ibid*, 16.
[76] *Ibid*, 16.
[77] Grimmett (n68) 16.

majority so the treaty failed. Since then, the US senate has definitively rejected only three treaties. These include, Treaty on General Relations with Turkey rejected on January 18, 1927; St. Lawrence Waterway Treaty with Canada rejected on July 18, 1932 (the St. Lawrence Seaway was subsequently approved by legislation); and adherence to the Permanent Court of International Justice rejected on January 29, 1935.[78] In addition, the US senate sometimes formally rejects treaties but keeps them technically alive by means of adopting or entering a motion to reconsider. This has happened, for instance, with the Optional Protocol Concerning the Compulsory Settlement of Disputes in 1960, the Montreal Aviation Protocols Nos. 3 and 4 in 1983, and the Comprehensive Test Ban Treaty in 1999.[79]

Under the US Constitution, a treaty, like a Federal statute, is treated as part of the supreme law of the land and is binding on States.[80] A perfect illustration for this is that during the Revolutionary War, the Virginia legislature provided that the Commonwealth's paper money, which was rapidly depreciating, was to be adopted as legal currency for the payment of debts as well as to confound creditors who would ordinarily not accept the currency provided that Virginia citizens could pay debts owed by them into the state treasury to subjects of Great Britain, which money was to be used for the prosecution of the war, and that upon payment, the auditor would give the debtor a certificate of payment and that such certificate once given would discharge the debtor of every future obligation to the creditor. This scheme by Virginia was a direct contradiction of the assurances in the peace treaty that there would be absence of bars to collection by British creditors hence, the court struck down the state law that it was a violation of the treaty that Article VI, paragraph 2, made superior.[81] There are treaties considered self-executing having direct application in the US if it is a signatory thereto and entry into force. Self-executing treaties are those that do not require implementing legislation, they automatically become effective as domestic law immediately upon entry into force. Other treaties do not become effective as domestic law until implementing legislation is enacted, and then technically it is the legislation, not the treaty unless incorporated into the legislation, that is the law of the land.[82]

For purposes of what qualifies as self-executing treaties, the question is whether mere entry into and ratification of a treaty is sufficient in every case to make the treaty provisions part of the law of the land or whether there are some types of treaty provisions that only a subsequent act of Congress can put into effect.[83] This established that not all treaties are self-executing, for, a treaty is 'to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.'[84] A treaty will not be self-executing when the terms of its stipulation import a contract when either of the parties engages to perform a particular act. When this is the case, 'the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.'[85] At times, it is not clear on the face of a treaty whether it is self-executing or requires implementing legislation. Some treaties expressly call for implementing legislation or deal with subjects clearly requiring congressional action in the US, such as the appropriation of funds or enactment of domestic penal provisions. The question of whether or not a treaty requires implementing legislation or is self-executing is a matter of interpretation largely by the executive branch or, less frequently, by the courts. Sometimes, the senate of the US includes an understanding in the resolution of ratification that certain provisions are not self executing or that the president is to exchange or deposit the instrument of ratification only after implementation legislation has been enacted.[86]

5. Conclusion and Recommendations

From the comparative examination of constitutional trends in treaty implementation in South Africa and the United States of America, it is very clear that the importance of treaty is emphasised in the constitutions of the various jurisdictions. In the case of Nigeria, section 12 of the 1999 Constitution provides the mode by which a treaty might be made a part of Nigerian law. What this means is that any treaty to which Nigeria has chosen to bind itself internationally and under which it has rights, that to attain a local enforceability status such a treaty must be subjected to a process; to wit: through an Act of the National Assembly.[87] Therefore, by virtue of the provision of section 12(1) of the Constitution, Nigerian courts do not have the power to apply the provision of a treaty that has not been enacted into law as it is this legislative approval that makes it enforceable in the country. Treaties that are self-executing in nature do not require domestication for effective domestic implementation in South Africa and the US. Therefore, Nigeria is expected to apply the practices in these jurisdictions in order not to deny her citizens the benefits of treaties to which the country is a party. It is recommended that Nigerians should not be denied the benefits of a treaty to which the country is a signatory by domestic courts by reason of strict adherence to technicalities. Therefore, the courts should always consider the importance of international treaties in reaching decisions on areas covered by them as is the case in jurisdiction like South Africa. In such situations, preference should always be given to treaty provisions. Some treaties should be treated as self-executing in Nigeria based on their importance as is the case in the United States of America. Treaties protecting human rights should be treated as self-executing.

[78] *Ibid*.
[79] *Ibid*.
[80] (n70).
[81] *Ware v Hylton* (1796) 3 US (3 Dall.) 199.
[82] Grimmett (n68) 17.
[83] *Foster v Neilson* (1829) 27 US (2 Pet.) 253, 314.
[84] *Ibid*; *Whitney v Robertson* (1888) 124 US 190, 194.
[85] *Ibid*.
[86] Grimmett (n 68) 4.
[87] A Olawale, 'Domesticating International Treaties' *The Nation* (Lagos, 19 September 2013) 1.