

## **A PLEA FOR CAUTION WHEN DRAFTING OR SIGNING INTERNATIONAL AGREEMENTS**

**B y**

**Dr. Ibrahim Ahmad Aliyu and B.Babaji Esq\***

### **1.0 INTRODUCTION**

The middle of the twentieth century has seen the gradual spread and entrenchment of ideas and ways of doing things in a very striking and similar style that seemed to make all countries of the world alike(globalization) in their culture, commercial practices, military structure, legal systems, media and entertainment and even sports. These growing similarities have led some people to believe that since the world has been globalized in virtually all social ethos, then the laws of all countries of the world have to be built on the same global set of values, and where the underlying of certain legal systems differ from these expectations, they are then judged by the so-called global values either affirmed or rejected.

Globalization of legal norms particularly in the areas of human rights treaties and conventions has led to the manufacture of numerous laws on wide range issues, some of which are sensible, while many others are quite frivolous, or even contrary to the principles of Sharia and therefore, unacceptable to the Muslims. Examples of these laws include those seeking for:

- a) Women's rights (e.g. Convention On The Elimination Of All Forms Of Discrimination Against Women (CEADAW); African Union Protocol on Women's Rights in Africa);
- b) Child's Right (e.g. United Nations Convention on Child Rights; the African Charter on the Rights and Welfare of the Child; the Declaration of the World Summit for Children and Child Rights Act, 2003 which was built on international conventions).
- c) African Charter on Human and Peoples Rights;
- d) Universal Charter on Human and Peoples Rights;

It is reasonable to expect that this cavalier approach to international legislation is bound to create problems for those societies whose cultural background is different from Western society's form, where almost all laws are directly or indirectly manufactured. Undoubtedly, most, if not all of these laws or conventions have already created difficulties and confusion to

Muslim societies, because they clash directly or indirectly with Sharia upon whose principles their legal system was founded. They also conflict with their religious values and norms which get upset when a single item is disturbed by any of the so-called international agreements or conventions.

In view of the above, therefore, this paper aims at making a plea for caution when nations ratify and domesticate treaties and suggesting methods limiting the negative effects of these international conventions where they interfere with Islamic values and laws of the Muslim communities.

The questions that must be discussed in order to achieve the primary aims of this presentation are:

- (i) What are the possible negative consequences of an international agreement or treaty on a nation state that signed or ratified it?
- (ii) What are the leading considerations that a nation must take as a guide when drafting or signing international agreement, instrument, treaty or convention?

The above questions will certainly be applicable to the challenges or difficulties that are likely to be encountered by a state party in domesticating (at national level) such international treaties or agreements.

However, before we go into the proper analysis of the above issues that necessitated the plea for caution in signing, ratifying or domesticating international agreements, it is imperative to make conceptual clarifications of some key terms and principles for the overall understating of the presentation.

## **2.0 Conceptual Clarifications of Some Key Terms and Principles**

This part of the article will attempt at examining preliminary matters of concepts such as the meaning of international agreement, convention and or treaty; when can a nation be said to have signed and or ratified an instrument or convention, including the binding and optional nature of an international agreement on a state party and domestication as a consequence of signing or ratifying an international instrument.

### **2.1 Meaning and Nature of International Agreements, Conventions and Treaties**

Treaties or international agreements are special devices through which several regions or countries do enter into different transactions and or relations. They are ways in which states may set up binding rights and obligation between themselves. For instance, conflicts or wars are

terminated or settled, territories acquired, alliances established and international organization and agencies created all by means of treaties, conventions and or charters.<sup>1</sup> It has been noted that no simpler method of reflecting the agreed objectives of states really exists and the international convention has to suffice both for straight forward bilateral agreements and complicated multilateral expressions of rights and obligations.<sup>2</sup> It is very essential for one to appreciate what really is the concept of a 'treaty' and how it operates under international law and or arena.

A 'treaty' has been described by Shaw, M.N.<sup>3</sup> as basically 'an agreement between parties on the international scene. Although they may be concluded or made, between states and international organization, they are in essence concerned with relations between states. This means that international agreements is primarily governed by international law and necessarily deals with the relationships between several nations or governments on matters of bilateral or multilateral and or global concerns and effects.

Under international law, internal agreements or treaties are generally governed by an international convention on the law of treaties, commonly referred to as 'The 1969 Vienna Convention on the Law of Treaties.'<sup>4</sup> This Vienna Convention was signed in 1969 and came into force in 1980. It constitutes the basic framework for any analysis of the features and characteristics of international conventions, compacts, or covenants.

The fundamental legal principle of international agreement is that, treaties are binding upon the parties to them and rights and obligations therein stated must be carried out in good faith.<sup>5</sup> This principle underlies every international agreement.

One of the rationales behind this principle of law of treaties is that, without a minimum belief that states or nations will implement their treaty obligation in good faith, there may not be basis for sovereign nations to enter into any bilateral and or multilateral transactions.

It is very important to observe and point out here that, the term 'international agreement' is mostly used or called as 'treaty.' There are, however, a variety of terms that can as well be utilized to define or explain what international agreement signifies. Those terms include, 'conventions', 'covenants', 'protocol', charter' etc.<sup>6</sup> Each of those terms refers to the same basic activity and or concept relating to international agreements or

treaties. Hence the use of one term rather than another may be of little or no difference or significance.<sup>7</sup> Let us, first but tersely define other terms that are similar to 'international agreements' or 'treaties' before the proper definition of the more popular term for international agreement i.e. 'treaties' is attempted in greater details.

'Convention' is a term used to mean 'agreement or compact, especially one among nations, a multilateral treaty.'<sup>8</sup> For example, Convention On the Elimination Of All Forms Of Discrimination Against Women (CEDAW) 1979.<sup>9</sup> The term 'covenant' may also be used as a 'treaty'.<sup>10</sup> The term 'protocol' signifies 'a summary of a document or treaty. It also means 'a treaty amending and supplementing another treaty'. Again, it covers 'the formal record of the proceedings of a conference or congress; the practices that nations observe in the course of their contacts with another'.<sup>11</sup> The term protocol as used in relation to treaty or international agreement can be exemplified by the African Union Protocol on the Rights of Women in Africa 2003. This is a protocol to the African Charter on Human and Peoples' Rights (ACHPR).<sup>12</sup> This protocol to the African charter on the Rights of Women in Africa is an agreement to supplement the provisions of the African Charter. In addition, certain protocols may be described as optional signifying that they are non-binding abinitio on states parties. For example, 'optional', protocol to Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2000.<sup>13</sup>

Another important term that can equally be used to describe international agreements or treaties is "charter". Among its meaning, 'charter' connotes 'an instrument that establishes a body politic or other organization, or that grants rights, liberties or powers to its citizens or members.'<sup>14</sup> For example, the Charter of the United Nations 1946 and African Charter on the Rights and Welfare of the child 1990.<sup>15</sup>

It is to be observed that all these terms are related to and or have same connotations and usage with International Agreements or treaties.

The main question now is what does the term 'treaty' or 'International Agreement' signifies under international law?

Under Article 2 of the 1969 Vienna Convention, a 'treaty' is defined as '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.”<sup>16</sup> This definition by the Vienna Convention has been reaffirmed and adapted by the Black’s Law Dictionary, the 8<sup>th</sup> edition and it went further to define treaty as ‘an agreement formally signed, ratified and adhered to between two nations or sovereigns,....’<sup>17</sup>

The above definition of treaty or international agreements indicates that once it is ratified and or acceded both by a state then it becomes binding. A state party may not therefore plead its domestic law including its constitutional provisions as the reason for its failure to discharge its obligations under such ratified treaties or international agreements.<sup>18</sup> In fact article 27 of the 1969 Vienna Convention indicates the binding nature of a ratified and acceded treaty on a party state and pointed the superceding tendencies of international agreements over and above domestic laws. The Article states that ‘a member state (Party to a treaty) is not entitled to invoke the provisions of its internal (i.e. domestic) law as justification for the non-execution of a treaty.’ The conclusion that can be drawn from this article is that once a treaty is ratified it has the damaging legal precedence over state’s or nation’s law on the same subject however negatively its consequence on the life and values of its citizens.

Although the definition of a treaty by the 1969 Vienna convention might not have included agreements involving international organizations as well as agreements between states which are to be governed by municipal (i.e domestic) law, such as a large number of commercial accords or pacts, yet they should still be seen as international agreements, according to Professor Shaw.<sup>20</sup> This assertion maybe supported by what article 3 of the Vienna convention itself states, that: ‘International agreements between states and other subjects of international law or oral agreements do not lose their validity by being excluded from the framework of the convention.” This is because one important requirement for the validity of a treaty is that parties to the convention intended to create legal relations as between themselves by means of signing, ratifying and or acceding to their agreements.

However, the definition of treaty under Article 2 of the Vienna convention accepts as treaties ‘agreements which are the constituent instruments of international organizations, such as the Charter of the United Nations (1946) and international treaties adopted within international organizations or agencies.’<sup>21</sup> On the other hand, there are certain agreements made between states, but as mere statements of commonly held principles and objectives only. Hence, they are usually not intended to establish binding obligations between states parties. Those types of agreements between nations strictly

speaking may not be within the meaning of treaty or convention under the 1969 Vienna Convention. They are just declarations, recommendations and or guidelines on commonly shared and upheld values and ideas. They do not have the binding nature and effect of a treaty or international agreement. Thus, even if they are signed and or ratified, can not be held binding but rather to be implemented or persuasive considerations only.<sup>22</sup>

Consequently, it may be observed that declarations like the Beijing declarations and Platform of Action 1999,<sup>23</sup> and recommendation on the consent to marriage, minimum age for marriage and registration of marriages (1965)<sup>24</sup> are some accepted principles of international law. Also guidelines, such as the United Nations Guidelines for the Prevention of Juvenile Delinquency 1988, popularly known as the 'Riyadh Guidelines',<sup>25</sup> can be described as additional accepted principles of international law and in many cases reflect the first attempt to codify customary international law before its final transformation into a binding treaty.<sup>26</sup>

It has been noted that in most cases, some of the international standards and transactions in this category of declarations etc, are adopted or proclaimed by the United Nations General Assembly, where most nations of the world are represented and this may indicate wide acceptability. While, in some cases they are adopted at special meetings of the specialized agencies like the United Nations Educational, Scientific and Cultural Organization (UNESCO) etc at which the interest of most states are represented.<sup>27</sup>

Notwithstanding the above efforts at clarifying the distinction between binding international agreements commonly called 'treaties' and or 'conventions' and non-binding international declarations recommendations and guidelines, it is always safer to submit that whether or not a particular agreement between states or nations is intended to create legal relations depends on the circumstances of each facts and or agreements and so subject to judicial interpretations.<sup>28</sup> For example, the International Court of Justice (ICJ) regarded a '*Mandate agreement*' as having the character of a treaty. Again, optional declarations with respect to the compulsory jurisdiction of the International Court of Justice itself have been regarded as treaty provision.<sup>29</sup> But in the Anglo-Iranian Oil Co. Case,<sup>30</sup> the ICJ expressed doubts about whether a 'concession agreement' between a private company and a state constituted an international agreement or treaty.<sup>31</sup>

In view of the analysis made on the meaning and nature of International agreements, one may venture to suggest that, there are non-binding international agreements which are mostly described as declarations, recommendations and guidelines subject, however, to parties intention to create legal relations. While on the contrary we have the binding international agreements and are commonly named “treaties”, covenants conventions and even sometimes protocols and charters. Also, treaties by their nature may be categorized as ‘bilateral i.e. before two nations and multilateral i.e., between more than two states. These are expressly covered by the provisions of the 1969 Vienna Convention on Law of Treaties.

## **2.2 The Making, Signing and Ratification of International Agreements are Treaties**

The primary concern of this part of the paper is to highlight some of the accepted ways of making a treaty including modes of expressing consent to it by states parties through, signature, ratification and or accession. Efforts will also be made to show the distinguishing features of signing and ratifying a treaty under international law.

Usually, international agreements or treaties as binding legal instruments between states parties are made or concluded in a written form. Mostly, international agreements are drafted as between states or governments or heads of states or governmental departments, whichever is found to be the most expedient and or convenient. It has been however observed that majority of the most important international agreements are concluded or entered as between heads of states, while many of the more worldly agreements such as minor commercial transactions or pacts are written as between government departments and or ministries.<sup>32</sup> A typical example of an important international convention concluded as between heads of states and or nations is the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (briefly called African Union Protocol on the Rights of Women in Africa), 2003.<sup>33</sup>

The text of the said protocol on women’s rights in Africa was presented to the Executive Council of the African Union (AU) and later on adopted by the African Heads of States and Governments following the recommendation of the Executive Council, during their second ordinary summit on July 11, 2003 in Maputo, Mozambique.<sup>34</sup> Nigeria signed and ratified this protocol on 16<sup>th</sup> December, 2004.<sup>35</sup>

After an international agreement has been drafted and got adopted by the member states, it will continue to remain a non-binding agreement until a state party expressed its consent to be legally bound by the stipulations in the agreement. The question is how does a state or nation express its consent to an international agreement so as to be legally bound by its provisions? In answer to the above question, it can be said that, there are a number of ways in which a state or nation may express its consent (or binds itself) to a treaty or convention. According to the indications under Article 11 of the 1969 Vienna Convention on Law of Treaties, there are about five ways in which a member state can express its consent to be legally bound by an international agreement. Hence, consent to an international agreement may be expressed by:<sup>36</sup>

- (a) Signature, or
- (b) Ratification, or
- (c) Accession or
- (d) Exchange of instruments constituting a treaty and
- (e) Any other means if so agreed by states parties.

Out of the above stated ways of expressing consent to international agreement (bilateral or multilateral) the first three, namely, signing, ratifying and acceding may be described as most popular, hence, the choice of them to be further but briefly expatiated in this presentation.

### **2.2.1 Consent by Signature**

A state or nation may regard itself as having given its consent to an adopted text of a treaty and becoming legally bound by it, when that treaty is signed by its head of state or its authorized representatives, like foreign minister, or minister of justice. It is important to note that where a treaty is signed by a person not authorized or authorized but not exercised as required by the enabling national law, such a treaty will be without any legal effect, unless the state involved afterwards confirms the act.<sup>37</sup>

Although consent by ratification is probably the most popular of the methods adopted in practice, yet consent by signature does retain some significance especially in light of the fact that to insist upon ratification in each case before a treaty becomes binding is likely to burden the administrative machinery of government and result in long delays.<sup>38</sup> This justifies the permissibility of consent by signature. This mode of expressing

consent is appropriate for the more routine and less sensitive or politicized conventions.

It is to be observed that where a treaty itself, or if the states parties intend that a signature alone without recourse to ratification would bind them, then signing a treaty would legally bind a state to a protocol or convention. However, where the convention is made subject to acceptance, approval or more commonly known term 'ratification', signature will become a mere formality and will mean no more than that state representatives have agreed upon an acceptable draft of the international agreement, which will be forwarded to their particular governments, for the necessary decisions making as to ratification or rejection. In this case, a treaty is said to be non-binding legally speaking, although a state party would be expected pending the ratification to refrain from doing certain acts that may defeat the purpose and object of the treaty.<sup>39</sup>

### **2.2.2 Consent by Ratification**

Generally, ratification is the most popular mode which a nation would express its consent to be legally bound by a treaty or convention. Ratification is always stronger than signature in terms of making a state bound by a treaty. In most cases, certain protocol will require that even if it is signed, it must be ratified before it comes into force.

The term 'ratification' is also used as 'acceptance or approval' in relation to expressing consent to international agreements. Article 2(1) (b) of the 1969 Vienna Convention defined 'Ratification' in connection with a treaty as 'the international (not national or domestic) act... whereby a state establishes on the international (not national) plane its consent to be bound by a treaty.'<sup>40</sup>

The rationale for requiring ratification of an international treaty even after signing same by a state or its sovereign was 'to ensure that the representative did not exceed his powers or instructions with regard to making a particular agreement'.<sup>41</sup>

The rule that a treaty is not binding on a state party until after its ratification has two basic advantages, namely internal and external. In the case of external benefit, the delay between signature and ratification may often be advantageous in allowing extra time for consideration once the negotiating process has been completed.<sup>42</sup> But in the case of the internal benefit, the advantages are so great and beyond measure for it led to greater participation by a state population in public affairs of the world that would

be of either positive or negative impact on their lives. Thus, by providing for ratification before a treaty becomes binding, the feelings of the public opinion or citizens of a state party have an opportunity to be expressed. The possibility is that if the public opinion indicates a strong negative reaction to the treaty, a responsible nation state may be compelled to decide or not ratifying the treaty.<sup>43</sup> It is observed that, the above wisdom and or advantages of ratification requirements, may be applied to explain the constitutional procedures and requirement under section 12 of the Constitution of the Federal Republic of Nigeria, 1999,<sup>44</sup> for the domestication and or implementation of international treaties in the country.

Generally, rules relating to the ratification of treaties vary from country to country. Hence, on how best a nation effects ratification is seen as a matter of internal domestic or national law alone and outside the regime of international law.<sup>45</sup> However, ratification usually occurs after a state's internal political as well as legal (including constitutional) processes and provisions to accept the terms of the treaty have been completed and or complied with.

Ratification in the case of bilateral treaties is usually accomplished by exchanging the requisite instruments. But in the case of multilateral treaties, the usually procedure is for one party (like the UN's Secretary General or the chairperson of the A.U. Commission) to collect the ratifications of all states and keeping all parties informed of the situation. For example, Article 47 of the Convention on the Rights of the Child (CRC), requires a state party to the convention to deposit its instrument of ratification with the Secretary General of the United Nations. Similarly, Article 28 of the Protocol on Women's Rights in Africa provides that "The instruments of ratification or accession shall be deposited with the chair person of the commission of the AU."<sup>47</sup>

### **2.2.3 Consent by Accession**

A state may become a party to a treaty and expressed it's consent to be legally bound by it, even through is not a signatory to the protocol, by the technique of "accession" and not by ratification, provided such mode of expressing consent is authorized or permitted by the treaty or the negotiating states.<sup>48</sup> For example, Article 48 of the CRC allowed "accession" to be one of the ways of expressing consent to it by a state

party. While Article 28 of the Protocol on Women's Rights in Africa also authorized its accession by the states parties in addition and or as alternative to signature and ratification.

It is hereby submitted that a state may express consent to by signature, or ratification and or accession, all however to be done in accordance with its national law or constitutional procedures. One of the most important consequences of signing, ratifying and or acceding to an international agreement is that, upon satisfying the minimum number of days and states parties, the treaty enters into force and a state party becomes bound by it including obligation to domesticate and or implement its provisions. For instance, Article 29 of the Protocol to Women's Rights in Africa declared that 'the protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.'

It is important to stress one fundamental nature of many treaties and or conventions. This is the fact that, many treaties are made amendable either by the agreement of the parties or through a separate treaty (better called 'a protocol'), thereby giving allowance for changing the provisions of a treaty. Thus, there are mechanisms provided for states parties who in the process of domestication of a treaty may be challenged to call for an amendment of the treaty for domestication.

### **2.3 Domestication as a Consequence of Signing, Ratifying and or Acceding to International Agreements**

The term domestication of a treaty' ordinarily may be described as the transformation of a signed, ratified or acceded convention into national law or legislation by a party state for its implementation and enforcement. Usually, domestication of a treaty comes as a consequence of the commitment of states parties to implement and enforce the undertakings under the treaty, nationally or locally. According to Sarah Mukasa, 'domestication' is a process of 'aligning and framing national laws to reflect' principles of international agreements as signed, ratified and or acceded to.<sup>49</sup>

Once a nation ratified a treaty then it becomes binding. The state must comply with all the terms of the treaty and ensure its effective implementation on its people and territory as a national or domestic law or legislation. This is what in reality domestication of international agreement is all about. Many multilateral treaties will include in their articles the

requirements for compliance with the convention through acts of domestication. Acts that may constitute domestication of an international agreement by a state include enacting and effectively implementing appropriate legislative including constitutional measure for the rights and obligations created under the treaty.<sup>50</sup> For example, Article 6 of the Protocol to Women's Rights in Africa, on marriage and the indications calling for its domestication by a state party, declared that:

‘States parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

- (a) No marriage shall take place without the free and full consent of both parties;
- (b) The minimum age of marriage for women shall be 18 years;
- (c) Monogamy is encouraged as the preferred form of marriage....”

In fact, Article 26 of the Protocol on Women's Rights in Africa provides a clear instruction on how a state party may domesticate and or implement provisions of the Protocol. Article 26 reads:

1. States parties shall ensure the implementation of this protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realization of the rights herein recognized.”

It is to be noted that the terms ‘ratification’ and ‘domestication’ in relation to international treaty though are not the same, yet they share similar purpose of making a state party to be bound by and enforce the provisions of a treaty. Strictly, ‘ratification’ as defined by Article 2(1)(b) of the 1969 Vienna Convention has to do with a nation's act at international plan expressing its consent to be bound by a treaty. But ‘domestication’ is a nation's act made or process and procedures followed at national or local arena for the application and enforcement of the terms of the treaty within its territory. Hence, domestication can be seen as the internal constitutional, legislative and sometimes political procedures and methods adopted for the effective implementation of ratified international agreement by a state party. As regards the procedure for signing, ratifying, acceding and domesticating or implementing protocols or conventions, many treaties do provide that states parties shall be guided by their constitutional procedures. There are mainly two different ratification and domestication techniques for international agreement in Africa.<sup>51</sup> The first mechanism is the French-

based constitutions. Here, constitutions of French-speaking countries or nations allow for direct domestication and or implementation of an international instruments once a state ratifies them. The second mechanism and in contrast to that of French-based constitution is known as the British-based and American constitutions. Here, for any term of international agreement ratified to be implemented at national level or domesticated, it must be enacted as a new bill by parliament or national assembly. It is this second methods of domestication that Nigeria belongs. Consequently the Constitution of the Federal Republic of Nigeria, section 12, specially provides for the procedures to be observed for the implementation of treaties in the country.<sup>52</sup>

In view of its fundamental significance in this paper, the provision of Section 12 of the 1999 Constitution on implementation of treaties in Nigeria will now be quoted as follows:

12(1) 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.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

A typical example of how Nigeria domesticated or transformed international conventions into national legislation for purpose of its enforcement following the due processes of the constitution is the African Charter on Human and Peoples' Rights 1981. Nigeria as early as 1983 ratified and domesticated it in the same 1983. This Act is today cited as 'the African Charter on Human and People's Right (Ratification and Enforcement) Act 1983'.<sup>53</sup> Section I of the Act provides for the enforcement of the provisions of the charter in the Nigerian courts as follows:

1. As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall subject as there under provided have

force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.”<sup>54</sup>

The Court of Appeal, in **Fawehinmi V. Abacha**<sup>55</sup> has this to say on the enforceability of a treaty in municipal courts. Where there is no enactment to give effect to the spirit of a treaty, and due regards by sovereign government it cannot be justifiable in a municipal court.” This simply explains how significant an act of domestication is towards effective implementation of ratified international agreements on the territory of a party state.

As we have noted earlier, one important feature of many international agreements is that they are capable of being amended. Another feature of international convention is that, ratification is generally not done within a short period of time. In other words, due to sensitive nature of some treaties, states parties take time or years before formally ratifying it. Thus, you find some multilateral treaties taking many years before entering into force. For example, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was adopted by the General Assembly of the United Nations in 1979. Nigeria ratified it in 1985 i.e. about six years after adoption. Yet upto date despite series of efforts by its promoters in the country, CEDAW has not been fully domesticated into Nigerian law.<sup>56</sup> This is a clear evidence that nations must always be very cautious in signing and ratifying treaties. Similarly, it is important to note that treaties are always allowed to be signed, ratified and or acceded to subject to certain reservations. A reservation is defined in Article 2 of the 1969 Vienna Convention as:

‘a unilateral statement however phrased or named, made by a state, when signing, ratifying, accepting acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.’<sup>57</sup>

Although many human rights activists may insist on the restrictive interpretation of the use of this right of a state party to international agreement, yet it is hereby submitted that countries like Nigeria – a multicultural and multi-religious society must always use this mechanism of reservations in order to avoid having conflicts with its international commitments and primary domestic responsibilities, values and laws. This

is a very important guide that upholds the present call for caution in ratifying and domesticating international agreements in Nigeria.

### **3.0 LET NATIONS BE CAUTIOUS OF INTERNATIONAL AGREEMENTS**

When we are requested to make a plea for caution when drafting, signing, ratifying and domesticating international agreements (or instruments) by sovereign nations like Nigeria, it means that, we are to identify and examine some of the reasons or consideration that should guide a state when accepting to be bound by and implement terms of international agreements. There are several considerations that can support the call for a nation's caution when ratifying and domesticating treaties. For the purposes of this presentation, two important factors and or considerations for caution are identified as follows:

- a) Difficulties arising from the application of treaties, namely, territorial scope or limit of the treaties within a nation and the supremacy of treaties over constitutional and other legislative provisions in the event of conflicts; and
- b) Some negative effects of certain international agreements on the socio-cultural and religious value, teachings, and injunctions of the majority of the citizens of the ratifying and domesticating country.

Certainly, these are some of the probable challenges and or difficulties a nation may encounter when ratifying and domesticating international covenants and or conventions. They are valid factors for caution in countries like Nigeria that operates multiple legal systems and made up of different socio cultural and religious background and practices which are equally sanctioned in the nation's supreme law i.e. the constitution. In discussing the above two major factors for guiding a nation in ratifying and domesticating a treaty, examples will be drawn from some selected treaties ratified by Nigeria and in some have been domesticated.

#### **3.1 Difficulties Arising from the Application of Treaties**

There are two important issues to be raised. The first, has to do with the scope or extent to which a ratified treaty is applied in a nation. Does it cover the entire territory or can its application be limited or restricted to a particular part of the ratifying country? Secondly, can a nation refuse to apply and or domesticate its ratified treaty on the basis that the terms of the treaty are in breach or conflict with its constitutional and other legislative provisions? In other words, in the event of conflict between the terms of the

ratified treaty and the provisions of a nation's law, for example, the constitution, which one supersedes?

In an answer to the first issue, Shaw, M.N. contended that, unless a different intention appears from the treaty or is otherwise established, Article 29 of the 1969 Vienna Convention provides that a treaty is binding upon each party in respect of its entire territory. This is the general rule, but it is possible for a state to stipulate that an international agreement will apply only to parts of its territory.<sup>58</sup> This paper strongly associates itself with the position above taken by Shaw. Hence, it can be advanced that, Nigeria, can validly restrict application of some ratified treaties to states where it is not going to be difficult to enforce them. For example, the provisions of CEDAW that have been ratified by Nigeria in 1985 and are currently undergoing processes of domestication, especially on contentious matters like equality of men and women and over their rights and responsibilities during marriage and dissolution.<sup>59</sup> States that are predominantly Muslims and governed by Islamic law injunctions would no doubt find the application of this type of treaty difficult on their people. The same argument could be advanced that, when a nation is domesticating a ratified treaty, like the Convention on the Rights of the Child (CRC) certain provisions of it that are directly in conflict with the values for example, Muslims in states like Kano, Sokoto, Katsina, Bauchi etc should not be extended to those states. Nigeria ratified CRC in 1991 and has in 2003 succeeded in the partial domestication of same as the Child's Rights Act, 2003.<sup>60</sup> The problem is that many states are yet to adopt the CRA because of the misgivings Muslims have over its origin and steps taken at domesticating it at the National Assembly.

On the second issue, to wit, where there is conflict between national law including its constitution and a ratified international convention or treaty, which of them takes legal precedence? There appears to be two contrasting answers and or opinions on the above question.

According to Ibrahima Kane,<sup>61</sup> an international agreement duly ratified, (like the Protocol on the Rights of Women, 2003), takes legal precedence over national law including its constitution in the event of conflict between the two. This, he submitted was part of the 'explicit' conclusion of the 1969 Vienna Convention on law of treaties. According to Article 27 of the Vienna convention, "a member state or party to a treaty is not entitled to invoke the provisions of its internal law as justification for the non-execution of a treaty".<sup>62</sup> This supremacy of international agreement over

national law is even more imperative when the treaty in issue seeks to protect human rights. Hence, it is contended that the consequence of permitting national law to take precedence over the charter (i.e. African charter on Human and Peoples Rights)', could be to obliterate the importance and impact of the laws and liberties provided for by the Charter'.<sup>63</sup>

Furthermore, it has been canvassed that a state cannot plead a breach of its constitutional provisions as to the making of treaties as a valid excuse for rejecting the implementation of a treaty. This seems to be the view provided by Article 46 of the Vienna Convention. It is now clear on this opinion that a nation must be cautious when ratifying and or domesticating an international agreement. It has a far reaching binding consequences over and above its national and or constitutional provisions. However, this presentation respectfully declined to associate itself with this type of conclusion.

The second and the preferred view in this presentation is the one held by Sibongile Ndashe,<sup>64</sup> to the effect that national law more particularly the constitutional provisions of a member state to a treaty must always take legal precedence over international agreement in the event of conflict between the two. According to this writer, a constitution is ordinarily the supreme law of a country. It constitutes an embodiment of the norms and basis upon which the laws of a country must be tested. All laws, including intentional agreement as governed by international law, will be valid to the extent of their consistency with a country's constitution.

This view is more sound and preferred compared to the one held by Ibrahima Kane. This is because, even going by the provisions of section 12 of the 1999 Constitution of the Federal Republic of Nigeria, international agreement, or charter or convention like CRC can not have the force of law in the country unless it has been domesticated or transformed into law by the National Assembly. Section 12(1) of the 1999 constitution reads: "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."

Thus, any international convention (as in the case of CRC) or charter (as in the case of African Charter on the Rights and Welfare of the Child (1990) Nigeria can only be implemented in Nigeria if its domestication is done not

in breach of the constitutional requirements and procedures under section S12(1), (2) and (3). One may probably submit that, because the domestication of these two most important international treaties on children's rights in Nigeria as the Child's Rights Act, 2003 hence it is viewed as unconstitutional for failure of the National Assembly and sponsors of the domestication to comply with the provision of section 12(3) of the 1999 Constitution.<sup>65</sup>

In view of the above highlighted difficulties on the application of treaties, it is always better for a nation to be cautious in ratifying and domesticating international agreements. The application of Islamic law of personal status can be seen as a constitutional matter and rights of the Muslims, therefore any treaty like (CEDAW, CRC) etc touching on matters of Islamic law of marriage, divorce and inheritance, may be interpreted as inconsistent with the constitution and of no force of law.

### **3.2 Some Negative Effects Of Certain International Agreements On The Socio-Cultural And Religious Values of a Nation State.**

It is to be noted that majority of the international agreements are drafted and expressed with the primary aim of setting universal standard for all peoples and all nations. However many of their terms and provisions may be viewed as against the socio-cultural and religious values of Nigerians, particularly Muslims. Therefore, they are vehemently resisted especially at the process of domestication. For example, certain international human right treaties, like CEDAW, CRC, the Protocol on Women's Right in Africa, African Charter on the Rights and Welfare of the Child and African charter on Human and Peoples Rights, etc may provide terms that are totally unacceptable to the divine injunctions of Islamic law and the socio-cultural and religious values of the Muslims. Whereas those treaties have been ratified by Nigeria awaiting domestication, some of them have even been domesticated. Amongst those that have secured domestication are: African Charter on Human and Peoples Rights, which is now cited as the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983, Cap. C23, Laws of the Federation 2004. Also the CRC and the African Charter on the Rights and Welfare of the Child have both been domesticated as the Child's Right Act, 2003.<sup>66</sup> All these seem to have contained provisions that are likely to be destructive to Islamic injunctions on children's and women's rights. For instance, CEDAW and the Protocol on Women's Right in Africa seek to protect the rights of women on marriage, inheritance, divorce and maintenance.

international instruments prohibit child marriage and betrothal. They fixed 18 years as the minimum age of marriage for a woman. The CRC and Africa Charter on the Rights and Welfare of the Child, domesticated as the Child's Rights, Act 2003 have equally provided some terms that are not acceptable to Muslims and Islamic law. For instance, the African Charter on the Rights of the Child, Article 24 permits adoption of a child. The Child's Rights Act, 2003 in section 146 authorises or legalizes adoption of children. These are certainly not acceptable in Islam. Again, the Protocol on Women's Rights in Africa guarantees sexual and reproductive rights of women. They include her rights to medical abortion, to resist unwanted or forced sex. In fact, Article 14 of the protocol on Women's Rights in Africa because of its far reaching implications on the socio-cultural and religious values of the majority of Nigerian Muslims over their family system deserves reproduction here below as follows:

“Article 14: Health and Reproductive Rights

- (2) States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
  - (a) The right to control their fertility;
  - (b) The right to decide whether to have children, the number of children and the spacing of children
  - (c) The right to choose any method of contraception;
  - (d) ...
  - (e) ...
  - (f) The right to have family planning education.”

The implication is that Nigeria has ratified the above protocol and so under obligation to enforce all its terms. They are to be applied even on Muslims. Therefore, when it comes to enforcement including domestication of provisions of such international treaties, Muslims will no doubt resist them.

#### **4.0 Conclusion and Suggestions**

In the final analysis one may submit that, a nation like Nigeria no doubt must interact with other nations of the world including ratifying bilateral or multilateral treaties. However, in doing so and by extension, domesticating those treaties, caution must be taken not to radically offend its constitution (as the grundnorm) and the socio-cultural and religious values of its citizen.

It is therefore suggested that when Nigeria is making, signing ratifying and domesticating international agreements, it should do so with caution, first to avoid undermining its constitutional provisions and secondly, not to destroy the socio-cultural and religious values of its citizens, especially principles and teachings of Islamic law.

Other measures to guide Nigeria in ratifying and domesticating international agreements include:

- (i) Signing must be subject to ratification.
- (ii) Ratification should always be made with reservations so as to allow flexibility in case of opposition to its enforcement as national law.
- (iii) Any international agreement to be signed and ratified or domesticated in Nigeria should be subjected first to the popular views and opinions of the citizens whom are to be affected by its provision. In other words, a treaty that is to be ratified or ratified but to be domesticated should be popularized to the citizens, while the state should in good faith respect the majority views of its citizens on same.
- (iv) Nigeria must not be in a hast to ratify and domesticate international agreements simply in order to make world leaders like America and Britain accept, it as a progressive nation. It must take its time weighing the advantages and disadvantages of any treaty. Again, even where it has ratified, it should be able to utilize the provisions of the treaty that allows amendment where later it discovered the impracticability of the terms of the treaty on its territory and people.
- (v) Parties representing Nigeria at signing or ratifying treaties must always be guided by the limits of their authorities or powers, by the constitutional provisions especially matter under exclusive and concurrent legislative lists and the overall socio-cultural and religious values of the citizens of the country they represent. This will enable them appreciate those areas of the treaty that may require reservation and or amendments.
- (vi) Heads of states and governments and members of the National Assembly who primarily are responsible for the domestication of an international agreement must also be made to appreciate and understand the binding consequences of a treaty and its possible conflicts with the national laws and socio-cultural and religious

values of the country. They must be educated on the need for observance of rule of law, due process and constitutional procedures in ratifying and domesticating international agreements.

## REFERENCES

- , *Department of Islamic Law, ABU, Zaria*  
 Shaw, M.N.; (1986), *International Law*, (2<sup>nd</sup> edition, Grotious Publications Limited, Cambridge, U.K. p.458.  
 Ibid  
 Ibid  
 Ibid. p.459  
 Ibid p.459. see also Article 26 of the 1969 Vienna convention.  
 Nwankwo Oby (2005): *Human rights of Women – A compilation of International Human rights Treaties and Instruments – Civi9l Resource Development and documentation Centre (CIRDDOC) Nigeria*, p.2.  
 Shaw, M.N. Op. cit. p.459.  
 Garner, B. A. (edn) (2004); *Black's Law Dictionary* (8<sup>th</sup> edt), West, a Thomson Business, USA p.359.  
 See also convention on the Rights of the Child 1988.  
 See also convention on the rights of the child 1988.  
 Garner, B.A. op. cit. p.1261.  
 Faiza Jama Mohammed: *African Union Protocol on the Rights of Women in Africa: The SOAWR campaign: in breathing life into the African Union protocol on Women's Rights in Africa* edited by Roselynn Musa, Faiza Jama Mohammed, Frioze Mangi (2006). *Solidarity for African Women's Rights and African Union Commission Directorate of Women, Gender and Development*, p.14 – 15.  
 Nwankwo, oby op. cit. p.93.  
 Garner, B.A., op cit.  
 Roselynn Musa et al (edt): *Breathing Life into the African Union Protocol on Women's Rights in Africa: Instruments on Women's Rights* by Rita Anyumba op. cit.p.9.  
 Shaw, M.N. op. cit. p.459; see also Nwankwo Oby op. cit.p.2.  
 Garner, B.A. op. cit. p.15640.  
 Nkwakwo, Oby op. cit. p.2.  
 Ibrahima Kane: *Harmonizing the Protocol with National Legal systems* in Roselyn Musa et al op. cit. p.53  
 1). Shaw, M.N. op. cit. 460  
 1. article 5 of the Vienna Convention; also see Shaw, M.N. op. cit. p.461.  
 2. Nwankwo Oby, op. cit. p.2.

Ibid p.203. See also Universal Declaration of Human Rights (UDHR) 1948. see also Ladan, M.T. (1999) Introduction to International Human Rights and Humanitarian Laws, A.B.U. Press, Kaduna p.7 – 43.

Ibid, p.41.

See Training Manual; Juvenile Justice Administration in Nigeria (2002); United Nations Children's Fund, UNICEF, Nigeria Office p.19.

Nwankwo Oby op. cit. p.2, who also cited Eze Onyeleperci, Economic, Social and Cultural Rights: A COmpilation of International Standard.

Ibid. p.2.

Shaw, M.N. op. cit. p.460.

See Shaw, M.N. Ibid., p.460 who cited South-West Africa Case ICJ Reports, 1962 pp.319-330. also the recent case between Nigeria and Cameroon at the ICJ can be good example of how ICJ acquired jurisdiction over Nigeria because we submitted or acceded to it power on the Bakassi dispute.

ICJ Reports 1952, pp.93-112 cited by Shaw.

Ibid p.460.

Shaw, M.N. op. cit. p.461.

Protocol to the African Charter on Human and Peoples' rights on the Rights of Women in Africa – Abridged Version and policy brief for implementation – Women's rights Advancement and Protection Alternatives (WRAPA) Nigeria (2004).

Babaji, B (2006): The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: Its popularization, Documentation and Challenges in Nigeria – being a paper presented at a one-day Advocacy meeting/workshop for community and Religious leaders, organized by WRAPA, WILDAF WARD, with support from SIGRID Foundation held at Confluence Beach Hotel, Ganaja Road, Lokoja, Kogi State on 31<sup>st</sup> August, 2006. p.5, See also Roselynn Musa et al op., cit., p.15.

Ibid p3, see also Roselynn Musa Ibid pp.112-113 for the list of African countries that have signed and ratified the protocol as at 2006.

See Article 11 of the 1969 Vienna Convention as referred to by Shaw, M.N. op. cit. p.462-464.

Shaw, M.N. op. cit. p.462-64.  
 Ibid., p.464.  
 See Article 18 of the 1969 Vienna Convention; See also Shaw, M.N. ibid, p.465.  
 Shaw, M.N. ibid, p.465.  
 Ibid p.465.  
 Ibid., p.465.  
 Ibid p.465.  
 See Section 12(1) (2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999, Cap. C23, Laws of the Federation of Nigeria (LFN) 2004.  
 Shaw, M.N. op. cit p.466.  
 Convention on the rights of the Child (CRC) 1989, See Nwankwo Oby op. cit. p.151.  
 Protocol on Women's Rights in Africa (2003). See also Nwankwo Oby p.130:  
 See Article 15 of the 1969 Vienna Convention.  
 Sarah Mukasa: Domesticating the Protocol in Roselynn Musa et al, op. cit. p.28.  
 See Article 26 of the Protocol on Women's rights in Africa 2003.  
 Mary Wandia: Institutionalizing Strategies for the Protocol in Roselynn Musa et al op. cit. p.35.  
 Babaji B. op. cit. p.26.  
 See the African Charter on Human and Peoples rights (Ratification and Enforcement) Act 1983. No.21, Now cap. A9 Laws of the Federation of Nigeria 2004.  
 Ibid.  
 (1996) NWLR pt-475, p.710 at 722 cited by Babaji B: Harmonizing the Childs Rights Act 2003 with cultural and religious values in Nigeria – The Muslim Perspective: being a paper presented at a one day Advocacy/Sensitization meeting with Religious and community/Traditional leaders in States under UNICEF Zone C. the meeting was held on 23<sup>rd</sup> June 2004 at the Federal Secretariat Conference Hall, Katsina.  
 Anthony Hodges (edt): (2001): Children's and Women's rights in Nigeria: Awake up call – Situation Assessment And Analysis National Planning Commission Abuja and UNICEF Nigeria p.3.  
 As quoted by Shaw, M.N. OP. CIT. P.467,

Shaw, M.N. op. cit. 423;

Article 16(1) (C) of CEDAW

Babaji B: (2006): An Overview of the Child's Rights Act 2003 – a paper presented at a Two day training on Child Justice Administration in Kebbi State, organized by the League of Democratic women (LEADS – Nigeria ) in collaboration with UNCEF Nigeria on 12<sup>th</sup> – 13<sup>th</sup> December 2006. p.6, See also Child's Rights Act simplified version, Federal Ministry of Women Affairs (2005) p.2.

Ibrahima Kane: (2006): Harmonizing the Protocol with National Legal Systems, in Roselynn Musa, op. cit. p.53

(Ibid p.53.

Ibid p.53.

Sibongile, Ndashe (2006): Strategic Litigation: A tool for domesticating the Protocol? In Roselynn Musa, et al, op. cit. p.61.

Babaji B. (2004) Harmonizing the Child's Rights Act, 2003, p.15.

Child's Rights Act 2003 Federal Republic of Nigeria, Official Gazette, No. 116, Vol.9, 23<sup>rd</sup> December, 2003, Lagos.