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THE ABORTION ISSUE IN NIGERIA: MARGIN OF APPRECIATION AND HUMAN RIGHT PRINCIPLE

BY

GANIAT MOBOLAJI OLATOKUN

ABSTRACT

Various groups and individuals in Nigeria have continue to agitate for the legalization of abortion in Nigeria especially under the right to choose provision contained in the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). It is expected that, Nigeria being a signatory to CEDAW ought to have implemented the Convention which will then pave the way for the legalization of abortion. The refusal by the Nigerian government to domesticate and consequently, implement CEDAW has given rise to speculations of breach of treaty agreement signed by the Nigerian government. This study investigates the stand of Nigeria as a sovereign nation as far as domestication and implementation of CEDAW is concerned in the face of the constant agitation for the legalization of abortion in Nigeria. This is a doctrinal research wherein, various materials like, books, journals, periodicals etc, which are based in the library are used in carrying out this research. The library-based research conducted by this work reveals that, sovereign nations like Nigeria have the right to uphold the fundamental principles of international human right instruments, like CEDAW. Also, it has been revealed that nations could rely on the margin of appreciation when determining which human right to uphold.

KEY WORDS: CEDAW, abortion, right to choose, human right, sovereign nation.

I. Introduction

The General Assembly of the United Nations, on the 18th December 1979, adopte the Convention on the Elimination of all forms of Discrimination against Women, CEDAV The Convention is a human right document which promotes the principle of no: discrimination and equality between men and women. The Convention focuses on three k issues of which reproductive right is one. The right to choose is one aspect of reproducti right.¹ 59-69

The right to choose according to the radical feminists of the 1960s means, the rig women have to determine what happens to their bodies.² To radical feminists, this rig extends to the decision whether or not to carry a pregnancy to term. This decision shou be left absolutely with the women. This view was boosted in 1973, by the Supreme Court the United States of America in the case of *Roe v. Wade*.³ By this decision, the court recognizes the right of a woman to have an abortion under the 14th Amendment to the American Constitution.

¹ Other aspects of reproductive rights includes, fully shared responsibility for child rearing by both sexes, right to maternity and family planning. Reproductive rights under CEDAW are contained in Article 12 dealing with health and Article 16 dealing with marriage and family. The combined effect of these articles is that, in order for the good health of women; women should be able to decide freely and responsibly as regards the number and spacing of their children. See the World Health Organization, *Birth Spacing Cluster Representatives and Health Volunteers Guide* (2008) available at www.emro.who.int/mps/pdf (accessed 26 November 2011). Here, birth spacing has been described as a procedure which save lives of mothers and babies, reduces abortion and unwanted pregnancies and improves children's health and mother's health. Furthermore, longer birth intervals have been identified as bettering the health of mothers. See, USAID Issue Brief, *Healthier Mothers and Children through Birth Spacing* available at www.usaid.gov (accessed 26 November 2011). See also, Population Information Programme, *Birth Spacing: Three to Five Saves Lives*, Population Report volume xxx, number 3 (2002).

² According to Firestone, a radical feminist, the connection which women usually have with men is an invasion of the women's body, and the resultant effect of that connection, which is pregnancy, should be left at the mercy of the women. See, R. west, *Jurisprudence and Gender in feminist jurisprudence* 505, 506 (Patricia Smith ed., 1993). See also, Martha C. Nassbaum, R. west, *Jurisprudence and Gender, Defending Radical Feminism*, 75 university of Chicago Law Review 985 (2008) available at <http://www.jstor.org/stable/201411934> (accessed 15 February 2011). See also, the declaration by the Administrator of the United Nations Development Programme, when speaking of a 1995 worldwide survey of the status of women, that 'life is dramatically unfair to women'. See, robert s. mc elvaine, *eve seed: biology, the sexes and the course of human history* (2000).

³ 410 U.S. 113 (1973).

Since this decision, most nations of the world began to have a more liberal view towards abortion. In fact, 60% of the world's 1.55 billion women of reproductive age (15-44) live in countries where abortion is broadly legal. The remaining 40% live in countries where abortion is highly restricted.⁴

II. Abortion Issue in Nigeria

Nigeria is one of those countries with restrictive abortion laws. Termination of pregnancy is highly restricted in Nigeria under both the Penal Code (applicable in the North) and Criminal Code (applicable in the South) and carries heavy jail term of up to 14/years for the provider and 7/years for the woman, unless it is performed to save the life of the woman.⁵

Based on this, some quarters of the Nigerian population believes that this is a form of discrimination against women. They felt that, since both men and women are equal before the law, there should be no restriction to deprive women from doing whatever they want to do with their bodies. Any attempt to stop women from exercising this right is seen as a discrimination which CEDAW has eliminated through the reproductive rights granted by it. The right to choose as defined by radical feminists of the 1960s is thus, implored and brought in to interpret the right to choose under CEDAW.

Abortion is presently regarded as a major cause of social and clinical problem in Nigeria. ⁶Because the Criminal laws of the country are against abortion, women result to abortion in clandestine places⁷ leading to astronomical increase in abortion-related maternal morbidity and mortality.⁸ Abortion is also thought to be responsible for long term morbidity in women including infertility, chronic pelvic pain, recurrent and spontaneous abortion and ectopic pregnancies.⁹

Consequently, abortion, though a legal issue in Nigeria, has assumed the status of a

⁴ See, Susan Cohen, Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide, 12 Guttmacher Policy Review (2009) available at <http://www.guttmacher.org/pubs/gpr/12/4/gpr120402.html> (accessed 15 June 2012). Previously, 25% of the world population lives in countries where abortion is restricted, and 61% of the world population live in countries where abortion is allowed. See, Siegrid Tautz, (un) safe Abortion, A Review and Discussion Paper, 4320 Health and Supraregional Project 7 (2004) available at [http://www.giz.de/Themen/de/dokumente/de-disk-ssa4\(1\).pdf](http://www.giz.de/Themen/de/dokumente/de-disk-ssa4(1).pdf) (accessed 20 November 2011). See also, Anika Rahman, Laura Katzive and Stanley k. Henshaw, A Global Review of Laws on Induced Abortion, 1985-1997, 24 International Family Planning Perspectives 56, 57 (1998) available at <http://www.guttmacher.org/pubs/journals/2405698.html/> (accessed 20 November 2011).

⁵ Sections 232 and 235 Penal Code of Northern Nigeria and sections 228, 229 and 230 Criminal Code of Southern Nigeria.

⁶ See, *The Background to the Seminar on Critical Issues in Reproductive Health. Prevention of Morbidity and Mortality from Induced and Unsafe Abortion in Nigeria*. Proceedings of a Seminar Organized by the Department of Obstetrics, Gynecology and Perinatology, Obafemi Awolowo University, Ile-Ife, Nigeria (4-9 December 1991) 8,8; See also, F E Okonofua, 'Clinical Consequences of Unsafe Abortion and their Management in Nigeria' (1991) in *Clinical Issues in Reproductive Health. Prevention of Morbidity and Mortality from Induced and Unsafe Abortion in Nigeria* 19, 19-20 being a paper delivered at the proceedings of a seminar Organized by the Department of Obstetrics, Gynecology and Perinatology, Obafemi Awolowo University, Ile-Ife, Nigeria. 4-9 December 1991. <www.popcouncil.org/pdfs/ebert/abortionmorb_mortnigeria.pdf> Accessed on 26th November 2011; See also, Singh Susheela, 'Hospital Admissions Resulting from Unsafe Abortion: Estimates from 13 Developing Countries' (2006) 368 (9550) *Lancet* 1887,1887-1889; See also, Nwogu-Ikojo, E E Ezegwui, H U, 'Abortion Related Mortality in a Tertiary Medical Centre in Enugu, Nigeria' (2007) 27(8) *Journal of Obstetrics and Gynaecology* 835,835-836.

⁷ Boniface A Oye-Adeniran, Carolyn M Long, Isaac F Adewole, 'Advocacy for Reform of the Abortion Law in Nigeria' (2004) 12(24 Supplement) *Reproductive Health Matters* 209-216,210; see also, Boniface A. Oye- Adeniran et al, 'Induced Abortion in Nigeria: Findings from Focus Group Discussion' (2005) 9(1) *African Journal on Reproductive Health* 133,134 <<http://www.ingentaconnect.com/content/wharc/ajrh/2005/0000009/0000001/00016>> Accessed on 2nd March, 2011.

⁸ F. E. Okonofua, *That She May Multiply Without Tears* (2006) being the inaugural lecture delivered by him on 7th December, 2006 at the University of Benin, Nigeria 12,25; see also, Nimi Briggs, 'Epidemiology of Unsafe Abortion' in *Critical Issues in Reproductive Health, Prevention of Morbidity and Mortality From Induced and Unsafe Abortion in Nigeria, being a paper delivered at the proceedings of a seminar organized by the Department of Obstetrics Gynaecology and perinatology, Obafemi Awolowo University, Ile- Ife, Nigeria* (4-6 December 1991) 17,17; See also, F E Okonofua et al, 'Perception of Policy Makers in Nigeria Toward Unsafe Abortion and Maternal Mortality' (2009) 35(4) *International Perspective on sex and Reproductive Health*, 194,194; See also, Patrick I Okonta, Peter N Ebeigbe, Ileogben Sunday- Adeoye, ' Liberalization of Abortion and Reduction of Abortion Related morbidity and Mortality in Nigeria' (2010) 89(8) *Acta Obstetrica et Gynecologica Scandinavica*, 1087,1087. These literatures provide evidence regarding the high rate of abortion-related maternal morbidity and mortality.

⁹ Several complications have been linked to abortion. See, Abasiattai, Anieken M, Umoiyoho, Aniefiok J, 'A 6-Year Review of Maternal Deaths in A Teaching Hospital in South-South Nigeria', (2009) 11(1) *International Journal of Gynecology and Obstetrics* 5,5. See also, Buowari, Debota, Yvonne, ' Pattern of Gynecological Admission at a Rural Hospital in Nigeria' (2010) 7(1) 5,5; See also, Boniface A Oye-Adeniran, Augustine V Umoh and Steve N N Nnatu, 'Complications of Unsafe Abortion: A Case Study and the need for Abortion Law Reform' (2002) 10(19) *Reproductive Health Matters* 18,18.

social problem¹⁰ with arguments centring on whether or not to legalize abortion.¹¹ There is a strong claim now that, abortion can be legalized in Nigeria using the right to choose, an aspect of reproductive rights within CEDAW as its basis.¹²

It is important to state that the controversy whether or not to legalize abortion in Nigeria dates as far back as 1982. A 1982 attempt to liberalize abortion law in Nigeria was defeated. A termination of pregnancy bill, sponsored by the society of Gynaecologists' and Obstetricians of Nigeria, was presented to the National assembly. This bill was strongly opposed by religious leaders and by the Nigerian Council of Women Societies of Nigeria who feared that its passage would promote sexual promiscuity.¹³

To date, this has been the stand of the Nigerian government on the issue of legalization of abortion. The fundamental principle of human right instruments as well as the margin of appreciation can be said to be the main justification for this stand by the Nigerian government.

III. Fundamental Principle of International Human Right Instruments

Most people who study jurisprudence or political philosophy are invited at some stage to read Thomas Aquinas's "treaties on law".¹⁴ Here, they read his definition of Natural Law as *participatio legis aeternae in rationali creatura*: the participation of the eternal law in rational creatures. Each of us is not only subject to God's providence, but is actually a participant. Thus, Natural Law is concerned with the reason whereby, we discern what is good and what is bad. This is simply the impress in us of the divine light.

The Natural Law originates nothing, sustains nothing, they are merely responsible for uniformity in sustaining what has been originated and what has been sustained.¹⁵ Hence, when it comes to establishing a strong conceptual frame work of human right

¹⁰ For a condition to be termed social problem, four conditions must be met. They are; (i) there must be some political outcry, people must become involved in discussing the problem, public attention becomes directed towards that condition; (ii) the condition must involve a gap between social ideals and social reality i.e, the condition must run counter to the values of larger society, (iii) a significant proportion of the population must be involved in defining the problem and, (iv) the condition must be capable of solution through collective action by the people. See Defining Social Problems. <www.people.vcu.edu/~mahoney/define.htm> Accessed on 23rd November 2011. The four steps are classified as agitation for mobilization, policy formation, policy implementation and policy modification. See, Peck, Dennis I Dolch and Norman A, *Extraordinary Behavior: A Case Study Approach to Understanding Social Problems* (2000) 1; See also, Donileen R Loseke, *Thinking About Social Problems: An Introduction to Constructionist Perspective* (2003) 6.

¹¹ The four criteria listed above has been met as far as abortion issue is concerned in Nigeria. In a strongly worded letter by a group, named African Anti-Abortion Coalition (AAAC), to the late president of Nigeria, Musa Yar'Adua, the group informed the president that, some pro-abortion groups have shifted their fight against the Nigerian unborn children to the States' Houses of Assembly, after their crushing defeat at the National Assembly. The group wants the president to act on the issue. See, African Anti-Abortion Coalition, Chidicon Medical Center, <www.chidicon.com/AAAC.html> Accessed on February 5th 2011. Even after the passage of the so-called Women's Reproductive Rights Law, in Anambra State, one of the Eastern States of Nigeria, there was an immediate worldwide condemnation from national and international pro-life groups alleging a constitutional violation, and a call for the outright striking out of the law. In another related development, in Imo State, another Eastern State of Nigeria, the State's House of Assembly has been commended for rejecting the Imo State Women's Right Bill (2009). The Legislators voted 13-1 against a bill that would have made abortion legal in the pro-life state. See, Orji Kalu, 'Legalization of Abortion?, No Way' <<http://www.sunnewsonline.com/webpages/columnists/kalu/kalu/20-june-htm>> Accessed on 22nd March 2011; see also, Patrick B Craine, 'Nigerian State Rejects Abortion-Legalizing Bills Pushed by American Group' <<http://www.lifesitenews.com/news/archive/1dn/2009/jun/09061909.html>> Accessed on 22nd March, 2011.

¹² Recommendation 24 of the CEDAW Committee has pointed out that neglect of health services that only women require is discrimination and a deficit that government must remedy. The committee further noted that criminalization of abortion is a barrier that states should improve. It must be pointed out quickly that, CEDAW committee, is a body set up to monitor compliance of state parties with CEDAW rules. This being the case, it is not expected of that body to make recommendations contrary to what is contained in the body of the rules, it expected to monitor its compliance. There is nothing within the CEDAW rules to show the intents of recommendation 24. Consequently, many researchers in Nigeria tend to blame the restrictive penal laws for the high rate of maternal mortality, which to them is a discrimination against women. CEDAW is now being used as a means of 'legalizing abortion through the back door'. See the article by Sonnie Ekwuowusi, 'Why Obasanjo Must Not Sign CEDAW', *This Day Newspapers* (Nigeria) May 16th 2007,16. The following researchers in Nigeria has persistently linked the restrictive abortion laws as the cause of maternal mortality: Lawrence Adedokun, 'Systematizing Determinants of Abortion: A Frame work for abortion Research in Nigeria' (4-6, December 1991) in *Critical Issues in Reproductive Health. Prevention of Morbidity and Mortality from Induced Abortion in Nigeria, being a paper delivered at the proceedings of a seminar organized by the Department of Obstetrics, Gynecology and Perinatology*, Obafemi Awolowo University, Ile-Ife, Nigeria, 97-110,104.

¹³ See Population Policy Data Bank maintained by the Population Division of the Department for Economics and Social Affairs of the United Nations Secretariat available at www.un.org/esa/population/publications/abortion/doc/nigeria.doc (accessed 7 November 2011).

¹⁴ See, Thomas Aquinas, *Summa Theologiae* (1265-1274) available at <http://www.ccel.org/ccel/aquinas/summa.html> (accessed 7 November 2011).

¹⁵ See, Henry Drummond, *Natural Law in the Spiritual World* 20 (2008).

principles, the theories of relativism and positive law, untethered from universal principles, has no place in the drafting of the Universal Declaration.¹⁶

The writing of the Universal Declaration¹⁷ represents such a bulwark. It also represents a tremendous leap in the progress of the moral conscience.¹⁸ The drafters of the Declaration clearly understood their role as representatives of the conscience of mankind. Hence, the dignity and worth of human person is the founding premise of the Universal Declaration.¹⁹ Eleanor Roosevelt,²⁰ Dr. Johannes Van Aggelen,²¹ Charles Malik,²² and a host of others who had close connections with the drafting of the Declaration, made constant reference to the premise, basis and foundation of the Declaration as the respect for the dignity, sanctity as well as worth of human person.

It can therefore be said that, the concepts of dignity, sanctity, status, and worth of individual person underpin the Declaration's understanding and acceptance of the first principle of natural law, that is, the moral importance to do good and avoid evil, and emanating from this, the precept that affirms preservation of any human life. Natural Law principles such as these, found concrete expression in the Declaration, and were declared by the drafters to be universal.²³ These are human rights, pertaining to human beings where ever they live, pertaining even to the smallest human being, who, for a short nine months, enjoy the natural right to live and grow in utero.

Thus, giving the human child at the early stages of development other names such as, 'embryo' or 'fetus', and referring to the child as 'it',²⁴ does not alter the child's human nature or the child's entitlement 'by nature' to the inherent dignity²⁵ and inalienable rights of all members of the human family.²⁶ The term inalienable rights of all members of the

¹⁶ See, Rita Joseph, *Human Right and the Unborn Child* 39 (2009). Classical Roman Jurists, Sir William Blackstone and a host of other writers, fancy that a rule of law made by judicial decision on a pre-existing custom exists as positive law. See, John Austin and Robert Campbell, *Lectures on Jurisprudence and the philosophy of positive law* 36 (2004). While speaking on the immutability of Natural Law, Hans Kelsen was of the opinion that, Natural Law claims absolute validity and therefore, in harmony with its pure idea, it presents itself as a permanent, unchangeable order. Positive Law on the other hand, with its merely hypothetical-relative validity is inherently, an infinitely changing order which can adjust itself to conditions as they change in space and time. See, Hans Kelsen, *General Theory of Law and State* 396-397 (2007).

¹⁷ The declaration is universally regarded as an authoritative elaboration of the human rights provisions of the United Nation Charter. Many, if not all of the rights elaborated in the Declaration are widely recognized as constituting rules of Customary International Law. See, Samuel Natale and Mark B. Frenon, *Business Education and Training: on the Threshold of the Millennium* 208 (2000).

¹⁸ See Joseph (note 9), 39.

¹⁹ *Id.* In view of the Nazi's crime against humanity, the United Nation Commission on Human Rights was charged with writing a declaration of human rights which reaffirms the faith in fundamental human right in the dignity and worth of human person... this is the basic premise See also, the of the Charter that the peace and security of mankind are dependent on mutual respect for the rights and freedoms of all. See, Suzanne McIntire and William E. Burns, speeches in world history 387-391 (2009). See also, Preamble of the Universal Declaration of Human Right. G.A Res. 217(A) (III), UN GAOR, 3rd Session, Supp. No 127 at 71, UN Doc A/180 (1948). See also, Mary Ann Glendon, *a world Made New* 175 (2001). See also, Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transformational Constitutional Discourse* 65 Montana Law Review 15 (2004).

²⁰ She was the former first lady in the white house (1933-1945). She became head of the United Nation Commission on Human Rights. At a meeting of the United Nation in Paris, 1948, she addressed United Nations officials, diplomats and world leaders at the Sorbonne University on the document she helped write- the Universal Declaration of Human Rights. See McIntire and Burns (note 12) 387.

²¹ He was a close associate of John Humphrey, Director of the United Nations Division of Human Rights, first appointed to oversee the drafting of the Universal Declaration. See JOSEPH (note 9) 40. See also, Van Aggelen Johannes, *The Preamble of the United Nations Declaration of Human Rights* 28 Denver Journal of International Law and Policy 133-134 (2000).

²² A Lebanese philosopher and diplomat, he was president of the United Nations Economic and Social Council. He served as rapporteur of the Commission on Human Rights at the time of drafting the Universal Declaration. See JOSEPH (note 9), 39. See also, Charles Malik, *International Bill of Human Rights* (1948) available at <http://www.udhr.org/history/ibrmalik.htm> (accessed 29 January 2013).

²³ See Joseph (note 9), 40.

²⁴ See, Copelon R, Zampas C, Bruise E and Devore J, *Human Rights Begins at Birth: International Law and the Claim for Fetal Rights* 13 Reproductive Health Matters 120-129 (2005).

²⁵ Considering the fact that 'dignity' is becoming common place in the legal text providing for human right protection in many jurisdiction, it is however contended here that, what must be borne in mind is the spirit and intents of the drafters of the Universal Declaration of Human Rights that human dignity is a symbol of natural law, that is, the moral imperative to do good and avoid evil. See, Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* 19 European Journal of International Law 656 (2008).

²⁶ See, Joseph (note 9), 44-46. A child before birth is a member of the human family biologically, genetically and genealogically. To be eligible for membership of human family, one has to be human. See, Morsink Johannes, *Women's Right in the Universal Declaration* 13 Human Right Quarterly 230 (1991). See also, Joseph (note 9), 48. Present in former president Regan's description of the fetus, was the notion of public fetus. The fetus to him was one of America's unborn children and a member of the human family. The fetus was not of the mother; the fetus was of the society. See, Michael Weiler and W. Barnett Pearce, *Regan and Public*

human family applied to the child before birth. The right to life is inalienable. This suggests that, this right cannot be taken from the child by anyone, not by the neo-Nazi state,²⁷ not by the doctors and not even by the child's mother.

Having established that the Universal Declaration of Human Rights was established on the basis a natural law,²⁸ which recognizes the dignity, sanctity and worth of human persons, from which the right to life is thereby granted to everyone including the unborn child, it is here argued that the prohibition of abortion is a legal norm considered so fundamental to its peremptory norm of international law. The protection of the child before as well as after birth is a fundamental principle of *jus cogens* of our system of international protection of human right based on universal recognition of international community.²⁹

The protection of the child before as well as after birth is recognized irrevocably by the Universal Declaration of Human Rights as a common standard of achievement for all peoples and for all nations.³⁰ It is on this basis and premises that, all other International Human Right Laws³¹ except the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,³² recognizes the protection of the child both before as well as after birth.

IV. Margin of Appreciation

International law³³ has recognized the global problem which appears particularly significant in regions where 'clashes of culture' are imminent.³⁴ In such countries with marked cultural diversity³⁵ and distinct political decentralization, culture-related

Discourse in America 278 (1992). The fetus is thinking, sensing, feeling and learning about life in that watery world. We need to revisit the roots of our humanity as members of the human family... See, Roy Ridgway and Simon H. House, *The Unborn Child: Beginning of a whole Life and Overcoming Problems of Early Origin* xiv (2006).

²⁷ See, Joseph (note 9), 179.

²⁸ The right to life, because it is inalienable rules out abortion. The natural law principle relevant here is that, a human entity should be allowed to persist in being and that, one must not directly attack any basic good in any person, not even for the sake of avoiding bad consequences. That this basic aspect of human well being is never to be directly suppressed, is cited by Professor John Finnis as the principle of natural law that provides the rational basis for absolute human rights, for those human rights that prevail *sempe et ad* (always and on every occasion) and even against the most specific human enactment and commands. See Joseph (note 9), 42.

²⁹ *Id.*, 105.

³⁰ *Id.* See also, the Preamble Universal Declaration of Human Rights.

³¹ All International Human Rights Laws are consistent in their right to life provisions of all citizens of the world generally, and in particular, the right to life of the unborn. Abortion is frowned at by all international human right instruments, by their provisions as regards the right to life of the unborn. See. Art. 3 of the Universal Declaration of Human Rights, Universal Declaration of Human Right, the Preamble to the Declaration of the Rights of the Child (1959), the Geneva Declaration of the Rights of the Child (1924), Art 1 of the Draft International Covenant on Human Rights (1947), Art. 6(5) International Convention on Civil and Political Right (1966), Art. 1(2) American Convention on Human Right, (1969). If all these international human rights instruments are consistent in their provisions for the right to life of the unborn, it is submitted that the Protocol to the African Charter on Human and People's Right of Women in Africa, authorizing medical abortion in a bid to protect the reproductive right of women, is inconsistent with all international human right instruments, and to that extent, void.

³² The arbitral exception of assault, rape and incest in Article 16 (c) of the Women's Protocol purporting to justify the authorization of abortion are not consistent with the long standing human right obligations towards the unborn child, and thus, not valid. See JOSEPH (note 9), 250. The child before birth, being innocent of any crime should not be deprived arbitrarily of his or her life, because the inherent right to life shall be protected by law and no one shall be arbitrarily deprived of his or her life. (Article 6(5) International Convention on Civil and political Rights).

³³ See, L. Oppenheim, *International Law* 8th Edition 26 (1955). See also, David Kennedy, *The Sources of International Law* 2 American University Journal of International Law Review 4 (1987) available at <http://www.auiilr.org/pdf/2/2-1-1.pdf> (accessed 9 April 2012).

³⁴ See, Karen B. Brown and David Snyder, General Report of the Xviiiith Congress of the International Academy of Comparative Law / *RAPPORTS GENERAUX DU XIII CONDRESS DE L'ACADEMIE INTERNATIONALE DE DROIT COMPARE* 583 (2012), 583. Vienna Convention on the Law of Treaties VCLT 1969, Vol 1155, Art 31(3) (c) 2, 12 also acknowledges that the complex and entangled relationship between custom and treaties must be taken into account when interpreting the latter if relevant and applicable. See, Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting Interpretation of Crimes* 21 European Journal of International Law 543 (2010) available at <http://www.lexisnexis.com.eserv.uum.edu.my/ap/academic/> (accessed 19 April 2012).

³⁵ Nigeria has a population of 140 million (National Population Commission Nigeria), making it the most populous country in Africa. See, Anjuwon Grace, I. Auston, R. Raghavan, S. Kotzin and K.J. Hofman, Assessment of Scholarly Publications of the Nigerian Health Science Researchers in MEDLINE/PubMed (1996-2007) 3 Sierra Leone Journal of Biomedical Research 90 (2011) available at <http://www.ajol.info/index.php/sljbr/article/viewFile/71809/60765> (accessed 8 March 2012). It is a nation with ethnic, religious and economic diversity. Nigeria is said to be characterized by several socio-economic inequalities among their regions, ethnic groups and religions. Nigeria is fragmented with 374 ethnic groups. See, Amim Langer and Ukoha Ukiwo, *Ethnicity, Religion and the State in Ghana and Nigeria: Perceptions from the Streets* 34 Center for Research on Inequality, Human Security and Ethnicity 3-4 (2007) available at <http://www.crise.ox.ac.uk/pubs/workingpaper34.pdf> (accessed 8 March 2012).

divergences in interpreting human right texts are visible.³⁶ Hence, in a bid to interpret the 'right to choose' within CEDAW in Nigeria, the relative (limited or moderate) universalism approach³⁷ is opted for.

This approach upholds the treaty-based human right as such (or at least the core of it), but allows consideration of particular cultural aspects when interpreting the often vague formulated-human right, when filling up a margin of appreciation,³⁸ or particularly significant, when weighting human rights and public interests. This approach shows that, any interpretation of normative texts in any country is interdependent with local and regional culture.³⁹ Nigeria, as a country, in recognizing these facts, have interpreted 'right to choose' to exclude abortion.

It is trite to mention at this juncture that, one area that has eluded efforts at international regulation is abortion. Tribunals and similar bodies involved in the implementation of international human rights laws have cautiously avoided taking a clear position on this subject, given the existence of wide disagreement from one country to another. The European Court of Human Right have therefore evoked what it calls the 'margin of appreciation' doctrine by which controversial matters (like abortion) on which there is no consensus are not addressed, thereby declining a pronouncement on the subject.⁴⁰

According to account of CEDAW's negotiating history, some countries were opposed to the mention of 'family planning services'. Since this (family planning services) did not exist everywhere, it could result in the refusal to ratify the convention, so the supporters of CEDAW emphasize that, the Convention calls on State Parties to take 'all appropriate measures', thereby, leaving it to State governments to determine what constitutes access to 'family planning'.⁴¹ In support of this, they point out to the negotiating history of the Convention that indicates that the text ('all appropriate measures') was left intentionally ambiguous to allow State Parties to ratify CEDAW.⁴²

³⁶ The process of interpretation is also an integral part of the legal system in which the text is situated. Legal texts only make sense within the legal context of the system that gives them authority and meaning. See, Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention* 54 International and Comparative Law Quarterly 286 (2005) available at http://www.biicl.org/files/2140_campbell_mclachlan_the_principle_of_systemic_integration.pdf (accessed 8 April 2012).

³⁷ Other approaches are, (i) absolute relativism, which totally denies, for whatever conflicting cultural reasons, the universal or at least, quasi-universal normative effect which result from the human right treaties, and (ii) universality through culture, which confirms an inner link, not a contrast between both dimensions saying that cultural adaptation increases or even creates sociological acceptance of the normative prescription and therefore, gives real efficacy to human right. These two approaches are seldom in nature, and cannot be upheld. See, Brown and Synder (note 27), 583.

³⁸ See, Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality* 8 German Law Journal 713 (2007) available at http://www.germanlawjournal.org/pdfs/Vol08No07/PDF_Vol_08_No_07_711-734_Articles_Bakircioglu.pdf (accessed 17 April 2012).

³⁹ What is decisive is the readiness of the interpreter to objectivize his/her culture-shaped mindset and to duly respect the international obligations. Thus, the need for universality is satisfied and cultural particularity is observed to the extent that the universal document explicitly or implicitly allows it. See, Brown and Synder (note 27) 583.

⁴⁰ Although the doctrine was first used within the frame work of the European Court system, it has been transplanted to the jurisprudence of other international human rights mechanisms. The United Nation Human Right Committee has implicitly employed the doctrine in the case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritanian women v. Mauritius* Communication No. R.9/35, U.N. Doc. Supp. No. 40 A/36/40 at 134 (1981). See also, Bakircioglu (note 31) 713. The United Nations Human Right Committee has also avoided the question of abortion. The closest the committee had come to the subject was its admonition in its general comment on the equality between men and women of March 2000, that States provide information on any measures to help women prevent unwanted pregnancies and 'ensure that they do not have to undergo life-threatening clandestine abortion'. See, "Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3)", U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), Human Rights Library, available at <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm> (accessed 27 March 2012). The texts themselves lend support to the view that there is some protection for the life of the unborn. They tend to rebut the arguments of those who maintained that abortion is authorized by international laws, because the unborn are not yet human beings, and therefore, they are not protected. See, David P. Forsythe, *Encyclopaedia of Human Rights* Volume 1445-446 (2009).

⁴¹ See, Lars Adam Rehof, *Guides to the Travaux Préparatoires of the United Nations Convention on the Elimination of all forms of Discrimination against Women* 143 (1993).

⁴² *Id.* Furthermore, still on the issue of allowance given to state parties to devise their own method and approach of 'family planning', Maria Isabel Plata, as far back as 1991, concerned about her country, Columbia where women's group in the country used the women's convention to promote equality and reproductive health. The Colombian Women Movement lobbied for the incorporation of the principles of women's convention into the 1991 constitution. In particular, the provision of the women's convention on the right to decide freely and responsibly the number of one's children is now part of the constitution. The women in Columbia has devised their own meaning of 'family planning' to include, the availability of a full range of reproductive health services, including infertility services, safe and effective contraception, integrated treatment of incomplete abortion and the

The reference to the negotiating history shows that, right from the onset, there were inhibitions expressed by state parties in respect of 'family planning' mentioned within CEDAW's 'right to choose' to be taken to mean abortion. It showed that, these inhibitions was respected and acknowledged by the leverage given to state parties to adopt the meaning that best suit their countries as far as 'family planning' is concerned, showing in the main, the respect for national sovereignty as expressed in the preamble to CEDAW.

V. Conclusion

Upholding the fundamental principles of international human right instruments lies on the legislature of every sovereign state as the primary defenders of the human rights of the unborn children. Therefore, African politicians in general and Nigerian politicians in particular, must conform to the universally recognized rights, as enshrined in the Universal Declaration of Human Rights, to which African states in general, and Nigeria in particular is Committed. States must provide legal protection against abortion which constitutes arbitrary deprivation of life in breach of the fundamental principles of international human rights laws. By the criminalization of abortion, the state is providing legal protection against abortion, and consequently upholding the fundamental principles of international human rights law.

It is here stated, based on the above examination that, the fundamental principles of international human right instrument is to uphold the dignity and sanctity of human persons, whether born or unborn. Hence, an international human right instrument like CEDAW cannot be used to perpetrate an act which is against such principles.

treatment of menopausal women. Plata had urged CEDAW, as far back as 1991 to issue a general recommendation clarifying the terms, women's health and 'family planning' programs. Such a recommendation would explain that, in order to comply with the convention, states need to develop comprehensive reproductive health services that 'empower women and not use women as a means to limit population growth, save the environment and speed development. See, Rebecca J. Cook, *Human Rights of Women: National and International Perspective* 19 Pennsylvania Studies in Human Rights (1994).