The Theory and Practice of International Law in Nigeria

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THE THEORY AND PRACTICE OF INTERNATIONAL LAW IN NIGERIA

CHRIS NWACHUKWU OKEKE
THE THEORY AND PRACTICE

OF

INTERNATIONAL LAW IN NIGERIA
THE THEORY AND PRACTICE
OF
INTERNATIONAL LAW IN NIGERIA

BY

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FOURTH DIMENSION PUBLISHERS
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For a very long time, the picture had been painted of Black Africa before colonisation by Europeans as a bunch of backward and uncivilised tribes who had no regard for the rule of law in their relationship with each other. It was therefore inconceivable to imagine "states" in the sense of international law existing in Africa, much less any system of international law. As has been pointed out elsewhere, "international law had never absorbed Africa as its integral part but merely as an appendix".¹

The fact that the theory and practice of international law is as old as the history of state-system itself can no longer be hardly denied. While modern international law made its appearance first in the ancient cities of Greece, Rome, and much later in the countries of Western christianized Europe, and consequently was better felt early in these parts of the world, it was very much in recent times that the full necessity and value of international law was being adequately appreciated in Africa and the Third World.

However, this is not to say that the doctrine of the law of nations was totally unknown of or never practised in Africa in the spirit of laws governing inter-state affairs which was very much identical with the relations between states in Europe.

An inquiry into the historical evolution of the doctrines of international law will reveal that it never took Africa into consideration, at least directly. Consequently, international lawyers did not bother to consider the African native states in their study of the science of modern international law.

The Federal Republic of Nigeria is one of such Black African States to emerge as an independent and sovereign state from the British Colonial rule in the early sixties.² Before this period of Nigeria's history as a nation, research has shown that the Yoruba-Benin and the Hausa Fulani states made useful contributions to inter-

² Nigeria attained Independence on October 1, 1960.
national law in precolonial Nigeria. From independence, Nigeria as a sovereign state became fully involved in the practical application of international law in all her dealings with other foreign states.

Consequently, the study of international law has been occupying a very fundamental position in the curriculum of all the law faculties in the country today.

The developments in this field have been the subject of compendious literature by eminent Nigerian scholars of international law. Above all, the law and practice of international law continues to grow and develop in Nigeria. Needless to state that this area of study is becoming increasingly of utmost interest to lawyers, political scientists and many other curious readers.

My fascination with international law dates back to 1964, about twenty years ago, as an undergraduate law student of Kiev State University in Ukraine Republic of the Union of Soviet Socialist Republics. The interest became a practical reality five years after on graduation when I set out on an arduous but certainly interesting journey of doing a doctorate in the field in the Netherlands. Then came 1974 when I became involved with the teaching of the subject at the University of Nigeria, Enugu Campus.

The present book represents the result of my endeavour and involvement till date, in both the teaching and research of the subject. Our decision to embark on this work was borne out of a number of considerations.

Firstly, with the accession to independence of the “new” states of Africa and Asia, of which Nigeria is one, there has been a demand that international law be adapted to meet the new needs of international society, considering the various legal traditions and interstate rules from the various parts of the world. If in the early sixties the concept of Nigerian international law might have been dismissed as untimely, this view would seem to be untenable today, as Nigeria’s attitudes in numerous aspects of the world questions are being collated and crystallized into principles of jurisprudential concepts.

Secondly, Nigeria is increasingly getting involved in a wide range of international activities particularly as it concerns the liberation of the remaining oppressed people of the African continent. Thirdly, the appreciation, awareness and interest of Nigerians in international legal problems is increasing at an encouraging rate.

Fourthly, although there is a spate of literature, as has been indicated by Nigerians on the multifarious aspects of international law, nevertheless, there is no concise work yet known to us, no matter how general, which is put together to cover a number of topics and can serve as a ready reference material particularly to students and practitioners on the subject. Fifthly, Nigeria today is a member of well over two dozen powerful political, judicial, administrative as well as economic international and regional organisations of the world. Twenty-four years after independence, it is necessary

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3 Godwin-Collins K.N. Onyeledo, “International Law” Among the Yoruba and the Hausa-Fulani, African International Legal History pp. 153-164; See, chapter III Supra for a more detailed discussion of this question.

to evaluate Nigeria's strategies and aspirations in these institutions.

The present book examines Nigeria's theory and practice of international law. In doing so, we have endeavoured to analyse in as simple a manner as possible some of the controversial and topical areas of international law against the general background of the theory and practice of these areas of law in Nigeria. Accordingly, the book is structured into fifteen chapters covering a wide range of carefully selected questions of international law which we consider very important at the present time.

Chapter one deals mainly with the general attitude towards international law. Chapter two is on the evolution and growth of Nigeria's practice of international law. Chapter three treats the question of the legal status of Federal States and their component states in International law with particular reference to the Nigerian Federation. Chapter four discusses Jurisdictional Immunity while Chapter five describes nationality and citizenship law. Chapter six is on Law of Aliens. Chapter seven examines Extradition in Nigerian Law. Chapters eight, nine and ten deal with Law of Organisations with emphasis on Nigeria's aims, participation and attitudes in the selected organisations. Chapter eleven is on Law of Treaties of Federal States and Chapter twelve analyses the basis of the treaty-making capacity of international organisations. Chapter thirteen is on the Law of the Sea while Chapter fourteen is on Civil Wars. The fifteenth chapter examines International Law in Legal Education in Nigeria.

It is hoped that all those interested in the dissemination and development of international law in Nigeria, be they academics, government officials, legal or "business" practitioners or politicians and, above all, students of international law, will find the present study useful towards a better understanding and appreciation of the Theory and Practice of International Law in Nigeria.

C. NWACHUKWU OKEKE

ENUGU, NIGERIA
1985
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<td>B.D.I.L.</td>
<td>British Digest of International Law.</td>
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<td>C.L.P.</td>
<td>Current Legal Problems.</td>
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<td>C.P.A.</td>
<td>Criminal Procedure Act.</td>
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<td>C.P.C.</td>
<td>Criminal Procedure Code.</td>
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<td>ECA</td>
<td>Economic Commission for Africa.</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States.</td>
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<td>FAO</td>
<td>Food and Agricultural Organisation.</td>
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<td>G.A.</td>
<td>General Assembly.</td>
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<td>GAOR</td>
<td>General Assembly Official Records.</td>
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<td>ICAO</td>
<td>International Civil Aviation Organisation.</td>
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<td>ILO</td>
<td>International Labour Organisation.</td>
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<td>ITU</td>
<td>International Telecommunications Union.</td>
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<tr>
<td>ILC</td>
<td>International Law Commission.</td>
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<td>I.C.J.</td>
<td>International Court of Justice.</td>
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<td>I.C.L.Q.</td>
<td>International and Comparative Law Quarterly.</td>
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<td>I.C.R.C.</td>
<td>International Committee of the Red Cross.</td>
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<td>I.M.F.</td>
<td>International Monetary Fund.</td>
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<td>I.M.C.O.</td>
<td>International Maritime Consultative Organisation.</td>
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<td>IBRD</td>
<td>International Bank for Reconstruction and Development.</td>
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<td>N.S.I.L.</td>
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<td>N.I.I.A.</td>
<td>Nigerian Institute of International Affairs.</td>
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<td>NGOS</td>
<td>Non-Governmental Organisations.</td>
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<td>OAU</td>
<td>Organisation of African Unity.</td>
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<td>OPEC</td>
<td>Organisation of Petroleum Exporting Countries.</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice.</td>
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<td>RIAA</td>
<td>United Nations Reports of International Arbitral Awards.</td>
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<td>SEMP</td>
<td>Soviet Yearbook of International Law.</td>
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CHAPTER 1

GENERAL ATTITUDE TOWARDS INTERNATIONAL LAW

INTRODUCTION:

The general attitude of both students of international law and
laymen towards international law is usually the same. It is often a
reaction of scepticism. When first a mention of international law is
made, a feeling of doubt as to its usefulness arises in the minds of
many people. Then comes the question whether it is really law or
just should be classified in the realm of ethics rather than law. The
central point of argument on this question had always been centred
basically on the vexed issue of the binding nature of the rules of
international law.¹

While we do not intend to delve into the details of the arguments
of both jurists and legal philosophers on this matter right from the
time of Grotius, Hobbes, Puffendorff and others to present time, it
is submitted that the dominant view is that international law is really
law from all considerations.

Indeed, the whole of the third world countries today as well as
socialist countries led by the Soviet Union, have recognised and
expressed their confidence in international law. They no more
express pessimistic views of international law. However, the new
states declare that they reject all the provisions relating to colonial
seizures, colonial dominations and racial inequality, the doctrine of
acquired rights, unequal treaties, the western doctrine of succession
to international treaties, provisions concerning responsibility for
harm caused to aliens, protection of foreign citizens and others.

The above position was even made clearer by Anand when he said:

“...This does not, however, mean that the “new” Afro-Asian countries
are not prepared to accept the whole body of present international
law. International law has in fact come to be accepted by these
countries except where it is still found to support past colonial rights

¹ For a detailed analysis of various schools of thought on whether international
law is law, see Michael Akehurst: A Modern Introduction to International
Law, Third Edition, London 1978, pp. 9-18; See, also, D.J. Haris: Cases and
Materials in International Law.
or is clearly inequitable by the present standards of civilizations".2

The above view seems to perfectly agree with that of the countries of socialist countries.3

Nigeria's attitude to international law, agrees with the views of Anand stated above. Its main concern with international law has been eloquently and succinctly put by Professor I.E. Sagay thus:

"The basic object of international law in the southern African situation has consistently and relentlessly been the affirmation of fundamental human rights, the dignity and worth of the human person and the equal rights of men and women of all communities".4

Further he stated:

"In contributing towards the solution of the problems of the Southern African situation, international law has forged and used three important instruments, namely. (1) the principle of self-determination (2) the principle of the legitimacy of liberation struggles and (3) the principle of the illegality of racial discriminations".5

According to Sagay, the difficulty of studying and observing international law in its proper context is that unlike municipal law which deals with situations with which the reader or even the ordinary citizen is familiar in his every day life, international law deals with issues which are remote from peoples including the very enlightened in many societies.6

It is submitted that it is no more in doubt whether international law is law or whether it satisfies the important element of law which is its binding character. Indeed, these questions have been given adequate answers by jurists of the highest authority and international reputation.7 International law is very much law.

MUNICIPAL LAW AND INTERNATIONAL LAW:

The relationship between international law and municipal law is full of theoretical problems. The international legal literature on the subject records two main principal theories involved in the debate. They are the monist and dualist doctrines.

(a) Dualism:

The protagonists of the dualist doctrine try to point out the essential difference between international law and municipal law. They make the point that the two systems differ in both their contents and scope. Essentially they regulate different subject matters.

While international law is law which essentially regulates the relationship between states, municipal law applies within the territory of a state and regulates the relations of its citizens with each other and with the executive. According to this point of view, neither legal order has the power to create or alter the rules of the other. Should there be a conflict between international law and municipal law, the dualists would hold the view that the courts should apply municipal law.

Dualism is closely connected with the positivist doctrine of law, which tends to deny the validity of the sources of international law apart from the practice of states.

(b) Monism:

The exponents of the monist theory assert the supremacy of international law even within the municipal sphere. One of the most forceful supporters of this doctrine is Sir Hersh Lauterpacht who holds the view that individuals could also be subjects of international

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4 See, J.I.E. Sagay: International Law and the Southern African Situation, Lecture Series No. 24 of the Nigerian Institute of International Affairs delivered on 23 Jan., 1978, p. 21. Professor Sagay is currently the Dean of Law at the University of Benin, Nigeria.
5 Sagay, op. cit. p. 3.
law. While Hans Kelsen also developed monist principles on the basis of formal methods of analysis dependent on a theory of knowledge, national law over municipal law, in his view, the question of "primacy" can only be decided on the basis of considerations which are not in themselves strictly legal.

In addition to the two main theories discussed above, there are the monist-naturalist theory as well as the theory of coordination.

(c) Monist-Naturalist Theory:

This theory resembles Kelsen's in a superficial sense. According to the theory, the international and municipal legal orders are subordinate to a third legal order, usually postulated in terms of natural law or "general principles of law" superior to both and capable of determining their respective spheres.

(d) Theories of Co-ordination:

In modern international law literature one will notice an increasing number of jurists who wish to escape from the dichotomy of monism and dualism. In their view, the logical consequences of both theories is that they conflict with the way in which international and national organs and courts behave. Accordingly, Sir Gerald Fitzmaurice, challenges the premises adopted by monists and dualists that internation law and municipal law have a common field of operation. The two systems do not come into conflict as systems since they work in different spheres. Each is supreme in its own field. Rousseau characterises international law as a law of co-ordination which does not provide for automatic abrogation of internal rules in conflict with obligations on the international plane. These jurists prefer practice over theory in this matter.

Apart from the theoretical discussion on the doctrine of monism and dualism in international law, there has been equal controversy in international law and practice on the distinction between the doctrine of incorporation and transformation. What is clear on this matter is that the practice of states is varied. Some countries adopt the incorporation principle while others follow the transformation principle.

The principle of law articulated in the above decision derives from a well-settled rule of international law, namely that a state cannot plead the provisions of its own law or deficiencies in that law in an answer to a claim against it for an alleged breach of its obligations under international law.

In the Alabama Claims Arbitration, the United States of...
The Theory and Practice of International Law in Nigeria

America successfully claimed damages from Great Britain for a breach of its obligations as a neutral during the American Civil War. The doctrine of transformation agrees with certain provisions of the Draft Declaration on Rights and Duties of states prepared by the International Law Commission in 1949. The said Declaration enjoined every state signatory to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions of its Constitution or its laws as an exercise for failure to perform this duty. Further it provides that every state has the duty to conduct its relations with other states in accordance with international law and with the principle that the sovereignty of each state is subject to the supremacy of international law. By a later resolution of the General Assembly of the United Nations Organisation; the said Draft was commended “to the continuing attention of member states and jurists of all nations.”

The supreme law of Nigeria like all countries is its constitution. Although suspended on the 31st December, 1983, it still remains at least the first proper source for determining Nigeria’s position on the subject of relationship between municipal law and international law. Unlike some African constitutions, there is no specific provision in the constitution of Nigeria that the municipal laws of the country will conform with the rules of international law. It was only with respect to international treaties specifically that the constitution provides for. With just this example, one can suggest that Nigeria prefers the transformation doctrine to that of incorporation in the restricted context of treaties.

Successive heads of Nigerian Government since independence have made official proclamations, to the effect that Nigeria would respect its obligations in international law. However, it will become clear to what extent Nigeria has kept to its promise when we come to discuss some specific areas of this work in which its adherence to acknowledged rules of international law was put to test.

Examples are the controversy over the opening of diplomatic bags during the wake of currency traffic in 1973, the expulsion of aliens order of 1983, the cement cases to mention but a few.

Discussing the question of transformation and incorporation doctrines in the relationship between municipal law and international law, some Nigerians are of the view that Nigeria is better with the incorporation principle. According to the supporters of this point of view, the transformation doctrine is rather too ambitious for the developing countries including Nigeria. They go further to argue that the doctrine of transformation is not consistent with the status of statehood or sovereignty in international law. In their view it is wrong for a nation to promulgate a law in which all its laws play a secondary role by giving the primary role to international law.

It is our considered view that it could be dangerous to propagate this type of doctrine. Naturally enough, the new states of Asia, Africa and Latin America (sometimes referred to as the third world countries) were afraid to surrender some chunk of their hard won sovereignty. However, as states grow in their international outlook, and as they participate in either the creation of new rules of international law or in the re-definition of the already existing ones, it must be borne in mind that the world is now advancing on the principle of inter-dependence and mutual cooperation. The age of holding tenaciously to the principle of absolute sovereignty is far gone. Indeed a state by taking laws to be in conformity with international law is a legitimate exercise of the sovereignty of such a state.

It is suggested that the legal advisers to Nigeria’s Ministry of External Affairs should keep Nigerian law under constant review to make sure that it does not violate international law.

If a proposed treaty such as the treaty of Economic Community of West African States (ECOWAS) was being negotiated it would be likely to necessitate changes in Nigerian law, or when the treaty on the regime of the sea has been negotiated, the requisite legislation should be pressed before such treaties are satisfied. By so doing, Nigeria may never be accused of committing a breach or violation no matter how temporary, of its treaty and other international obligations. It is submitted with respect that the idea that the doctrine of transformation is rather too ambitious for the developing countries is, to say the least, backward and does not take into consideration the stage of development of international relations as a whole.

Both in theory and in practice, international law does not, as it
example is in the area of treaty relations, which covers a good area of the states' relations with foreign subjects of international law. The relevant principles of law in resolving disagreements that may arise in this area are surely international law principles. The same can be said in respect of questions of immunity of a diplomat or the sovereign immunity of a sovereign entity.

At least three examples of constitutions, that of Greece, Federal Republic of Germany and United States of America, contain rather very clear provisions on the relationship between municipal law and international law. The 1975 Greek constitution contains provisions showing the place international law ought to occupy in modern constitutions. The constitution provides as follows:

"The generally accepted rules of international law (i.e. rules of customary international law) as well as international conventions from the time they are sanctioned according to each one's own terms, shall be an integral part of internal Greek law, and they shall prevail over any contrary provision of law..."\(^\text{27}\)

The Constitution of the Federal Republic of Germany provides:

"The general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory"\(^\text{28}\)

The United States of America Constitution provides:

"The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, and anything in the Constitution or Laws of any state to the contrary notwithstanding"\(^\text{29}\)

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\(^{22}\) Op. Cit.

\(^{23}\) (1932) P.C.I.J. Series A/B Case No. 46, p. 167.

\(^{24}\) (1906) 8. F. (JC) 93.

\(^{25}\) Prepared by the International Law Commission in 1949.


\(^{27}\) See, Article 28(1) of the 1975 Greek Constitution.

\(^{28}\) See, Article 25 of the Constitution of the Federal Republic of Germany.

\(^{29}\) Article VI, Clause 2 of the United States Constitution. In the United States treaty practice, the distinction is often made between self-executing and non-self-executing treaties. For more insight on constitutional provisions on the relationship between international law and municipal law, see, Peasles: Constitutions of Nations, 3rd ed. 1968, Vol. III.
ATTITUDE ON SUCCESSION QUESTIONS GENERALLY:

Successive Nigerian Governments from independence till date have shown positive attitude towards questions of succession generally. For example, on attainment of independence various questions of succession as they affect, for example, treaties, international claims, territorial claims, public property, private property and nationality issues arose. The Federal Government of Nigeria made the following declaration which was not only communicated to the Government of Great Britain but also to other foreign powers:

(i) all obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instruments shall henceforth in so far as such instruments may be held to have application to Nigeria, be assumed by the Government of the Federation;
(ii) that rights and benefits henceforth enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Nigeria shall henceforth be enjoyed by the Government of the Federation of Nigeria.\(^{30}\)

The above statement is self-explanatory and does not call for further explanations. Happy enough, subsequent Heads of State of Nigeria after the collapse of the first civilian administration, including all the military Heads of State had kept to the above pronouncement almost to the letter. It is submitted that the practice of Nigeria in respect of succession to treaty obligations appears to fall in line with the customary international law practice as reflected in the Draft Articles of the International Law Commission on State Succession to Treaties. The Draft provides as follows:

"A newly independent state is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the "treaty was in force in respect of the territory to which the succession of states relates".\(^{31}\)


\(^{32}\) See, Articles 11 and 12 of the Draft Articles.
CHAPTER 2
THE HISTORICAL OUTLINE OF NIGERIA'S PRACTICE OF INTERNATIONAL LAW

History acquires meaning and objectivity only when it establishes a coherent relation between past and future
— Edward Hallet Carr.

1. INTRODUCTION:

In an earlier work,¹ we had adopted the stand that international legal relations could not be reasonably understood if divorced from material relationships. International relations are the animating factors of international law. They provide the factual basis of the law.²

The concept of international relations, as we understand it, includes the interaction between all its participants.³ This presupposes all the main international legal entities operating in the international arena irrespective of the differences in the extent of their rights.

Consequently, the study of international law whether as practised by an individual participant of that legal system, or by a group of participants within an identifiable region of the world, must be connected with an examination of international relations of the given participant or participants within the given period of human history.

This chapter will attempt to inquire into Nigeria's history of the practice of international law. Nigeria's legal history has been much associated with the establishment of British colonial rule in the country.⁴ This assertion in our view is most debatable. In exploring this subject, the main thesis that will be canvassed will be that long before the advent of the British, the various kingdoms of what later emerged in the international scene as an independent political unit,

³ Okeke, C.N., op. cit. at p. 217.
called Nigeria, were actively involved in the practice and the shaping of international law relevant to their needs and competence to regulate their affairs. It must be conceded however, that international law of this era and as practised by the states of Nigerian Empires cannot be exactly equated to modern international law created to govern the diplomatic, commercial, military and other relations of the society of states. The term “international law” may not have been used, but the idea and essence certainly were the same. Furthermore, we shall briefly review the trend of Nigeria’s foreign policy as provided in its various Constitutions between 1914 and 1979. Also to be surveyed are the laws which were enacted in furtherance of the country’s future theory and practice of international law.

Sufficient historical evidence abound to show that some kingdoms of Nigeria had contact with each other and then with other countries both far and near before the arrival of the British in Nigeria. Prominent among these kingdoms include the so-called Hausa states of Bornu, Sokoto, Kano, to mention a few. They conducted relations between themselves on a basis much similar to the Greek City states, or India, and those of the Roman Empire. What more, there are records of international relations between modern North-Eastern states of Nigeria and the region of Segu in modern Mali. In the south of Nigeria, there is evidence that the Benin Empire had extensive relations with the Portuguese. During this period, wars were waged, trades within and across boundaries conducted, ambassadors exchanged, disputes settled, conferences held, and agreements signed. It is here suggested that these ancient states, conducted their affairs in a manner and style, not entirely different from those of modern states today. What may be conceded, however, is that the scope of the activities undertaken by them were limited. Above all, facilities in communications between their individual governmental organs on matters of common interest were hampered. There was decline in sophistication in statecraft generally.

The realisation of the mutual activities listed would have been difficult if not impossible without some legal framework. They developed rules of conduct to guide themselves, which had the force of “law.” It is with the specific illustrations of the nature of relations that existed among these states that we shall now deal.

2. FOREIGN POLICY, INDUSTRY, DIPLOMACY AND WARFARE OF THE HAUSA STATES OF NIGERIA:

The states that made up what was then described as the “Hausa States” of North-Eastern Nigeria included Sokoto, Kano, Bornu. These states occupied a vast area of land and exerted tremendous economic and political power. Sokoto and Bornu states particularly had borders with foreign countries with whom they developed mutual relations for nearly three centuries in practically every facet of international life. Kano, though located much in the centre was by all means the longest single trading centre at the material time. Its economy was buoyant. The dominant trade was centred on cotton cloth. Contacts with the outside world were established spontaneously on a reciprocal basis. Kano, therefore, can be regarded as having great industrial potential in the cloth industry as was aptly described by a German traveller at the time, Mr. Henry Bath. According to him, “The great advantage of Kano is that trade and manufacture go hand in hand. Almost every family has a share in them. There is something grand about this kind of industry. It spreads to the north as far as Murauk, Ghat, and even Tripoli (on the coast of the Mediterranean sea). It spreads to the west not only to Timbuktu, but in some degree even as far as the shores of the Atlantic, the very inhabitants of Aigun (on the coast of Mauritania) dressing in the cloth that is woven and dyed in Kano. It spread to the east all over Bornu”. Bornu people ranked high among the adventurous lot of the North of Nigeria. They travelled far and wide in the conduct of their trade thereby exerting great influence on the people of the present Chad Republic as well as across the Sahara Desert. Niven, the historian

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5 The historical outline of the Nigerian army has been clearly traced by Acheke O., Professor of Law in his book: “Groundwork of Military Law and Military Rule in Nigeria”, Fourth Dimension Publishers, 1978, p. 6. The point is made that as a result of numerous tribal or inter-village wars, rules of wars were developed. Various tribes in Nigeria had comparatively good military organisations. Several encounters between the native soldiers and the British forces were recorded. The Great Fulani wars, the formidable Ijebu Expedition of 1892 and the senatorial Aro Expedition of November 1901 to March 1902 to mention a few, are clearly remembered both in oral traditional and in books.


7 Basil Davidson, Ibid., pp. 187-188.

8 Quoted in Davidson, op. cit.
had described the nature of the contact thus: "In Spain we find a Kanem man at the Court of El Mansour as court poet: in 1271 an Embassy to Tunis is recorded as having presented a giraffe to its ruler from the king of Kanem and the Monster of Bornu. A small but valuable trade grew up across the desert".9

It will soon be seen, that in the effort to trade with nearby countries, these states developed indigenous art of diplomacy and foreign policy. They were able to export their culture as well as religious beliefs. Above all, they waged wars when it became very necessary. What was responsible for this advancement for West Africa?, one may ask.

Davidson writes that "(the seventeenth century yeilds two works of central importance from the school of Timbuktu, those of Mahmud Kati and Abderrahman Es-Sa'di. And with the eighteenth and nineteenth centuries the field of surviving African manuscripts in Arabic becomes broader and includes many West African lands."

Kotoko of Lake Chad is said to be among the most renowned of the scholars of the time who used Arabic script to write their own languages. According to Davidson, none of these writings, perhaps, is more interesting for the light it throws on learning and sophistication than the diplomatic correspondence of 1813 between Sultan Muhammed Bello of Sokoto and his neighbour and opponent, Sheikh Amin the Muhammed of Bornu in which they argued for and against the holy war of the Fulani. These communications were contained in letters exchanged between the two leaders.10

From the Kano Chronicle, there is precious evidence of the states of the Hausa people that flourished in what is now Northern Nigeria through the middle ages and for long afterwards. They are said to have been conquered by the Fulani at the beginning of the nineteenth century.

The eighth Sarkin Kano was Shekkarau (who reigned A.H. 689-706 or A.D. 1290-1307).12 On his inauguration as the Sarkin, his men wanted to know how he assessed the people of Kano and wished to proceed in ruling them. He clearly opted for peaceful resolution of problems rather than fight. But he was warned on the consequences of peaceful diplomacy for according to his counsellors, if he sought to make peace with his people, they will take it to be weakness. The proper method of diplomacy was considered to be force where an offer for peace failed. The counsels of his men prevailed throughout his rule. His reign was for seventeen years.

After his life, there was constant fierce war between Kano and Gobir for supremacy which was hard to determine until the reign of Sarkin Dussi Makuri. He nearly entered the city of Gobir through the fierceness of his attack but had to return to Kano on the surrender of his opponents.13 It is clear that during this period, the use of war for the settlement of disputes was accepted as legal just as was the case in other parts at the time. Perhaps enlightened opinion would suggest that it should not have been so. But this implies no defect in the method and structure of the laws of war, but simply in its content, which is capable of development and change.

There is evidence also that in the field of diplomacy, rulers of the period exchanged diplomatic notes. Tarikh El-Fetash narrated how in A.H. 913 the Songhay Emperor, Askia Muhammed, made restitution to three poor scholars who had suffered persecution by Chi Ali, a prvious and despotic ruler. Having received servants and cattle from Askia, these men asked for a safe-conduct for all the cities of the empire to which he agreed. His secretary wrote a note under his dictation commanding all whom it may concern to respect and protect the three scholars. He further authorised the scholars and their descendants to marry any women they may wish throughout his empire, from the Kanta to the Sibridugu.14 Leaders of both states accorded full respect to matters affecting their interests on the basis of reciprocity.

Muhammed Al-Hajji, the Sudanese Vice-Chancellor of the University of Omdurman, who was formerly at the Bayero University Kano, stated that diplomatic relations between Kanem-Borno and other Muslim States in North Africa and Middle East, date back to the 11th century. Dunama, the successor to Humai B. Selemia first Kanem ruler, performed the pilgrimage to the Holy Land twice and it

10 Davidson, op. cit., p. 26. The Beni of Benin are thought to have used a pictographic form of writing in earlier times but there is no conclusive evidence.
11 For details of these letters, see: Charles Smith's English translation of the Infaq al-Maysun (London 1931); See also Thomas Hodkin: "Nigerian Perspectives", Oxford, 1960.
12 As quoted in Davidson, op. cit., p. 84.
13 Davidson, op. cit.
14 That is from modern North-Eastern Nigeria to the region of Segu in modern Mali. For details, see, Davidson, op. cit., at pp. 92-94.
became customary for Kanem-Borno rulers until the dynasty fell in the 19th century. In a visit to the Turkish archives in Istanbul in 1966, al-Hajj recovered diplomatic exchanges in Arabic between the Ottomans Sultan Murad III and Mai Idris Aloma of Borno in the 16th century. Also, diplomatic notes between Uthman B. Idris Sultan of Borno to Barquq, the Manluk Sultan of Egypt was received in Cairo in 794 A.H. (1391-2 A.D.)

3. THE EMPIRES OF BENIN AND OYO OF SOUTHERN NIGERIA:

Like other states in early medieval West Africa, the “forest belt” empire of Benin emerged from the economic and social changes which an onward-moving iron age brought in its train. Many years ago, the Benis came all the way from Egypt to find a more secure shelter in this part of the world after a short stay in the Sudan and at Ile-Ife which the Benin people called Uhe.

There were contacts in form of trade, social and cultural representations with African countries and beyond. The Portuguese ranked first among countries outside West Africa with which Benin Empire had contacts. The Portuguese are said to have come in contact with Benin in 1446. There was exchange of ambassadors between the two states as well as occasional exchange of diplomatic notes.

The Benin people sent ambassadors to Europe and are known to have received ambassadors from Portugal. During the reign of Oba Esigie of Benin, a Portuguese missionary, John Affonso d’Averio came at least twice to Benin at the instance of the King of Portugal to try to persuade the Oba to become a Christian arguing that Christianity would make his country better.

In a reaction to these pressures, Esigie therefore sent one of his influential Chiefs, Ohen-Okun, the Olokun priest as ambassador to the King of Portugal asking him to send priests who would teach him and his people the faith. An account of the personality of this ambassador was aptly given by Davidson who wrote as follows:

“The ambassador was a man of good speech and natural wisdom. Great feasts were held in Portugal in his honour. He was shown many of the good things of Portugal. He returned to his own land in a Portuguese ship. When he left, the King of Portugal made him a gift of rich clothes for himself and his wife and also sent a rich present to the King of Benin”.

The items of the presents included a copper stool, coral beads and a big umbrella. In addition to the presents, the King of Portugal also sent Roman Catholic missionaries, as well as Portuguese traders who established trading factories at Ughotom, the old port of Benin. They traded in ivory, Benin clothes, pepper and other brands of spices as well as other commodities in the mutual interest of both Kings. Unfortunately, owing to the unhealthy state of the country their commerce soon ceased.

For over a century the management of affairs of Benin was carried out under different leaders. The Empire of the first period or dynasty was founded about A.D. 900. The rulers or Kings who were commonly known as “ogiso” wielded much influence and gained popularity among its people. The nearest Kingdom in Nigeria with which the Benis had contact were the Ouduada and his party at Ife in Yorubaland, about the twelfth century of the Christian Era. Between the two Empires, there were constant exchanges of ambassadors who were accorded full respects and immunities similar to those enjoyed by such representatives under the modern rules of diplomacy.

A good example of an occasion during which an ambassador was sent by the Benis to the authorities of a nearby Empire was during tussle for leadership of Benin Empire after the death of Oba Ewian. Ewian was until his death the administrator of the government of the country because of his past services to his people. Before his death he nominated his eldest son Ogiamwen as his successor, but his people resisted and refused his nomination because there had...
been a decision to set up a republican form of government which
Evian by his action was selfishly trying to alter.
Rather than accept Evian's son as their ruler, the people indi-
gnantly sent an ambassador to the Oni Odudua, the greatest and
wisest ruler of Ife asking him to send one of his sons to be their
ruler. Odudua unfortunately died before he could send one of his
sons to Beni as requested by the people. However, he left strong
orders to his son and successor, Obalufon that Oranmiyan should be
sent there.
Oranmiyan arrived in Benin where he was very well received by
the people. He spent a number of years as the Oba of Benin. Su-
ddenly one day, he called a meeting of the people and voluntarily
renounced his office as the Oba to the surprise and amazement of
everybody. His reason was that only a child, born, trained and
educated in the arts and mysteries of the land could rule over the
people. Having been married on assumption of duty to a beautiful
Benin lady with whom he had a son, caused his son to be made the
Oba in his place. He saw to it that this wish was carried out before he
finally returned to Ife.
Furthermore, integrative efforts of the functional type were very
everly conceived as a necessity in West African States even before the
colonial period and the partition of Africa. In the 19th century,
particularly during intra-African wars there is sufficient evidence to
illustrate the existence of inter-state organisations for purposes of
defence mainly as well as for socio-economic ends. The most striking
of such inter-state relations was during the war against the imperial
power of Ibadan. A military alliance was formed between the states
of Ekiti, Ijesa and Igbomina between 1877 and 1893 for the purpose
of the liquidation of the imperial power of Ibadan. There was also
the Convention signed between the Yoruba States, no doubt with the
participation of other West African States of the time, in which
market places were to be considered as neutral zones in times of war.
This goes to show how West African States accorded the greatest
importance to the distinction between military and civil objectives
and even how during military conflicts there was for these states,
the need to reaffirm socio-economic cooperation.20

When the British trading companies first arrived in Nigeria, they
found that the country had tremendous political and economic
potentials. In order to be allowed to settle and carry on their
business, they made moves to secure some agreements with some
indigenous chiefs of Nigeria, particularly those of Lagos. These
agreements are often referred to as cession treaties, which we now
propose to examine.

4. INTERNATIONAL AGREEMENTS: Cession Treaties

Any discussion of Nigeria's history in the practice of international
law would be incomplete without a comment on the cession treaties.
The method by which Nigeria was colonized by the British was not
only through conquest as a result of war, but also by means of a
series of treaties through which some chiefs of Nigeria ceded rights to
the British to exercise jurisdiction over the country, otherwise
known as cession treaties.
These treaties may, for convenience sake, be grouped into two.
They are:

(a) Cession treaties for exercise of jurisdiction over Lagos and the
protectorate; and
(b) Royal Niger Company treaties with the protectorates for the
cession of the entire territory of the protectorate to the
company,

These two types of treaties will be discussed here below in this
order:

The 1861 Cession Treaty for the exercise of Jurisdiction over Lagos
and the Protectorates:

The exercise of jurisdiction by the British Government over Lagos
and the protectorate was through a set of cession treaties concluded
in 1861. The signatories to the treaties were two unequal parties,
namely the representatives of the British Government on the one
hand and the Chiefs and people of Nigeria on the other.
Under the treaty, King Dosumu of Lagos signed on behalf of the
people of Lagos and its environs granting the free possession of Lagos
to the British Queen. The treaty provides inter alia:

20 See generally, Lt.-Col. Turedu & Dr. Huttel in Mollidge Monograph, Etudes
Dahomeennes Vol. 2, 1949; Richard O. Laniyan: War and Diplomacy among
the Yoruba in the 19th century (Unpublished thesis); H. Clapperton, Journal
of Second Expedition in the Interior of Africa, London 1829; Nduguike
M.C. Genese du Regroupment Regional en Afrique de l'Ouest, (Unpublished
"I, Dosumu, do with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto belonging.... I do also covenant and grant that the quiet and peaceable possession thereof shall, with all possible speed, be freely and effectively delivered to the Queen of Great Britain, or such person as her Majesty shall thereunto appoint for her use in the performance of grant; the inhabitants of the said island and territories as the Queen's subjects and under her sovereign crown, jurisdiction and government, being still suffered to live there." 21

Limitation of space, however, would not permit a full discussion of the apparent inequalities of the terms of the entire treaty as borne out of the provisions of Article 1 of the said treaty. However, one of the most celebrated cases in which the real issue was the legal effect of the Treaty of Cession by which Lagos was supposedly ceded to the British Crown by King Dosumu in 1861 was AMODU TJANI v. SECRETARY, SOUTHERN PROVINCES. 22 This case will be highlighted here.

The facts of the case were simple. The Government of Southern Nigeria had in November 1913 acquired a certain area of land at Apapa, Lagos, for public use under the Public Lands Ordinance, 1903. Amodu Tijani, alias Chief Oluwa, one of the Lagos white-capped Idejo Chiefs, claimed that the acquired land was his family's; he therefore demanded full compensation in accordance with the provisions of the Public Lands Ordinance. The crucial issue in this case was the legal effect of the Treaty of Cession by which Lagos was supposedly ceded to the British Crown by King Dosumu in 1861. 23 The Chief Counsel for the plaintiff argued that the white-capped chiefs were not party to the treaty signed by King Dosumu supposedly ceding Lagos to the British in 1861. The two British Officials who negotiated the treaty, they contended, noted how the chiefs protested vigorously against the signing of the treaty, and that they "disputed the right of the King to alienate their lands which did not belong to His Majesty, King Dosumu, under the native law and in fact... "official pronouncements in Lagos and in London after 1861 were consistent with the view that the white-capped chiefs were recognized as the owners of the land in Lagos. In an earlier land matter Oduntan Onisiwo v. Attorney-General, 24 the Supreme Court of Nigeria had ruled that the plaintiff in that case, a white-capped chief like Amodu Tijani, be paid full compensation for the land acquired from him by the government on the basis that he was the owner of the land.

The argument for the colonial administration was centred around the Treaty of Cession. It was contended before the Court that the meaning of the treaty was exactly what it said: namely, that King Dosumu ceded his territory to the British Crown "freely, fully, entirely, and absolutely". The white-capped chiefs were dismissed as no more than "simply part of the machinery of government and in no sense owners of the soil".

The result of the legal tussle was that the plaintiff's claim was upheld by the Privy Council as a result of which he was given full compensation for the land acquired by the Nigerian Government. It was clear from the above decision therefore, that the treaty of cession did not in any way disturb the traditional rights of the people to their property. What this implied was that the right of the citizens to their property was to be fully respected. 25

After the Tijani Case, there was no more doubt about the position of the British Crown regarding Lagos land or the land in the Protectorate of Nigeria.

A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners, and the general terms of a Cession are prima facie to be construed accordingly. This dictum amounted

21 Article 1, of the Treaty of Cession, 1861.
22 (1915), (1921) 3 NLR 24, (1921) 2 A.C. 399. The case is regarded as the most celebrated legal action ever to have arisen in Nigeria, and indeed, in West Africa. It began in Lagos in 1915 and reached the Judicial Committee of the Privy Council in 1921.
23 The Privy Council's decision in the case has often been held as authoritative on two particular issues in British Colonial Administration: the effect of treaties ceding overseas territories to the British Crown, and the nature of customary land tenures in Africa. For further reading on this matter, see: A.E.W. Park, "The Cession of Territory and Private Land Rights: A Reconsideration of the Tijani Case: The Nigerian Law Journal, 1, 1, 1964, p. 38.
24 (1912) 2 NLR 79.
25 While the Tijani case concerned African rights to land under a colonial system, another important case, ESHUGBAYI ELEKO v. OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA AND ANOTHER, focuses attention on the liberty of the individual. See, 6 NLR 65, 73; (1931) A.C. 662.
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Royal Niger Company Treaties with the Protectorates:

The other types of international agreements entered into with the natives in the Protectorate of Nigeria were those with the officials of the Royal Niger Company. The Royal Niger Company was a formidable economic organisation of the British people that had much influence in the colonial territories. The Company is known to have entered into so many treaties with specific areas of the Protectorate. These territories included those of the basins of Rivers Niger and Benue, the Lower Niger, Yoruba land, Delta States as well as some areas of modern Northern States, particularly the Fulani Empire. A total number of three hundred and sixty of such treaties were entered between the Company and these areas. Specific discussion of these treaties will not detain us here since they do not differ in content and procedure from the one earlier discussed.

Evaluation of the Legal Nature of the Treaties:

What remains to be done here is to briefly evaluate the legal nature of these treaties in international law.

It is doubtful if they qualify as treaties at all in the sense of international law. Apart from the fact that the Chiefs of the colonial territories with whom the British representatives dealt were illiterates and ignorant and therefore could not have reasonably understood the full implications of the terms of the agreements, they had no mandate to dispose of the people's property. This has been eloquently made clear in the Tijani decision already discussed.

What more, most of those treaties if not all, were done under threat or use of force, the usual expression to the effect that “the treaties were entered into by the Chiefs out of their own free will and consent” notwithstanding. It is debatable if such agreements can bind any of the parties in view of the shortcomings referred to above.

Nigeria remained under various types of British administrative arrangements for a rather long period of time. During this period, there were a number of constitutions. However, the country's true posture on matters of international relations were best illustrated in her post-independence constitutions as she gradually but firmly articulated her foreign policy objectives. We shall discuss these briefly as indicative of Nigeria's extension of its people's attitude to relations with foreign nations which undoubtedly will be better appreciated as expressed and carried out by an independent and sovereign state.

5. INTERNATIONAL LAW AND NIGERIA'S FOREIGN POLICY CONSTITUTIONAL PROVISIONS:

In order to ascertain the attitude of a given state to international law, one has to examine closely the state's foreign policy objectives as expressed or implied within its basic law – the constitution. Although such foreign policy objectives would not necessarily confirm the practice of the state on the international plane, they will closely indicate the manner of behaviour of such a state in specific situations.

Consequently, Nigeria's practice of international law will be best found in various provisions of its constitutions as they affect foreign affairs. Nigeria has had at least eight constitutions at different stages of its political development between 1914 and 1979 which for convenience sake may be divided into:

(i) Pre-Independence Constitutions, and
(ii) Post-Independence Constitutions. 29

29 The Constitutions in question are the Lugard Constitution of 1914, the Clifford Constitution of 1922; the Richard Constitution of 1946; the Macpherson Constitution of 1951; the Federation Constitution of 1954; the Independence Constitution of 1960; the Republican Constitution of 1963 which was in operation until 15th January 1966 when the Civilian Government of Alhaji Abubakar Tafawa Balewa was overthrown by the military and finally the 1979 Presidential Constitution overthrown four years after by the Buhari Administration. We do not intend to dwell here upon a detailed discussion of Nigeria's constitutional history as this will be superfluous in view of the numerous materials on the subject. Reference to any particular Constitution will be in passing only. Consequently, the discussion of the relevant
According to Professor M.A. Ajomo, no foreign policy of any state in relation to its constitution can be discussed without an objective examination of those policies which although are within a state's sovereign purview yet may nevertheless have international repercussions. There is no doubt that the foreign policy of a state is very important and forms the basis for measuring a country's contribution to the peace and concord within the international community. A state's policy on matters like treaties, international organisations, national liberation struggles, treatment of aliens, economic relations etc. are all relevant in this regard. Professor Ajomo argues that all previous constitutions up to and including the independence constitution give little or no comfort in the treatment of these issues. While we agree with his opinion on this point, we may go further to state as will be seen later that the latest which was the 1979 Constitution did not offer much improvement. However, what is rewarding is that the importance of reflecting our foreign policy objectives in some of these important areas have not been left out completely in these constitutions much as one would have wished that they are substantially covered and spelt out in them.

Out of all the eight constitutions under reference, it was the 1960 Independence Constitution which first contained some general provisions of Nigeria's foreign policy, as well as some provisions on international law. Under the 1960 Constitution, Parliament was authorised to make laws for Nigeria on any other part thereof with respect "to matters not included in the legislative lists for the purpose of implementing any treaty, convention or agreement between the Federation, any other country or any arrangement with or decision of an international organisation of which the Federation is a member." According to this provision, the regions were very much involved in the country's treaty-implementation process. One consequence of this state of affairs was that no treaty concluded between Nigeria and a foreign country would be implemented in the regions of Nigeria without the consent of the Parliament assented to by the Governor of such a region. Indeed, these regions either deliberately or by default made incursions into foreign affairs of the country, particularly in matters such as trade in which independent agreements were signed with foreign governments on the basis of equality. Some regions established posts of Agents-General and in few cases Premiers or even Ministers of some regions made policy pronouncements imputable to the Federal Government of Nigeria.

It is important to point out that the 1960 Constitution also contained important provisions on citizenship and fundamental human rights. Above all, between 1960 and 1963, the Nigerian Government enacted a number of important legislations which were of great relevance to the country's outlook and practice in international law. As a young country desirous of full participation in international relations, both in political and economic spheres, the Nigerian Government lost little or no time in enacting laws in these two areas. These are the Diplomatic Immunities and Privileges Act, the

35 The four regions that existed then were the Northern, Western, Eastern and Mid-Western Regions of Nigeria.
37 Akinyemi, op. cit.
38 See, Sections 7-16.
39 See, Sections 16-32.
40 No. 42, 1962. This was to prepare the ground and bring the local law in conformity with the Vienna Convention on Diplomatic Relations done at Vienna on the 18th of April 1961 and to which Nigeria acceded some years after. It came into force on 24th April 1964. In 1963 the Vienna Convention on Consular Relation was adopted and Nigeria also became a member of that Convention.
External Loans Act,\(^{41}\) and the Exchange Control Act.\(^{42}\) The period between 15th January 1966 and October 1, 1979 became a turning point in Nigeria's political history. A successful military coup d'etat led by Major Kaduna Nzeogwu overthrew the Civilian Government of Alhaji Abubakar Tafawa Balewa. The new Military Government was led by Major-General J.T.U. Aguiyi-Ironsi who on assumption of office in his first public proclamation, made an important statement concerning the Nigerian foreign policy. He assured the world that Nigeria would continue to honour all treaty obligations and financial agreements entered into by the past Civilian Government. Further, he stated that Nigeria would also honour the Charters of both the United Nations Organisation and the Organisation of African Unity.\(^{43}\)

Barely six months after, the Government of Nigeria changed hands. Another military coup led by General Yakubu Gowon\(^{44}\) toppled Ironsi in July of the same year. Just like his predecessor, General Gowon again assured the world that Nigeria was prepared to honour all her international treaty obligations and commitments and all financial agreements and obligations entered into by the previous Governments.

The period between 1966 and 1978 saw a host of laws promulgated by the military administrations in Nigeria in the area of international law, touching on a number of interesting aspects of international relations.

In 1966, the Extradition Act was enacted.\(^{45}\) One year after, two enactments were recorded namely, the International Centre for Settlement of Investments Disputes (Enforcement of Awards) Act,\(^{46}\) and the Territorial Waters Act.\(^{47}\) The Immigration (Special Provision) Act was promulgated in 1969.\(^{48}\)

Between 1970 and 1974 the following other laws were enacted, namely, the External Loans (Rehabilitation, Reconstruction and Development) Act,\(^{49}\) the Fisheries Act,\(^{50}\) the Nigerian Institute of International Affairs Act,\(^{51}\) the Diplomatic and Privileges (Amendment) Act,\(^{52}\) Others are the Exchange Control (Anti-Sabotage) Act,\(^{53}\) the Nigerian Enterprises Promotion Act,\(^{54}\) the Trade (EEC References Under Lome Convention) Act\(^{55}\) and the Exclusive Economic Zone Act.\(^{56}\)

CONCLUSION:

From the foregoing, it is clear that the notion of international law in Nigeria long pre-dated the advent of the British to Nigeria. In the relations between the various kingdoms that made up Nigeria and themselves and the nation outside Nigeria, various activities in the sphere of diplomacy, culture, treaties, trade, war to mention but a few, were recorded. These relationships would have been impossible had there been no rules to regulate them. Thus, the origin of what is today recognized as the Nigerian Army is traceable to the diverse local forces raised in the second half of the 19th century.\(^{57}\)

The customary practice of war whereby a defeated force was taken captive by the victor, or whereby the overrun and conquered territories were annexed conformed with the practice of war elsewhere in the world during the period under discussion.

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\(^{41}\) No. 9, 1962. According to this Act only the Minister of Finance has the power to raise loans outside Nigeria but he is limited to certain amount.\(^{42}\) No. 16, 1962. This Act was intended to control all Nigeria's foreign exchange transactions. The 1962 Act was amended by the Exchange Control (Anti-Sabotage) Decree No. 57, 1977 which in turn was later repealed by the Federal Republic of Nigeria (Certain Consequential Repeals) Act, No. 105, 1979.\(^{43}\) Nigeria was one of the founding members of this Organisation. The address referred to was made by General Ironsi to members of the Diplomatic corps in Lagos.\(^{44}\) General Gowon ruled for thirteen years between January 15th 1966 and July 29th 1975 when he was overthrown by General Murtala Ramat Mohammed. General Murtala Mohammed was killed in an abortive coup led by Col. Dimka on 13th January 1976 barely six months after he came to power. At his death, General Obasanjo succeeded him until October 1, 1979 when he handed over power to President Shehu Shagari under the 1979 Constitution.\(^{45}\) No. 87, 1966. This Act has been fully discussed. It repealed all former Statutes on the subject.\(^{46}\) No. 49, 1967.\(^{47}\) No. 5, 1967. The Act extended the territorial waters from three nautical miles to twelve nautical miles. In 1971, this Act was amended extending Nigerian Territorial Waters to thirty nautical miles. No. 38, 197.\(^{48}\) No. 33, 1969.\(^{49}\) No. 38, 1970.\(^{50}\) No. 30, 1971.\(^{51}\) No. 35, 1971.\(^{52}\) No. 4, 1974.\(^{53}\) No. 57, 1977.\(^{54}\) No. 3, 1977.\(^{55}\) No. 47, 1976.\(^{56}\) No. 28, 1978.\(^{57}\) Achike, O., op. cit. p. 6.
Needless to mention that the norms of the law of diplomacy though on ad hoc basis, were fully applied and respected. The principle of diplomatic immunity of envoys was accorded recognition.

It is conceded that the norms of international law which guided these activities of the kingdoms at the time could have been primitive and undeveloped when compared with the modern sophisticated rules, nevertheless, they served their purpose at the time. Indeed, the trend and spirit were not lost in the future efforts of Nigeria in international relations on her attainment of independence as have been evidenced by the numerous laws passed by the successive governments of the country in the field of international law.

CHAPTER 3

THE LEGAL STATUS OF THE NIGERIAN FEDERATION AND ITS COMPONENT STATES

1. INTRODUCTION

In this chapter we shall study the status of the Federation of Nigeria and its component nineteen states in international law. The content of the personality of an entity is not vested by international law but by the facts of international life. The scope of the personality and its content is an entirely different matter. There is no uniformly accepted status of Federal Unions in international law. As will be shown, every particular Federation makes its own constitutional arrangements as it pleases endowing its component Federal Unions with whatever rights and corresponding duties as it considers necessary for the purposes of conducting activities on the international plane.

What appears to be clear, however, is that the Central Government of a Federation is universally acknowledged as the Chief Spokesman of the Federal State in international law. This position notwithstanding, it will be shown that because of the nature and origin of the Nigerian Federation, sometimes problems have arisen with regard to some activities and pronouncements of some of its component states on the international plane which occasionally appeared embarrassing to the Central Government. Unfortunately, none of the constitutions of the country from independence till 1979 was able to completely resolve these conflicts. It has been argued that the obvious explanation for this failure stemmed from the divergent

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1 There is need to define the terms that will be used here. The terms "Federal State" and "Federal Union" will be used interchangeably and in a broad sense to cover all constitutional sub-divisions of a state and component entities of a constitutional union or association. "Treaty" will be used in the widest possible sense as covering all international agreements between states and other subjects of international law, in accordance with the original concept of the International Law Commission, Draft Articles on the Law of Treaties, ILC YB at 161-162 (1962/11). "Constitution" will be used in its formal sense, of a written one. Such a constitution makes it easier for a foreign state to determine whether the prospective other party possesses a capacity to conclude the treaty or not.
interests and incompatibilities of its people.

In order therefore to appreciate fully the proper position of the legal status of the Nigerian Federation and its component states in international law, it is important to adopt a comparative approach to the question making reference to the examples of some selected Federations for illustrations. Accordingly, it is proposed to divide our inquiry into the following paragraphs:

(1) The theoretical aspects of the international personality of a Federal State.
(2) The theoretical aspects of the international personality of the component units of a federation;
(3) A survey of relevant characteristics of selected federal constitutions with a view to establishing the degree of their separate participation in international relations;
(4) The experience of the Nigerian Federation and its component states since independence.

2. THE THEORETICAL ASPECTS OF THE INTERNATIONAL PERSONALITY OF A FEDERAL STATE:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. Only states can constitute to the formation of international law as an objective body of rules — states as international entities which are territorially identifiable. This is so because the fulfilment of this latter requirement makes them the principal objects and creators of such rules. Thus it has been pointed out that in the international system, the principal though not the only subjects of international law are the sovereign independent states.

But the international community is not a stationary phenomenon devoid of any sort of development. It changes just like every other community. The laws regulating activities within it also continue to develop as the international community continues to grow day by day, so the problems facing it get more and more complicated. This persistent development in various fields renders it necessary to seek the solution of many international problems outside the exclusive field of the community of sovereign and independent states. It became essential to equip this community with additional machinery in order to regulate its multifarious and difficult tasks.

One of the well-known methods apart from others which states adopted to solve some of their divergent political and economic problems is by setting up Federal States. It is not necessary for our purposes to devote time to an exhaustive inquiry into the definition of what a federal state is. It will suffice to say that a federal state is a union of several states which have organs of their own and are invested with certain powers, not only over the member states, but also over their citizens.

However, it is possible to distinguish between two types of federal states, namely those formed out of already existing independent sovereign states by means of an international treaty and those created out of former colonial self-governing countries by the Colonial Powers. In respect of the first type of federal states, such states agree under treaty to transfer control over certain functions of government to a central federal authority. This central federal authority from then onwards is alone competent to deal with these particular transferred functions. At the same time, the component states retain their sovereignty in all other matters except those entrusted in the care of the central federal authority.

In respect of the second class of federal states, to which Nigeria

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2 See, Article 1, Montevideo Convention on Rights And Duties of States 1933. The Convention was adopted by the 7th International Conference of American States. Fifteen Latin American States and the United States are parties to it. The Convention is commonly accepted as reflecting, in general terms, the requirements of statehood at customary international law. The term "state" may, however, be given a different meaning for the purposes of a particular treaty. On its meaning in the United Nations Charter, see Higgins, The Development of International Law through the Political Organs of the United Nations, 1963, pp. 11-57.

3 Okeke, C.N. op. cit. at p. 36.

4 In the history of international relations there was a time when there were "states in real union" or "states in permanent union". These governmental formations had their usefulness at their time. They are no more. The same may be said of confederated states. At the moment, there is no union of confederated states. The last confederation in existence — the Republic of Central America — which comprised the three fully sovereign states of Honduras, Nicaragua and San-Salvador was established in 1895 and was dissolved three years later in 1898. Notable historic confederations are those of Netherlands from 1579-1795; the United States of America from 1778-1787; Germany from 1815-1866; Switzerland from 1291-1798 and from 1815-1848; and the confederation of the Rhine from 1806-1815.
federation is to prove satisfactory and to last, certain political conditions must be satisfied. It must be formed with the full consent of the parties, given voluntarily. In other words, units desiring to form themselves into a federal state must be allowed to do so freely without any let or hindrance, or any pressures, political, economic or physical (military). These conditions are undoubtedly very vital for all types of federations, as history has proved that the absence of these elements in a federation may make all the difference between its success and failure as a form of political union which will stand the test of time.  

3. THE THEORETICAL ASPECTS OF THE INTERNATIONAL PERSONALITY OF THE COMPONENT UNITS OF A FEDERATION

It is still theoretically an unresolved issue whether international law as such accords any measure of rights to the individual participating states of a federation to take part directly in international relations, as subjects of that law. There seem to be two main views on the problem. The traditionalists hold firmly to the position that it is only the collective federal state which is the subject of international law; therefore states which are members of a federation, like any of the nineteen states of Nigeria, are not themselves states in the sense of international law and cannot regard themselves or be regarded as possessing such rights.

The other point of view is maintained by those who, while refusing to recognize component states of a federation as having full personality in international law, nevertheless consider that they may enjoy a measure of international personality, in so far as the federal constitutions of such states permit.

Many other complex theories have been advanced in an effort to support one or the other of the above-named positions, but we do not intend to describe all these doctrines and theories or what has been said by the various protagonists to support or disapprove the various points of view. We shall restrict ourselves to a few that are representative of certain distinctive contributions to the main body of thought. It is our conviction that a more flexible approach to the controversy, taking cognizance of actual state practice in con-

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8 Section 2(1)
11 For a detailed discussion of these problems, see, Mazi Ray Ofoegbu, "Foreign Policy and Constitution-Making: The Degrees of Inclusion and Exclusion" Nigerian Institute of International Affairs Monograph Series No. 4, 1979, pp. 30-33.
12 Okeke, C.N. op. cit., p. 40.
temporary international life, may give the most reliable answer. Our specific aim, therefore, is to seek to establish to what extent doctrinal and theoretical views on this question agree with what obtains in practice.

We have set ourselves the strictly juristic task of describing the international legal status of states which are component members of a federation. Are they states within the meaning of international law? How far in the past have they participated in international relations independently of the federal authority? In order to find this out, it becomes important and interesting to devote some space to inquire into the treaty-practices of federal states with special reference to their component parts. This area has been chosen both because treaties lie at the centre of international legal relations and because the capacity to enter treaty relations with other subjects of international law is a very important attribute of personality in international law. This will be looked into in paragraph 4 of the present section. In this way, it may become easier to see how far federal constitutions which grant the right of participation in international relations to their component units, do so as a mere formality rather than as a reality as a result of the needs of genuine necessity of life. In other words, are such formal constitutional provisions in line with what takes place in the practical life of modern times.

Having now considered the elements or characteristics of a federation, the first question which arises, therefore, is whether the component states which are the members of a federation can nevertheless be considered as continuing to be separate international persons. Korowicz says that a member-state of a federation does not enjoy international personality. Whether or not this view is correct will be seen in the course of our investigation and consideration of a number of factors. At the same time, it is worthwhile pointing out that the traditional concept of international law as regulating relations only between sovereign states is no longer in accordance with contemporary international conditions, which require the recognition of other entities as playing a significant role in international relations, and as enjoying some measure of international personality. The need for recognizing this state of affairs cannot be over-emphasized. If the stark realities of international life require a state to structure itself in such a manner as to enable its component units to participate in some ways in international life without infringing in the other actor's rights and comforts, it would not appear to us that there are, in principle, any rules of international law that will nullify this right, for according to President John F. Kennedy: 'We must deal with the world as it is and not as it might have been had the history of the last eighteen years been different'.

Component members of a federation are independent with regard to certain functions of government, but subordinate to a higher authority with regard to others. States members of a federation can for many purposes enjoy the rights and owe the duties regularly connected with international persons. In the words of Professor Oppenheim, "the member-states of a federation can be international persons in a degree. They certainly cannot be full subjects of international law with all the rights and duties regularly connected with international personality. Their position, if any, within this circle is overshadowed by their federal state, they are part-sovereign states, and are consequently, international persons for some purpose only. If, of course, the constitution of a federal state confers completely on the central federal government the external representation of its member-states, so that, so far as international relations are concerned, the member-states do not make an appearance at all, no difficulty arises as regards the legal position internationally. The member-states remain autonomous, but only with regard to internal affairs. It will be certainly a fact that they are not international persons at all so long as all their external sovereignty is absorbed by the federal state.

Perhaps it will be useful at this juncture, while still examining the issue of the degree of statehood of states which are members of a federation, to refer to the conclusions made by an eminent British Jurist and former Judge of the International Court of Justice, Sir Gerald Fitzmaurice on the basis of the pronouncements of the Inter-


national Court of Justice in the *Injuries case*, on the question of the international personality of international organisations, and in the *Morocco case*. Even though his conclusions relate specifically in the first case to the international personality of international organisations and in the second to the position of protected states, nevertheless they can by analogy, be said to have thrown some light on the question of the international personality of states which are members of a federation, and in fact, on the whole question of the subjects of international law.

From the Court's pronouncements, Sir Fitzmaurice came to the conclusion that the Court can be regarded as having affirmed the general propositions:

1. that all states are international persons; but not all international persons consist of states;
2. that there are entities which are not fully independent sovereign states but which are nevertheless states, so that statehood may be possessed by not fully sovereign entities — that in fact, statehood is an attribute of any territorial entity which enjoys some real degree of sovereignty in the international field.

Under the heading of what he described as 'the hall-mark of international statehood', Sir Gerald considers that 'the essential factor that distinguishes international states, even semi-sovereign or Protected States, even States which have placed the whole conduct of their foreign relations in the hands of another State' — from entities that are neither States nor international persons — 'is not the mere fact that these latter entities are not independent, but the fact that they lack that capacity to enter into treaty or other international relationships which is possessed by all international persons, including international organisations (see the Opinion of the Court in the *Injuries case*) and which all international States possess, whether these are fully or only semi-sovereign, and whether the relationship is entered into directly or, through the agency of a third State having the conduct, in part or in whole, of the external relations of a Protected State.'

We share the views expressed in Sir Gerald's statements on the basic principles underlying international statehood in general.

However, he went on to deny that, normally, international statehood could be possessed by the component states of a federation, which meant in effect, denying them international personality. Yet, if it is agreed that treaty-making capacity constitutes the 'hall-mark' of an entity qualifying as an international person under international law — as Sir Gerald thought — the conclusion would be that states which are members of a federal union can possess separate international personality if they are invested with that capacity by the federal constitution.

If the Court (I.C.J.) in the Moroccan case, affirmed the principle that protected semi-sovereign states to retain international personality — are international persons, although their position within the international community, and their legal relationships to other states (or international persons as not being states) is governed by special considerations, it seems that the Court would not in principle have denied the possibility of such right to states members of a federation. The requisite personality in an international sense would be seen to exist if the entity claiming it had in fact entered into separate association or relationship with other members of the international society, for example, by treaty which, even if concluded by the federal government, could mark the existence of a self-contained relationship between itself and the other contracting party, even if, in case of violation by the component state, the federal state was held to be jointly responsible with it.

It is the possession and enjoyment of this capacity, with or without restriction, which distinguishes the state of international law from the large number of political entities also given that name, and yet which do not appear to be endowed with such capacity.

4. CONSTITUTIONAL REVIEW: A BRIEF SURVEY OF THE CONSTITUTIONAL STIPULATIONS OF A NUMBER OF FEDERAL STATES, WITH AN AIM OF ESTABLISHING THEIR STAND ON THE ISSUE OF PARTICIPATION IN INTERNATIONAL RELATIONS BY THEIR MEMBER-STATES:

After the foregoing theoretical discussion of the international legal

personality of states which are members of a federation, we can proceed to review the relevant portions of specific federal constitutions and see how far they still correspond to, or to what extent they have rendered out of date our existing train of thought. For this purpose, we choose the constitutions of the Federal Republic of Germany, the Union of Soviet Socialist Republics, the Federation of Switzerland and the United States of America, and would like to treat them in that order.

The Federal Republic of Germany

Under the German Constitution as it existed before the First World War, the member-states retained their competence to send and receive diplomatic envoys, not only in intercourse with one another but also with foreign states. Article 32 of the Constitution of the Republic of Germany, 1949, provides that in so far as the member-states are competent to legislate, they may, with the approval of the Federal Government, conclude treaties with foreign states.

In Germany as well as in Switzerland, the member-states of these two countries have not only the right to conclude treaties between themselves without the consent of the Federal Central Authority, but they also retain the right to conclude treaties with foreign states on matters of common interest between them, the exception being that such a treaty should not be of a political nature.

The Union of Soviet Socialist Republics

The member-states of the Soviet Socialist Republics (USSR) existed as separate sovereign states until December 30, 1922, when the Union was legally formalized by the signing of the Union Treaty between the Russian Soviet Federative Socialist Republic, the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic and the three republics of the Transcaucasian Federation. In subsequent years nine more republics acceded to the treaty with the same rights and obligations as the original members.

In May 1945, the Republics of Ukraine and Byelorussia were separately invited to the San Francisco Conference. This was in accordance with the Yalta Conference Agreement of February 1945. Although both these countries are constituent republics of the Union of Soviet Socialist Republics, they were admitted as separate original members of the United Nations. Possibly in anticipation of, or preparation for this, the Soviet Union had on February 1, 1944, adopted an amendment to its constitution by virtue of which each republic of the Union acquired the right to enter into direct relations with states, to conclude agreements and exchange diplomatic representatives with them.

Article 13 of its present constitution provides that ‘the Union of Soviet Socialist Republics is a federal state formed on the basis of voluntary union of equal Soviet Socialist Republics’. The Soviet Union Republics are sometimes referred to as a special type of federation with features of a confederation.

Article 18(a) permits each Union Republic to enter into direct relations with foreign states and to conclude international agreements with them and exchange diplomatic and consular representatives too and Article 18(b) provides that, ‘Each Union Republic has its own Republican military formations’. In the same manner, Article 60(a) stipulates that: ‘The Supreme Soviet of a Union Republic decides upon the representation of the Union Republic in

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21 Article 45 of the Weimar Constitutions of August 14, 1919. According to this Article, ‘The President of the Federation represents the Federation in its international relations. He concludes alliances and other treaties with foreign powers in the name of the Federation. He accredits and receives foreign Ambassadors. Declaration of war and conclusion of peace are effected by federal law. Alliances and such treaties with foreign states as refer to matters of federal legislation require the consent of the Reichstag’. Under Article 78, the administration of the relations with foreign states is the business of the Federation alone, but Bavaria was allowed to maintain intercourse with the Holy See. (Oppenheimer, The Constitution of the German Republic (1923), p. 28.


24 The Yalta Conference took place in February 1945, between the three Heads of States – of USA, USSR and Great Britain. The Conference is of great international significance. Its main task was the definition of all the principles under which the post-war peace was to be built; and particularly the position of post-war Germany. It was here that the decision to occupy Germany by the armies of USA, USSR and Great Britain was taken.

its international relations'.

The issue of the international personality of the member-states of the Union of Soviet Socialist Republics remains controversial. Some writers deny completely the international personality of the Union Republics and others question strongly the degree of its federalism. Thus, Professor Rousseau, for example, writes that, 'the structure of the USSR remains very centralized and the federalism there is nothing but a facade'. 26 Others think that the USSR is neither a confederation nor a federation but merely a unitary state. The question of international personality of the Union Republics of the USSR has always aroused wide interest among jurists of both East and West alike. Much effort has been expended in discussing this issue among Soviet international lawyers themselves. It may be fair to look briefly into their reasoning.

It seems that the Soviet legal science is unanimous in the opinion that the Union Republics are full subjects of international law. V.M. Koretsky, I.I. Lukashuk, V.I. Losovski, M.V. Inovski, M.E. Korostarenko and A.N. Visnik to mention a few among the leading Soviet international jurists, agree that the Union Republics of the USSR are full subjects of international law, whose sovereignty is not limited. 27 In furtherance of the same point of view, Prof. P.E. Nedbilo and V.A. Vasilenko vigorously argued that the Soviet Republics did not cease to exist as sovereign states after uniting into USSR. This, they continue to explain, is recorded and guaranteed by the constitution of the USSR, based on the fundamental principles of the Treaty of Union in 1922, and the constitutions of the Union Republics. Their articles recorded all the main attributes and elements of a sovereign state, territory, population, supreme organs of power and administration of the republic, budget, etc. 28 Further, they argue that, 'Unity of sovereignty of the Union State and the Republics exists in the Soviet Federation in the form of the USSR. The USSR possesses sovereignty because it is an expression of the sovereignty of the Union Republics. The sovereignty of the USSR is a result of the sovereign will of the republics; they have created it and its supreme power by free voluntary and sovereign agreement. The sovereignty of the USSR, consequently, is based on the sovereignty of the Union Republics; without the sovereign Republics, there would not be a sovereign Union of Soviet Socialist Republics, either. 29

We are not here concerned with the sovereignty of states which are members of a federation as such, but Prof. Nedbilo and Vasilenko's arguments make it necessary to offer a few remarks. To argue that the Soviet Union Republics did not cease to exist as fully sovereign states after uniting into the USSR is begging the question. Granted that the Union Republics before joining to form the USSR under the Union Treaty of 1922 were fully sovereign and independent states, which, according to Nedbilo and Vasilenko freely and voluntarily agreed to give up part of their powers to make the formation of this Union possible, it is in our view contradictory to persist in maintaining that the Union Republics even after that still possess full sovereign status, on the basis of which they can claim full international personality. It may be correct to assert that the sovereignty of the USSR is a result of the sovereign will of the Union Republics. But to agree with Nedbilo and Vasilenko that these republics still have full sovereignty would be tantamount to agreeing with the Austinian theory of the indivisibility of sovereignty. After all, the formation of the USSR federation just like every other federation, presupposes that the former fully sovereign Union Republics transferred control over certain functions of government to a central federal authority, which thereafter alone assumes the competence to deal with these transferred matters.

In our opinion therefore, the attempt to describe the governmental structure of the USSR as confederation fails. We submit that the USSR is a federal State with special and peculiar features, which resulted from the historical situation at the time of its formation. Many would regard it as being in essence a unitary State that has been given the forms of a federal structure. In any case it is incorrect to maintain that it is a confederation because, in the first place, the Union has a common citizenship law which is under the jurisdiction of the Union’s highest organ of State power. In the


second place, the Union Republics, practically speaking, do not enjoy one of the essential attributes of a Confederation — the right of secession. 30 We, therefore, find it difficult to accept that the federation of the USSR has such a loose nature and organisation (which it certainly has not) as to permit the assertion that the rights of the component states forming it are equal to those which are enjoyed by the member states of a confederation.

The fact cannot be denied that the component states of the Union of Soviet Socialist Republics participate in international relations, particularly the Ukrainian and Byelorussian Soviet Socialist Republics. Even then, the participation is not so unlimited as to give the Soviet Union the legal entitlement to claim for its Union Republics the position of separate, sovereign and independent subjects of international law. 31

Switzerland

Switzerland is one of the examples of Federal Unions whose member-states exercise the right to conclude treaties, not only between themselves, but also with foreign states in regard to certain specified matters. Article 9 of the Swiss Constitution provides "Exceptionally, the Cantons retain the right to conclude treaties with foreign states concerning matters of public economy, neighbourly relations and police, provided such treaties contain nothing contrary to the Confederation or to the rights of other Cantons'.

We may note here, that the authority and sovereignty of the cantons occupy an important place in the history of the constitutional development of the Swiss State. Thus, Sir J.A.R. Marriot, 32 writes that although the occupation and control of Switzerland was one of great strategical value to Napoleon, particularly in the campaign of 1799-1800, Napoleon was quick to perceive that the Union Republic imposed upon Switzerland by the French doctrinaires was quite incompatible to the traditions of the cantons. Accordingly, in the act of Mediation of 1803, Napoleon purported to restore the sovereignty of the cantons — some with their burgher aristocracies, others with representative democracies; but over all there was still superimposed a central Government with a Federal Diet.

The Act of Mediation lapsed on the fall of Napoleon in 1814, but it formed the basis of the new Federal Act which was approved by the Powers when by the Treaty of Vienna (1815) they guaranteed the independence and neutrality of Switzerland. The compromise attempted by the Federal Pact resulted in such acute friction between the cantons that in 1843 the Sonderbund or League of Swiss Roman Catholic Cantons, threatened to secede. Civil war broke out in 1847, but a brief and almost bloodless campaign resulted in the dissolution of the Sonderbund, and the Swiss, freed by the revolutions of 1848 from all interference on the part of the autocratic powers, carried out a radical revision of the makeshift constitution of 1815.

The constitution adopted in 1848 and extensively amended in 1874 still forms the basis of the Helvetic Confederation. It is at once truly federal and truly democratic: federal because, within their respective spheres, the national and cantonal governments are sovereign: democratic because ultimate sovereignty is vested in the people who exercise it by means of the Referendum and the Popular Initiative.

According to Article 8 of the constitution, "The Confederation alone has the right to declare war and to make peace, as well as to conclude alliances and treaties, especially customs and commercial treaties, with foreign states'. There is consequently some possibility of conflict between this provision and Article 9 (vide supra); 33 but unless the latter is to be nullified entirely, the conclusion must be that the cantons retain the right under Article 9 to conclude with

30 Even though Article 17 of the Constitution of the Union of Soviet Socialist Republics reserves the right to every Union Republic to secede from the USSR, it is a mere formal stipulation and would be strongly resisted in practice. Attempts in the past by component units of a federation to secede have always been considered under the constitutional law of a federation as a revolutionary act and an act of high treason. This provision in Article 17, is therefore purely theoretical.

31 See Article 14 of the USSR Constitution, paragraphs (a), (x), (b), (g), (h), (i), (v). It is also necessary to remark that the membership of the Republic of the Ukraine and Byelorussia in the United Nations is really an historical accident brought about by the situation prevalent after the Second World War.

32 Marriot, Federalism and the Problem of the Small State, 1945, p. 81.

33 Article 9 reads: 'Exceptionally, the Cantons retain the right to conclude treaties with foreign states concerning matters of public economy, neighbourly relations and police provided such treaties contain nothing contrary to the Confederation or to the rights of other Cantons'. 
foreign states international agreements of the kind specified in that article.

5. THE NIGERIAN EXPERIENCE SINCE INDEPENDENCE: AN EXAMPLE OF A FEDERATION OF THE FORMER COLONIAL SELF-GOVERNING COUNTRIES

The constitutions of federations of the former colonial self-governing countries are undoubtedly different in their nature and context from those so far considered, perhaps as a result of the conditions under which they were drawn up. The Federation of Nigeria serves as a very good example of this class of federations. The creation of federations after the Second World War pursued in the main, two objectives:

Firstly, to try in every possible way to camouflage the fact of colonial supremacy;

Secondly, to use the federal form of governmental management to aggravate national incompatibilities with consequent prejudice to national liberation movements among the indigenous citizens of the colonies. The essential difference between the federation of Nigeria and those discussed earlier is that it was more or less superimposed and did not spring as such from the historic sources and from the deep-felt needs of the indigenous population. Most of the provisions of the pre-independence constitutions of Nigeria like the independence one were full of compromises aimed at containing various interests of the divergent groups of its people on the one side and that of the metropolitan state on the other hand.

It is a matter of history that before the 1960 Independence Constitution, Nigeria had the experience of passing through different types of constitutions at different stages of its political and legal development. As a forerunner to the 1960 Independence Constitution, there were a number of constitutional conferences which were held in London from 1957 and 1960 between the representatives of the major political parties, on the one hand and the British Government on the other. It was after these series of constitutional conferences that the 1960 Constitution emerged. Typical of all Colonial

34 The Action Group, the Northern Peoples Congress, and the National Council of Nigeria and the Cameroons.


36 The Constitution was embodied in the Nigerian Constitution Order in Council, 1960, as a second schedule to it.
of the special problems often posed by federalism. One of such problems is that of political engineering which would involve a practical effort to reconcile unity with cultural, language and territorially-based differences aimed at reconciling the problem of divided authority. Perhaps, we may not do better in articulating this problem than to reproduce the statement of K.C. Wheare who is an acknowledged expert in federalism when he said:

“There are at least two important problems confronting the framers of a federal constitution in respect of the conduct of the foreign relations of the federation. There is the problem of whether the power to control foreign relations should be given in its entirety to the general government or divided between general and regional governments, more particularly so far as the carrying of treaties into effect is concerned. And there is the problem of how the power of the general government in foreign affairs, whatever its content may be, is to be so controlled that in its exercise the divergent interest of the component regions in the federation shall be duly safeguarded.”

Of all the federal constitutions of Nigeria, it is that of 1979 that came closest to clarifying the status of its component states in the conduct of foreign affairs, apparently in recognition and appreciation of the problem of divided authority, as well as learning hard lessons from the failures experienced in the past in this regard in the life and operation of the previous constitutions.

Thus, in the allocation of legislative powers under the 1979 Constitution, the Federal Exclusive Legislative List as provided in the Second Schedule Part One, vested in the Central Government the exclusive power to deal with all matters relating to foreign relations. These include borrowing of moneys within or outside Nigeria for the purposes of the Federation or of any state, citizenship, naturalization and aliens; currency, coinage and legal tender; Customs and excise duties; Defence; Deportation of persons who are not citizens of Nigeria; Diplomatic, Consular and Trade representation; Export duties; Exchange Control; External Affairs; Extradition; Fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within Nigeria; Immigration into and emigration from Nigeria; Implementation of treaties relating to matters on this list; Legal proceedings between Governments of States or between the Government of the Federation and Government of any State or any other authority or person; Maritime shipping and navigation; Passports and visas; Service and execution in a state of the civil and criminal processes, judgments, decrees, orders and other decisions of any court of law outside Nigeria or any court of law in Nigeria other than a court of law established by the House of Assembly of that State; Trade and Commerce.

From the above list, it is clear that the Constitution adopted a very broad conception of foreign relations to embrace more than mere diplomatic contact with the outside world. Furthermore, sufficient emphasis has been placed on the federal exclusive control of the country’s foreign economic relations. This is a definite step to stop the old practice whereby the regional governments in the First and Second Republic could and in fact did send rival economic missions abroad soliciting for external support and assistance. What

38 Ibid. Second Schedule Item 7.
39 Ibid. item 10.
40 Ibid. item 14.
41 Ibid. item 15.
42 Ibid. item 16.
43 Ibid. item 17.
44 Ibid. item 18.
45 Ibid. item 22.
46 Ibid. item 24.
47 Ibid. item 25.
48 Ibid. item 26.
49 Ibid. item 28.
50 Ibid. item 29.
51 Ibid. item 30. For a discussion of treaty-making and implementation see Ibid. item 34.
52 Ibid. item 35.
53 Ibid. item 41.
54 Ibid. item 56.
55 Ibid. item 61.
56 The Sub-Committee on Economy, Finance and Division of Power at the drafting stage of the Constitution had suggested that the adoption of an exclusive legislative list for the Federation should not necessarily exclude the component states from executive action in relation to the subjects covered provided that they do so within the regulations, law or policy laid down by the Central Government. This view was rejected. The adoption of such a suggestion would have caused more problems.
more, they set up a network of quasi-international relations between them and foreign governments. The 1979 Constitution therefore made the Federal Government solely responsible for the conduct of Nigeria's external affairs leaving the component states with no such powers no matter the limitation, unlike the 1963 Constitution which allowed the regional governments to appoint Agents-General to represent them in the United Kingdom.

CHAPTER 4

JURISDICTIONAL IMMUNITY

INTRODUCTION:

The question whether a state can be impleaded before the courts of another state is very controversial and incredibly a vast area. The legal literature on this theme alone can claim several lifetimes of patient and back-breaking study. The term 'state' as employed here means a state in the sense of international law. The notion of states as subjects of international law has been fully examined in another place and will not engage our attention here. Apart from states and their diplomatic and consular agents, there are also other categories of legal persons and bodies which under international law, are immune from the jurisdiction of municipal courts. These include international organisations, special missions and sometimes armed forces of one state which are in the territory of another state, with the permission of that state. These later other categories, though growing in importance cannot be compared with sovereign states. But it is important that they be mentioned.

It is through the instrumentality of diplomatic and consular agents essentially that sovereign states seek to promote amity amongst themselves. These governmental agents enjoy certain immunities and privileges. There used formerly to be a rule of absolute immunity which ought to be discarded in view of the current trend of international relations where efforts are geared towards cooperation and interdependence of the subjects of international law irrespective of their political, cultural or other differences. Consequently, what should be preferred is the doctrine of restrictive immunity. This aspect of our study lends itself to three or less (more rather than less) neat sub-divisions, namely:

(a) Sovereign Immunity.

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58 Even between 1979 and 1983, some State Governments defied the clear provisions of the Constitution on this matter to negotiate loans with foreign powers and organisations. The Anambra State Government of Jim Nwobodo entered into sister State Agreement with Ohio State of United States of America.


2 One significant result of contemporary international relations after the second World War is that Socialist States and others have come to engage in trading and other commercial activities (acts jure gestionis) in addition to the public functions traditionally associated with states (acts jure imperii).
3 Okeke, C.N. op. cit., p. 31.
(b) Diplomatic and Consular Immunity,
(c) Immunity of other categories of persons.

Like it has been our method in this work, the chapter will examine the above seriatim principally from the point of view of Nigeria’s theory, practice and international law.

(a) Sovereign Immunity:

Sovereignty is often considered to be the essence of the state, at least from the point of view of law. The international community exists as one in which all the sovereign states are legal persons on the basis of the principle of sovereign equality. The nature of this community does not allow the occupation of a superior position juridically by any one state so as to regulate all international relationships. Dominance, if it exists, is de facto not de jure; and even so, no state today could afford to do so without cooperation with other states. The principle of sovereignty is, therefore, of the most vital importance in the relationship between the subjects of international law.

Since states are independent and equal, no state may exercise jurisdiction over another state without its consent. In particular, the courts of one state may not assume jurisdiction over another state. The majority of cases that have arisen in modern times are in situations where a department (or organ) of government is impleaded. Few cases exist concerning personal sovereign or other head of state. The Head of a foreign state to this day enjoys complete immunity, even for acts done by him in a private capacity. Thus, in Mighell v. Sultan of Johore, the defendant proposed marriage, under the assumed name of “Albert Baker”, to a young lady who later sued him for breach of promise of marriage. He thereupon disclosed his identity and successfully pleaded sovereign immunity. A Hawaiian court accepted a claim of sovereign immunity made by the Foreign Minister of the Republic of South Korea on the basis of a suggestion submitted by the United States Department of Justice. The suggestion read:

“There are some rules of international law, recognized and applied in the United States, the head of a foreign government, its foreign minister, and those designated by him as members of his official party are immune from the jurisdiction of the United States Federal and State courts.”

The area of some difficulty arises in determining whether governmental corporations which have a legal personality distinct from that of the state are entitled to immunity. Furthermore, what amounts to a sufficient interest in property on the part of a state in order that it may be impleaded in proceedings to which the state is not a party.

In modern times unlike during the 19th century, state trading has become more common. Virtually all states show interest in commerce nowadays consequent upon which they prefer the rule of qualified immunity.

The doctrine of sovereign immunity of state property as it affected the interest of Nigeria came up in a number of cases during the Murtala-Obasanjo military governments in Nigeria. Thus, in Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria, the Central Bank of Nigeria issued a letter of credit in favour of the plaintiffs, a Swiss Company, for the price of cement to be sold by the plaintiffs to an English company which had secured a contract with the Nigerian Government to supply it with cement for the construction of an army barracks in Nigeria. When, under instructions from the Nigerian Government (which was taking steps to extricate itself from the Nigerian Cement Scandal created by its predecessor Government), the bank refused to honour the letter of credit, the plaintiffs brought an action in personam against the bank in the English High Court. The bank successfully claimed sovereign immunity before Mr. J. Donaldson but was reversed on appeal.

Examining the legal position of the bank, vis-a-vis immunity, Lord Denning said:

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4 Okeke, C.N. op. cit., p. 23.
5 (1894) 1 Q.B. 149.
7 Sometimes referred to as the “cement cases”.
8 (1977) 1 All. E.R. 881.
9 The Nigerian Military Government under Gowon had ordered huge quantities of cement from different sources more than Nigeria actually needed or the ports of Lagos could handle.
10 Stephenson L.J. and Shaw L.J. agreed with Lord Denning on the status of the Bank and that international law had changed to a doctrine of restrictive immunity.
At the hearing we were taken through the Act of 1958 under which the Central Bank of Nigeria was established, and of the amendments to the Act by later decrees. All the relevant provisions were closely examined. The upshot of it all, may be summarized as follows:


2. It has governmental functions in that it issues legal tender; it safeguards the international value of the currency; and it acts as banks and financial adviser to government.

3. Its affairs are under a great deal of government control in that the Federal Executive Council may over rule the board of directors on monetary and banking policy and on internal administrative policy.

4. It acts as banker for other banks in Nigeria and abroad, and maintains accounts with other banks. It acts as banker for the states within the Federation, but has few, if any, private customers. In these circumstances I have found it difficult to decide whether or not the Central Bank of Nigeria should be considered in international law a Department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be.

The reasoning in the above decision appears to form the basis of the decision of the District Court of Frankfurt, West Germany,12 and that of United States Court in similar suits instituted against the Central Bank of Nigeria.13

(b) Diplomatic and Consular Immunity.14

Nigeria’s diplomatic and consular law are as young as the state itself. It borrows heavily from the English Law particularly before independence. Foreign policy is indissolubly bound up with diplomacy. Diplomacy is the most important instrument of a state’s foreign policy.15

It serves solely the aims of foreign policy and in a large measure predetermines the limits and ways for the employment of other instruments in foreign policy. Foreign policy is the sum total of the state’s aims and means of intercourse with other states and nations. It has its own specific features and forms of implementation. Nevertheless, it is organically bound up with domestic policy of the state.

Accordingly, all states send and receive diplomats and consuls, which explains the smooth working of rules of diplomatic immunity. Diplomatic relations are established by mutual consent between the two states concerned.16 However, they may be either broken or suspended unilaterally.17

At independence in 1960, the Diplomatic Immunities and Privileges (Commonwealth Countries and Republic of Ireland) Act represented Nigeria’s diplomatic charter.18 However, soon after independence, Nigeria acceded to the Vienna Conventions on Diplomatic and Consular Relations.19 The Diplomatic Immunities and Privileges Act, 1962, gives effect to the relevant provisions of the two Vienna Conventions in Nigerian law.20

This Act consolidated all the previous laws on diplomatic and consular relations in the country, i.e. the Diplomatic Immunities and Privileges (Commonwealth Countries and Republic of Ireland Act) and the Diplomatic Privileges (Extension) Act.21 Before the coming into force of the two Vienna Conventions on Diplomatic and Consular Relations, state practice tended to differ much, but this has significantly stabilized since the emergence of the Conventions.

Throughout history, diplomats and other envoys have needed privileges and immunities for the effective performance of their functions in the territory of the receiving state. However, it must be made clear that the principle of diplomatic, consular or other

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11 The judges were unanimous in allowing the appeal.
12 In Youssel M. Nada Establishment v. Central Bank of Nigeria, the Court gave judgment for the plaintiff on the ground that only assets which are dedicated to the public service of the state are exempted from forcible attachment and execution. For the detail of the judgment, see, International Legal Materials, Vol. XVI, No. 3, May 1977, pp. 501-505.
13 96 Civ. 3745 (G.L.G.) of March 27, 1978
14 Consuls like Diplomats, represent their state in another state, but unlike diplomats, they are not concerned with political relations between the two states.
16 Article 2 of the Vienna Convention on Diplomatic Relations, 196.
17 Often as a mark of disapproval of an illegal or unfriendly act by the other state.
18 It conferred immunities and privileges on agents from Commonwealth countries and the Republic of Ireland.
19 Of 1961 and 1963 respectively.
21 The latter Act will be discussed under Immunity of other categories of persons.
immunity is accorded not for the benefit of the individual agent in question, but for the benefit of the state in whose service he is, in order that he may fulfill his diplomatic or consular duties with the necessary independence and freedom.\textsuperscript{22} It is submitted that Nigeria in her diplomatic law and practice adheres to a large extent to the provisions of the Vienna Conventions. For example, every envoy and every foreign consular officer, the members of their families, their official or domestic staff,\textsuperscript{23} as well as the members of families of those staff must be accorded immunity from suit\textsuperscript{24} and legal process, and inviolability of residence and official archives.\textsuperscript{25} A member of the family for the purposes of the act is "the spouse or any child of that envoy",\textsuperscript{26} while the term property includes the personal property of the envoy as well as his residence, diplomatic and consular baggages and state property.

Apart from the fact that this rule is recognized under general international law,\textsuperscript{27} the Nigerian law also recognizes it. Residence as it affects the property of a Government means "any house or other premises whatsoever used or occupied for diplomatic purposes by the head of a mission or by a member of the diplomatic staff"; and as it affects any person means "any house or other premises for the time being occupied by that person and however acquired."\textsuperscript{28}

Subject to the provisions of the Diplomatic Immunities and Privileges Act, a Chief Representative\textsuperscript{29} and members of his official or domestic staff,\textsuperscript{30} his family\textsuperscript{31} or a member of the official staff,\textsuperscript{32} will be entitled to the like immunity from suit and legal process and inviolability of residence and official archives as are accorded to a foreign envoy.\textsuperscript{33} Similarly, representatives of any Government of a Commonwealth country attending a conference in Nigeria will also be treated as if he is a foreign envoy.\textsuperscript{34}

The assertion made above, to the effect that Nigeria appears to have respected the rules of international law with regard to the problems of diplomatic and consular relations has not been without some difficulties. At least, between 1960 and the present time, a few incidents have tended to call for a review of Nigeria's adherence to her international obligations under international diplomatic law.

Events of the Period of the Civil War, 1967-1970:

During the Nigerian civil war, five states – Tanzania, Gabon, Ivory Coast, Zambia and Haiti recognized Biafra as an independent state. At the time of the recognition, Nigeria maintained full diplomatic relations with most, if not all the states that extended recognition to the Biafran state. While there was no evidence of formal diplomatic relations between those states and Biafra, it is inconceivable to think that they had no informal diplomatic relations of an \textit{ad hoc} nature, pending the final outcome of the conflict. In consequence of the recognition extended to Biafra, Nigeria broke off diplomatic relations with the five states. The diplomatic mission of the affected states were withdrawn from Nigeria and that of Nigeria from those states. Diplomatic relations between Nigeria and those countries were re-established at the end of the civil war.

The "special duty" to protect the premises of the mission is well established in customary international law.\textsuperscript{35} It is even considered very important at the present time when such premises prove convenient settings for political demonstrations and sometimes other illegal acts. The duty extends to the private residence of a diplomatic

\textsuperscript{22} A fundamental basis for diplomatic or consular immunity is the fact that the diplomat or consul represents his or her state.
\textsuperscript{23} Conforms with Section 37 of the Vienna Convention.
\textsuperscript{24} Article 24 of the Vienna Convention on Diplomatic Relations, 1963.
\textsuperscript{25} Section 1(1) of the Diplomatic Immunities & Privileges Act. Also, see the decision in Ishowo-Noah \textit{v. His Excellency, The British High Commissioner to Nigeria} (1980) 8-11. S.C. 100, in which the plaintiff brought an action against the British High Commissioner in Nigeria. Fatayi-Williams C.J.N. as he then was ruled that the action was contrary to Section 1 of the Diplomatic Immunities & Privileges Act 1962.
\textsuperscript{26} Article 22 of the Nigerian Diplomatic and Privileges Act 1962.
\textsuperscript{27} See, Article 27(3) of the Vienna Conventions.
\textsuperscript{28} Section 1 of the Diplomatic Privileges Act.
\textsuperscript{29} Section 3, \textit{ibid}.
\textsuperscript{30} Section 4(a), \textit{ibid}.
\textsuperscript{31} Section 4(b), \textit{ibid}.
\textsuperscript{32} Section 4(c), \textit{ibid}.
\textsuperscript{33} Section 3 and 4, \textit{ibid}.
\textsuperscript{34} Section 6, \textit{ibid}.
\textsuperscript{35} See Article 22 of the Vienna Convention 1961.
This duty was interpreted in the context of the Convention in Agbor v. Metropolitan Police Commissioner. There, a dispute arose over the occupation of a flat in a house in London owned by the Nigerian Government and used to house diplomatic agents. Shortly after Biafra seceded from Nigeria, a Biafran family managed to gain possession of the flat while its next official tenant was awaited. At the request of the Nigerian Government, the family was evicted by the police. The court was asked in the application before it to allow the family to return to the flat until it had given a decision on the right of possession. The application was granted because the flat was not at the time the residence of a diplomatic agent. What would have been the legal position had the flat been the residence of a diplomatic agent was pronounced upon by Lord Denning when he stated that:

"he was not at all satisfied that the (Diplomatic Privileges) Act of 1964 gives to the executive any right to evict a person in possession who claims as of right to occupation of the premises. It enables the Police to defend the premises against intruders. But not to turn out people who are in possession and claim as of right to be there."39

It is submitted that the provision of the 1964 Act as interpreted above needs to be brought in conformity with the Vienna Convention on Diplomatic Relations 1961. In a situation like the one under consideration, it should be possible for the local authorities to facilitate re-possession of an official diplomatic house of a foreign power with whom it has diplomatic ties from the occupation of a non-diplomatic agent or his family. Furthermore, there remains the duty to ensure that the premises is protected on the part of the receiving state.

Clearly a court cannot allow persons who are no diplomats to occupy a house rightly designated as a diplomatic house of another friendly state on the basis only of a simple assertion of an interest in the property by the occupier, unsupported by evidence.

36 Under Article 30, ibid.
38 A local British Act.

Examination of Major Diplomatic Controversies of the Period 1970 till date:

Opening and Inspection of Official Correspondence and Diplomatic or Consular Pouches 1973

In 1973, the Nigerian Federal Military Government felt that there was a need to effect a change of her currency from pounds sterling to naira. In furtherance of this economic policy, the authorities considered and came out with a statement on the procedure of carrying out this exercise. According to the Government, the basis for undertaking the measure was to check the trafficking of Nigerian currency. One of the suggested procedures which was the opening and inspection of official correspondence and diplomatic or consular pouches generated much protests and condemnations among foreign missions accredited to Lagos in reaction to the Federal Government's note on the matter addressed to all Heads of Diplomatic and Consular Missions in the country through the Ministry of External Affairs. The Note stated thus:

"Without prejudice to their immunities and privileges, which the Federal Republic of Nigeria respectfully upholds under the Vienna Convention on Diplomatic Relations, 1961, as well as the Vienna Convention on Consular Relations, 1963, the Ministry wishes to confirm that no packages or articles consigned to any person, diplomatic agent, diplomatic or consular mission, organisation or institution may be immuned from search. In order therefore to ensure that such packages, articles and personal effects consigned for the official use of diplomatic/consular missions or for the personal use of a diplomatic agent or member of his family forming part of his household, are verified in an atmosphere of security and safety and with appropriate courtesies, the Ministry appeals to the diplomatic/consular missions for their kind cooperation and assistance in facilitating the work of the customs officials at ports of entry...."

As has been indicated, the action of the Federal Government evoked protestations from a good number of missions as being in clear violation of the 1961 and 1963 Conventions. It is humbly
submitted that the opening and inspection of official correspondence and diplomatic or consular pouches conflict with customary international law and international agreements to which the Federal Republic of Nigeria is a party. International law governing diplomatic relations prohibits any interference with official correspondence and diplomatic pouches whether sent to or from a foreign ministry or between its mission.

The Diplomatic Aspect of the Return of the Nigerian Fugitives as a Result of the December 1983 Military Coup.

As a result of the 31st of December 1983 military coup, a number of former politicians fled the country. Discussions on their possible return to the country had been rather heated. Prominent among those wanted politicians is Dr. Umaru Dikko. In early July, an unsuccessful abduction attempt was made on him in his hideout in London. This triggered off serious diplomatic crack in the relationship between Nigeria and Great Britain. The Umaru Dikko abduction affair was first reported by both the press and radio in Nigeria on the 5th of July 1984. According to the reports, Dr. Umaru Dikko was found by the British Intelligence officers drugged and crated in a box. The box was brought to the British Standstead Airport, where it was to be loaded unto a Nigerian-bound Nigeria Airways plane. Two Israelis were reported to be found in another crate and were thought to be the brains behind the kidnap attempt. There was however a further report that a Nigerian official of the Embassy in London was found at the said airport at the time of loading. With the collapse of the attempt, a major diplomatic war between the two countries started.

The Nigerian Government strongly denied any involvement in the kidnap bid. On the other hand, the British authorities arrested and detained seventeen people, among whom were some Nigerian diplomats, who, according to them, were seen at the scene of the airport incident. The action raised a number of crucial questions of immunity of diplomats. The Head of the Nigerian Mission, Major-General Hananiya was recalled for consultations by the Nigerian authorities after offering some explanations at the British Foreign Office, while Nigeria forced Britain to recall his counterpart in

Nigeria. Two Nigerian diplomats in Britain were declared persona non grata and deported. In retaliation, the Nigerian Government declared two opposite numbers in the British Embassy in Nigeria persona non grata.

The British demand for a waiver of diplomatic immunity for the Nigerian officials was rejected and rightly so. We have expressed an opinion on this matter somewhere to the effect that, to make such a demand in the face of a strong denial of any official connection by the Federal Government of Nigeria was unreasonable. It must be noted that Nigeria demonstrated commendable maturity in the matter, taking appropriate reciprocal steps whenever the need arose. The Government of Nigeria is reported to have made a formal request to the British Government for the extradition of Dr. Dikko and possibly other fugitives resident there. The chances of their being extradited depend on a number of issues already discussed.

(c) Immunity of Other Categories of Persons – International Organizations and Special Missions:

The extent of immunities enjoyed by international organizations is uncertain. But practice shows that it is regulated by treaties in most cases. This affects regional as well as international organisations like the United Nations Organisation. In the case of the United Nations Organisation, it enjoys complete immunity from legal process. The representatives of member-states attending UN meetings enjoy nearly the same privileges and immunities as diplomats.

Nigeria has made corresponding laws to cover the immunity of international organisations operating in her territory. Thus, the Minister for External Affairs may, by order declare that an international organisation enjoys the immunities and privileges set out in

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41 A full discussion of the subject of Extradition has been undertaken. See Chapter supra.

42 See, Daily Times, July 12, 1984, centre page.
43 See, Chapter supra.
44 However, there is the General Convention on the Privileges and Immunities of the U.N. 1946.
45 Section 2, ibid.
46 Sections 11-16, ibid.
the first schedule of the Act. Diplomatic immunity as provided in the third and fourth schedules to the Act will be conferred upon such other classes of officers and servants of the organisation as well as the staff of the representatives of such organisations respectively.

It must be pointed out however, that Section 11 will not authorize the making of any order to confer immunity or privilege upon any person as the representative of the Government of Nigeria or as a member of the staff of such a representative. In Nigeria, immunity is conferred on bodies like African Development Bank, West African Health Community, African Groundnut Council and the International Committee of the Second World Black and African Festival of Arts and Culture.

Under Nigerian Law, the Federal Minister of Finance may from time to time, wholly or partly exempt from any public tax, duty, rate, levy or fee applicable to the Federation a foreign envoy, a chief representative of a Commonwealth country, a foreign consular officer, a person upon whom consular immunity is conferred by regulations made under the Act, and a person attending a Commonwealth conference in Nigeria. Furthermore, such exemption may be extended to a representative or officer of the Government of any country other than Nigeria or of any provisional Government, national committee or other authority recognised by the Government of Nigeria if he is temporarily resident in Nigeria in accordance with any arrangement made with the Government of Nigeria, and a member of the official or diplomatic staff of any of the foregoing persons.

Other international bodies that enjoy diplomatic privileges in Nigeria and for whom notices and orders were made include the United Nations, Special Agencies, UNICEF, International Court of Justice (ICJ), Food and Agriculture Organisation, UNESCO, Refugee Organisation, World Health Organisation, International Civil Aviation Organisation, ILO, World Meteorological Organisation, Universal Postal Union, and International Telecommunication Union.

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55 Diplomatic Privileges (Special Agencies) Declaration of Application Notice 1949.
57 Diplomatic Privileges (United Nations and International Court of Justice) Order in Council 1948.
58 Order of 1949.
59 Order of 1949.
60 Diplomatic Privileges Refugee Organisation Order 1949.
63 Order of 1949.
64 Order of 1956.
65 Order of 1956.
66 Order of 1956.
CHAPTER 5
NATIONALITY AND CITIZENSHIP

INTRODUCTION

The terms nationality and citizenship though often used separately in legal writings mean the same thing in terms of legal context. Perhaps, it is right to assert that while the term citizenship is used in municipal law, nationality is mainly used in international law.

It is now generally accepted in international law that the determination of who is a national of a state is the responsibility of the State concerned. Thus, “it is for each state to determine under its laws who are its nationals.” Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the laws of that state.

While a number of writers have attempted to explain the concept of nationality, it is considered important to adopt the description of at least, two of such authors for purposes of illustration. According to Shigeru Oda, “It is pertinent to know, first of all what law determines the nationality of each individual. It has long been conceded that the state is as a principle, free to determine by its own Constitution and domestic legislation, who is entitled to its nationality. In other words, the grant of nationality is within the domestic jurisdiction of each State.” On the other hand, Oppenheim said:

“Nationality of an individual is his quality of being a subject of a certain state, and therefore its citizen. It is not for international law but for municipal law to determine who is, and who is not considered a subject... In the United States, while the expressions “citizenship” and “nationality” are often used interchangeably, the term “citizen” is as a rule employed to designate persons endowed with full political and personal rights within the United States, while some persons—such as those belonging to territories and possessions which are not among States forming the Union are described as “nationals”.

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1 Article 1 of the Convention on Conflict of Nationality Laws, 1930.
This chapter is designed to examine the Citizenship Law of Nigeria. Nigeria became a sovereign and independent state on October 1, 1960. Before this date, there were no nationality and citizenship laws applicable in the territory. Consequently, there was no Nigerian citizenship. The applicable laws in this regard were the British nationality laws as defined by the British Nationality Act 1948.

At independence in 1960, the Independence Constitution contained sections relating to Nigerian citizenship. The Constitution distinguished between persons who on October 1, 1960, became Nigerian citizens and those who acquired such citizenship at birth on or after that date. The Constitution also made provisions for the acquisition of Nigerian citizenship by registration. The Nigerian Parliament was empowered to make laws for the acquisition of citizenship of Nigeria by other modes which are not provided for in the Constitution. It was also possible for the Parliament to lay down rules for the renunciation and deprivation of Nigerian citizenship.

Accordingly, Parliament enacted the Nigerian Citizenship Act 1960 and the Nigerian Citizenship Act 1961. Most of the Citizenship law in Nigeria as of 1974 was made up of the Constitutional provisions and the enactments of the Nigerian legislature during 1960 and 1961. Later, it was possible for people who although they were eligible to become citizens of Nigeria by registration but could not submit their application before the closing date.

In the first fourteen years of Nigeria's life as an independent and sovereign state, its citizenship law did not discriminate between Nigerian citizens and foreigners in a number of economic engagements. This meant that Nigerians and non-Nigerians enjoyed equal rights in carrying out any business endeavours within the country.

However, the Federal Military Government promulgated the Nigerian Enterprises Promotion Decree 1972 which was later amended by the Nigerian Enterprises Promotion (Amendment) Decree 1973. The Decree accorded the Nigerian citizen or association a privileged position in trade and commerce activities as compared with aliens. According to the Decree, a "Nigerian citizen or Association" is:

(a) "a person who is a citizen of Nigeria by virtue of the Constitution of the Federation and the Nigerian Citizenship Act 1960;
(b) any person of African descent not being a citizen of Nigeria, who is a national of any country in Africa which is a member country of the Organisation of African Unity, and who continues to reside and carry on business in Nigeria, if the country of which he is a national also permits citizens of Nigeria to establish and operate businesses or enterprises in that country on the basis of reciprocity; and
(c) any company registered under the Companies Decree 1968, partnership, association or body (whether corporate or incorporate) and except as otherwise prescribed by or under this Decree, the entire capital or other financial interest of which is owned wholly and exclusively by citizens of Nigeria"


**ACQUISITION OF CITIZENSHIP**

The Nigerian Constitution 1979 has provisions for citizenship. Three modes of acquiring citizenship are recognized, namely: by birth, by registration, and by naturalization.

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5 This became possible by virtue of the 1861 cession treaty of the island and territory of Lagos.
6 Section 32(1).
7 Chapter II of the 1960 Constitution.
8 Section 15 of the 1960 Constitution.
10 See: Nigerian Citizenship (Validation) Decree 1968.
12 Section 16(1).
13 Act No. 33 of 1974.
14 Section 1(2).
15 Chapter II of the 1979 Constitution.
16 Section 23, *ibid*.
17 Section 24, *ibid*.
18 Section 25, *ibid*.
1. By Birth:

A person may acquire Nigerian citizenship by birth in the following ways: (a) Every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria. However, a person cannot become a citizen if neither of his parents nor any of his grandparents was born in Nigeria; (b) Every person born in Nigeria after the date of independence, either of whose parents or any of whose grandparents is a citizen of Nigeria; and (c) Every person born outside Nigeria either of whose parents is a citizen of Nigeria. 19

2. By Registration:

Subject to the provisions of Section 26 of the Constitution, persons who have satisfied the President in respect of the following shall be eligible to apply for citizenship by registration: (i) shows that he is a person of good character; (ii) shows that he has a clear intention and desire to be domiciled in Nigeria; (iii) shows that he has taken the Oath of Allegiance prescribed in the Sixth Schedule of the Constitution. 20

The above provisions apply to a woman who is or has been married to a citizen of Nigeria or every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria. 21

The question of citizenship by birth occurred as a result of the deportation of Shugaba Abdulrahman Darman in 1930. See, Shugaba Abdulrahman Darman v. The Federal Minister of Internal Affairs (1981) 2 MCLR pp. 459-521. The applicant, a member of the Great Nigeria People’s Party and the Majority Leader in the Borno State House of Assembly was deported by the Federal Authority and its agents from Nigeria on the 24th January 1980. The deportation order was signed by the Minister for Internal Affairs in exercise of his powers under Section 18(3) of the Immigration Act, 1963. The grounds were that the applicant was a security risk and was not a citizen of Nigeria. The applicant was sent out of the country to the Republic of Chad. His passport was impounded. Having examined the existing citizenship laws of Nigeria before and after independence the Court ruled, that the applicant’s mother was a Nigerian and therefore the applicant was a Nigerian citizen by birth.

20 Section 24(1) of the 1979 Constitution.
21 Section 24(2), ibid.

The provisions give the President enormous discretionary powers and his judgment in the above matters is final. He must be satisfied that the prescribed conditions are complied with, but the mode of determining whether an applicant is of good character is not certain.

With regard to the requirement of a clear intention to be domiciled in Nigeria it would presuppose a consistent stay in Nigeria for some years but it is not clear how many years will satisfy this condition. The conditions listed above will limit to a great extent the number of persons who may acquire Nigerian citizenship by registration. This is because in the absence of clear rules on the matter, the issues will depend on the President.

3. By Naturalisation:

Three conditions must be fulfilled by a person before he can be naturalized. 22 The conditions are: (i) the person must in the opinion of the Governor of the State where he proposes to be resident be acceptable to the local community in which he is to live permanently and has been assimilated into the way of life of Nigerians in that part of the Federation; 23 (ii) He is a person who has made or is capable of making useful contribution to the advancement, progress and wellbeing of Nigeria, 24 and; (iii) He has, immediately preceding the date of his application either resided in Nigeria for a continuous period of fifteen years or resided in Nigeria continuously for a period of twelve months and during the period of twenty years immediately preceding that period of twelve months has resided in Nigeria for periods amounting in the aggregate to not less than fifteen years. 25

Each and everyone of the above conditions presents some difficulties of precise determination and application in practice. For example, it will be difficult for the Governor of a state where the applicant proposes to reside, to determine the extent of acceptability of the said applicant by the community.

Whether a person is accepted and has been assimilated into the way of life of the community remains a question of fact. As one author has suggested, in determining this question, the person’s “mode of life, including such factors as the type of food he eats, his...

22 Section 25, ibid.
23 Section 25(2) (d), ibid.
24 Section 25(2) (e), ibid.
25 Section 25(2) (g), ibid.
mode of dress, participation in local affairs, fluency in the local language and sharing in the general community welfare”.  

Even if the above is accepted, there is no doubt that the provision is very fluid and very susceptible to abuse by an over-zealous Governor.  

With regard to the condition of contribution to the advancement of Nigeria, Nwogugu has aptly summed it up. He stated:

"Where the applicant has already made such a contribution, the issue will be clear-cut. But in determining whether he is capable of making any such contribution, several factors will be taken into consideration, including his standard of education and training, his skill, his wealth, and his general ability... Moreover, the contribution should relate to the advancement, progress and well-being of Nigeria including achievements in education, commerce, sports and service to the nation”.  

The question of ascertaining whether the residential requirement has been fulfilled appears straightforward since it will be easy to find out from the Immigration Department how long an alien applicant has been resident in Nigeria.  

4. **Dual Citizenship:**

Nigerian Citizenship law prohibits dual citizenship. A person will forfeit his Nigerian citizenship if he acquires or retains the citizenship or nationality of a country other than Nigeria. However, the law gives him a period of twelve months within which to renounce his citizenship of another country. A citizen of Nigeria by birth will not forfeit his Nigerian citizenship if within twelve months of the coming into force of the provision of Chapter III or of his attaining the age of twenty-one years (whichever is later) he renounces the citizenship or nationality of any other country which he may possess.

5. **Deprivation of Citizenship:**

The President may deprive a naturalized citizen of his citizenship if he is satisfied that such a person has within a period of seven years after becoming naturalized been sentenced to imprisonment for a term of not less than three years. In the same manner, the President will deprive a person other than a citizen by birth of his citizenship, if he is satisfied from the records of proceedings of a court of law or other tribunal, or other due inquiry that:

(a) the person has shown himself by act or speech to be disloyal towards the Federal Republic of Nigeria, or

(b) he has during any war in which Nigeria was engaged, unlawfully traded with the enemy or been engaged in or associated with any business that was in the opinion of the President carried on in such a manner as to assist the enemy of Nigeria in that war, or unlawfully communicated with such enemy to the detriment of or with intent to cause damage to the interest of Nigeria.

The President is vested with the power to make regulations for granting of special immigrant status with full residential rights of non-Nigerian spouses of citizens of Nigeria who do not wish to acquire Nigerian citizenship. The regulations which should not be inconsistent with the provisions of the chapter, must be placed before the National Assembly for approval.

**CONCLUSION:**

The discussion of Nigerian citizenship law shows that it is in conformity with generally accepted principles of international law in many respects. International law recognizes that it is for each state...
to determine under its own law who are its nationals, and any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that state.

37 17 L.N.T.S. 89.

1. INTRODUCTION

The question of the treatment of aliens, that is to say, the treatment of the nationals of other states is not only a very important one but is as controversial a subject as any in international law. Essentially, it is within the domestic jurisdiction of states to determine, who is an alien under its laws, who to admit or who not to admit into its territory. It therefore follows from the above statement, that the admission of aliens is the exclusive preserve of each sovereign state who in turn reserves the inalienable right of determining from time to time, its procedures for the reception, treatment and expulsion of aliens from its territory.

The controversy over the treatment of aliens stems from a difference of approach between those states that consider that there is an "international minimum standard" of treatment which must be accorded to aliens by all states irrespective of how they treat their own nationals and those that argue that aliens may only insist upon "national treatment", i.e. treatment equal to that given by the state concerned to its own nationals.

In general, the older and economically "developed" states follow the "international minimum standard" approach while the newer and "developing" states favour national treatment.

In the beginning, the latter states consisted mainly of Latin American states, but more recently they have been joined by most of the post-colonial Afro-Asian states. The Union of Soviet Socialist Republics and other "developed" socialist states reject the "international minimum standard" approach also. It is the considerable support for both approaches that makes it difficult to determine many of the rules of international law in this area.

Whether an "international minimum standard" or a "national treatment" rule applies, it is commonly agreed by states that international law does not control their treatment of aliens in every area of activity. The rules of international law with regard to the status of aliens are principally derived from state practice. So far, all known attempts to codify international law in this area have proved un-
successful save for one instance.\(^1\)

This chapter will attempt to review the law side by side with the existing case law and the rules of international law on the subject. Against this background, the study will proceed to determine who is an alien, the method of his admission, what constitutes his rights and duties as well as restrictions if any, the treatment of an alien and finally his expulsion under Nigerian law.\(^2\)

2. THE CONCEPT OF AN ALIEN UNDER NIGERIAN LAW

An examination of the legal status of aliens in Nigeria necessarily calls for a discussion of the concept of an alien under Nigerian law generally. Under the provisions of Nigeria's independence constitution of 1960, and later that of 1963, a Commonwealth citizen automatically acquired the status of Nigerian citizenship. The 1963 constitution was in force until January 1966 when it was suspended following the overthrow of the Federal Government by the Military under, first, the leadership of Major-Generals Aguiyi Ironsi and later, in July the same year, Yakubu Gowon. Thirteen years later, in 1979, another constitution was enacted which ushered in the Presidential system of government in the country, under Alhaji Shehu Usman Aliu Shagari.

However, by the Constitution (Amendment) Act 1974,\(^3\) the citizenship provisions of the 1963 constitution of the Federation was amended by this amendment, a Commonwealth citizen by operation of Law.\(^4\)

By virtue of chapter III of the constitution of the Federation\(^5\) 1966 relating to citizenship, a Commonwealth citizen does no longer automatically acquire Nigerian citizenship as was the case before.\(^6\)

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\(^2\) It is proposed to give a particular attention to the discussion of the provisions of the Treaty of Economic Community of West African States (ECOWAS) as they touch on the vexed problem of admission and free movement of Community citizens within the territory of Nigeria.

\(^3\) No. 33, 1974.

\(^4\) A discussion of citizenship law in Nigeria will be undertaken separately in another study.

\(^5\) Now suspended as a result of the Military coup of 31st December 1983 which brought Major-General Buhari to power.

\(^6\) See, chapter III of the suspender 1979 Nigerian Constitution.

To establish who an alien is in the sense of Nigerian law, means wading into an extensive search into several isolated legislations. This is for the simple reason that reference to that term ‘alien’ is only given some form of statutory definition in a number of scattered enactments.

Thus, the 1963 Immigration Act defines an alien as “any person not a Commonwealth citizen or a citizen of Eire”.\(^7\) Clearly, this definition of an alien is not within the context of Nigerian citizenship.

In 1977, Nigeria promulgated the Enterprises Promotion Act,\(^8\) the sole aim of which was to concentrate the control of the economy of the country in the hands of Nigerians. The Act defines an alien as “a person or association whether corporate or incorporate other than a Nigerian citizen or association”.\(^9\) It is understandable why this definition extends to artificial persons. The Act itself is purely commercial in nature, objective and content.\(^10\)

An alien under Nigerian law, is a person who is not a citizen of Nigeria within the meaning of chapter III of the suspended 1979 constitution of the Federal Republic of Nigeria.\(^11\) However, it is important to observe that in Nigeria, the notion of alien comes under two distinct categories. For purposes of clarity they may conveniently be classified into ordinary aliens and treaty aliens. The treatment of each of the categories of aliens afore-mentioned is different to some extent.

The treatment of ordinary aliens will come within the ambit of the provisions of the applicable law on the subject, namely the 1963 Immigration Act, as amended. On the other hand, treaty aliens will be treated in accordance with the provisions of any treaty in force in Nigeria. The treaty of Economic Community of West African States (ECOWAS), is an example of such treaties. It follows that the treatment of aliens who are citizens of the states parties to this treaty will

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\(^7\) Section 51 of 1963 Immigration Act.

\(^8\) Popularly referred to as the Indigenisation Decree 1977. The Act has been under heavy criticism recently and calls have been made by several individuals and organisations for its review in view of the allegation that some foreigners are violating some of its principal objectives.

\(^9\) Section 23.

\(^10\) For our present purposes “alien” refers to natural persons”.

\(^11\) Section 2 of the Native Lands Acquisition Law, Cap. 80, Laws of Western Nigeria; Section 3, Acquisition of Land by Aliens (Amendment) Law, 1971 (Lagos State).
be according to the provisions of the treaty.

In summary, the definition of an alien under Nigerian law conforms with the universally accepted meaning of the term in international law. That is to say, the term simply means nationals of other states or a person who is not a citizen of the state concerned.

3. ADMISSION OF AN ALIEN IN INTERNATIONAL LAW

As has been stated above, the rules of international law touching on the states of aliens are essentially derived from state practice. In the absence of any treaty obligations, an alien or his state of origin has no legal right to impose his nationality or that of its national on any state. There exists an array of authorities both in international case law and in the writings of the most highly qualified publicists to support the views expressed above.

According to Shigeru Oda:

"The rules of international law regarding the status of aliens are mainly derived from state practice which are naturally varied. In addition to this, customary international law, treaties to commerce or establishment, bipartite or multi-partite, often contain detailed provisions on the subject." 12

But with particular reference to the issue of reception and admission of an alien, it is within the domestic jurisdiction of states. Framed differently, the reception of aliens is a matter of the discretion of every state. Every state is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory.

In Attorney-General for CANADA V Cain, 13 the Judicial Committee of the Privy Council said:

"One of the rights possessed by the supreme power in every state is the right to refuse "to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter that state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order and good government, or to its social or material interests." 14

In the Nottenbolm Case, 15 Judge Read eloquently stated:

"When an alien comes to the frontier seeking admission.... the state has an unfettered right to refuse it...."

On the matter of admission of an alien, Godwin Gill stated:

"Questions of immigration, of the entry and expulsion of aliens, fall easily within traditional conceptions of domestic jurisdiction. It is still common to find expressed the view that such matters are for the local states alone to decide." 16

The right of a state to admit or not to admit is therefore well established in international law. However, it is not clear whether it seems to matter at customary international law what grounds there are for refusing to admit. The admission and expulsion of aliens is regulated by a number of bilateral and multilateral treaties. Thus, the 1962 Anglo-Japanese Treaty of Commerce, Establishment and Navigation, 17 for example, reads:

"Nationals of one High Contracting Party shall be accorded, with respect to entry into, residence in and departure from any territory of the other, "treatment not less favourable than that accorded to the nationals of any other foreign country"." 18

In conformity with the practice of states as discussed above, Nigeria regulates the admission of aliens into its territory by the means of its immigration laws. An inquiry into the immigration laws of many states will reveal that few of them admit aliens uncon-

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14 Ibid.
ditionally. Most attach conditions. But hardly any state, though entitled to assert the right to exclude aliens, actually exercises this right in its extreme. According to Oda, no state is inclined to severe all intercourse between itself and other countries.\textsuperscript{19}

4. **APPLICABLE LAW IN NIGERIA**

The law regulating the question of admission of aliens into Nigeria is to be found in the Immigration Act 1963,\textsuperscript{20} as amended by the Immigration (Amendment) Act, 1972.\textsuperscript{21}

5. **PRELIMINARY REQUIREMENTS BEFORE ARRIVAL**

No country throws its frontiers open to aliens to come in at will without some measure of check. Nigeria is no exception. Consequently, Nigerian law prescribes certain requirements which must be fulfilled by the intending alien before he can gain entry legally into the country. On fulfilling the prescribed requirements, the alien may then enter the country through any of the ports of entry of his choice which may be by air, sea or road.

These requirements are set out in the Nigerian Immigration Act 1968 as amended by the Immigration (Amendment) Act, 1972. By virtue of the Act, an alien is prohibited from entering the country unless he is in possession of a visa or entry permit, whichever is applicable to the alien’s case. It will be a different matter if the alien is exempted from having such a visa or permit.\textsuperscript{22}

The law requires that an application for visa or entry permit should be made to the appropriate Nigerian diplomatic mission abroad. If in the opinion of the Head of the Mission, he is satisfied that the application has some merit, in other words, that it is a good case, he must issue a visa or entry permit.\textsuperscript{23}

In a like manner, appropriate entry permit must be issued in the case of Government officials of countries other than Nigeria, personnel of the United Nations Organisation and its agencies, personnel of the Organisation of African Unity and its agencies, persons seeking entry under any technical aid scheme, specially organised economic and trade delegations and persons specially invited by the Federal Government.\textsuperscript{24}

It is possible that an alien may be seeking admission for the purpose of taking up employment under a contract of service, with any of the Governments of the Federation.\textsuperscript{25} In that case, the head of the diplomatic mission must issue the appropriate entry permit. All he requires to ensure is that the applicant produces the contract of service or such other acceptable satisfactory evidence to that effect. However, if an alien seeks entry for the purpose of taking up any other employment the diplomatic head must refer the application to the Federal Ministry of Internal Affairs for action.\textsuperscript{26}

Further, the law makes provisions for situations where there is no diplomatic mission in the country concerned. In that case, an application must, if there is an agreement between Nigeria and the Government of that country for the performance of that Government of consular functions on behalf of Nigeria, be made to that Government.\textsuperscript{27} A person desirous of employing a non-national must make an application to the Chief Federal Immigration Officer who will order the immigration of the persons employed and their dependents to Nigeria.\textsuperscript{28} The foregoing provisions do not apply to:

(a) persons who after a tour of duty with any of the Governments of the Federation of Nigeria, Corporation or company aided or controlled by any such Governments are abroad on leave with the intention of resuming duty in Nigeria thereafter;

(b) spouses and children of persons within (a) above;

(c) persons otherwise employed in Nigeria and their spouses and dependants who before departure on leave apply for and obtain a non-entry permit from the Chief Federal Immigration Officer;

(d) transit passengers who remain in or in the vicinity of the port of entry for a period of time not exceeding forty-eight hours.\textsuperscript{29}

\textsuperscript{19} Oda, op. cit.
\textsuperscript{20} No. 1, 1963.
\textsuperscript{21} No. 8, 1972. A distinguishing characteristic of Nigerian Immigration laws is the lack of categorization of immigration status. The United Kingdom law distinguishes between “patrials” and non-patrials” while the United States of America law makes a distinction between immigrants and non-immigrants.
\textsuperscript{22} Section 1(1) Immigration (Amendment) Act No. 8, 1972.
\textsuperscript{23} Section 2(a) Immigration (Amendment) Act, 1972.
\textsuperscript{24} Section 2(b), ibid.
\textsuperscript{25} Other than by way of technical aid.
\textsuperscript{26} Section 2(d), ibid.
\textsuperscript{27} Section 3(a), ibid.
\textsuperscript{28} Section 33, Immigration Act. 1963.
\textsuperscript{29} Section 4, Immigration (Amendment) Act, 1972.
The entry of aliens for business purposes is provided for under the law.\textsuperscript{30} No person other than a citizen of Nigeria can accept employment without the consent in writing of the Chief Federal Immigration Officer.\textsuperscript{31} Equally, an alien cannot, on his own account or in partnership with any other person, practise a profession, trade or business without the consent in writing of the Ministry of Internal Affairs on such condition as to the locality of operation and persons, as the Minister may prescribe.\textsuperscript{32} Failure to comply with the provisions of section 8(1) constitutes an offence as a prohibited immigrant.\textsuperscript{33}

Subject to the provisions of the Immigration (Amendment) Act, 1972, any Commonwealth citizen or citizen of Eire, not being on tour of service with the Federal or State Government, may enter the country for the purpose of residence on production of a residence permit with his own travel documents. Such travel documents must be signed by or on behalf of the Chief Federal Immigration Officer and issued subject to such conditions as may be endorsed thereon. If the entry is for any such tour of service, such citizen will on production of any evidence which an immigration officer may reasonably require, by deemed to be in possession of a reasonable permit.\textsuperscript{34}

An alien desirous of entering the country for the purpose of residence, unless exempted, has to give security in such amount as the Minister may prescribe and supply such information as the Chief Federal Immigration Officer may reasonably require. The Chief Federal Immigration Officer may issue a residence permit accordingly if he is satisfied that it is a proper case to do so.\textsuperscript{35}

It is know that the preliminary requirements with respect to the admission of aliens discussed above, are many a time violated. Recently, there have been such discussions in the press, radio and television on the increasing violation of Nigeria's territory by illegal aliens. Not long ago, in a publication in one of the dailies, it was reported that irrespective of the efforts of the Federal Military Government to check the inflow of illegal aliens, some desperate Nigerians in collusion with Ghanaians and Beninois are determined to frustrate the Government's efforts. Writing under the caption "Illegal Aliens Keep Coming" it was narrated how the delinquents have formed a syndicate based at Sema, a border village between Nigeria and Benin Republic bringing in illegal aliens without valid travelling papers by ferrying them across the border to various destinations in Nigeria. These acts definitely constitute an offence punishable under the Immigration Act. Such persons on arrest will be declared prohibited immigrants.\textsuperscript{36}

6. PROCEDURE ON ENTRY

As has been discussed before, once the alien has satisfied the pre-arrival requirements, he can proceed by whatever means he chooses to arrive at any of Nigerian ports. However, on arrival at such a port, he must present to an Immigration Officer a number of documents as requirements. These include:

(i) a passport,\textsuperscript{37}
(ii) a landing card,\textsuperscript{38}
(iii) a visa or entry permit,\textsuperscript{39}
(iv) an inoculation certificate,
(v) completed Foreign Currency Exchange Control Form.

The definition of a passport under the Act agrees with the international notion of a passport. It defines a passport as "a travel document furnished with a photograph of such person and issued to him by or on behalf of the country which he is subject or a citizen and for a period which, according to the laws of that country has not expired and includes any other similar document approved by the

\textsuperscript{30} Section 8 of the Immigration Act.
\textsuperscript{31} Section 8(1), \textit{ibid}.
\textsuperscript{32} Section 8(1) (b), \textit{ibid}.
\textsuperscript{33} Section 8(2), \textit{ibid}.
\textsuperscript{34} Section 9(1), \textit{ibid}.
\textsuperscript{35} Section 9(2), \textit{ibid}. See, also, Section 9(3), \textit{ibid}.
\textsuperscript{36} See, Tunde Rotifa, "Illegal Aliens Keep Coming", \textit{Front page Punch, Wednesday, February 22, 1984}. The Immigration Officer for Ondo State announced over the radio on 9th March that over 5000 aliens had got residence permits while about 500 had been repatriated, mostly from ECOWAS countries.
\textsuperscript{38} Section 4, \textit{ibid}.
\textsuperscript{39} Section 51, \textit{ibid}.
Minister establishing the nationality and identity of the person to whom it refers to the satisfaction of an Immigration Officer.

A visa is defined under the law as "an impression or endorsement" by any means on a travel document purporting to be signed and dated by an officer appointed for that purpose by or on behalf of the Government of Nigeria, and authorising entry into or transit across Nigeria subject to compliance with any special requirements prescribed by the immigration authorities at a port of entry, and valid for specified time and for the number of journeys stated therein".

The requirement for an international inoculation certificate appears to be based on an international convention to ensure that measures have been taken to prevent the spread of smallpox, cholera and yellow fever. Finally, the alien is expected to fill the Foreign Currency Exchange control form which he has to present to an officer of the Department of Customs and Excise. If he has any goods in his baggage to declare, the declaration has to be made to an officer of the Department of Customs and Excise.

The law requires that every person entering or leaving the country must report to an Immigration Officer for examination and furnish such information in his possession as that officer may necessarily require. The authority of the Immigration Officer to examine includes also his power to search the person and baggage belonging to him. Immigration Officer has the power to detain for examination any document found on a search, but the law limits the period of such detention to seven days.

With regard to any ship or aircraft landing in the country, the captain or commander of such vessel must supply to the Immigration Officer-in-Charge separate lists showing disembarking and transit passengers who may in his discretion, examine them as if they were immigrants. Any immigrants or transit passengers named in any list whose international certificates of health fail to comply with the requirements of the Chief Federal Immigration Officer or whose state of health the officer has cause to suspect, must submit such medical examination or vaccination as a medical inspector may reasonably require.

7. PROHIBITION OF ENTRY

An Immigration Officer may, by notice given at any time to any person who has arrived at a recognized port in the country as a visitor or as a transit passenger on board a ship or aircraft and is for the time being on board a ship or aircraft prohibit him from landing while he remains at such port unless authorized to do so by an Immigration Officer. It is within the competence of the Immigration Officer to order that the person leave the country in a specified ship or aircraft or within a specified period in accordance with the condition of his permit, or any other arrangements. The power of an Immigration Officer to refuse entry or admission into the country must be exercised unless the Minister otherwise directs.

8 TREATMENT OF ALIENS

There are two opposing views as to the standard of treatment of aliens in international law. These are the "international minimum standard" and the "national treatment" rule. There is no doubt that the national treatment rule cannot conform with the minimum international standard, whose meaning Commissioner Nelson stated in NEER CASE: thus: "It is clear that the domestic law and the measures employed to execute it must conform with the requirements of the supreme law of members of the family of nations, which is international law, and that any failure to meet these requirements is a failure to perform a legal duty, and as such an international delinquency. The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of

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40 Nigerian citizens are expected to submit to this procedure unless exempted.
41 Section 2(1) of the Immigration Act.
42 Section 2(3), ibid.
43 Section 3(1), ibid.
44 Section 3(2), ibid.
45 Section 10(1), ibid.
46 Section 10(3), ibid.
47 Section 7(1), See also Section 7(2), ibid. For an example of a case in which the Minister of Internal Affairs exercised his discretion of refusing entry of an alien under Section 13 of the Immigration Act 1958, See Chief O.A. & Others v. The Minister of I.A. & Others (1962) LLR. 777.
48 U.S. v Mexico, 4 R.I.A:A. 60, p. 64 (1926); Also in U.N. Report, Vol. IV, p. 60 (1926).
governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency. Whether this insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of a country do not empower the authorities to measure up to international standards is immaterial.

The great majority of arbitration awards are like that in NEER CLAIM in supporting the view that international law requires states to treat nationals according to an international minimum standard. In the CHE v REAU CASE, for example, in which France claimed on behalf of a French national, in respect of his arrest and treatment in detention by Great Britain, the Arbitrator (Beichmann) said:

"The detained man must be treated in a manner fitting his station, and which conforms to the standard habitually practised among civilized nations".

Some efforts have been made to marry the two standards but without success. Thus, Garcia Amador, the International Law Commission's Special Rapporteur in his draft Article 5 on the Rights and Duties of states proposed that:

"The state is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its nationals. These rights and guarantees shall not, however, in any case be less than the "fundamental human rights" recognized and defined in contemporary international instruments".

The proposal was rejected and consequently, the subject of responsibility for the treatment of aliens has been left for the time

being.

The Nigerian practice on the question of treatment of aliens is certainly inclined to the national standard of treatment approach. In certain areas, Nigeria like some other states treat aliens qua aliens in their discretion. For example, aliens may be, and commonly are, restricted in the ownership of property, participation in public life, participation in business, and the taking of employment. There is great need for Nigeria to keep the requirement of the international minimum standard constantly in view in its treatment of aliens so far there is a noticeable cordiality in the relationship existing between the teeming alien population and Nigeria to suggest some positive satisfactory treatment.

9. RIGHTS AND DUTIES OF ALIENS

Except for a limited number of circumstances, aliens in Nigeria enjoy practically the same rights under the law as Nigerian citizens themselves. Most countries of the world provide for the rights of foreigners in their basic laws, i.e. their constitutions. Similarly, Nigeria in its suspended 1979 Constitution of the Federal Republic of Nigeria, entrenched a number of fundamental rights. These are contained under chapter IV of the Constitution of the Federal Republic of Nigeria. Section 30 of the suspended Constitution of the Federal Republic of Nigeria 1979.

Some of these are:

- Right to life
- Right to dignity of human person
- Right to personal liberty
- Right to fair hearing
- Right to private and family life
- Right to freedom of thought, conscience and religion
- Right to freedom of expression and the press
- Right to peaceful assembly and association
- Right to freedom of movement
- Right to freedom from discrimination
- Right to property

50 Ibid.
53 Despite redrafting, Garcia Amador's proposal was thought to be impracticable for purposes of codification and dropped. For further reading on the preparatory study concerning a Draft Declaration on Rights and Duties of States, see, Memorandum submitted by the UN Secretary-General, UN Doc. A/CN. 4/2, p. 71.
54 Section 31, ibid.
55 Section 32, ibid.
56 Section 33, ibid.
57 Section 34, ibid.
58 Section 35, ibid.
59 Section 36, ibid.
60 Section 37, ibid.
61 Section 38, ibid.
62 Section 39, ibid.
63 Section 40, ibid.
restriction on and derogation from fundamental rights,\textsuperscript{66} and right of access to the courts of the land.\textsuperscript{67}

It is not intended to go into a discussion of the foregoing rights here. However, it is important to note, that although some provisions of the Constitution in which they are entrenched have been suspended, they are deemed to be very much alive for no responsible government can afford to trample upon the fundamental rights of individuals and still hope for support from them. Furthermore, the rights as contained in the constitution are in conformity with international standards.\textsuperscript{68}

10. DUTIES

There are no legal rights without corresponding legal duties. Consequently, the rights of aliens have corresponding duties. Just like Nigerians, aliens have a duty to respect the laws of the land. They must subject themselves to the jurisdiction of the courts of Nigeria. There is a recognized principle of international law that aliens have the right to possess and dispose of property. Such rights over property can only be violated for public purposes on payment of full compensation by the state. The liberty and property of aliens may be temporarily restricted for the purpose of the maintenance of public order, social welfare and security of local communities or of the state.\textsuperscript{69}

RESTRICTIONS ON ALIENS

This section will be concerned with the treatment of a number of areas in which the rights of a foreigner are restricted in the state in which he resides. Indeed, international law recognizes as a fact that an alien is disabled, restricted or even discriminated against in some aspects of the affairs of the nation. As we indicated earlier on in this chapter, aliens may be, and commonly are, restricted in the political activities, business activities, human rights, matrimonial rights, ownership of property and sometimes the taking of employment.\textsuperscript{70}

The general position in international law in this regard has been aptly put by Oda when he stated:

"... the state may place aliens under certain disabilities or measures of restriction of varying severity, in order to preserve its national security or public order and to protect the interests of its own nationals. Aliens are usually denied the exercise of political rights including the right to vote, to hold public office or to engage in political activities".\textsuperscript{71}

In keeping with state practice on the matter, Nigeria placed certain restrictions on foreigners. Let us now turn to a discussion of some of these areas:

(a) Political Activities:

Nothing in law prevents a state from endowing upon an alien a right to participate in politics. However, unless and until a state so stipulates through its laws, regulations and orders, an alien shall not be entitled to any political rights, including the right or suffrage, nor shall he be entitled to engage himself in political activities.

With respect to Nigeria, the legal position on such restrictions can be found essentially in some sections of the suspended 1979 Presidential Constitution of Nigeria; the Electoral Act 1977 and the Electoral Act 1982.

The 1979 Constitution like its predecessors, restricts political activities to citizens of Nigeria only. For example, "a person shall be qualified for election as a member of the Senate if he is a citizen of Nigeria and has attained the age of 30 years".\textsuperscript{72} Similarly, the Constitution clearly stipulates that only Nigerian citizen by birth shall

\textsuperscript{66} Section 41, \textit{ibid.}

\textsuperscript{67} Section 42, \textit{ibid.}

\textsuperscript{68} See, Universal Declaration of Human Rights 1948. The European Convention of Human Rights 1950. The African Charter on Human and Peoples’ Rights, 1981. Also, Asian-African Legal Consultative Committee Report. Article 1 of the Reports provides that subject to local laws, regulations and orders, an alien shall have the right to freedom from arbitrary arrest to religion, to have the protection of the executive and police authorities in the state and to have access to the courts and legal assistance.


\textsuperscript{70} In the United Kingdom, an alien may not own a British ship or vote in parliamentary election. See, \textit{Hood Phillips}, \textit{Constitutional and Administrative Law}, 5th ed. 1973, p. 367.


\textsuperscript{72} Section 61 (a) of the Constitution of Nigeria, 1979.
be qualified to hold the offices of the President,23 and Governors,24 of the States of Nigeria as well as members of Federal25 and State Assemblies.76

According to the 1982 Act, the persons entitled to vote at any election in any constituency within the meaning of that expression as used in the constitution shall be those ordinarily resident there on the qualifying date and who, on that date and on the date of the poll, are citizens of Nigeria of the age of 18 years or over and are not subject to any legal incapacity to vote.77

Other sections of the Constitution provide for political appointments.78 While there is no specific provision therein prohibiting the appointment of foreigners to political positions, no such appointments have been extended to non-Nigerian citizens, even on contract basis.

(b) Business Activities:

The right of a state to legislate with a view to regulating its economic and business life is an attribute of statehood or sovereignty. In the exercise of this right, the state may regulate or prohibit professional or business activities or any other employment of aliens within its territory. Nigeria, like other countries regulates its commercial activities. Areas of business activities very much affected include employment opportunities, membership of professional bodies as well as promotion of business.79 There is no law in Nigeria prohibiting the appointment of aliens to the public offices of the country’s public service. However, there are certain areas where because of their nature, non-Nigerians cannot be appointed. Take for example, the Nigerian Armed Forces, Navy, Air Force, Nigerian Security Organisation, etc.

Some professional bodies in the country have by the laws establishing or regulating their activities discriminated against non-Nigerians. Prominent among these bodies are the Architects Association of Nigeria, the Chartered Accountants Association of Nigeria, Nigerian Bar Association. Indeed, only citizens of Nigeria until recently can be called to Bar. By virtue of the Nigerian Enterprises Promotion Act, 1977, aliens are prohibited from participating in certain business.

EXPULSION OF ALIENS

Just as every independent state or nation is entitled to admit the subjects and citizens of foreign states, equally every state reserves the same right to exclude from its territory such foreign nationals, unless it has entered into any engagement by treaty on the subject. In that case, the treaty must of course prescribe the rule to be observed. In the case of Attorney-General for Canada v. Cain,80 the Judicial Committee of the Privy Council said:

“One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order and good government, or to its social or material interests”.

Accordingly, the state enjoys an unqualified right to expel an alien depending on its own whims and caprices and does not need to give reasons whatsoever for its action. However, under generally accepted principles of international law, a state must not carry out the expulsion in an arbitrary manner, such as by using brute force to effect the expulsion, or by otherwise mistreating the alien. It has also been argued that the alien being expelled ought to be given a reasonable opportunity to safeguard property. This requirement is certainly

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73 Section 123, ibid.
74 Section 163, ibid.
75 Section 61(b), ibid.
76 Section 100, ibid.
77 Section 1(1) of the 1982 Electoral Act which is exactly a reproduction of Section 1(1) of the 1977 Electoral Act.
78 See, for example, Sections 132, 139, 140, 173, 177 and 178 of the Constitution.
79 In the case of employment, the policy of Nigeria is that strictly all jobs which were originally held by foreigners and can be filled up by the indigenes must be retrieved from such aliens. Recently a good number of state military governors have directed that the hiring of non-Nigerian teachers in post-primary institutions must discontinue. The Nigerian Medical Association (NMA) sometime ago forced the resignation of the Director of Medical Services of the Nigerian Railway Corporation.

80 See, Section 4 of the Legal Practitioners Act, 1975, (No. 15, 1975) and Section 5 of the Legal Education (Consolidation) Act, 1976.
81 (1906) A.C. 542 at p. 546.
justifiable in terms of an alien who entered the country legally and engaged in a legitimate business thereafter, only to fall out of favour with Government of the realm. Need, the same opportunity be given to an alien who found his way illegally into the country? The answer, obviously will be in the negative for whatever he did while he was in the territory of the expelling country could be said to be upon a base ground.

In *Palgrave Brown's Case*, the right of the Hungarian Government to expel Brown was not disputed. Mr. Brown was a British student who was awarded a Hungarian state scholarship on November 20th, 1949 to study for a year in Hungary. Within two weeks of his arrival in Budapest, he was informed that he must leave the country by December 12, 1949. No reasons were given. In the House of Commons, a Minister of State at the Foreign Office, in reply to a question, stated:

"It is of course, within the rights of the Hungarian Government to expel any foreigner from their country and there seems, therefore, to be no legal ground for an official protest. My right honourable friend nevertheless deplores their arbitrary expulsion, at the shortest notice, without specifying a reason, of a British student to whom they had just awarded a state scholarship for one year."

In the *Boffola Claim*, an Italian was expelled from Venezuela for publishing an article, inter alia, criticising the Judiciary. The Umpire, (Ralston) said:

"(1) A state possesses the general right of expulsion; but (2) Expulsion should only be resorted to in extreme instances and must be accomplished in the manner least injurious to the person affected."

"(3) The country exercising the power must when occasion demands, state the reason of such expulsion before an international tribunal, and an inefficient reason or none being advanced, accept the consequences."

"(4) In the present case, the only reasons suggested to the Commission would be contrary to the Venezuelan Constitution; and as this is a country not of despotic power, but of fixed laws, restraining among other things, the acts of its officials, these reasons (whatever good ones may in point of fact have existed) cannot be accepted by the umpire as sufficient".

The above statement of Umpire Ralston raises at least two issues which call for comments namely that:

(i) States should expel only in extreme instances;
(ii) The country exercising the power, must when occasion demands, state the reasons before an international tribunal.

Taking the first submission of Ralston, it is known that states in ordering expulsion of an alien do so for a number of considerations which vary as of necessity depending on the circumstances of each state. There is no doubt that a state orders expulsion of an alien when his conduct in general activities within the domain of the expelling state becomes rather unbearable. The Nigerian Government will expel if an alien indulges in sabotage of the states' security, economic espionage or violates other known cherished values of the state. The state will also expel if the foreign national indulges in politics of any nature capable of inciting a section of the Nigerian society against other sections either on the basis of ethnic or religious differences. Two examples readily come to mind to illustrate our point of view here. At this point in time, greatest headache is the state of Nigeria's economy as well as occasional religious riots which result in destruction of both valuable lives of a good chunk of its citizens and property. Any foreigner found behind the perpetration of any of these acts will surely get the boot, and shown the way out. The circumstance will be considered extreme enough to warrant expulsion. One cannot but agree with Ralston that states should not expel on flimsy excuses. What defies understanding and certainly does not enjoy the support of the present writer is his suggestion that if a state is pressed by whatever reason to expel, according to him, when occasion demands, it should state its reasons before an international tribunal. This suggestion is completely unacceptable. A state should be given the benefit of the doubt to be capable of deciding when to expel based on its inherent sovereign powers so to do. Similarly, the option of giving reasons for such an act should be optional and ought not to operate as a duty upon such a state. It is a different matter if the ordered expulsion is violative of the supreme law of the land —
namely The Constitution. In Ben Tiller’s Case, in which a British dock leader who had gone to Belgium to support dockers’ activities there was expelled from that country, the Arbitrator stated that, “The right of a state to exclude from its territory foreigners when their dealings or presence appear to compromise its security cannot be contested”.

EXPULSION OF NATIONALS

On the expulsion of nationals, Weiss states:

“As between national and state of nationality the question of the right of sojourn is not a question of international law. It may, however, become a question bearing on the relations between states. The expulsion of nationals forces other states to “admit aliens, but, according to the accepted principles of international law, the admission of aliens is in the discretion of each state.... It follows that the expulsion of a national may only be carried out with the consent of the state to whose territory he is to be expelled, and the state of nationality is under a duty towards other states to receive its nationals back on its territory”.

The position in international law is that a state is under a duty as between other states to accept in its territories those of its nationals who have no where else to go. If a citizen of Nigeria is expelled for example, from Ghana, and he is not accepted for settlement elsewhere, Nigeria will be required by Ghana the state where then she was to accept him. We cannot readily cite an example in which the reception of a Nigerian citizen, who has been expelled from another state. But it is clear that in the event of such an event happening, he will be allowed to return to the country, by the Nigerian authorities.

In sum, therefore, the right of expulsion, like the right to refuse admission, is a concomitant attribute of statehood. The state has a right to expel aliens in the interest of public order and stability. All that need to be stressed is that in exercising this right, every state must resist the temptation to abuse such a discretionary right.

PROHIBITED IMMIGRANTS

The Nigerian Immigration Act provides for the expulsion of prohibited immigrants.

According to the Act, any person within any of the following categories is deemed to be a prohibited immigrant and liable to be refused admission into the country or to be deported as the case may be. Such persons include:

(a) any person who is without visible means of support or is likely to become a public charge;
(b) any idiot, insane person or person suffering from any other mental disorder;
(c) any person convicted in any country of any crime wherever committed, which is an extraditable offence within the provision of the Extradition Act.
(d) any person whose admission would in the opinion of a Ministry of State be contrary to the interest of national security.
(e) any person against whom an order of deportation from Nigeria is in force;
(f) any person who has not in his possession a valid passport or being a person under, the age of sixteen years has not in his possession a valid passport or is unaccompanied by an adult on

8 Whitman 874. In a press release dated May 21, 1951, the US department of State expressed its concern “over the continued denial by Chinese Communist authorities of exit permits to certain Americans, including a number of shanghai businessmen, some of whom have been endeavouring for over a year to leave China”. No state should refuse granting exit permits voluntarily asked for by an alien, provided such an alien is not standing trial on a charge before a competent court of the host state. Certainly the US has the right to speak only for its citizen who had been denied exit permits.

8 Great Britain v. Belgium 6 B.D.I.L. 147 (1898).

whose valid passport particulars such a person appears;\textsuperscript{91} any prostitute;\textsuperscript{92} any person who is or has been a brothel keeper,\textsuperscript{93} a house holder permitting the defilment of a young girl on his premises, a person allowing a person under thirteen years of age to be in a brothel, a person causing or encouraging the seduction or prostitution of a girl under thirteen years of age, a person trading in prostitution,\textsuperscript{97} or a procurer.\textsuperscript{95}

**DEPORTATION ORDER**

Any person who being a prohibited immigrant that enters Nigeria except in accordance with the Act is guilty of an offence and, if convicted, the court may make a recommendation for deportation of the offender.\textsuperscript{96}

The Minister can, in the public interest, make a deportation order whether or not the person has been prosecuted for an offence.\textsuperscript{97} Equally, if the Minister is of the opinion that any person ought at any time after his entry to be an immigrant, he may make an order accordingly.\textsuperscript{98} Any person having entered Nigeria at any time in pursuance of a visitor's permit or transit permit and remains in the country beyond the time allowed by such pass or breaks any other condition subject to which such permit was issued, will come under the ambit of the provisions of Section 18.\textsuperscript{99}

Where a person convicted of an offence by any court is committed for sentence to another court, any power to make recommendation for deportation in respect of him must be exercisable by the court to which he is convicted.\textsuperscript{100} For the purposes of any enactment relating to appeals in criminal cases, a recommendation for deportation is treated as an order made on conviction and the validity of such a recommendation will not be called into question except on an appeal against the recommendation or the conviction upon which it is made.\textsuperscript{101} Wherefore, the minister may, at his discretion, make a deportation order requiring the person to leave the country and prohibiting him from entering there,\textsuperscript{102} as long as the order is in force.\textsuperscript{103} A deportation order may at any time be revoked, whether before or after the person to whom it relates has left or been removed from the country but will not affect the validity of anything previously done thereunder.\textsuperscript{104} Pending the deportation, the Minister may direct him to be detained.\textsuperscript{105}

**THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES TREATY (ECOWAS) AND THE ADMISSION AND FREE MOVEMENT OF COMMUNITY CITIZENS WITHIN NIGERIA**

The point has been made earlier, that movement across national boundaries whether of persons, goods or services is primarily within the domain of national regulation. The jurisdiction of Nigeria with respect to the admission and free movement of citizens of ECOWAS countries within Nigerian territory may however be limited by treaties and international law rules expressly recognized by Nigeria.\textsuperscript{106}

Member states of ECOWAS have enacted various legislations which deal with the entry and sojourn of aliens in their respective territories. The question that comes up for consideration is to what extent Nigeria has accepted limitations by the said treaty of her right to regulate entrance and exit of aliens in her territory?

The Economic Community of West African States (ECOWAS) Treaty is an international agreement to which Nigeria is a party. The

\textsuperscript{91} Section 37 of the Act empowers an Immigration Officer to allow any person under the age of 16 years to enter the country without a permit provided such person is with his/her parents. Such a person if admitted will not live anywhere else in the country without the permission of an Immigration Officer.

\textsuperscript{92} Section 17(3) (g).

\textsuperscript{93} Section 17(a) defines brothel keeper.

\textsuperscript{94} Section 17(3) (e), ibid.

\textsuperscript{95} Section 17(3) (g), ibid. The Minister reserves the right to add to or amend any clause on prohibited immigrants by giving notice on such amendment.

\textsuperscript{96} Section 18(1), ibid.

\textsuperscript{97} Section 18(2), ibid.

\textsuperscript{98} Section 18(3), ibid.

\textsuperscript{99} Section 18(4), ibid.

\textsuperscript{100} Section 19(1), ibid.

\textsuperscript{101} Section 19(2), ibid.

\textsuperscript{102} Cf. Section 22.

\textsuperscript{103} Section 20(1), ibid. Also, Section 20(2), ibid.

\textsuperscript{104} Section 20(3), ibid.

\textsuperscript{105} Section 22(1), ibid.

preamble to the treaty envisages the elimination of all obstacles to the free movement of persons. The principle of free movement of persons is equally confirmed in the aspect of the treaty dealing with the aims of the Community.107 Ordinarily speaking, the preambular provisions in international conventions do not create legal obligation for the parties.108

However, it would appear that stipulation as to the aims of ECOWAS certainly imposes legal obligation on member states. This is for the simple reason that once the aims of the organisation are violated, the whole management becomes a farce.

The ECOWAS Treaty inter alia stipulates that “Member states should make every effort to plan and direct their policies with a view to creating favourable conditions for the achievement of the aims of the community; in particular each member state shall take all steps to secure the enactment of such legislation as is necessary to give effect to the treaty.”109 Thus, this provision no doubt imposes a legal obligation on the member states to ensure the achievement of the aims of the community.

The ECOWAS Treaty provides a concrete legal basis for the freedom of movement and to some extent, the method of its implementation. It is Article 27(1) of the said Treaty that provides this bias. It states:

“Citizens of member states shall be regarded as Community citizens and accordingly member states undertake to abolish all obstacles to their freedom of movement and residence within the Community”.

The Treaty does not define the term “Community citizen”. In pursuance of Articles 27 and 2 of the Treaty, the Heads of States and Governments of the Community, at a Summit Meeting held in Senegal, Dakar, signed the Protocol on Free Movement of persons in 1979. According to this document, a “Community citizen” is defined as “a citizen of any member state”.110 What is clear is that the definition of the term “Community citizen” does not offer an easy understanding of the concept nor can the term be assigned the same meaning as is given to the notion of citizenship in local legislations. Under the treaty definition of “community citizen”, a claimant to that right needs to prove that he is a citizen of the member state within the meaning of the constitutional provisions of such a state as it affects citizenship laws. Mere residence in the territory of a member state of the treaty would not do.

The legal significance of Article 27 is that with coming into force of the treaty, all citizens of member states become community citizens. Furthermore, Article 27(1) imposes a legal obligation on member states to abolish all obstacles to the freedom of movement of ECOWAS citizen. The enjoyment of the freedom by ECOWAS citizens is subject to agreements between the member states.111 They are therefore under an obligation to reach an agreement on the issues in good faith.

What does the term “free movement of persons” mean in the context of the ECOWAS Treaty? Does the free movement provision give unqualified freedom to a community citizen to move around the territory of a member state without any restriction whatsoever?

Free movement entails an uninterrupted mobility of the community citizen within the territory of any of the member states. This presupposes that there should be no form of discrimination on the grounds of nationality in respect of physical movement, residence and establishment.112 It is submitted that freedom of movement envisaged here cannot be absolute. Every state, like individuals in ordinary life have certain privileges which cannot be easily thrown open to all and sundry. It therefore necessarily follows that the community citizen can be allowed to move freely only within the limits of maintaining public policy, public health and above all, public security. What this means in effect, is that the community citizen will be free to move around to the extent permitted by the municipal laws of the admitting state. In other words, he has to comply with the immigration laws of the admitting state in the sense of the ECOWAS Treaty and the 1979 Protocol.

Article 2(1) of the Protocol provides inter alia that community citizen has the right to enter the territory of member states. The rights contemplated under Article 2(1) are to be achieved in three phases which must be completed within 15 years. The right of entry

107 Article 2(d).
108 Osita Eze, op. cit.
109 Article 3.
111 Article 27(1).
112 Article 2 of the 1979 ECOWAS Convention.
and the abolition of visa is to be accomplished during the first phase.

Implementation of the First Phase:

Abolition of Visa and Entry Permit: The Protocol and the directive of the Authority of Head of State and Government on the Implementation of the Protocol Relating to the Freedom of Movement of Persons and the Right of Residence and Establishment contain the provision for the implementation of the first phase. The directive is to come into force upon signature and shall be published in the official journal of the Community and the National Gazette of the respective member states.

Movement of Persons: A citizen of the Community who is visiting any member state for a period not exceeding ninety days has the right to enter the member-state through the official entry point free of visa requirements. If such a visitor desires to extend his stay beyond the stipulated period of ninety days, such extension must be authorized by the appropriate authority of the member state. If he fails to obtain the extension, any further unauthorized stay becomes illegal.

The exemption from visa requirements for community citizens does not preclude the possession of a valid travel document. Any citizen of the Community who wishes to enter into the territory of any other member state is required to hold a valid travel document and an international health certificate. A valid travel document is defined to mean "a passport or any other valid document establishing the identity of the holder with his photograph, issued by or on behalf of a member state of which he is a citizen and on which endorsement by immigration authorities may be made". A valid travel document shall also include a laissez-passer issued by the community to the officials establishing the identity of the holder. Failure to comply with these requirements will disqualify a community citizen from benefitting from ECOWAS regime on the freedom of movement. What is more, compliance with these requirements does not imply an automatic right of entry for community citizen into the territory of a member state. "Notwithstanding the provisions of Article 3 above, member states reserve the right to refuse admission into their territory of any community citizen who comes within the category of inadmissible immigrants under its laws." Consequently, the determination of who comes within the category of inadmissible immigrants is within the competence of the national jurisdiction. There is a provision for the challenge of an arbitrary exercise of this right by a state before the Tribunal of the Community. The occasion could arise where the exercise of such competence goes against the spirit of the Treaty and the Protocol, or contravenes any of their substantive provisions.

RECENT IMMIGRANT AND EMIGRANT QUESTION IN NIGERIA

The crisis in the Nigerian economy over the past five years has resulted in successive Nigerian Governments taking stern measures to control the drift. Available data shows significant shifts in number of Africans who immigrate and emigrate to and from Nigeria. Aliens from neighbouring African countries who hitherto had easy access to Nigeria in search of better economic life are no more finding things easy in this regard, because of such measures like closure of borders, and stringent checks at Nigerian ports for valid travel documents in respect of aliens. Those who are already within the country must prove satisfactorily that they are legally admitted. The following Tables show the movement of Africans to and from Nigeria between 1979 and 1981 showing countries of origin of such Africans.

Neither the Treaty nor the Protocol provides for the emigration of Community citizens. There is no doubt that national laws and regulations govern such matters. However, it will be a progressive step if the spirit of the freedom of movement would extend to it. Other aliens whether they reside or are domiciled in the territories of member states are excluded from the concession envisaged in Article 27 of the Treaty. In their case, it is the national laws and regulations of member states, that will operate. The only exception would be where there exists some arrangement between the host state and that of the alien.

113 1979 Dakar Protocol op. cit.
114 Article 5(3) of ECOWAS Treaty.
115 Article 4 of the Protocol.
From the above discussion, it becomes evident that a lot of work awaits the member states of ECOWAS Treaty to translate into reality the aims and objectives of the Community, particularly that of free movement of its citizens. Significant restructuring of their immigration laws must be undertaken. Tables A and B hereunder give a picture of recent immigrant and emigrant figures of aliens entering and leaving Nigeria.

CONCLUSION

The discussion of the legal status of aliens in Nigeria reveals a number of loose ends untied. These problems are particularly to be noticed in the implementation of the provisions of the ECOWAS Treaty with regard to free movement and residence of Community citizens within its territory. Although the Treaty itself is young, some of the provisions of the suspended Nigerian Constitution of 1979 dealt a heavy blow to the intended equal treatment of aliens provided therein. In Nigeria's twenty-four years of life as an independent country, it has acceded to a number of international agreements whose effect touch on treatment of aliens. One of such treaties is the Geneva Convention on the Status of Refugees, in 1957, and most recently, the ECOWAS Treaty to mention but a few. In the light of the above, the need arises for a close re-examination of Nigeria's Immigration Acts of 1963 and 1972 to bring them in line with present modern treaty obligations of the country.

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TABLE A

AFRICAN IMMIGRANTS INTO NIGERIA

<table>
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<td>80,593</td>
<td>80,686</td>
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<td>Guinea</td>
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<td>Togo</td>
<td>4,845</td>
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<td>14,894</td>
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</table>

SOURCE: Statistics Section, Immigration Department, Lagos.

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116 See, Sections 34 & 39 of the suspended Nigerian Constitution.

117 SOURCE: Statistics Section, Immigration Department, Lagos.
TABLE B
AFRICAN EMIGRANT

<table>
<thead>
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</table>

SOURCE: Statistics Section, Immigration Department, Lagos.

CHAPTER 7
EXTRADITION IN INTERNATIONAL LAW WITH PARTICULAR REFERENCE TO SOME EVENTS IN NIGERIA

1. INTRODUCTION

The subject of extradition is much older than modern international law. From the earliest times, up to the development of modern states in international relations, states had considered the need borne out of practical experiences, to fashion out laws, which would govern the question of extradition. The enactment of specific municipal legislations on extradition became necessary to enable sovereign states bring back their citizens who on committing certain punishable offences fled from their fatherland to seek refuge in foreign countries.

The concept of extradition is not a new idea in international law. In any of its forms, it is an ancient institution, whose origin can be traced to ancient civilization. Despite its long historical evolution, extradition still remains confused and complicated. In the minds of many once extradition is mentioned, what is referred to are such deeds as are nowadays termed “political offences”. Ordinary crimes such as smuggling, currency counterfeiting and trafficking are not included nor given adequate weight. It is submitted that a critical study of ancient treaties on extradition of culprits was not limited to political crimes alone. Persons surrendered often included those charged with murder, theft, robbery, rape, abduction and other serious non-political crimes.

It is difficult to state precisely when and where the first enactment of municipal law on extradition by a state was promulgated. However, what is on record is that as early as 1803, a law on extradition was passed by the State of Belgium. Over three decades later, the

United Kingdom of Great Britain and Northern Ireland promulgated its own extradition Act in 1870. Later in the nineteenth and twentieth centuries more states gradually but steadily enacted their own local laws on the subject which later formed the basis of treaties on extradition.

In the absence of a concise and universally accepted rule of international law, governing extradition, resulting from the diverse state practice on the issue, the only other way out was for states to conclude either bilateral or multilateral agreements between themselves.

Organisations of states and groups of states from a particular geographical region whose criminal laws were grounded upon identical basis are known to have concluded extradition treaties. Prominent among the earliest extradition conventions of a multi-partite nature was that of 1933 between members of the Organisation of American States. In 1952, the Arab States also concluded extradition agreements.

The necessity for a closer examination of this problem is further compounded by the fact that in the present stage of technological advancement, the activities of criminals, apart from the issue of political offences, have been substantially influenced. Boundaries have almost lost all meanings. With the various economies of most West African States in virtual state of collapse as a result of incessant economic and other crimes committed freely within and across State boundaries, there cannot be a better time than now to suggest a joint and concerted action to combat and punish them among the States of West African subregion.

Life in Nigeria and among Nigerians shows that such crimes as murder, currency trafficking and counterfeiting, rape, abduction etc. are very much on the increase in the country, at a time when the Government is at pains to deport all illegal aliens while at the same time trying to uphold the spirit of the Economic Community of West African States as it affects free movement of the so-called “community citizens”.

Accordingly, it is proposed that the study will first examine the question of extradition, survey the international law perspective of the question; review the extraditable offences both in international law and under the Nigerian Extradition Act, 1966 on the subject. The questions of surrender of fugitives, restriction of surrender, seizure and surrender of property as well as transit of surrendered fugitives, the provisions of the Nigerian law applicable and treaty agreements, if any, will be discussed.

2. MEANING AND POSITION OF EXTRADITION IN CONTEMPORARY INTERNATIONAL LAW

A criminal may take refuge in a state which has no jurisdiction to try him, or a state which is unable or indeed unwilling to try him for various reasons. Sometimes, the reason may be because all the evidence and witnesses indispensable for the crime alleged are abroad. At other times, it might well be that the offence for which the criminal is wanted by the requesting states does not constitute a criminal offence in the municipal laws of the requested state.

Under international law, there is no duty known to us which places any obligation upon a state to extradite in the absence of a treaty. The suggestion has been made to the effect that there is a nexus between extradition and asylum; even though they may not necessarily be coterminous. According to Michael Akehurst, asylum ends where extradition begins, i.e. a state has right to grant asylum to fugitive criminals unless it has bound itself by treaty to extradite them. The right of asylum means the right of a state to grant asylum.

According to D.P.O'Connel, extradition is “a gloss on the rule of law which permits asylum to a criminal fugitive from abroad.” The

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4 Clarke, The Law of Extradition, 1903. See also, Pigott, Extradition, 1910.
5 It is an established rule of international law, confirmed by the practice of states that the decision as to whether a state would accept or refuse a request to extradite A or B at the request of C will certainly depend usually on the existence of an extradition treaty between the requesting state and the requested state, or alternatively, on the degree of friendly relationship between the states concerned.
7 See, (1952), 8 Revue Egyptian, p. 328.
International Court of Justice offered an explanation of the connection between extradition and asylum in the *Asylum case*\(^{12}\) when it stated:

> "In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of territorial sovereignty. The refugee is outside the territory of the State where the offence was committed and a decision to grant him asylum in no way derogates from the sovereignty of that state." \(^{13}\)

But whether an individual reserves a right in international law to demand asylum is not quite clear. While it is often stated, at least one international document, namely, the Universal Declaration of Human Rights seeks to confer such a right on an individual. The document provides as follows:

> "Everyone has the right to seek and enjoy in other countries asylum from prosecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." \(^{14}\)

From the above provision, the Declaration seeks to give individuals a right of political asylum. Granted that the states which voted in favour of the Universal Declaration did not feel themselves obligated by so doing, there is the possibility that the Declaration may subsequently become binding as a new rule of customary international law. \(^{15}\) At the United Nations Conference on Human Rights held in Teheran in 1968, a resolution was proclaimed to the effect that "the Universal Declaration of Human Rights... constitutes an obligation for the members of the international community". \(^{16}\)

In international law, individuals are extradited (i.e. handed over) by one state to another state, in order that they may be in the latter state for offences against its laws. \(^{17}\) Extradition treaties are usually bilateral and often impose the same obligations on the parties. The main characteristics of provisions of such treaties which appear to be common to all of them include the following:

(a) **Definition of extraditable offences:**

The situation is that extradition usually is restricted to serious crimes. Such crimes must also be crimes under the laws of both states concerned. In other words, the treaty would apply to all offences which are criminally punishable in the two countries. \(^{18}\) The prescribed punishments for each crime must also be clearly stipulated. A vital provision of extradition treaties has to do with the place of the commitment of the alleged crime. What international law requires which is often provided for in the treaty is that the alleged crime must have been committed on the territory of the state requesting extradition. The fact that at least part of the crime, not necessarily all, has been committed on the requesting state’s territory is usually interpreted to be sufficient.

(b) **Definition of extraditable persons:**

The scope of application of extradition treaties constitutes another important aspect of the question. The treaties may apply to all persons accused or convicted of an extraditable offence. It is usual to find some provisions in the treaty which clearly exclude the extradition of nationals. \(^{19}\)

(c) **Procedure for request of extradition:**

Under international law, there is no binding procedure for com-

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\(^{13}\) Ibid.

\(^{14}\) See, Article 14, of the Universal Declaration of Human Rights, 1948.

\(^{15}\) See, *Akehurst, op. cit.* at pp. 78-79.

\(^{16}\) Already, the impact of the Universal Declaration of Human Rights is being fully felt in many parts of the world. A good number of Charters on Human Rights are being adopted in many regions of the world, the latest being the African Charter on Human and People’s Rights adopted in 1981. For a detailed discussion of this document, See, *Prof. U.O. Umozurike’s Article on Same in American Journal of International Law, Vol. 77 No. 1, 1983.*

\(^{17}\) Extradition includes the surrender of convicted criminals who have escaped before completing their sentence.

\(^{18}\) This approach is often referred to as the "double criminality" principle. The practice whereby the treaty lists the extraditable offences by name is not helpful as the list may become out of date when completely new types of crimes are introduced.

\(^{19}\) Such provisions are to be found in extradition treaties concluded by continental countries who claim wide jurisdictions to try crimes committed by their nationals abroad.
communicating the request for extradition. However, a request for the surrender of a fugitive criminal would normally be made by the diplomatic representative of the country requesting extradition to the country in which the criminal has taken refuge. In the absence of such a representative; the application may be made through a senior officer of the ministry of external affairs of the requesting state. Such an officer should not be below the rank of a first secretary in an embassy. It will be expected that the application will furnish all the necessary details which will facilitate the extradition requested. Such particulars will include certificate of conviction issued by a competent court of the country making the application. Where a fugitive is being sought with the aim of prosecuting him for alleged crimes, it will be necessary that such application will include a collation of evidence of the alleged crimes. Normally, treaties provide that the courts of the extraditing state must satisfy themselves that there is *prima facie* evidence of guilt before ordering extradition for purposes of trial.

(d) Specialty principle:

This means that an extradited person must not be tried for a crime other than that for which he was extradited. He must first be given a chance to leave the country to which he was extradited.

(e) Offences of a political, military or religious character:

The definition of what constitutes political offences has raised a number of difficulties of interpretation. Consequently, countries have tried to solve the difficulties in different ways. For example, opinions differ as to what constitutes a political offence.

On the issue of extraditable offences in international law, Oppenheim's statement is very instructive. In his view:

"Unless a state is restricted by an extradition law, it can grant extradition for any crime it thinks fit. And unless a state is bound by an extradition treaty, it can refuse extradition for any crime. Such states as possess extradition laws frame their extradition treaties conformatory therewith, crimes for which they are willing to grant extradition".

Having thus briefly sketched the international law perspective of the question, it now becomes necessary to examine the applicable law in Nigeria with respect to extradition.

3. THE APPLICABLE LAW IN NIGERIA

The extradition law of Nigeria is to be found in the Extradition Act 1966. The provision of the Act will be applied to a country by an order where a treaty exists between Nigeria and that country on the prosecution or punishment of wanted persons.

The law requires that an order made in pursuance of Section 1(i) should embody the terms of the extradition agreement and the provisions of the Act will apply to the country subject to such conditions, exceptions and qualifications as may be specified in the order. Within the period the order is in force in respect of any country, the provisions of the Act will apply to that country subject to the provisions of the order and to the terms of the extradition agreement as recited or embodied therein.

One observable feature of Section 1 of the Act is that by its construction, it envisages both existing and any future extradition treaties and agreements between Nigeria and any foreign country or countries. The provisions of that section of the Act allow for charges depending on the circumstances of a particular treaty or agreement and of course depending on the country concerned. The intention perhaps of this type of provision is to allow the country some measure of flexibility. An order made in pursuance of the Act will not come into force before the commencement date of the Act.

Section 2 of the Act is broad enough and deals with the territorial application of the Act. In other words, what is the scope of its application? It does include first and foremost, member states as well as non-member states of the United Nations Organisation. The Act applies to every separate country within the Commonwealth. The term "separate country" as used in the Act includes each sovereign

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20 No. 87, 1966.
21 Section 1(i), Extradition Act, 1966.
22 Section 1(2), ibid. See, also Section 2(4), ibid.
23 Section 1(4), ibid.
24 Section 1(6), ibid. See, also Section 2(2), ibid. By the Extradition Act (Appointed Day) Order, 1967, (L.N. 28, 1967) signed by the then Attorney-General of the Federation, Dr. T.O. Elias, the Act came into effect on 31st January 1967. Judge Elias is now the President of the I.C.J. Geneva.
25 Section 2(1), ibid.
and independent territory. But it is vital that the Sovereign and independent country should inform the Nigerian Government that the territories should be designated as forming part of the independent country for the purposes of the Act. The Nigerian Government extended the application of the Act to all the dependent territories of the United Kingdom of Great Britain and Northern Ireland.

Although the membership of the Commonwealth is quite sizeable, it constitutes less than one fifth of the nations of the world. From the provisions of Nigeria’s Extradition Act as it affects the scope of its application, it is clear that no extradition can be effected with non-Commonwealth Countries in the absence of an extradition treaty between any such country and Nigeria. Only two of such treaties are known to us to be in existence, namely that with Liberia and the United States of America.

**EXTRADITABLE OFFENCES UNDER THE 1966 ACT:**

The Nigerian Extradition Act 1966 specifically enumerates the offences which are extraditable. These include murder of any degree, manslaughter, abortion, maliciously or wilfully wounding or inflicting grievous bodily harm, assault occasioning actual bodily harm, rape, unlawful sexual intercourse with a female, indecent assault, procuring or trafficking in women or young persons for immoral purposes, bigamy, kidnapping, abduction or false exposing or unlawful detaining of a child, bribery, perjury or subornation of perjury or conspiring to defeat the course of justice, arson, an offence concerning counterfeit currency or against the law relating to forgery, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences, receiving stolen property, or any other offence in respect of property involving frauds.

Others include burglary, housebreaking or any similar offence, robbery, blackmail or extortion by means of threats or by abuse of authority, malicious or wilful damage to property, acts done with the intentions of endangering vehicles, vessels or aircraft, an offence against the law relating to dangerous drugs or narcotics, piracy, revolt against the authority of the master of a ship or the commander of an aircraft, and contravention of import and export prohibitions relating to precious stones, gold and metals. It is also an extraditable offence “for aiding and abetting or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the offences” enumerated above. Listing of extraditable offences under the Nigerian law appears to have been borrowed from the British practice. This method has been criticised as being clumsy and capable of becoming out of date in the wake of new types of crimes. It does not appear in our view that the list is exhaustive.

**POLITICAL AND GRAVE OFFENCES:**

What appears to be generally agreed international standard is that extradition cannot be effected for purely “political offences” (emphasis ours). However, extradition should be granted in respect of “grave offences”. Let us examine the two issues starting with the political offences. As has been indicated, the definition of political offences has given rise to difficulties of interpretation which different countries have tried to solve in different ways.

Accordingly, it is left to the country to which a request for extradition is made to determine which offences fall within the political category. Since the concept of political offences is very fluid, countries are bound to come out with different interpretations of it. Political offences have been described as such as are incidental to, and form part of political disturbances. Various national courts have had occasion to pronounce on what constitutes a political offence. Thus, in *In re Kapheugst,* the Swiss Federal Court granted extradition of a person accused of having committed bomb outrages

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26 Section 2(2) (a), ibid.
27 Section 2(3), ibid.
29 These are contained in Schedule 2 of the Extradition Act.
30 See, Schedule 2, items 1-28.
31 See, Akehurst, op. cit. at p. 106.
34 See, *Annual Digest, 1929-1930,* Case No. 188.
of a purely terroristic character in October 1930. In Re Castion, a Swiss national who had taken part in a revolutionary movement in the Canton of Tinaco and had incidentally shot a member of the Government was refused extradition by the court because it considered the crime to be of a political nature. According to the Court, in order that an offence can qualify as a political offence:

“It must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political manner, a political rising, or a dispute between two parties in the state as to which is to have the government in its hands”.

The Jacquin Case presents yet another interesting example of the definition of the concept of political offences. In the case, a French manufacturer named Jules Jacquin domiciled in Belgium and a foreman of his factory named Celestin Jacquin, who was also a French, tried to cause an explosion on the railway line between Little and Calais with the intention of murdering the Emperor Napoleon II. France requested the extradition of the two criminals, but the Belgium Court of Appeal refused to surrender them on account of Belgium extradition law prohibiting the surrender of political criminals. Since the decision in Jacquin case, it is now an accepted rule of law that the murder of a Head of a foreign Government or a member of his family should not be considered a political offence.

The term “grave offences” like “political offences” has defied an acceptable legal definition. Different legal writers have made some efforts at the definition. Thus, D.P. O’Connel stressed the difficulty of determining the expression when he commented:

“The understanding at the basis of extradition treaties is that the procedure will be employed in cases of “grave offences”. However, what is ‘grave’ to one country is not to another. In certain Middle East countries, violation of a harem is certainly a “grave offence” but it is not viewed in that way elsewhere. By which legal system then, that of the requisitioning state or that of the requisitioned, is gravity to be measured? International law is indifferent to the question for it has no yardstick for the purpose.”

Another writer, Shigeru Oda though he did not attempt a definition of ‘grave offences’ gave some examples of grave offences. To him such offences “as murder, arson, robbery, forgery and other offences which it is the common interest of all nations to suppress” would fall into this category.

It is submitted that what should guide the determination of what constitutes a grave offence must depend on the general practice of states as borne out of extradition treaty or agreement subsisting between them. Certainly the courts have a role to play in this regard. Essentially an offence is grave if such a country so feels.

OTHER PROVISIONS UNDER THE 1966 ACT:

The Act clearly provides for the surrender of fugitives, discharge of fugitives, restrictions on surrender, seizure and surrender of property and transit of surrendered fugitives. These provisions will now be discussed separately.

Surrender of Fugitives:

The procedure for the surrender of a fugitive criminal is clearly set out under the Act. Accordingly, every fugitive criminal of a country to which the Act applies, must, subject to the provisions of the Act, be liable to be arrested and surrendered whether the offence in respect of which his surrender is sought was committed before or

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36 (1891) 1 Q.B. 149.
37 See, Joyce v Director of Public Prosecutions, (1946) A.C. 347, 372. The accused, William Joyce was charged with treason under the Treason Act 1351 for having made propaganda broadcasts to the UK from Germany for the German Government. Although Joyce had spent his adult life in England, the accused was a US citizen, born in the US of Irish parents who had emigrated there and became naturalised US nationals. It was argued at the trial that the accused did not owe allegiance to the Crown and hence could not be guilty of treason. The House of Lords accepted that allegiance was necessary to the offence of treason but found that the accused, as holder of a British passport in his name still in force at the time of his broadcast, was entitled to protection by the Crown and therefore owed allegiance to the Crown. This was so even though the passport had been obtained by fraud.
38 See, O’Connel, op. cit. 291.
after the commencement of the Act or the application of the Act to that country, and whether or not there is concurrent jurisdiction in any country in Nigeria over the offence.  

While, as has been stated, international law does not prescribe any specific procedure for communicating a request for extradition, the Nigerian Act provides that a request for the surrender of the fugitive criminal of any country must be made in writing to the Attorney-General by a diplomatic representative or consular officer of that country and must be accompanied by a duly authenticated warrant of arrest or certificate of conviction issued in that country.  

Where a request is made in accordance with the provisions of the Act, the Attorney-General may require a magistrate to deal with the case in accordance with the provisions of the Act.  

It is possible in practice that two countries could at the same time make a request for the surrender of the same fugitive criminal. To take care of this type of situation, the Act requires the Attorney-General to determine which request is to be given priority.  

In the absence of any guideline to the Attorney-General under the Act, in determining which circumstances should receive priority consideration in reaching a decision whether or not the fugitive should be surrendered, and to which country, the Act allows him a discretion, the onus lies then on the Attorney-General to consider seriously all the circumstances of the case objectively before taking a position.  

A magistrate issues a warrant of arrest of the fugitive criminal if he is satisfied that the evidence before him justify the issue of the warrant. However, it is vital that the offence complained about had been committed in Nigeria or the fugitive had been convicted in Nigeria. A warrant so issued may be executed anywhere in Nigeria.  

Such a fugitive criminal arrested on the strength of the warrant must be brought before the magistrate as soon as is practicable, after he is so arrested. The magistrate may exercise the power of issuing a provisional warrant for the arrest of a fugitive criminal without any order from the Attorney-General. However, it is clear that he can only invoke this power if he is satisfied by information and evidence that there is sufficient ground to do so. It is possible to issue a provisional warrant in respect of a person who is, or is suspected of being on his/her way to Nigeria.  

However, the power of a magistrate is confined to his jurisdiction. In issuing the warrant, the magistrate must send to the Attorney-General a report of the Act, together with the information and evidence, or certified copies thereof upon which he based his action. The Attorney-General reserves the right to cancel the warrant and order the release of the fugitive criminal where he has already been arrested. A fugitive criminal must be released within a period of thirty days beginning with the day on which he was arrested, if an order is not received from the Attorney-General. But this does not mean that a fugitive offender so released will not be re-arrested if the request for his surrender is made afterwards.  

It is expected that the hearing will commence after the completion of the preliminary requirements under the Act. In proceeding with the hearing, the magistrate will assume jurisdiction as if the fugitive were brought before him charged with an offence committed within his jurisdiction. It is possible to lead evidence to prove that the offence for which the fugitive is being tried is not an extraditable offence or that the surrender of the fugitive is for some other reason not provided in the Act or that the extradition treaty in force between Nigeria and the country seeking his surrender does not cover such an offence.  

The Act already provides that some documents if duly authenticated will be received in evidence. No further proof will be required. These documents include:

40 Section 4 of the Act. See, also, Section 38(2) of the suspended Nigerian Constitution 1979.
41 Section 5(1) of the Act.
42 Section 5(1), ibid.
43 The Attorney-General will not make such an order once he is satisfied that the surrender of the fugitive criminal is restricted by the provisions of the Act. The discussion of the instances in which a fugitive criminal will not be surrendered will be undertaken under "Restrictions on Surrender".
44 Section 5(4).
45 Section 6, ibid. See also Sections 21-28, C.P.A.; Sections 56-68, C.P.C.
46 Section 6(2), ibid. cf. Section 31, C.P.A., Section 64 C.P.C.
(i) any warrant issued in a country other than Nigeria;
(ii) any deposition or statement or oath or affirmation taken in any such country or a copy of any such deposition or statement;
(iii) any certificate of conviction issued in any such country.66

The term "duly authenticated" presupposes that the enumerated documents must be certified according to law, by persons usually recognized to exercise such functions. These include a judge, magistrate or officer of the country concerned.57

The Act provides for the taking of evidence in Nigeria for use abroad. Under this section, the testimony of any witness in Nigeria may be obtained in relation to any criminal matter pending in any court or tribunal in another country in like manner as it may be obtained in relation to any civil matter under any law for the time being in force in any part of Nigeria as regards the taking of evidence there in relation to civil or criminal matters pending before tribunals in other countries.58

If the magistrate is satisfied under certain circumstances, he may commit a fugitive to prison while still awaiting the order of the Attorney-General for his surrender. This will happen if the magistrate is convinced that:

(i) the warrant was issued in a country to which the Act applies, is duly certified and relates to the prisoner.
(ii) the offence of which the fugitive is accused is an extraditable offence in relation to that country;
(iii) the evidence produced would, according to the law of Nigeria, justify the committal of the prisoner for trial if the offence of which he is accused had been committed in Nigeria; and
(iv) the surrender of the fugitive is not precluded by the Act.59 Also where the country requesting the surrender of the fugitive is one to which the Act applies, is also not prohibited by the terms of the extradition agreement as recited or embodied in the order.60 If the magistrate decides to commit the fugitive criminal to prison, he must inform him that he will not be surrendered until after the expiration of fifteen days beginning with the day on which he is committed. He must also be told that he has a right to apply for a writ of habeas corpus and forthwith send to the Attorney-General a certificate of such a committal and such report on the case as the magistrate thinks fit.61 If in the circumstances of the case, the magistrate is satisfied that the fugitive criminal should not be committed to prison, he must promptly order him to be discharged.62 However, if on the other hand, the fugitive criminal is committed to prison, he must not be surrendered before the expiration of fifteen days beginning with the day on which he is committed, or if a writ of habeas corpus has been issued, until the court has given its decision on the return to the writ, whichever is the later.63 Where the fugitive criminal is not discharged, the Attorney-General may order his surrender to any person authorized by the requesting state.64 The person so authorized may receive, hold in custody and convey out of Nigeria the fugitive criminal surrendered to him in pursuance of the order. If the person so surrendered escapes from any custody to which he has been delivered, he will be liable to be retaken in the same manner as any person who escapes from lawful custody.65

Discharge of Fugitives:

If a fugitive criminal already committed to prison is not surrendered and conveyed out of Nigeria within two months beginning with the day on which the court gives its decision on the return of the writ, whichever is the later, the High Court of the territory in which he is, may, on application made on behalf of the fugitive, and upon proof that reasonable notice of the intention to make the application has been given to the Attorney-General, order that the fugitive be discharged from prison custody.66

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56 Section 15(1), ibid. See also Section 15(2), ibid.
57 Section 15(3), ibid. Judicial notice must be taken of the official seals of ministers of state of countries other than Nigeria. See, Section 15(4), ibid.
58 See, Section 16, ibid.
59 See, Section 3(1), and (6), ibid.
60 See, Section 8(3), ibid.
61 Section 8(6), ibid.
62 Section 8(7), ibid.
63 Section 9(1), ibid.
64 Section 9(3), ibid. cf. Section 271 of the Criminal Code.
65 Section 10, ibid. Section 10 deals with discharge of a fugitive criminal.
66 Section 9(2), ibid.
Restrictions on Surrender of Fugitive Criminals:

There are certain situations in which the Act restricts the surrender of fugitive criminals. In at least nine instances, a fugitive criminal will not be surrendered if either the Attorney-General or the court is satisfied that:

(a) the offence in respect of which his surrender is sought is an offence of a political character.
(b) the request for his surrender, although purporting to be made in respect of an extraditable crime was in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions or was otherwise not made in good faith or in the interest of justice;
(c) if surrendered, he is likely to be prejudiced at the trial, or to be punished, detained or restricted in his personal liberty, by reason of his race, religion, nationality or political opinion;
(d) by reason of the trivial nature of the offence for which his surrender is sought or the passage of time since the commission of the offence, be unjust or oppressive, or be too severe a punishment, to surrender the offender;
(e) he has been convicted of the offence for which his surrender is sought or has been acquitted thereof and that he is not unlawfully at large;
(f) criminal proceedings are pending against him in Nigeria for the offence for which his surrender is sought.
(g) the fugitive offender has been discharged whether by acquittal or on the expiration of a sentence as the case may be.
(h) provision is made by the law of that country, or that special arrangements have been made, such that, so long as the fugitive has not had a reasonable opportunity of returning to Nigeria, he will not be detained or tried in that country for any offence committed before his surrender other than any extradition offence which may be proved by the facts on which his surrender is granted.

(i) a period of fifteen days beginning with the day on which he is committed to prison to await his surrender has expired.

Seizure and Surrender of Property:

The Act makes some provisions for the seizure and surrender of property. Under the Act, a police officer may seize and detain any property found in the possession of the fugitive at the time of the arrest which appears to him to be reasonably required as evidence for the purpose of proving that the fugitive committed the offence of which he is accused. Any property seized may be handed over to such person as the Attorney-General may direct, being a person who in his opinion, is duly authorized by the country obtaining the surrender to receive it. Nothing in this section will prejudice any right which any person may have in any property which falls to be handed over and where any such rights exists, the property must be handed over except on condition that the country obtaining the surrender of the fugitive criminal in question will return it as soon as may be after the trial of the fugitive.

Transit of Surrendered Fugitive:

The Attorney-General may grant the right of transit through Nigeria of a person being or about to be conveyed from one country to another on his surrender pursuant to a treaty or other agreement in the nature of an extradition agreement or the law of any country within the commonwealth relating to the surrender of persons wanted for prosecution or punishment. However, such a grant of

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67 Section 3, ibid.
68 Court in this context, means any magistrate dealing with the fugitive's case as provided for under Sec. 8.
69 Section 3(1), ibid.
70 Section 3(3), ibid.
71 Section 3(6), ibid.
72 Section 3(2) (a), ibid.
73 Section 3(4), ibid.
74 Section 3(2) (b), ibid.
75 Section 3(5), ibid.
76 Section 3(7), ibid.
77 Section 3(8), ibid.
78 Section 11, ibid.
79 Section 11(1), ibid.
80 Section 11(2), ibid.
81 Section 11(3), ibid. For further reading, see I.A. Shearer, Extradition in International Law, 1971, ch. 7, See, specially Rosalyn Higgins, "Unlawful seizure and inextricable extradition", (1960) 36 B.Y.I.L. 279.
82 Section 14, ibid.
right of transit by the Attorney-General must be upon a request to that effect made by the country to which he is being or is about to be conveyed.\textsuperscript{83} If the Attorney-General makes a grant of right of transit of any person, may make arrangements for his transit to be supervised by the Nigeria Police Force and where such arrangements have been made, the person in transit must be treated as being in lawful custody so long as he is accompanied by a member of that force. Where such a person escapes from lawful custody, he will be liable to be retaken accordingly.\textsuperscript{84}

EVALUATION OF THE 1966 ACT:

Overall, the Act demonstrates a bold move in dealing with a good number of issues affecting the problem of extradition. However, as has been observed, the provision in respect of extraditable offences is by no means exhaustive and is bound to raise problems.

For example, the offence of bigamy is included in our list of extraditable offences just because it is in the British Extradition Act without considering the fact that bigamy though considered an offence under the laws is perfectly in keeping with Nigerian culture as a people. Thus, it has been argued that if the offence of bigamy is enforced, nine out of every thirty Nigerian male would be behind the bars. From the discussions of the provisions of the Act, it is clear that the judiciary and the Attorney-General have decisive roles to play in extradition matters. Indeed, the final and conclusive decision in respect of extradition questions in most states vests essentially on the judiciary. This, of course, is in keeping with international standards.\textsuperscript{85} Since the Attorney-General exercises a great deal of discretionary powers, it is expected that much attention is paid to

\begin{itemize}
\item Section 14(1), \textit{ibid.}
\item Section 14(2), \textit{ibid.}
\item Shigeru Oda in Max Sorenson at p. 525 states: “In most states the final decision is in the hands of the judiciary, which will declare that the requested state is either authorized or not authorized to extradite the person claimed. A declaration that the competent authority is not authorized to extradite the person claimed is conclusive, and the person claimed is set at liberty. Where extradition is authorized by the judiciary, the extradition itself is effected by executive action”. Even in situations where extradition agreements exist between the parties, any dispute as to the true construction of the terms usually falls for the determination of the courts, unless the contrary is provided.
\end{itemize}

the merits of each case. In other words, his discretionary powers must be judiciously exercised. The same is applicable to the magistrate.

Another positive aspect of the Act is in respect of Section 3 which clearly enumerates instances where it will be unlawful to surrender a fugitive criminal. Whereas the list given may not be exhaustive, what is prohibited therein serves as some check against excesses of either the judiciary or the executive in the surrender of fugitives.

4. EXTRADITION TREATY BETWEEN THE PEOPLE’S REPUBLIC OF BENIN, THE REPUBLIC OF GHANA, THE FEDERAL REPUBLIC OF NIGERIA AND THE REPUBLIC OF TOGO.\textsuperscript{86}

INTRODUCTION:

The idea for the conclusion of an extradition treaty among certain countries of the West African Sub-region had been mooted for a long time now as the best way to fight against crime in all its forms within the region. Owing to the highly heterogeneous nature of the sub-region arising from political, social, cultural, linguistic and ethnic differences, such ideals and ideas were not initially possible, particularly during civilian regimes in these countries. In recent times, the desire of the countries of Benin, Ghana, Nigeria and Togo to promote peace, security, solidarity and harmony for the economic, social and cultural developments of their respective countries motivated the realization of this wish at a time when the situation of the world economy in general and that of Africa in particular is in a total state of chaos. Thus, after a period of slumber, punctuated with apathy on the party of the West African States concerned, the execution of this noble and laudable idea became a reality as a result of determined initial moves made by Nigeria and the other countries.

The Preamble of the Treaty though short, precisely states the main

\begin{itemize}
\item Done in Lagos on the 10th day of December 1984. It was not possible for us to lay our hands on the certified true copy of the text of this treaty at the time of the preparation of this paper. However, rather than skip an examination of this important legal document, we chose to base our discussion on the so-called “Draft Treaty” which we are assured is exactly the same as the final document signed by the Heads of States concerned.
\end{itemize}
aim of the instrument. 87

RETURNABLE OFFENCES:

The Treaty does not list down extraditable offences. However, it states that extradition shall be granted in respect of persons accused of offences punishable by the laws of the Contracting Parties by at least two (2) years imprisonment. 88 Participation in a crime is sufficient to return a criminal provided that such a participation is punishable by the laws of the Contracting Parties. 89 Persons who have been convicted by the requesting state for extradition offences whether they have served part of their sentence or not shall be returned. 90 It is clear that the provision for extraditable offences does not contemplate all crimes per se. It is in respect of crimes which on conviction carry penalties not less than two years imprisonment. Such crimes must in addition be punishable by the laws of the Contracting Parties.

POLITICAL OFFENCES:

The provision on political offences prohibits the grant of extradition for crimes or offences of a political nature or if it is proved that the requisition for the surrender has been made to try the accused for a crime or offence of a political nature. 91 Extradition will also be refused if in the opinion of the requested State the request is to persecute or punish him on account of his race, religion or political opinion. 92

The law governing extradition of the fugitive criminal under the Treaty shall be carried out in the requested state in conformity with the laws of the requested state. 93

87 The countries were animated by their strong desire to maintain and foster the firm relations of friendship and fruitful cooperation which unite their peoples, as well as their desire to fight against various crimes particularly those of currency trafficking, smuggling and economic offences against the States.
88 Article 2(1) of the Treaty.
89 Article 2(2), ibid.
90 Article 2(3), ibid.
91 Article 4, ibid.
92 Ibid.
93 Article 6, ibid.

EXTRADITION PROCEDURE:

The question of procedure for extradition is fairly elaborately and comprehensively set forth. 94 The medium of communication of the request for extradition is through diplomatic means. This must be made in writing accompanied by the original or certified copy of a judgement of conviction or a warrant of arrest or any other order issued in the form prescribed by the requesting state. Also important is the fact that the offences must be legally defined and the time, place of commission of the offence as well as the relevant laws under which the offences fall shall be stated as precisely as possible. 95 It is vital that the description of the person claimed is made as well as any further information which can help determine his identity and nationality. 96

It is possible to request for a provisional arrest in cases of emergency. Such a request shall be transmitted to the competent authorities of the requested state either directly by letter or telegram or by any other means in writing, but the request shall be confirmed through diplomatic channels. 97 The provisional arrest shall terminate if within a period of forty (40) days after the arrest the authorities of the requested party have not received the relevant documents. 98 In case supplementary information is required, by the requested state, this must be communicated through diplomatic channels. The information needed must be provided within a period of forty (40) days beginning from the receipt of the request for supplementary information. At the expiration of this period, the offender shall be provisionally released but this does not mean that he may not be re-arrested after the awaited supplementary information is received.

OTHER PROVISIONS UNDER THE TREATY:

The Treaty provides for communication of decision, multiple requests, transit through another state, extradition expenses, transfer of convicted prisoners for execution of sentences and property of
extradited persons.

The decision of the requested state on whether or not she would extradite shall be done through diplomatic channel. 99 Should the request for extradition be concurrently made by more than one state, either for the same offence or for different offences, the requested party shall make its decision based upon the relative seriousness of the case, the place of the commission of the offences, the relative dates of the requests and the possibility of subsequent extradition to another state.

The requested party shall bear expenses incurred by reason of the extradition except cost of land, sea and air transport to and from the requested state. 100 The Articles connected with the offence which can serve as exhibits found on the person sought at the time of his arrest, shall at the request of the requesting state be seized and returned to the authorities of that state. 101 It is possible that the articles involved may belong to a third party. In that situation, they must be returned to the requested state as soon as possible after legal proceedings. Returning of such articles shall not attract charges. 102

There is no doubt that the Treaty is a very welcome development in the relations of the four states concerned. Most of its provisions appear to have borrowed heavily from the Nigerian 1966 Extradition Act earlier discussed. There are however, areas which will surely generate great controversies in the future to force provisionally upon the signature by Heads of States.

The Treaty will go a long way to stabilize the relations of the four states concerned. Most of its provisions are in conformity with the accepted rules and practice of extradition in international law. It is only by such arrangements that states can hope to regulate the contemporary trend in the proliferation of crimes in the complex present era of technological advancement.

5. NIGERIAN PRACTICE:

Nigeria, as a comparatively newly independent state has not developed extensive practice and case law in the area of extradition. However, it is possible to deduce from the existing laws and the attitude of the Nigerian government in few cases affecting it on this subject, what may be generally regarded as the Nigerian practice in this area. Since 1960, there have been four main instances in which Nigeria has had to contend with issues of extradition before the December 31st 1983 developments in the country.

The first case arose in 1962 in the second year of Nigeria's life as an independent country in Brixton Prison (Governor) and another, Exparte Enahoro. 103 The applicant, a Nigerian citizen was wanted in Nigeria to stand trial on charges of treasonable felony and conspiracy to effect an unlawful purpose. After an unsuccessful attempt to overthrow the legitimate government of Nigeria headed by late Sir Abubakar Tafawa Balewa by unlawful means, he escaped to Ghana from where he subsequently arrived in London. While in London, the applicant was arrested under the Fugitive Offenders Act, 1881 on a warrant issued by the metropolitan magistrate. He was committed to prison on 13 December, 1962. 104 While in detention pending extradition to Nigeria, the applicant filed a writ of habeas corpus and for an order of relief. 105

Counsel for the applicant argued that the evidence presented in the magistrate's court on behalf of the Nigerian Government did not raise a strong or probable presumption of guilt. The applicant fought his case vigorously up to the House of Lords. His contention was that he was wanted in Nigeria for political offences, but he lost the case and was finally extradited to Nigeria to face his trial. In Nigeria, the applicant was convicted by the High Court of Lagos on charges of treasonable felony and conspiracy to effect

99 Article 8, ibid.
100 Article 13, ibid.
101 Article 14(1), ibid.
102 Article 12(3), ibid.
104 Section 5 of the Fugitive Offenders Act, 1881.
105 Under Section 10 of the Act.
an unlawful purpose.\textsuperscript{106}

The Nigerian Extradition Act was only enacted in 1966 while the Enahoro case was heard in 1962. If the matter were to come up today, there will be very good chances of his succeeding in not being extradited. The reason is obvious. Under the present Act, the offence of treasonable felony is not listed as an extraditable offence. Again, this lends weight to the criticism of enumeration of offences under the Act.

The other two cases of interest are those of \textit{Chukwuemeka Odumegwu Ojukwu and Yakubu Gowon}. Even though neither of these two cases was heard in a court of law, it will be interesting to discuss them, according to the order in which they happened.

In the \textit{Ojukwu} case, it arose as a result of an unsuccessful attempt at secession. On May 30, 1967, Biafra declared its independence of Nigeria, of which it had constituted the Eastern Region. Its war of independence was unsuccessful and Biafra surrendered to the Nigerian Federal Government on 12 January, 1970 and is now once again fully a part of Nigeria. At the collapse of Biafra, its leader Chukwuemeka Odumegwu Ojukwu escaped from the country to Ivory Coast. There he was granted political asylum.

The Nigerian Government under the leadership of Yakubu Gowon made determined representations to the Government of Ivory Coast to extradite Ojukwu to face charges connected with his role during the civil war. Despite persistent diplomatic moves on the part of the Federal Government, the Government of Ivory Coast bluntly refused to extradite Ojukwu on the ground that the offence being canvassed against him was a political offence.\textsuperscript{107}

In the \textit{Yakubu Gowon} case, it arose as a result of an abortive \textit{coup de tat} led by Dimka.\textsuperscript{108} Mr. Gowon was overthrown by General Murtala Mohammed while he was outside Nigeria, attending an African Heads of State summit in Uganda. He later found his way to England where he asked for, and was granted political asylum. Following the abortive Dimka coup, a number of allegations of involvement in the coup were levelled against Mr. Gowon by Dimka the leader of the coup.\textsuperscript{109}

The allegations were of such a grave nature that the Nigerian Government then under General Olusegun Obasanjo made representations to the Government of the United Kingdom for the extradition of Mr. Yakubu Gowon. At the time, the British Government like the Government of Ivory Coast in the case of Ojukwu, bluntly refused to extradite Gowon to come and face the charges preferred against him as a result of the abortive coup on the ground that the offence was a political one.\textsuperscript{110}

In contrast with the Enahoro case, it must be mentioned, for purposes of clarity, that the extradition of Anthony Enahoro from Britain in 1962 was for the purely political offence of sedition. The extradition was effected under a law which has since been repealed. Under that law, the rule of non-extradition of political offenders did not apply between Commonwealth countries.

The fourth case, though unreported,\textsuperscript{111} is of relevance to our present discussion. It deals with the section of the Act in respect of transit of surrendered fugitives. That was the case of \textit{Andre Sabbe v Etim Ekonk Inyang}.\textsuperscript{112} Sabbe was extradited from the Congo Kinshasa. He was in transit to Liberia. On landing at Ikeja Airport as it then was, to change his plane, refused to proceed on his journey. He argued that he was a free man. Accordingly, he resisted all efforts by the Nigerian Police to get him on a plane bound for Liberia which was the requesting state. The Nigerian Police in consequence of Sabbe's refusal to continue his journey held him in custody from where he briefed a lawyer who filed a \textit{habeas corpus} writ on his behalf. Sabbe claimed the sum of \textsterling}20,000.00 as damages against the Nigerian Police for false imprisonment. Sowemimo J. (as he then

\textsuperscript{106} See, \textit{Enahoro v The Queen} (1955) 1 All. N.L.R. 125.

\textsuperscript{107} Ojukwu remained in exile in Ivory Coast until 1983, when the ousted Shagan Administration granted him pardon and he later returned to join the National Party of Nigeria. He contested the Onitsha Senatorial seat during the 1983 general elections and finally lost to Dr. Edwin Onwudie at the Supreme Court.

\textsuperscript{108} Dimka's coup took place on 13 February, 1976. Though it failed, it claimed the life of the then Head of State, General Murtala Ramat Mohammed.

\textsuperscript{109} Dimka was finally court martialled.

\textsuperscript{110} The recent cases of Joseph Wayas, Umaru Dikko, Adisa Akinloye, etc. are likely to present the same difficulties following the trend of the cases discussed above. However, trying "other means" as indicated by Buhari, may be an alternative where extradition fails but they have some difficulties. This will be discussed later.

\textsuperscript{111} Various Nigerian National dailies carried the news at the time. See, Suit No. LD/434/66 unreported.

\textsuperscript{112} Etim Ekonk Inyang is now the Inspector-General of Police in Buhari's Administration. He is described as a very efficient officer who rose from the ranks. He succeeded Sunday Adewusi who was compulsorily retired soon after the 31st of December 1983 coup.
was)\textsuperscript{113} granted Sabbe the *habeas corpus* but dismissed his action for damages. However, Sabbe was later re-arrested and deported by the Immigration Department on the orders of Justice Lambo, who felt that the deportation was lawful.\textsuperscript{114}

**THE UMARU DIKKO CASE:**

As a result of the 31st of December 1983 military coup, a number of former politicians fled the country. Discussions on their possible return has been rather heated. Prominent among those wanted politicians is Dr. Umaru Dikko. In early July, an unsuccessful abduction attempt was made on him in his hideout in London. This triggered off serious diplomatic crack in the relationship between Nigeria and Great Britain. The Umaru Dikko abduction affair was first reported by both the press and radio in Nigeria on the 5th of July, 1984. According to the reports, Dr. Umaru Dikko was found by the British intelligence officers drugged and crated in a box. The box was brought to the British Stanstead airport where it was to be loaded unto a Nigeria-bound Nigeria Airways plane. Two Israelis were reported to be found in another crate and were thought to be the brains behind the kidnap attempt. There was however, a further report that a Nigerian official of the Embassy in London was found at the said airport at the time of loading. With the collapse of the attempt, a major diplomatic war between the two countries started.

The Nigerian Government strongly denied any involvement in the kidnap bid. On the other hand, the British authorities arrested and detained seventeen people among whom were some Nigerian diplomats, who, according to them, were seen at the scene of the airport incident. The action raised a number of crucial questions of immunity of diplomats. The Head of the Nigerian Mission, Major-General Hananiya, was recalled for consultations by the Nigerian authorities after offering some explanations at the British Foreign Office, while Nigeria forced Britain to recall her counterpart in Nigeria. Two Nigerian diplomats in Britain were declared *persona non grata* and deported. In retaliation, the Nigerian Government declared two opposite numbers in the British Embassy in Nigeria *persona non grata*.

The British demand for a waiver of diplomatic immunity for the Nigerian officials was rejected and rightly so. We have expressed an opinion on this matter somewhere to the effect that to make such a demand in the face of a strong denial of any official connection by the Federal Government of Nigeria was unreasonable.\textsuperscript{115} It must be noted that Nigeria demonstrated commendable maturity on the matter taking appropriate reciprocal steps whenever the need arose. The government of Nigeria is reported to have made a formal request to the British government for the extradition of Dr. Dikko and possibly, other fugitives resident there. The chances of their being extradited depend on a number of issues already discussed.

From the discussion of the above cases, it is clear that it is not easy to define which offences are political offences and which are not. What has compounded this difficulty is the fact that both state practice and case law are most inconsistent on the subject. They offer no help whatsoever. Perhaps, the difficulty in arriving at an acceptable determination of what constitutes a political offence stems from the simple fact that it is more of a political rather than a legal decision.

Consequently, there is a great deal of leeway open to every state who may on the ground of political expediency, refuse extradition of a fugitive offender on the pretext that it is a political offence when in fact it is not. It would appear to us that what determines the chances of a requested state accepting or refusing to extradite a fugitive will depend largely on whether by so doing it advances substantially its economic or other interests with the state concerned. In other words, it will depend on the extent of good relationship between the states.

Where the relationship has been cordial and friendly, chances are such a request will be given some positive consideration, whereas the opposite will be the case if the relationship has been rather unfriendly, or at times virtually non-existent.

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\textsuperscript{113} Justice G. Sowemimo is now the Chief Justice of the Federation of Nigeria having succeeded retired Justice Attanda Fatayi Williams who left office in 1983.

\textsuperscript{114} This illustrates the use of the State's statutory powers to deport an alien often used in recent times as a means of disguised extradition.

\textsuperscript{115} See, Daily Times, July 12, 1984, centre page.
6. GENERAL EVALUATION

The discussions carried out above clearly show that a number of questions remain unanswered with regard to the question of extradition. What may be regarded as the general international law standard on the matter does not offer a uniform practice of states. This stems from the fact that so far the issue of extradition is left to the municipal laws of individual states for determination. In the alternative, conflicts are resolved in reliance on existing extradition treaties and agreements between the parties. One area of controversy is the definition of the concept of political offences; above all.

It is our considered view that the mere existence of an extradition treaty between the requesting state and the requested state does not provide the assurance that the requested fugitive offender will in fact be extradited. What appears to weigh decisively is the degree of goodwill relationship existing between the parties. A case in point is that of Gowon who sought for and received refuge from the British authorities. He was refused to be extradited on the ground that the charge for which he was wanted was political. That of Ojukwu in which the Ivory Coast authorities bluntly refused extradition is understandable. For one thing, if any of the wanted politicians takes refuge in a non-Commonwealth country besides Liberia and the United States as Ojukwu did, he may never be extradited.

However, it is known that in the practice of states, some states have tried methods ranging from abduction to assassination of wanted persons where their efforts to bring the wanted persons back failed. Such methods have not only raised serious legal problems between the authorities of the states in whose territory the wanted fugitives resided and the requesting state, but have sometimes resulted in the agents of the requesting state being jailed by the authorities of the country of the requested state. International Law is still fluid on this matter. A brief review of some cases will be instructive on the nature of the problems.

In the Eichmann case, the accused who had general nationality, was the Head of the Jewish office of the German Gestapo. He was the administrator incharge of “The final solution” — the policy that led to the extermination of between 4,300,000 and 4,600,000 Jews in Europe. Eichmann was found in Argentina in 1960 by persons who were probably agents of the Israeli Government, and abducted to Israel without the authority or knowledge of the Argentinian government. He was convicted and sentenced to death.

With reference to the circumstances of the arrest of the accused and his transfer to Israel, the Republic of Argentina lodged a complaint with the Security Council of the United Nations which resolved on June 23, 1960, as follows: The Security Council, having examined the complaint and the transfer of Adol Eichmann to the territory of Israel constitutes a violation of the sovereignty of the Argentina Republic, considering that the violation of the sovereignty of a member state is incompatible with charter of the United Nations,

1. declares that acts such as that under consideration, which affect the sovereignty of a member state and therefore cause international friction, may, if repeated, endanger international peace and security;
2. requests the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law;
3. expresses the hope that the traditionally friendly relations between Argentina and Israel will be advanced.

Pursuant to the above Resolution, the two governments reached an agreement on the settlement of the dispute between them as a result of which the following communique was issued:

“The governments of Argentina and Israel, animated by a desire to give effect to the resolution of the Security Council of June 23, 1960, in so far as the hope was expressed that the traditionally friendly relations between the two countries will “be advanced, resolve to regard as closed the incident which arose out of the action taken by citizens of Israel which infringed the fundamental rights of the state of Argentina...”


118 The said agreement was reached on August 3, 1960.
119 Argentina, had earlier “requested appropriate reparation for the act, namely the return of Eichmann, for which it set a time limit of one week, and the punishment of those guilty of violating Argentine territory”. U.N. Document S/4336 (ed.)
However, it is an established rule of law that a person being tried for an offence against the laws of a state may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that state. The courts in England, the United States and Israel have constantly held that the circumstances of the arrest and the mode of bringing of the accused into the territory of the state have no relevance to his trial, and they have consistently refused in all instances to enter upon an examination of these circumstances.

Thus, in Ex parte Elliot, the court heard an application for habeas corpus by a British soldier who had deserted his unit in 1946, was arrested in Belgium in 1948, by two British military officers accompanied by two Belgium police officers, was transferred by the British military authorities to England and was there held in custody pending his trial for desertion. The court dismissed the application of the defence counsel to the effect that the defendant was illegally arrested. In dismissing the application, Lord Goddard said:

"... If a person is arrested abroad and he is brought before a court in this country charged with an offence which that court has jurisdiction to hear, it is not an answer for him to say, he being then in lawful custody in this country: "I was arrested contrary to the laws of the state of A or the state of B where I was actually arrested". He is in custody before the court which has jurisdiction to try him. What is it suggested that the court can do? The Court cannot dismiss the charge at once without its being heard. He is charged with an offence against English law, the law applicable to the case".

The above principle is acknowledged in Palestine case law. Thus, in Afouneh v Attorney-General, the Supreme Court stated:

"In our opinion, the law is correctly stated in volume 4 of Moore's Digest of International Law, at p. 311 .... where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he cannot, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose terri-

Extradition in International Law with Particular Reference to Some Events in Nigeria

In the Savarkar Case, an Indian who was being returned to India from Great Britain under the Fugitive Offenders Act 1881 escaped and swam ashore in Marseilles harbour. A French policeman arrested him and handed him over to the British policeman who had come ashore in pursuit. Although the French police in Marseilles had been informed of the presence of Savarkar on board, the French policeman who made the arrest thought that he was handing back a member of the crew who had committed an offence on board. France alleged a violation of its territorial sovereignty and asked for the return of Savarkar to it as restitution.

The Permanent Court of Arbitration decided in favour of Great Britain for the following reasons:

"... it is manifest that the case is not one of recourse to fraud or force in order to obtain possession of person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of Savarkar to the British authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful .... while admitting that an irregularity was committed by the arrest of Savarkar and by his being handed over to the British police, there is no rule of international law imposing, in circumstances such as those which have been set out above, any obligation on the power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that power".

120 (1949) 1 All. E.R. 373.
121 G.A. 14/42 (1942) 9 P.L.R. 63.
122 It has been suggested that the principle in Afouneh and reported in Moore's Digest, relied on Ker v. Illinois 119 U.S. 346 (1886) as his authority. In the case, an agent acting for the state of Illinois went to Peru with a warrant for the extradition of Ker under the extradition treaty between the US and Peru. At the time, Peru was at war with Chile and most of Peru including Lima, was in Chilean hands. In the confused situation, the agent approached the Chilean military authorities in Lima and, with their assistance, obtained custody of Ker and took him to Illinois. No approach was made to the Peruvian government, which was still in existence in retreat, and no recourse was had to the extradition treaty.
123 See, Scott, Hague Court Reports, p. 275.
124 Ibid, p. 279.
In the Lawler Incident in 1860, a convict escaped from prison in Gibraltar. He was arrested by a British warder across the border in Spain and taken back to Gibraltar without the Spanish consent. The British Law officers advised:

"A plain breach of international law having occurred, we deem it to be the duty of the state into whose territory the individual, thus wrongfully deported, was conveyed, to restore the aggrieved state, upon its request to that effect, as far as possible, to its original position."

On the duty to return, Fawcett suggested the following limitation:

"... it might perhaps be said, in the case of irregular capture and removal for trial of a criminal jure gentium, that the state, from which he is taken, may only demand his reconduction if two conditions are satisfied: that that state is the forum conveniens for his trial, and that it declares an intention to put him on trial. If these two conditions are not satisfied, the state must accept reparation in another form, since otherwise the interest of justice would be defeated."

SUMMARIES AND SUGGESTIONS:

A lot of criticism of the English and American case law from the standpoint of international law in this regard has been levelled by a number of international jurists. It is not for us here to enter into this controversy between international jurists. However, on the basis of the materials examined in this work, the possibilities of the Buhari Administration to secure the return of the run-away Nigerian politicians to face the charges that may be framed against them, must definitely take into consideration the following important points that have emerged:

1. Extradition is a very intricate matter whose importance throughout the world is regrettably fast declining.
2. It is uncertain whether extradition treaties made by colonial powers remain binding on their former colonies. It is our view that they do not.
3. Rather than hope for the possibilities of a uniform state practice on the question of extradition, perhaps through an international convention, in contemporary state practice, modern statutory powers to deport aliens are often used as a means of disguised extradition.
4. Though under the existing rules of international law no state, in the absence of treaty, is under any legal obligation to surrender a fugitive from justice found within its jurisdiction to the requesting state, yet to meet the urgent needs of humanity and to achieve international solidarity, states should not ordinarily decline to surrender persons charged with or convicted of criminal offences affecting the general well-being and happiness of society.
5. We strongly propose the negotiation of a multilateral treaty on Extradition amongst most African States (or among a number of African States of a particular region), in view of the recent increase and proliferation of various types of crimes in the region whose boundaries are not only intermingled but appear very difficult to be effectively policed against criminals.

125 Monir, 78.
126 Ibid.
127 See, Fawcett, op. cit.
128 See, Dickinson, "Jurisdiction following seizure or arrest in violation of International Law" (1934) A.J.I.L., 231. Morgenstern, "Jurisdiction in seizures effected in violation of International Law" (1952) 29 B.Y.L.L. 215; See, also, Lauterpacht in (1948) 64 Law Quarterly Review, 100, note (14).

129 See, Akehurst, op. cit., p. 108. He rightly argues that in this way the safeguards created for the individual in legislation and treaties relating to extradition are evaded. Still further, the use of deportation explains why there are fewer extradition treaties and fewer extradition cases.
CHAPTER 8
INTERNATIONAL ORGANISATIONS

1. INTRODUCTION

In the nineteenth century, states were the only legal persons in international law. However, the developments in the substance of international law which have occurred in the first half of the twentieth century have so transformed the character and content of the international legal system. Consequently, it can no longer be satisfactorily presented within the framework of the former classical concepts. While international organisations, in the sense of interstate organisations have existed since 1815, it is only since the First World War that they have assumed much political importance.¹

In looking for the answer to the question whether international organisations are subjects of international law, we should keep in mind that if an entity claims to have international legal capacity, no rule of international law comes into play until the entity appears and asserts itself. This doctrine has received extensive explanation by us elsewhere.²

The question whether the entity is entitled to do, is substantially the same as whether it has the international capacity which it claims to have. If the answer is in the affirmative and so recognized, it means that a series of acts performed by this entity in the field of international law and relations are legal acts, and it is admitted to have the capacity to perform them. We must recall here that the subject of any legal order means that entity to whom the norms of the legal order in question apply, and whose conduct this order regulates or licenses by imposing duties and conferring rights.

It must be observed, however, that it is not always correct to assume that a legal system addresses itself directly to certain entities. Sometimes, a legal order may in certain respects regulate or license the conduct of some entities indirectly. However, the important issue is that any subject of law should be capable of having certain rights and duties under the given legal system. The degree of this capacity may vary, but this is an entirely different matter.

¹ See, Akehurst, op. cit. p. 71.
² For details, see, Okeke C.N., op. cit. pp. 9-19.
For an entity to be regarded as a subject of international law, that entity must enjoy some measure of international personality. Thus, the notion of international personality is a judicial concept which is regarded as essential to provide a legal basis for entitling a subject to rights, and submitting it to obligations under international law. Whether international organisations are subjects of rights, and submitting it to obligations regarded as essential to provide a legal basis for the notion of international personality has been a question of controversy for some time. This was a direct consequence of the basic premise of the classical view of international law which denied almost all personality in international law.

This viewpoint was evident in international law literature at a time when the development and expansion of international institutions had as yet made little impact on international law. Side by side with the development of international organisations, there has been discernible in international law, a trend towards the attribution in some degree of international personality to them.

The International Law Commission in its commentary to the Draft Articles on the Law of Treaties in 1969, noted, that entities other than States might possess international personality, which according to the Commission’s view is a principle of international law. Examples of such entities are increasing gradually. They include intergovernmental organisations such as the United Nations, some dependencies and colonies which are on their way to statehood, and also ‘communities’ which have been customarily described as States which as a matter of internal and constitutional law can be considered States by virtue of their political cohesion, their internal autonomy and their historical status. International law writers on this intricate question have shown four approaches to which we shall now turn.

2. MODES OF APPROACH
a. The Inductive Approach

1. Existence of personality: Those who hold to this method of approach express the view that every organisation possesses some rights and duties. These rights and duties are expressly conferred upon the organisation. From this body of rights and duties, the organisation derives a general international personality. Framing this in other words, the international personality of an organisation according to the supporters of this position, is a consequence of the expressed or sometimes implied rights and duties, as can be evidenced from the constitutive instrument of such an organisation. Bowett writes: ‘Whilst, therefore, specific acknowledgement of the possession of international personality is extremely rare, it is permissible to assume that most organisations created by a multilateral intergovernmental agreement will, so far as they are endowed with functions on the international plane, possess some measures of international personality.”

b. The Objective Approach

According to this approach the structural content of an organisation is considered to be of prime importance. Special attention is paid to the specific elements pertaining to composition, voting procedure, functions and above all, powers of the organisation. Once these pre-requisites are established, then the personality of the organisation is admitted. It is further thought that the foundation of the personality of an international organisation is not the will of the States, but is to be discovered in general international law. In the opinion of Seyersted, it is the international legal order which ascribes personality to an entity fulfilling certain conditions.

c. The Formal Approach

2. Content of personality if it exists: According to this approach, it is sufficient to arrive at the conclusion that an organisation has
specific rights and duties from the simple premise that such organisation is endowed with international personality. In order to ascertain whether an organisation has the capacity which it claims, it is essential to have recourse to the provisions of the instrument setting up the organisation. Dr. Brownlie observes that ‘Particular care should be taken to avoid automatic implication from the very fact of legal personality of particular powers, such as the power to make treaties with third-states, or the power to delegate powers.’ This point of view is held also by other writers such as Ingrid Detter and O’Connell.

d. The Material Approach

The fact is recognized that legal consequences may vary in their nature and degree, but they, however, possess one essential feature — they identify a certain category of rights and duties which is considered to arise from the very personality of the organisation constituting an international person, irrespective in principle of particular provisions of the constitution. Even though these provisions may be useful indicators of the personality, nevertheless they do not determine its content. Seyersted seems to be a strong supporter of this train of thought. He writes: ‘International organisations like states, have an inherent legal capacity to perform any sovereign or international act which they are in a practical position to perform. They are, in principle, from a legal point of view general subjects of international law, in basically the same manner as states’.

Seyersted thinks that the personality of an international organisation is founded on general and customary international law, but that the inherent powers of an international organisation, seen from the international point of view, can be limited if the constitution of such an organisation forbids the organisation to perform certain legal acts, or if the acts which the organisation wishes to perform exceed the purposes set down for the organisation.

e. Assessment of these Approaches

We could continue ad infinitum to bring examples of doctrinal pronouncements on the question of international law, but meanwhile, we might try to analyse some of the definitions already noted above.

It seems to us that the ‘material’ and ‘objective’ approaches offer the best guidelines for focusing the problem of the legal personality of international organisations. By this we do not mean to imply that the approaches have in fact offered the answer being sought for. But, at least a close perusal of these approaches presents us with the following general picture: there is a recognition of the fact that in the international sphere several and different subjects of international law exist; also an admission of the distinct nature of the unidentical subjects of international law which, consequently, results in their differing rights and duties. We share Seyersted’s view to the effect that the personality of an international organisation is founded on general international law. This in turn is proved by international practice.

But, on the other hand, not all his points of view are, in our consideration, free from criticism. For example, he attempts to find in the practice of an international organisation a clear equation of organisations and states. We consider that this is basically wrong in view of the evident differences in their legal nature. Furthermore, it is not clear from his attitude whether the ‘international acts’ and ‘capacities’ and the ‘activities of international organisations’ form a common category which may be considered as a necessary consequence of personality. As for the opinions of the three other publicists cited above namely, Brownlie, Detter and O’Connell, one essential and clear message is carried; they call for a further examination of the constituent instrument of a given international organisation in order to establish its capacity in law.

3. The Soviet View: Meanwhile we must survey another important body of literature which has been more cautious and traditional in its approach to finding a solution to the question of international personality of international organisations. The Soviet jurists who have spoken on this problem can be conveniently grouped as follows: those of them who grant a monopoly of international personality to sovereign states to the complete exclusion of all international organisations, including the United Nations, and those who, while denying that international organisations are international persons,

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11 Brownlie, op. cit.
15 Seyersted, op. cit., p. 100.
16 Ibid., p. 29.
17 Ibid., p. 35.
on the ground that they are fundamentally different from states, still concede to these entities some degree of international rights. We shall begin with the first group.

Professor L.A. Modzhorian maintains that as long as international organisations are not sovereign entities, they are ipso facto not subjects of international law. To her, the attribution of personality to international organisations would undermine state sovereignty. The element of sovereignty is in her opinion indispensable as a certain criterion of personality in international law. V.M. Shurshalow denies that international organisations are international persons, on the ground that they are fundamentally different from states. All the same, he concede some degree of international rights to these entities. Professor G.P. Zadorozhnyi writes that whereas only sovereign entities are subjects of international law, such entities like international organisations, juridical persons and physical persons, are, at least, only subjects of international relations and not of international law.

It will be clear that the opinions of the above quoted Soviet international jurists, which in our view, represent a minority position among Soviet authorities in international law on the subject, still clinging to a traditional view of international law. As a result of our earlier arguments it will also be clear that this train of thought is unacceptable. It is being overtaken by the course of events. Moreover, it neither serves a useful and objective purpose, nor is it in agreement with the realities of contemporary international life.

It is necessary to point out that in a recent article on ‘Subjects of international legal responsibility’, Professor Modzhorian gave what appears to be a modified view of her original stand on the question of subjects of international law and their international personality. She states that: ‘To bear international legal responsibility means to answer for one’s actions and in certain cases, also for the actions of others, therefore, to be subjected to international legal capacity, i.e., international personality. The question of the international legal responsibility of international organisations cannot be decided other than in close association with their international personality. The highly limited and conditional personality which member states grant to international organisations must serve, in our opinion, as the basis for the determination of the international legal responsibility of these organisations."

At the other end of the scale, is the next group of Soviet jurists who, while laying strong emphasis on states as the real subjects of international law, accept that international organisations possess some measure of international personality, whose derived and non-sovereign character must be emphasized and should be borne in mind at all times.

R.L. Bobrov writes: ‘... the United Nations is a secondary, derived (non-typical) subject of contemporary international law, created by the expressed will of sovereign states — the principal and real subjects of this law. Created as a centre for the co-ordination of the actions of states, in the name of peace and development of international cooperation based on democratic grounds, the UN is granted a certain measure of international personality which is essential and necessary if it is to execute its functions properly. The significant characteristics of the international legal personality of the UN are interdependent and in their totality constitute a specific legal personality which is based on legal grounds that are different from those upon which the legal personality of states is founded. The capacity of the UN is strictly to those powers granted under its Charter...’

Professor D.B. Levin posed the question whether international organisations can rightly be considered subjects of international law. To this he gave an answer in the affirmative thus: Undoubtedly, they can be, if such organisations, on the basis of their constituent instruments, possess some measure of individual rights and obligations vis-a-vis states especially the right to conduct external relations independently. According to him, the international personality of international organisations is founded on the fact that these organisations promote the common interests of member states in the sphere of maintenance of international peace and security and development of inter-state co-operation. These organisations, in his view, ‘possess the right to take independent actions within the limits

19 Ibid., at p. 8. See also by the same author ‘O sub’ektyakh mezhdunarodnogo prava’ in Sovetskoie Gosydarstvo i prava, SGP, 1956, No. 6, at pp. 95-97.
of these interests'.

Professor G.I. Tunkin, a leading Soviet jurist in the theory of international law, states that 'there is no generally accepted norm which defines the legal status of all international organisations... At the same time, international law does not contain any norm which precludes the granting of certain elements of international personality to this or that international organisation. The scope of such personality shall be determined — in the case of such organisations, by the provisions of the constituent instrument'. This point of view is shared by G.I. Morozov, R.L. Bobrov, E.A. Shibaeva and a host of others.

Professor I.I. Lukashuk had as important conditions for the international personality of international organisations, the fact that members of such an organisation must be states, duly represented by their governments, and, secondly, that a treaty between States must form the foundation of such an organisation. Commenting on the same question, E.A. Shibaeva emphasized that: 'From our point of view one can point to the following four criteria which must be satisfied by an international organisation which lays claim to the status of an international person: first, the inter-state (inter-governmental) character of the organisation; secondly, universal membership; ... thirdly, a specific charter provision granting legal capacity for certain international rights and obligations; and fourthly, compatibility of its aims and objectives with the generally recognized principles and norms of general international law.

A close analysis of some of these criteria shows significant inconsistency with modern international trends. The first requirement, namely, that the membership of an international organisation, in order to claim international personality, must be made up of sovereign states is doubtful from the standpoint of theory as well as of practice. Theoretically speaking (and as we have observed elsewhere) no specific rules or norms of international law operate as a kind of precondition for the emergence of an international organisation endowed with international personality. It does not seem to us that the ascertainment of the degree of international personality enjoyed by a given international organisation ought to precede its actual appearance in the international sphere provided it consists of statal or governmental entities. Again, we believe that any attempt to lay down a body of rigid rules for attributing international personality to organisations would complicate matters the more rather than offer the required solution to the problem.

The next point which merits observation in connection with the first requirement is the fact that there exist many international organisations the membership of which is not exclusively restricted to States. The organisations of UNESCO, WHO and ITU are cases in point, to mention just a few organisations which grant associate membership to entities which are not responsible for their international relations. It would be a matter of guess to what extent the inter-state character of these organisations remains, having regard to the express provisions of their constitutions. The matter will be different if what is meant by the specific requirement is that an organisation formed initially by governments of sovereign states but later joined by non-sovereign state entities still retains its so-called inter-state character.

Shibaeva's second requirement that an international organisation must be universal in order to lay claim to international personality is unconvincing to us. There exists today a good number of international regional organisations which cannot be described as being universal in the strict sense of the word. Take for example, the EEC and the COMECON. These are clearly international organisations which are by no means universal. It will be hard to deny them international personality outright. The Soviet Union is a member of the COMECON and it does not seem to us that any Soviet scholar would deny the COMECON the attribute of international personality.

We feel convinced that the whole Soviet attitude towards the

30 E.A. Shibaeva, op. cit., p. 32.
31 Article 11, paragraph 3 of the Constitution of UNESCO grants associate membership to 'territories or groupings of territories which are not responsible for the conduct of their international relations'.
32 Article 8 of the WHO Constitution.
33 Article 1, paragraph 3, of the ITU Constitution.
question of the legal nature of international organisations is connected with the general history of the participation of the Soviet state in international organisations. Commenting on this is beyond the scope we have set for ourselves on the present occasion. The denial of international personality to international organisations by Soviet writers seems to us to be based more on political than legal considerations. One can only hope that the apparent shift from the original traditional stand of Soviet international lawyers on the legal status of international organisations will continue to make substantial progress in view of the remarkable changes which are taking place in international law since the Second World War.

4. CONCLUSION:

A further examination of the literature and Court decisions on the subject of the international personality of international organisations confirms that these organisations possess a degree of international personality.

The status of the League of Nations in international law was the subject of guarded appraisal in the fourth edition of Oppenheim: 'The League appears to be a subject of international law and an international person side by side with several states... not being a state, and neither owing territories nor ruling over citizens, the League does not possess sovereignty in the sense of state sovereignty. However, being an international person sui generis, the League is the subject of many rights which as a rule can be exercised by sovereign states'.

The contemporary trend towards granting a measure of international personality to international organisations, was strengthened by the Advisory Opinion of the International Court of Justice on Reparations for Injuries Suffered in the Service of the United Nations. The request for the Opinion arose out of the assassination of the United Nations Mediator, Count Bernadotte, in Palestine. The Court found it necessary, first to affirm the international personality of the United Nations and then to consider whether the Organisation had capacity to bring an international claim.

In the opinion of the Court, the functions and rights attributed to the United Nations could only be explained on the basis of the possession of a measure of international personality. The Court continued: 'That it is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is the same thing as saying that it is a 'super State', whatever that expression may mean... what it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims'.

From the foregoing discussion a number of points have become apparent. First, the fact that the concept of international personality seems to be firmly established; also the general picture flowing from our analysis is that international organisations are international persons, though not on exactly the same footing as sovereign states. Various consequences and attributes flow from the concept of international personality, but the basis of what makes the law binding upon them may vary from organisation to organisation.

34 For a clear and detailed analysis (historically approached) of the Soviet experiences in selected international organisations, see, Chris Osakwe, The Participation of the Soviet Union in Universal International Organisations, Leyden, 1972.
37 Ibid. For more examples from municipal courts on the question of the international personality of international organisations, e.g. of the European Communities, see, Detter, Law-Making by International Organisations, Stockholm 1965, under the section 'Delegation of Law-Making Powers to the European Communities', pp. 271-318.
CHAPTER 9
NON-GOVERNMENTAL ORGANISATIONS¹
AND PRIVATE CORPORATIONS

A state-centric view of international relations has prevailed for a very long time. Even though the difference between public law and private law seems to be less absolute in recent times, nevertheless, public law still forms the basic aspect of the structure of contemporary international relations and law.² Students and practitioners of international politics have traditionally concentrated their attention on relationship between states. Thus, the state is regarded as the basic unit of action whose agents are the diplomat and soldier.

On the other hand, few would question that the advancement of technology in various fields and better means of communication have dramatically altered the nature of twentieth century international relations. Today, a good deal of inter-societal intercourse takes place. In addition, there exists a wide variety of transnational phenomena: multi-national business enterprises, trade unions and scientific research networks, international air transport cartels and communications activities in outer-space. These constitute a proof of continuous growth in world integration.

True, the destinies of the international society are still being shaped largely by the community of states and therefore, entities which are not sovereign States are still far from having a significant share in any one of the three basic attributes of sovereignty: international legislation, international administration, international judicial authority — although they are admitted to have, in each one of these spheres, some say, and though always limited still of varying, but never negligible degree.³

¹ The term ‘non-governmental organisations’ is derived from the official UN usage as set down in the ECOSOC Resolution 288 (X) and 1296 (XLIV). The classification of such organisations under this resolution appears to be based purely on functional considerations rather than from the point of view of their composition, for it is known that governments or branches of governments are members of many non-governmental organisations.
This development was brought about through the political power of some NGOs. Important among such NGOs are the Churches, Trade Unions and Humanitarian Organisations proper, on the one hand, and by the totality of NGOs on the other hand. Though non-governmental organisations like the International Committee of the Red Cross (ICRC) and the World Council of Churches (WCC) have no recognized international status as subjects of international law, and may not be said to have international treaty-making capacity, there is a growing number of international transactions between governments of sovereign states and non-governmental international organisations which are humanitarian in character like the two institutions mentioned above. Both of them and a lot of others in that category contribute to mutual understanding amongst peoples.

The ICRC's role since the last war in the international humanitarian front has tremendously increased. It includes agreements with governments in relation to questions of relief in distressed areas or war situations. It also works for the proper treatment of prisoners of war in the letter and spirit of the internationally recognized conventions on war. As a result of the atrocities of the Second World War and the surge of the movements for the international protection of human rights, there was a strong feeling that a minimum of humanitarian legal regulation should apply in all armed conflicts, regardless of their internal or inter-state character.

It must be observed also that within the framework of the ICRC, the UN and other bodies are making efforts to re-examine and update the law of armed conflicts. It is important to add that

4 The four Geneva Conventions of 1949 deal respectively in a series of detailed provisions, with the amelioration of the condition of the wounded and sick in armed forces in the field, with the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, with the treatment of prisoners of war, and with the protection of civilian persons in time of war.


6 See the works of ICRC, Preliminary Report on the Consultation of experts concerning non-international conflict and guerilla warfare, Geneva, 1970. Also the three reports by the UN Secretary General on Respect of Human Rights in Armed Conflicts, UN DOC. A/7720 1969; A/8052 (1970); A/8370, 1971.

many of these non-governmental organisations participate in the work of public international organisations actively.

1. PRIVATE CORPORATIONS

In the arena of modern international relations, there are such big combines like Unilever concern, Royal Dutch Shell, General Motors Corporation, and a number of other gigantic private Companies. These are clearly commercial combines which in the words of Tinberg, 'have to a large extent wrested the substance of sovereignty from the so-called sovereign state'.

Many of the large companies get their capital from different countries, and often have subsidiaries or associates in foreign countries. The private non-profit institutions that make grants for public purposes depend for their existence on the private accumulation of wealth and of fiscal and moral incentives for its philanthropic use.

Again, though in terms of international expenditures they do not approach states in importance, nonetheless, the resources and attention of the larger philanthropic foundations, especially such as Carnegie, Ford, Rockefeller Foundations, can be critically important in specific sectors of other societies.

In comparing the international position of all these entities with that of international governmental organisations, one must start with the fact that they are in strict legal theory, subjects of private law.

But, however, the very fact that private corporations like those just named, and hundreds of others, are engaged in vast and complex international operations, which involve them in manifold contacts with different governments and in many cases with the public international financial agencies, suggests that the problem

7 Here the notion 'private corporations' is employed in the most general sense to designate all combines of non-governmental character which operate on the international sphere and play a more or less active role in re-shaping the structure of the contemporary international community.


9 For a recent and detailed discussion of the economic strength and influence of these foundations on the international plane, see, Peter B. Bell, "The Ford Foundation as a Transnational Actor", in International Organisation, Vol. XXV, No. 3, Summer 1971, at 465.
of their international status cannot be so simply dismissed.

Arnold Wolfers noted more than a decade ago that, 'the Vatican, the Arabian-American Oil Company, and a host of other non-state entities are able on occasion to affect the course of international events. When this happens, the entities become actors in the international arena and competitors of the nation state. Their ability to operate as international or transnational actors may be traced to the fact that men identify themselves and their interests with corporate bodies other than the nation state'.

Long before Wolfers, Eugene A. Korovin, a leading Soviet jurist and one of the founders of Soviet doctrine of international law had written in the same vein, challenging the notion of the state as the sole and executive subject of international law. He accorded recognition to the international personality of the World Trade Union Federation whose membership he reckoned neared 65 million, without, however, drawing the legal consequences this recognition should have in law.

It will be useful to examine further what major international transactions these private corporations engage in with States. How are disputes between the parties arising out of such transactions resolved? What law is applicable in such contractual relationships?

2. SURVEY OF THE PRINCIPAL TYPES OF TRANSACTIONS BETWEEN PRIVATE CORPORATIONS AND STATES AND THEIR NATURE:

a. Concession Agreements:

The transactions between private corporations and governments are in many cases these type of agreements. To explain what we mean by this sort of agreement, we choose to adopt for our present purpose the working definition proposed by Fatouros. According to him, 'a concession agreement is an instrument concluded between a state and a private person and providing for the grant by the state to the individual of certain rights or powers which normally would belong to and be exercised by the state'.

These may involve the permission given to a foreign company by the territorial government to exploit certain natural resources under specific conditions. Usually, these conditions include normal rights and obligations of commercial transactions: time limits for delivery of goods or performances of services, obligations to proceed with proper care, the apportionment of profits, stipulations as to the manner and extent of permissible imports, the employment quota of foreign and local personnel and the repatriation of earnings and capital. Typical characteristics of concession agreements are that they relate to mineral and other natural resources or to the operation of enterprises of public utility. It is vital to add that concessions may vary in their object, type and legal nature, and therefore, may involve basically different legal transactions and relationships.

b. Instruments of Approach:

A good example of such an instrument is the one issued in May 1956 by the Greek Government concerning the importation of capital for the exploitation of Greek asbestos by an American Corporation.

The decree starts with a statement of approval of the importation of capital up to the sum of $8,350,000, to be used by the investing company for exploration, research and mining of asbestos, and for its production and sale. The use of the capital for the purpose specified in the initial statement is an essential condition of the continued validity of the whole instrument. The form in which the capital is to be imported is clearly stipulated — namely, in the form of machinery and foreign exchange in equal parts, over a period of slightly more than four years.

Should the need arise, the implementation of the provisions is


12 Royal Decree of May 30/June 23, 1956, concerning the approval of the importation of capital from abroad, by virtue of Legislative Decree No. 2687/1953, by the Konnecott Copper Corporation.
to be ascertained by the Ministry of Industry of Greece whose report is subject to a review by a special Committee composed of representatives of two other ministries and of the investor, if the investor contests the accuracy of the Ministry of Industry's report. The investing corporation is allowed to transfer abroad, without limitation, the capital imported and profits. The investing corporation is granted exemptions from import duties and other charges on the machinery imported by it during the initial period of ten years. During the same period, it is also exempted from all city and other local taxes and charges. The employment of foreign personnel up to the number of twenty-five persons is permitted, and such personnel are allowed to export part of their salaries. Finally, the instrument contains detailed provisions for arbitration in case of dispute.

c. Guarantee Contracts:

By this agreement a state gives an investor, under certain conditions, a number of guarantees or privileges, in the absence of special statutes regulating the granting of such guarantees. It must be pointed out, that though these three types of instruments appear similar in many ways, they are not identical.

They often differ in form as well as in content. While instruments of approval usually take the form of administrative acts, concession agreements and guarantee contracts often assume the form of legislation. In content they differ from the point of view of the fact that concession agreements cover a wider range of issues of a legal, economic and political character, than either guarantee contracts or instruments of approval. 13

d. Economic Development Agreements:

The modern economic development agreements made by developing countries with foreign corporations include: Ghana - Valco Agreement 1960. 14 India - Vacuum Oil Agreement 1952,15 and the Iran Consortium Agreement, 1954.16 Each of these agreements contains provisions for the submission of disputes to arbitration which will form the central point of the next question of our discussion.

3. ARBITRATION:

The settlement of disputes between individuals appear to be the oldest form of judicial practice. It has preceded the creation of judicial courts and tribunals. However, the settlement of disputes between states and individuals is a very recent phenomenon. The concept of the settlement of contractual disputes by means of an arbitration agreed upon directly between a State and an individual or corporation without the inter-position of the state of which the individual or a corporation is a national, is a fairly recent development.17 What explains this new trend one may ask? As we have observed above, contemporary international relationships have witnessed more efforts at integration between peoples than perhaps at any other time in human history. The need for the settlement of contractual disputes between states and private parties is consequent upon the fact of the increase in foreign investments, concession as well as economic development agreements involving foreign capital and the expansion of international commercial transactions. Besides, a state's trading or industrial activities carried out under the shield of

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14 This agreement was concluded on 17 November 1960, between the Government of Ghana and the Volta Aluminium Company (a Consortium of American and Canadian Companies) for the construction and operation of an aluminium smelter to utilize electric power produced from the dam to be constructed on the Volta river. For a detailed discussion of this agreement see, Nwogugu, The Legal Problems of Foreign Investment in Developing Countries, Manchester University Press, 1965, pp. 170-173.
15 This took the form of exchange of notes between the Government of India and the Standard Vacuum Oil Company for the construction of oil refineries in India.
16 The agreement was between the Government of Iran and the National Iranian Oil Company on the one hand, and a consortium of American, British, French and Dutch companies on the other, granting the consortium the right to prospect and produce oil for a period of twenty-five years, with provision for renewal.
the state's jurisdictional immunities no longer produce maximum result.

Nwogugu has rightly remarked that arbitration provides flexible and important machinery not only for the settlement of investment disputes, but also for the settlement of commercial disputes. Such a procedure will help to limit the claim of sovereign immunity which constitutes a hindrance in suing a foreign state.

An arbitral tribunal could be national (i.e. local) or international, whose special characteristic is that the arbitrators are selected from different countries. Another important feature of an international arbitral tribunal is that it may be either permanent or ad hoc. Nowadays, it is common to observe that arbitral machinery in contractual and commercial transactions between states and private corporations are found in a number of state contracts relating to oil concessions. A few examples will illustrate the nature of such provisions.

Henry Cattan quotes the Middle East Oil concession of 1910 granted to D'Arcy by the Persian Government, as, perhaps, the first of such concessions to provide that disputes between the parties which are not settled by negotiation or mutual agreement shall be resolved by arbitration. According to Article 17 of the concession agreement, any disputes that may arise between the parties with regard to its interpretation or defining the rights and duties of the parties shall be submitted to two arbitrators at Teheran, one of whom shall be named by each of the parties, and to an umpire, who shall be appointed by the arbitrators before they proceed to arbitrate. The decision of the arbitrators or in the event of their disagreement, that of the umpire, shall be final.

Such concessional arbitration agreements and similar types of international transactions have been characterised by some writers as being akin to international treaties. This may be because in such transactions, public international law, rather than the national system of law of any of the parties may be expressly, or by implication, indicated as the law governing the contract. Besides, certain arbitration agreements incorporate clauses providing for the appointment of a neutral arbitrator as chairman, and two arbitrators chosen by the parties which places the government and foreign private party or parties on the same legal footing, at least for purposes of the interpretation and adjudication of the agreement. But this 'equality' is anything but perfect, as the government party, invoking its sovereign powers, can in practice, defy the arbitration clause as much as it can cancel or dishonour the agreement as a whole.

It must be pointed out that even though there is a progressive trend whereby oil concessions between states and private corporations provide that disputes between the parties which are not settled by negotiation or mutual agreement shall be resolved by arbitration, there seems to be limited use being made of arbitration in practice. It does not appear that states wish to arbitrate such disputes. For public relations purposes, states opt for settlement through negotiations or mutual agreement, rather than by arbitration as no state would like to be on record for failing to carry out its international obligations, resulting from the decision of an international arbitration tribunal.

-Sometimes the parties choose to invoke the so-called re-negotiation clause provided for in the contractual agreements between the state and private persons. According to this clause, any of the contracting parties reserves the right to call for a re-examination of the entire contract. But this must be requested in the manner agreed upon by the parties and within the time limit stipulated in the agreement. However, it is never certain what would result from such an exercise. The chances are even that the position of the party re-

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18 Nwogugu, Legal problems of foreign investments in developing countries, Manchester 1965, p. 240.
19 Ibid., at 241. In the Lena Gold Field Case of September 2, 1930 which involved a British private company and the Soviet Government, the arbitration tribunal found in favour of the company without making any reference to the sovereignty of the state of Russia. The tribunal held that, the Lena Company was entitled 'to be compensated in money for the value of the benefits of which it had been wrongfully deprived. On ordinary legal principles, this constitutes a right of action or damages but the court prefers to base its award on the principle of 'unjust enrichment' in its opinion, the money result is the same'. See, Lauterpacht, Annual Digest of Public International Law Cases, 1920-30, at pp. 3-4.
20 The Permanent Court of Arbitration has its seat in the Peace Palace at the Hague. It was created as a result of the Hague Convention for the Pacific Settlement of International Disputes of 29 July 1899 which was revised and later replaced by the 1907 Hague Convention.
21 Henry Cattan, supra, at 143.
22 Ibid.
23 Friedmann, op. cit., at 223.
24 Ibid.
25 Ibid., at footnote 5.
questing a re-negotiation may become worse than at first. One reason why this system of settlement of dispute should be encouraged is that it leaves the door open for the parties to maintain constant contact with a view to assessing the progress of the implementation of their various undertakings. Above all, disagreements are contained within the circles of the contracting parties without much publicity which may throw the parties into an open embarrassment or loss of face.

4. THE LAW APPLICABLE IN CONTRACTUAL RELATIONSHIPS BETWEEN A STATE AND A PRIVATE PARTY:

Just as no uniformity exists in the law applicable to state contracts generally, so also no uniformity exists in the law applicable to disputes arising from contracts between a state and a private person. However, modern contracts between a state and a private person usually include clauses indicating by what law they are to be governed. This principle is one of the important elements in contracts concerning more than one legal system.

Some writers have the view that public international law is not to be applied to contracts between a state and a private party. This position which we find unacceptable has also been strongly criticised. Nothing prevents the parties, if they so desire to apply such principles of public international law as are capable of being applied to their agreements. The contracting parties are not restricted by any legal system in the choice of the proper law of their contract. This choice generally may be a particular municipal law system, international law, or general principles of law recognized by civilized nations. Naturally, the mere fact that the parties by agreement make their contract to be governed by international law does not make the private entity concerned a subject of international law. It merely subject the contract to that law.

26 McNair, 33 BYIL (1957), p. 10; Cattan, supra, at 68.
29 Article 16 of the Refinery Agreement between Nigeria and Shell-BP dated 25 July 1962 refers to Nigerian law as the proper law of the Agreement. The same is applicable to the Ghana-Valco Agreement of 1961 whose article 49 stipulates that the contract is to be governed by the law of Ghana as it existed on the date of execution.

In the Serbian Loans Case, the Permanent Court of International Justice held that, 'Any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country'. There are cases to support the view that this pronouncement would be totally invalid in contemporary international transactions.

The arbitration clause included in Article 22 of the AIOC's concession agreement (1933) provided that, 'The award shall be based on the judicial principles contained in Article 38 of the Statute of the Permanent Court'.

The Libyan Petroleum Law of 1955 was amended on 25 November, 1965 to provide that the oil concessions granted in Libya shall be governed by, and interpreted in accordance with, the principles of international law, and in their absence, in accordance with the general principles of law including those applied by international tribunals. Furthermore, in the award of the arbitration between Saudi Arabia and Arabian American Oil Company (Aramco) of 1958, the tribunal came to the conclusion that: 'Public international law should be applied to the effects of the concession, when objective reasons lead it to conclude that certain matters cannot be governed by any rule of the municipal law of any state, as is the case in all matters relating to transport by sea, to the sovereignty of the state on its territorial waters and to the responsibility of states for the violation of its international obligations'.

Again, the Iranian Petroleum Act (1957) has defined 'force majeure' in article 13 as meaning 'occurrences which are recognized as such by the principles of international law'.

Finally, in contractual relationships between a state and a private corporation, the parties may expressly choose the general principles of law recognized by civilized nations as the proper law of their contract. A case in point is article 46 of the Iran Consortium Agree-

30 PCU Series A., Nos. 20/21, at p. 41. On 19 April, 1928, the French and Serbian Governments agreed to submit to the Court, by Special Agreement, a difference which had arisen regarding the payment of certain Serbian loans issued in France between 1895 and 1913.
31 The Award, p. 65.
32 By Article 37(2) of the Iran-Pan-American Oil Company Agreement of 1958 the term 'force majeure' as used in the agreement means 'occurrences which are recognized as such by the principles of international law'. This agreement is discussed further by Ramazani, II International and Comparative Law Quarterly, 1962, p. 503.
ment of 1054 which provides: In view of the diverse nationalities of the parties of this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals. 33

Again, the comment made above, just before the reference to the Serbian Loans case is equally applicable here.

CONCLUSIONS:

The foregoing inquiry into the place of non-governmental organisations and private corporations in international law suggests that, though they cannot be said to enjoy international personality as ascribed to international governmental organisations, nonetheless, they conduct activities on the international plane with often significant political importance and with little or no governmental control. Their status is different from that of public international organisations (i.e. organisations formed by states), which are formed by international treaties concluded between sovereign States.

International law made only by States could be exclusive law only under the assumption that there are no transnational relations outside the State i.e., that the State was the only social community in which the individual is living.

But it is true that a good number of trade unions take part in an organisation which transcends the state territories. The Liberal state is transcended by a multitude of non-state, transnational communities, and particularly in the economic field. While international law was once a law of inter-state relations only, it is now seen to have become the law of all those relations which, not being localized nationally and functionally within the boundaries of specific State, and of one State only, involve intercourse among nations and organizations created independently of States. In dealing with

33 Article 38(1c) of the Statute of the ICJ authorizes the Court to apply general principles of law recognized by civilized nations. It is also usual that where the contracting parties are not clear on the law to govern their contractual relations, the arbitral tribunals apply general principles of law as was the case in the Lena Gold Field Case cited above.

CHAPTER 10
MEMBERSHIP OF INTERNATIONAL ORGANISATIONS

INTRODUCTION

International Organisations have greatly proliferated in the last century. This trend stemmed from the fact that the interests and scope of activities of States on the international arena had significantly increased to the point that States could not conveniently handle most of them alone. Accordingly, the best way to grapple with the situation was thought to be through formation of international organisations.

Most of the organisations were established by an international agreement or instrument. These agreements in turn defined in clear terms the functions and powers of such organisations. Originally, the aims, functions and powers of the organisations were limited to the promotion of cooperation among their members in the fields of politics, economics, culture etc. However, as time grew and societal needs increased these organisations undertook activities similar to those exercised by national governments.

There are no general rules of international law which regulate the admission of members to an international organisation. The rules by which a State acquires membership of an international organisation differ from organisation to organisation. The issue of membership is definitely a very important question in the theory and practice of international organisations. Whether a State is regarded as new or old, the incident of membership affords such a state the right to participate with other members of the organisation on an equal basis. Besides, particularly for the newly emerging States, it serves as an expression or manifestation of their sovereignty and independence. Although no generally accepted methods of acquisition of member-
ship of an international organisation exists, nevertheless, most international organisations distinguish between member states and non-member states.4

It must be pointed out that in discussing Nigerian participation in international organisations in a work of this nature, one necessarily is forced to adopt the method of general discussions of the selected organisations, rather than pretend to embark on a detailed analysis of Nigeria's role in each of the specific organisations selected. Certainly, the available space does not admit of such a scope of inquiry. Accordingly, we are limiting our inquiry to only a few discriminately selected international organisations. References to other international organisations in the discussion will be incidental only. The adequacy of the approach adopted in this chapter will be for the reader to judge. Its purpose is essentially to simplify presentation. This purpose in our considered view seems a satisfactory guide.

In concluding the introductory section of this chapter, a word must be said of the classification of international regional organisations of which Nigeria is a member discussed herein. It will be readily apparent that organisations of an administrative character precede those of predominantly political character. Thus, it is broadly possible to distinguish on the basis of the functions of the organisations. It is also possible to distinguish between the "political" organisations, of a regional character, essentially concerned with the preservation of international peace and security, such as the Organisation of African Unity and the administrative organisations of more limited aims, e.g. Lake Chad Basin Commission, River Niger Commission. The other class of organisations considered important for our consideration are the "economic" organisations such as Economic Commission for Africa, the Economic Community of West African States and the Organisation of Petroleum Exporting Countries.5 We shall start our discussions with the "economic" Organisations.

THE ORGANISATION OF PETROLEUM EXPORTING COUNTRIES6

1. The Formation and Activities of OPEC

The Organisation of Petroleum Exporting Countries is an international economic organisation of the major oil producing countries. About 1949, a consultative meeting of the oil producing nations met for the first time. The aim of the meeting was to discuss the need for closer communication between them.7 The actual formation of the organisation of Petroleum Exporting Countries took place at Baghdad capital of Iraq.8 The original members of the organisation who took part at the preliminary meeting in Venezuela in 1949

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4 These organisations include the United Nations Organisation and its related agencies such as World Health Organisation (WHO), See Articles 4 & 6; Articles 92 and 93 of International Civil Aviation Organisation (ICAO); Articles 6 and 7 of Inter-Governmental Maritime Consultative Organisation (IMCO); Article 11 paras. 1 and 2 of the Constitution of the Universal Postal Union (IPU); Article 1 para. 1(b) and (c) of the Convention of International Telecommunications Union (ITU). On membership in international organisations generally, See Schermers, International Institutional Law, Vol. 1, 1972, pp. 26-27; Schaezengerber, International Law Vol. 3, 1976, pp. 242-268. Howett, The Law of International Institution 3rd Ed. 1975, pp. 342-345.

5 Not all international organisations to which Nigeria belongs can be discussed here. Consequently, some have been deliberately excluded particularly the United Nations Organisation and its specialized agencies like IMF, GATT, UNCTAD, IBRD, ICAO, FAO, UNESCO, WHO, UPU, ITU, IMCO, UNIDO, UNURAL, ICJ, ILO, etc. Much has been written in respect of the United Nations and its specialized Agencies. There exist abundant general and specialized works on the organisation. For general reading on the subject, see Goodrich, The United Nations (1959); Goodrich and Hambro, Charter of the United Nations, Commentary and Documents (2nd ed 1949); Sohn, Cases and Materials on United Nations Law, 1956; Sohn, Basic Documents of the United Nations 1956; Weissberg, The International Status of the UN (1961); Wooten, The United Nations: The first ten years (1957). The exclusion of the UN and its agencies is mainly from the consideration of space. There is no doubt that Nigeria fully participates in their activities. However, the few organisations selected for our examination are hoped to serve as samples of Nigeria's attitude and role in international organisations.

6 Hereinafter referred to as OPEC. Since its formation, a number of literature have been written on the Organised. Most of the writings appeared in the form of newspaper articles while a few appear in monographs. For further references and additional reading see: AYO Akinbobhola "Should Nigeria be in OPEC?" Nigerian Institute of International Affairs Monograph Series No. 3, 1979; Professor J K Onoh, Chapter 9 of his book: "The Nigerian Oil Economy from Prosperity to Glut", St Martin's Press, New York 1983.

7 The consultative meeting was held in Venezuela.

8 In September 1960.
included Venezuela, Iran, Saudi Arabia, Iraq and Kuwait. OPEC's main functions can be summarised as follows:

1. To co-ordinate and unify the petroleum prices of member countries and to determine the best ways of protecting their interests individually and collectively;
2. To seek avenues that ensure the stabilization of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuation, inorder to ensure a steady income to the producing countries;
3. To promote reasonable margin of profit for those investing in the petroleum industry;
4. To guarantee an efficient, reasonable price and regular supply of petroleum to the consuming countries.

The organisation has a secretariat in Vienna, Austria. Most of its activities are processed and carried out through its headquarters in Vienna. For example, the secretariat of the organisation offers specialized technical advice to member nations in the areas of economics, technology administration and law. The Organisation employs experts in various fields of the oil industry. The experts conduct extensive research for the Organisation and store their findings for the consultation and use of members.

OPEC can be described as a special loose type of an international economic organisation. While a normal binding international organisation fashions out rules and regulations for the guidance of the conduct of its members, OPEC does not. In effect OPEC does not exercise any executive authority with sanctions over its members.

What this means is that a member can flout the decisions of the Organisation to reduce or regulate output of oil production to prevent market gluts largely with impunity. Except for passionate appeals no other form of enforcement mechanism is open to the Organisation in respect of such an offending member.

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9 Since the formation of the Organisation, its membership has increased to 13 - Indonesia, Libya, Equador, Algeria, Gabon, Nigeria, Qatar and Abu Dhabi joined much later.

10 See, OPEC Information Booklet, Vienna 1977, pp. 5-6.

2. OPEC And Its Achievements:

Despite the constitutional and solidarity weaknesses of OPEC it has made significant successes - the monopoly of the Western countries in the oil industry before the emergence of OPEC in 1960 has been aptly described by Professor J K Onoh in his book. For a very long time, oil multinationals of American, British, French and Anglo-Dutch origins were the masters of the world industry. They invested their funds, determined the oil production level, fixed the prices of oil and oil products. They also determined the regions where oil production was to be stepped up or down, with the objective of achieving maximum profits for these companies.

One significant achievement of OPEC is that it has not only played an important role in stabilizing posted oil prices and checked further unilateral price reductions by the oil companies, it has brought about agreements with the oil companies providing for higher income prices and a higher income tax rate together with compensation for inflation.

Nigeria, like all member nations of OPEC is being assisted by the Organisation to participate in the ownership and management of foreign oil companies operating in member-territories. The Organisation as it were, transferred power from the oil companies to itself. Apart from that, it has minimised to a great extent, the capability of the oil companies to divide-and-rule the oil-producing countries. The new dimensions in world oil prices and politics emboldened OPEC member countries into stiffening their demands for active participation in the oil and allied industries.

3. Set-Backs:

OPEC as an organisation has had its set-backs. For example, Akinbobola summarized the solidarity problem of OPEC thus:

1. The unevenness of oil distribution and the advantageous
position of many of the Arab countries, particularly Saudi Arabia, in terms of abundant petroleum availability and large financial accumulation.

2. The resource to population needs of each state and the qualitative variation of the level of development and, 

3. The political factor which arose as a result of using oil as a political weapon against the West during the Arab-Israeli War in 1973/74.14

Apart from the problems enumerated above, the centre could no longer hold among OPEC members at the beginning of 1982. This was brought about by the world oil glut. There was grave fear of over-production among OPEC members. There was danger of market forces pushing down OPEC reference prices for various blends of oil. In order to arrest the situation OPEC member states met in Qatar early in 1982 and agreed on production ceilings for its members whereby OPEC’s total oil production was set at 17.5 million barrels a day. The output level was shared among OPEC members according to an agreed ratio based on the oil production of OPEC member countries over the preceding ten years.

In a subsequent meeting of OPEC members held in July 1982 in Vienna to review the allocations there was serious disagreement on future oil pricing and production policies. For the first time, OPEC could no longer speak with one voice as a result of Iran’s refusal to continue with production quota of 1.2 million barrels per day allocated to her during the meeting of Qatar in March 1982. On the other hand, Saudi Arabia was pressed by mainly OPEC members to reduce her quota below 7.5 million barrels a day which she had volunteered in March 1982 at Qatar.

However, Saudi Arabia, proposed a doubling of the fixed 1.5 price differential between the high quality sweet crude produced by countries such as Nigeria, Algeria and Libya and the Saudi Arabian brand. The African oil producing countries vehemently opposed the Saudi Arabian proposal on the ground that the prices of their crudes were already selling above their market rates.

4. Rationale of Nigeria’s Continued Participation in OPEC:

In recent times, much argument has been generated as to whether Nigeria’s membership of OPEC is desirable in view of the country’s present economic predicament. In other words, there appears to be an increased doubt in the minds of many Nigerians as to the usefulness of the country’s continued participation in the organisation.15

There is no doubt that OPEC as an international organisation has got some problems. However, the present difficulties faced by the organisation do not differ from those that could be faced by any other international governmental organisation at any time. The organisation certainly has experienced a number of problems in the last few years and forces which tend to act against the very existence of OPEC are many. Even on international plane, doubt arises in the minds of many analysts whether OPEC can survive the turmoil within its rank and file.

The strongest argument against Nigeria’s continued participation in the Organisation is that, it is a weak link in the OPEC equation and that Nigeria may be crushed by the weight of the heavier member states, especially the Gulf States. On the other hand, those who argue in support of Nigeria’s continued membership of the Organisation are of the firm view that a pull-out is the surest and fastest means of ruining whatever remains in the present and future Nigeria’s oil economy. The present writer tends to support the view that Nigeria continues its membership of the Organisation for a number of considerations.

For over two decades, OPEC proved to be the most formidable raw material cartel ever formed by a group of developing countries, which has been able to withstand international economic and political forces aimed at disintegrating the unity of the Organisation. Membership of OPEC exclusively guarantees some measure of advantages for all the states in it including Nigeria. As has been stated earlier, OPEC members have through their united efforts, destroyed the monopoly status of the seven international major oil producing countries, who in the past exploited the oil resources of member states of OPEC. At the time, all they paid amounted only to token rents and royalties. Above, all, they refused the participation by the governments of those countries in an important endeavour like the oil industry. Nigeria by belonging to OPEC is now participating in

14 Akinbobola, op. cit., p. 5.

15 The conclusion reached by at least two Nigerian writers who have examined the usefulness of the organisation to Nigeria is in the affirmative. See Akinbobola, op. cit. pp. 9-15, Onoh, op. cit. pp. 142-146.
petroleum production and refining as well as other allied industries such as gas and kerosine. In the areas of technical and economic advice, Nigeria would have to pay a great deal to meet the research capabilities of OPEC, if she were to go it alone. By coming together, OPEC member countries have been able to co-ordinate and unify petroleum prices. As a debtor member of OPEC, Nigeria has been able to redeem her international image and restore her credit standing. Another important reason in favour of OPEC’s continued existence is the organisation’s cooperation with third world countries. The organisation makes development funds available to at least 45 African, Asian, Latin American and Caribbean countries.

CONCLUSION:

It has been argued that Nigeria’s economy is significantly dependent on oil. In the absence of a diversified economy, Nigeria needs the cooperation it can get from its colleagues in OPEC to make her oil industry a stable one. Rather than pull out of OPEC, she should examine all possible avenues to make the organisation stronger. A break-up of OPEC will open up the flanks once more for the oil “majors” who are eager to return to their former monopoly in the oil industry.

THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

Historic Perspective of ECOWAS:

An important economic region in which Nigeria is not only a member, but played a dominant role in establishing it is the ECOWAS. According to an editorial in one of Nigeria’s leading daily newspapers on the history of ECOWAS, “the road had been hard and long and many were the pioneers who laboured to build it”. A number of writers on the historical background of ECOWAS indicate a period ranging from ten to twelve years between the inception of the original idea of the organisation and its actual realisation. However, it would appear that the significance of forming an economic cooperation among the States of the region pre-dates the departure of the colonial powers. The first concerted effort or attempt to achieve collective self reliance in West Africa was made in November 1963 when a conference of industrial harmonization in the sub-region was held in Lagos.

This was followed at Niamey by a conference on economic cooperation in October 1966. At a similar conference at Accra in April 1967, an agreement on the Charter of a proposed Economic Community in West Africa was signed. An interim Council of Ministers was established under this framework to prepare a draft Treaty for the proposed Community. Early in November 1967, the four Heads of State of the Organisation of Senegalese River States met at Bamaco and expressed their intention of extending their cooperation through the creation of a regional group embracing the whole of West Africa and accordingly mandated the President of the Islamic Republic of Mauritania to communicate their intention to the Heads of State of the other West African countries.

Consequent upon the above move, the Heads of State met at Monrovia and signed the Protocol establishing the West African Regional Group. Officials of the Governments of Nigeria and Guinea met later in 1968 to prepare the studies which were submitted to the then 14 West African States pending their consideration by the Interim Council of Ministers. Unfortunately, this body

16 Onoh, op. cit., p. 144.
17 By 1980, Nigeria earned 75% of its total revenue from oil, while 95% of her total export was from oil.
18 See, Editorial, Sunday Renaissance, Sunday, June 1, 1975, p. 3. The name of this paper has been changed to “Daily Star”. 

19 The Pan-African Congress held at Manchester in 1945, after noting the systematic exploitation of the economic resources of West Africa by the imperial powers recommended, among other things, the establishment of a West African Economic Union. Further, the first conference of the political parties in Africa held in Accra in December 1958 called for the removal of customs and other trade restrictions on trade between African States and the conclusion of multilateral payments agreements, with a view to enhancing economic exchanges and the consequent establishment of an African Common Market.
20 The Interim Council held its first meeting at Dakar in November, 1967, when it was agreed that the inaugural meeting of the proposed Community should take place at the level of Heads of State of Governments.
21 April 1968. The meeting instructed Guinea and Nigeria to prepare priority studies on areas of cooperation while Liberia and Senegal were asked to prepare a draft Treaty and Protocol for customs union.
never met and as a result, neither the priority studies nor the draft treaty and protocol on the customs union were considered, let alone adopted.

In April 1972, the Heads of State of Nigeria and Togo met and decided to revive the process of establishing an economic Community of West African States. Accordingly, they mandated their ministers and officials to work out the frame-work and strategy of such cooperation.

At subsequent meetings the Governments of the two countries agreed on the following guiding principles:

(i) That the new economic community should cut across linguistic and cultural barriers;
(ii) That initially, limited objectives capable of early realisation should be pursued;
(iii) That a pragmatic and flexible approach should be adopted;
(iv) That the necessary institutions should be set up to deal with specific issues calling for immediate attention and,
(v) That an open door policy should be adopted which would enable all the countries in the sub-region to become members of the community if and when they were ready.

The proposals embodying the above principles and others were later submitted by the two Governments in November 1973 to a meeting of Ministers representing 15 West African countries at Lome after a visit to all countries by a joint Nigerian/Togolese Ministerial delegation. A third Ministerial meeting to finalise the treaty was held in Lagos and the treaty was subsequently signed by the Heads of State and Plenipotentiaries of 15 West African countries at Lagos on 28 May, 1975.

The ECOWAS Treaty:

This very important legal instrument represents the first successful economic arrangement of West African States in which free trade and free mobility of labour and skill would enhance the harmonization of economic development embracing agriculture, industries, transport and communications and training and skills. The treaty's preamble is very impressive followed by a set of important and far-reaching aims and objectives. It is generally accepted that the provisions of either the preamble or the aims of an international convention do not create legal obligations for the parties. One would go further to stress that at best, such provisions constitute an embodiment of the aspirations of the makers of the documents underlying their mood.

The treaty creates form institutions for the Community, namely:

(i) The Authority of Heads of State and Government which shall be responsible for the general direction and control of the performance of the community's executive function and shall meet at least once a year;
(ii) The Council of Ministers which shall consist of two representatives from each state and shall meet twice a year;
(iii) The executive secretariat with an executive secretary, two deputy secretaries, a financial controller and other officers of the secretariat shall be responsible only to the Community itself;

22 Presidents Gowan and Eyadema of Nigeria and Togo respectively.
23 See, Professor Adebayo Adedeji, "Collective Self-Reliance in Developing Africa, Scope, Prospects, and Problems" Keynote Address at the International Conference on the Economic Community of West African States, Lagos 23-27 August, 1976, p. 6. The Conference was jointly organised by the Central Bank of Nigeria and the Nigerian Institute of International Affairs (NIIA) and was held at the Institute's building in Victoria Island. This delegation was led by Professor Adebayo Adedeji of Nigeria. For further readings on Nigeria's role in the formation of ECOWAS, see Aluko "Nigeria's Initiative in the West African Economic Community" Societe d'Etude et d'Expansion (Lege) November/December 1973, 870-880; Nigeria's role in Intra-African Relation”, African Affairs, April, 1973, 72 (287) 145-162.
24 Only a highlight of the main provisions of the treaty and their assessment where necessary, will be undertaken here. The treaty contains 64 articles arranged into 14 chapters.
25 The aims and objectives of the treaty are spelt out in Chapter 1. For a further statement on the legal nature of preambular provisions in international conventions, see, Professor Osita Eze, "The ECOWAS Treaty and the Movement of Aliens, Goods and Services" Paper presented at the Conference on "Nigeria's International Boundaries", Lagos, April 5th - 7th, 1982, p. 2.
26 For further statement on the legal nature of preambular provisions in international conventions, see, Professor Osita Eze, "The ECOWAS Treaty and the Movement of Aliens, Goods and Services" Paper presented at the Conference on "Nigeria's International Boundaries", Lagos, April 5th - 7th, 1982, p. 2. See, Articles 5 - 12 for details of the establishment, composition and functions of the institutions.
(iv) The Tribunal of the Community which shall settle disputes regarding the interpretation or application of the treaty where direct agreement fails.

Member States are enjoined to co-ordinate and harmonize their policies, particularly in the fields of political, diplomatic, economic, educational and cultural co-operation as well as health, sanitation, nutritional, scientific and technical cooperation. In accordance with the above purposes, member states commit themselves to the further promotion of the following basic principles:

(a) The sovereign equality of all member States;
(b) Non-interference in the internal affairs of States;
(c) Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;
(d) Peaceful settlement of disputes by negotiation; mediation, conciliation or arbitration;
(e) Unreserved condemnation, in all its forms of political assassination as well as of subversive activities on the part of neighbouring States or any other State;
(f) Absolute dedication to the total emancipation of the African territories which are still dependent; and
(g) Affirmation of a policy of non-alignment with respect to blocs.

The treaty makes specific reference to the Charter of the United Nations as well as to the Universal Declaration of Human Rights. The principal aim of the Community is to promote co-operation and development in all the fields of economic activity, particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and in social and cultural matters for the purpose of raising the standard of living of its people, of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to the progress and development of the African continent.

To enable the Community to achieve the above, agreement was reached to bring about by stages:

(a) the elimination as between the member states of customs duties and other charges of equivalent effect in respect of the importation and exportation of goods;
(b) the abolition of quantitative and administrative restrictions on trade among the member states;
(c) the establishment of a common customs tariff and a common commercial policy towards third countries;
(d) the abolition as between the member states of the obstacles of the free movement of persons, services and capital;
(e) the harmonization of the agricultural policies and the promotion of economic projects in the member states notably in the fields of marketing, research and agro-industrial enterprises;
(f) the implementation of schemes for the joint development of transport, communication, energy and other infrastructural facilities as well as the evolution of a common policy in these fields;
(g) the harmonization of the economic and industrial policies of the member states and the elimination of disparities in the area of development of member states;
(h) the harmonization required for the proper functioning of the community of the monetary policies of the member states;
(i) the establishment of a Fund for Co-operation, Compensation and Development;
(j) such other activities calculated to further the aims of the community as the member states may from time to time undertake in common.

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31 Articles 12-15 Ibid.
32 Articles 16 and 18 Ibid.
33 Article 27, Ibid. For further reading on this, see Chukwurah, A.D., "ECOWAS, Obstacles to Labour Migration and Residence. Paper presented at the International Conference on ECOWAS held at NIIA, Lagos, 23-27 August, 1976.
34 Articles 33-35, ibid.
35 Articles 41-47, ibid.
36 Articles 28-31, ibid.
37 Articles 50-51, ibid.
38 Article 2(2), ibid.
An important highlight of the treaty is the provision of the most favoured nation clause. Under this Article, member states shall ascend to one another in relation to trade between them the most favoured nation treatment, and in no case shall tariff concessions granted to a third country under an agreement with a member state be more favourable than those applicable under the Treaty. Copies of such agreements referred to in paragraph 1 of this Article, shall be transmitted by the member states which are parties to them, to the Executive Secretariat of the Community. Any agreement between a member state and a third country, under which tariff concessions are granted, must not derogate from the obligations of that member state under the Treaty.

Under the Treaty, all citizens of member states are to be regarded as “community citizens” and all obstacles to their freedom of movement and residence within the community, abolished. Member states can continue to impose restriction in the interest of security, the control of weapons, the protection of health or morality, the transfer of gold, silver or precious stones, or the protection of “national treasures”. “Dumping” is prohibited. No legislation will directly or indirectly discriminate against products of member states.

The Treaty provides for what it describes as “Safeguard Clause”. This clause is intended to be invoked by a member state in case of an economic crisis in the territory of such a member. In the event of serious disturbance occurring in the economy of a member state, the member state concerned shall, after informing the Executive Secretary and the other member states, take the necessary safeguard measures pending the approval of the Council of Ministers. They may not be extended beyond that period except with the approval of the Council of Ministers. The Council of Ministers shall examine the method of application of these measures while they remain in force.

The Treaty provides for settlement of disputes between member states. Any dispute that may arise among the member states regarding the interpretation or application of this Treaty shall be amicably settled by direct agreement. In the event of failure to settle such disputes, the matter may be referred to the Tribunal of the Community by a party to such dispute and the decision of the Tribunal shall be final.

Evaluation of the Treaty:

Overall, the provision of the ECOWAS Treaty covers a wide range of subject of vital importance to the member states. However, it must be observed that the provisions of the treaty are rather loose in a number of respects. It has been argued that the treaty as it is presently construed would create a freedom which favours the most developed member states of the Community at the expense of the less developed ones. As one writer rightly argues, a major criticism of the treaty is that the elimination of customs duties among the states might open wider markets for those countries, the nucleus of whose heavy industries have been established or are about to be. The consequence of this state of affairs would be that such countries would then swamp the markets of the less developed ones with products that are produced at lower costs because of economies of scale and availability of cheaper raw materials from within the community. The result of this happening would be that the less developed member states would have an uphill task trying to compete in this wider market since their younger industries might produce at higher costs. This fear though genuine, has been adequately taken care of under the functions of the committee on the harmonization of economic and industrial policies. This committee must endeavour to adopt such rational measures in the exercise of their function as to ensure that adequate safeguards are worked out to protect the interest of the less de-
veloped member states. Furthermore, a provision for compensation for loss of revenue is contained in the treaty. However, some difficulty is bound to arise on the part of the member state wishing to invoke this provision in appropriate circumstances. For example, such a member state has first to report to the Executive Secretary who would thereafter refer the matter to the appropriate Commission or Commissioner to determine the compensation to be paid. For such a loss, there would be certainly a lag between the reporting of the loss and the final payment of compensation.

The other strong criticism which is often levelled against the ECOWAS Treaty, is the dominant position occupied by Nigeria. The basis of this fear is the apparent superiority of Nigeria both in population and in wealth as compared with other member states. This of course is a natural fear of minority in an international arrangement of this nature. Yet, on a closer examination of the contributions being made to nurture the organisation, Nigeria is giving more than she can get, at least in the short run. It would appear that in an effort by Nigeria to dispel this fear, she has given many concessions to show that such misgivings are unfounded. Apart from declaring from the onset that she was joining ECOWAS as a partner on the principle of sovereign equality and not to dominate, Nigeria has consistently worked hard to see ECOWAS stand as a formidable regional economic organisation. In conclusion, it must be stated that there is no doubt, that as ECOWAS celebrates its ninth birthday, it has got much to show for the period it has so far lived.

THE LAKE CHAD BASIN COMMISSION:

Historic Perspective:

The strategic and geographical location of Lake Chad, coupled with its enormous economic potentials, moved the main users of the Lake to come together to work out the details of maximizing the benefits of the Lake under a legal framework. In furtherance of this purpose, a meeting of Heads of State of the user countries was held on May 21, 1964. The result of the meeting was the establishment of the Lake Chad Basin Structure and the Lake Chad Commission.

Legal Framework:

Two documents, namely the Convention and Statute, as well as an Agreement on Water Utilization and Conservation in the Lake Chad, constitute the legal basis of the Chad Basin, upon which it is founded.

The Lake Chad Basin Commission is established by the Convention and Statute. One of its main functions is the preparation of regulations in accordance with the Convention and Statute for the conduct of the activities of the Basin.

It must be pointed out that the Commission does not enjoy executive powers, rather it makes recommendations to members, which they are at liberty to accept or to reject. This certainly is a weak aspect of the set-up.

However, the Commission sets up specialist committees whose main function is to conduct researches in various aspects of the potentials of the Lake for eventual dissemination to member states for adoption.

The particular interest of the Commission is to harness the agricultural and fishery resources of the Lake. To ensure the full realization of this objective, constant contact is maintained with other appropriate bodies of member states as well as the Food and Agricultural Organisation of the United Nations Organisation.

Under the arrangement of the Commission, member states are enjoined to set up River Basin Development Authorities within their states. In satisfaction of this requirement, Nigeria did in 1976, enact the River Basin Development Authorities Act. The Act

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52 Article 25, ibid.
53 For the relative population position of the fifteen member states of ECOWAS, See, Chukwurah, op. cit.
54 The eloquent testimony is seen in the provisions on visitors' visa and common citizenship etc.
56 The principal users of the Lake are Chad, Cameroun, Niger and Nigeria.
57 The Secretariat of the Commission was located in Fort Lamy in Chad.
58 Signed at Fort Lamy on May 22, 1964.
60 Article 1 of the Convention and Statute.
61 No. 25, 1976. Recently, the Buhari Administration gave a hint that the existing River Basin Development Authorities will be reorganised to avoid duplication and financial waste.
established ten River Basin Development Authorities including the Chad Basin Development Authority. The 1976 Act was repealed by the River Basin Development Authorities Act of 1979. Instead of the original ten River Basin Development Authorities, eleven were created including the Chad Basin Development Authority. The functions of the authorities are spelt out in the Act, and include the following:

(a) to undertake comprehensive development of both surface and underground water resources for multi-purpose use;
(b) to undertake schemes for the control of floods and erosion, and for water-shed management including
(c) to assist the State and Local Governments in the implementation of some specific rural development work in the Authority's area.

THE RIVER NIGER COMMISSION:

Historic Perspective:

The River Niger Commission, like the Chad Basin Commission discussed earlier, can be described as an administrative and consultative inter-regional organisation. The Commission has a relatively short history. In February 1963, three years after Nigeria attained independence, a conference was held in Niamey, the capital of the Republic of Niger. The conference was attended by seven riparian States, users of the River Niger.

The Legal Framework:

The result of the conference was the production of a Convention agreeable to the seven States on the regime of the River Niger.

To this Convention was annexed a Statute, and both formed the operative international agreements for the regulation of the regime of the Niger. The Commission has five principal functions, as provided under the Convention, namely:

(a) to draw up General Regulations for the application of the principles affirmed in the Statute and the Convention to which it is annexed. The General Regulations and the other decisions of the Commission shall, after approval by the states concerned, have binding force with regard to their mutual relations as well as their internal regulations;
(b) to supervise the application of the above-mentioned Regulations;
(c) to give its opinion on all projects drawn up by the States with a view to the development of the River as set out in Article 4 of the Statute, the Commission may also recommend studies and works which it regards as useful for the national exploitation of the River;
(d) to undertake, at the request of one or more riparian states, the planning and execution of any project for the development of the River;
(e) to inform the riparian states of all schemes and questions concerning the development of the basin, to harmonize inter-state relations in the field, to examine complaints and to contribute to the settlement of disputes.

THE ORGANISATION OF AFRICAN UNITY

1. The Formation:

Another important organisation in which Nigeria is not only an active member but a founding state is the Organisation of African


66 Article 11 of the Convention.
Unity (OAU). The formation of this body was not an easy one in the least for a number of incidents which tended to divide the countries that formed it prefixed its appearance. There are too many of such factors to admit serious discussions of them here. However, mention must be made of the existence of three distinct political groups into which the African States had fallen. The immediate causes of the groupings can be traced to the disagreements over the status of Algeria during her liberation wars and the disagreements on the policy towards the civil war which raged in Congo (Kinshasa).

Irrespective of the clear differences existing among the African States on a number of issues, it appeared that they were in agreement on the need for setting up a central organisation in which African problems would be discussed. Moves were made from different angles to achieve this objective including the lobby halls of the United Nations Organisation. It has been argued that former President Sekou Toure' of Guinea and former Emperor Haile Selassie of Ethiopia were leading figures in the process of reconciliation and that it was at the meeting of the two statesmen at Asmara, in Ethiopia, on June 28, 1962 that the idea of a Summit Conference of all independent African States was born.

The Summit Conference of the Heads of State and Government of Independent African States was preceded by that of the Foreign

67 The Organisation was founded on May 24, 1963, a year often referred to by writers as Africa's Unity Year. Leaders of thirty-one African States signed its Charter which is hoped to lay the foundations of a continental Union or lead to a substantial degree of economic and political unity highly needed in Africa.

68 These were the Casablanca group, the Monrovia group and the Brazzaville Twelve. The Monrovia group got its name from the Conference held in Monrovia, May 8-12, 1961. This conference was attended by Liberia, Ivory Coast, Cameroun, Senegal, Malagasy Republic, Togo, Dahomey, Chad, Niger, Upper Volta, Congo (Brazzaville) now Kinshasa, Central African Republic, Gabon, Ethiopia and Libya. These signed the Lagos Charter of December 20, 1962. The Casablanca group included Ghana, Guinea, Mali, Morocco and the United Arab Republic whose charter came into force on January 7, 1963. The Brazzaville Twelve is made up of Cameroun, Central African Republic, Congo (Brazzaville), Ivory Coast, Dahomey (now Benin Republic), Gabon, Mauritania, Upper Volta, Madagascar (now Malagasy Republic), Niger, Senegal and Chad. They signed their Charter on September 12, 1961.

69 Zdenek Cervenka, The Organisation of African Unity and its Charter, 1968, 1969 pp. 1-2. Ministries who actually did the preparatory work. Although the agenda of the conference included many topics, two topics dominated the proceedings of the conference, namely:

(a) African Unity;
(b) Decolonisation of Africa.

During the discussion of these questions, African Heads of States and Governments made their positions clear. The main trust of difference in the proposal package for Unity suggested by the various Heads of States was between that of Ghana that suggested an outright Union Government for Africa and those states including Nigeria that advocated a gradual process to African Unity.

According to Late Sir Abubakar Tafawa Balewa, who led the Nigerian delegation:

"Nigeria's stand is that, if we want unity in Africa, we must first agree to certain essential things. The first is that African States must respect one another. There must be acceptance of equality by all the States. no matter whether they are big or small, they are all sovereign and their sovereignty is sovereignty. No my mind, we cannot achieve this African Unity as long as some African countries continue to carry on subversive activities in other African countries."

He stressed that African Unity could only be achieved by taking practical steps in economic, educational, scientific and cultural cooperation and by trying first to get the Africans to understand themselves before embarking on the more complicated and more

71 Cervenka, op. cit., p. 9.
72 Nigeria held Ghana responsible for the coup d'etat which toppled President Sylvanus Olympio on January 13, 1963. The Nigerian Foreign Minister at the time, Jaja Nwachukwu had publicly alleged that Ghana was behind the coup and called a meeting of the Monrovia Group to secure the condemnation of Ghana and prevent the recognition of the provisional Government of Monsieur Grunitzky. The only evidence adduced to support this stand was that according to him, Ghana was not happy with Togo for harbouring Ghanaian political refugees.
difficult arrangement of political union.

Practically, all the other African Heads of States and Governments present at the Conference stated their position on the matter of African Unity and economic cooperation. It became clear that all of them were seized by a genuine urge for an immediate action. In summary, most of the delegates supported what has been described as the limited "functionalist" approach to unity, and thus signed a Charter structured along this line.

2. The Purpose of the Organisation:

The purposes of the Organisation are stated in Article 11(1) as follows:

1. to promote the unity and solidarity of the African States;
2. to cooperate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
3. to defend their sovereignty, their territorial integrity and independence;
4. to eradicate all forms of colonialism from Africa;
5. to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

In order to achieve these goals, Member-States resolved among themselves to co-ordinate and harmonize their general policies in the fields of political and diplomatic cooperation; economic cooperation including transport and communications; educational and cultural cooperation; health, sanitation and nutritional cooperation; scientific and technical cooperation and co-operation for defence and security.

3. Principles of the Organisation:

The seven principles which guide the activities of the Organisation are embodied in Article III, as follows:

1. the sovereign equality of all Member-States;
2. non-interference in the internal affairs of States;
3. respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence;
4. peaceful settlement of disputes by negotiation, mediation, conciliation, or arbitration;
5. unreserved condemnation, in all its forms, of political assassination as well as subversive activities on the part of neighbouring States or any other State;
6. absolute dedication to the total emancipation of the African territories which are still dependent;
7. affirmation of a policy of non-alignment with regard to all blocs.

What the Organisation has done is to adopt in respect of the first four principles the generally recognized principles of international law as embodied in the Charter of the United Nations Organisation.

4. Conclusion:

Apart from playing an active role in the formation of the Organisation, Nigeria's role in advancing and sustaining its objectives and principles are well known on the whole questions of decolonization and apartheid in Africa. Indeed, she has been a member of a number of Committees charged with the question of national liberation on the continent. The countries like Angola, Zimbabwe,

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73 Cervenka, op. cit., p. 12
74 Articles 2(1); 2(7); 1(2) of the Charter of U.N.O. for example.
75 Nigeria is a member of the Coordinating Committee for the Liberation of the African Continent whose functions are to coordinate financial assistance to national liberation movements; to coordinate military training and distribution of military equipment to such movements; to provide military advice through its Ad Hoc Committee of Experts; and to reconcile rival liberation movements and assess their efforts. Apart from this Committee, Nigeria was a member of the Committee on Sanctions Against Southern Rhodesia established on May 29, 1968 and also a member of the United Nations Council for Namibia established on May 19, 1967. From 6th November 1962, she has been a member of the U.N. Special Committee on the Policies of Apartheid. In fact the present Chairman of this Committee is Rtd. Major-General Joseph Garba, the Nigerian Permanent Representative at the U.N.
Mozambique and Guinea-Bissau received enormous financial and moral support in their struggles for independence.

So far, two very important Conferences in the struggle against apartheid have been held in Nigeria with the country’s substantial financial support. These are the World Conference Against Apartheid and the recent International Seminar on the Legal Aspects of the Apartheid Regime in South Africa and other Legal Aspects on the Struggle Against Apartheid.

Held in Lagos between August 22-26, 1977.

Held in Lagos between August 16 and 19, 1984 under the sponsorship of the U.N. Special Committee Against Apartheid in cooperation with the Government of Nigeria.

CHAPTER 11

LAW OF TREATIES OF FEDERAL STATES

GENERAL DOCTRINE:

Treaties lie at the centre of international legal relations and the capacity to enter into treaty relations with other subjects of international law is a very important attribute of personality in international law. Treaty-making powers and their implementation constitute very essential avenues through which governments participate in international life. In the previous section on the legal status of the Nigerian Federation and its component states, our inquiry led us to the conclusion that only the Central Government of Nigeria reserves the power to conduct the foreign relations of the country. That notwithstanding, it is considered necessary to look much more closely here at the Nigerian treaty practice against the background of the practice of other Federal structures and their component states.

Usually, in a Federal State or Union like Nigeria, the power to make and implement treaties is assigned to the Federal Government in the conduct of foreign affairs and provided for in the constitution. While international law governs the relations between subjects of international law, it does not follow that the municipal law has no concern with treaties. In fact, the subject of treaties is governed partly by international law and partly by municipal law, although the aspects which each system of law regulates are different.

Municipal law determines the competence of the government of a state, that is, of its treaty-making organs or organ, the procedure to be followed by them in the making of treaties, and the effects of treaties upon persons within its allegiance. There is certainly a significant link or relationship between international law and constitutional law with regard to the question of the division of the treaty-making power of a Federal State between its central government and its component units.

We now propose to examine the treaty-making procedures of a number of Federal States, paying particular attention to the position of their component states in the exercise of this complicated function. In this regard, Nigeria’s treaty-making and implementation practice as a federal state will be given a prominent place. Another
interesting question would be to determine whether the limited treaty-making rights granted by some Federal Constitutions to their component units have enabled the latter to attain international personality. It is hoped that the approach adopted by us here whereby an examination of the treaty-making practice of some selected Federal states is contrasted with that of Nigeria will afford an opportunity to determine whether in the light of past experiences, there would be the need either for an affirmation or for a cautious moderation of the present practice. This could be useful when the future Nigerian Constitution will be drawn if and when the present military regime decides to surrender the reins of power to the civilians.

It is a universally accepted principle of international law in respect of the question of what authority or authorities shall exercise the treaty-making power of a sovereign state or other subject of international law; or what procedure is to be followed by its central or provincial governments, or executive organs, for making treaties internationally binding upon them; and of whether its political component units should have any part in their conclusion — that these are matters entirely for the constitution of the particular State or Organisation to determine.¹ A number of legal systems recognize this process. Thus, according to the view taken by English and American law, the authority in whom the treaty-making power is vested in any state depends upon the fundamental or constitutional law of that state.² The Soviet legal system and practice also recognizes that ‘the determination of the authority to conclude a treaty lies with each state and is to be found in its Constitution.’³

It must be observed here that a case may arise where the effective Constitution of a state may not be quite identical with its written Constitution. It often happens also that the treaty-making practice of a state differs considerably from the norms of its written Constitution.

Thus, in the United States of America, the President makes executive agreements which are as binding in international law as treaties, although they do not require to be approved by the Senate in the same way as treaties properly do. There is, however, a difference between municipal regulations determining the organ which can conclude treaties, and municipal regulations determining whether component states can conclude treaties. In the first case it is entirely for the national law to determine. It does not seem that in the second case the internal law is completely indifferent to it.

Where the Constitution of a Federal State grants the component members treaty-making power, international law recognizes this grant and regards the treaties made by them as valid when they are within their constitutional contractual capacity. But if this grant is not expressed, and if the constitution is completely silent about who should have power to conclude treaties in a Federal State, the presumption in international law is that this power is vested in all its totality in the Central Government.⁴ It seems that the reasoning behind this presumption in international law is that the general object of most federations is to prevent the component units from entering into international engagements which are inconsistent with national interest and policy, or which diverge inter se and to pursue a unified foreign policy vis-a-vis other members of the world community. In the absence of a clear authority conferred by the Federal Law, member-states of a federation cannot be regarded as possessing the power to conclude treaties. For according to international law, it is the Federation which, in the absence of provisions of constitutional law to the contrary, is the subject of international law and international intercourse.⁵ But if, on the other hand, a Federal state by its constitution of treaty practices is not seen to deny its component units the right to enter into international relations with foreign countries through treaties, the treaties so concluded will be recognized as valid under international law. We hope that a survey of the treaty-making capacities of a number of Federal States as reflected in their treaty-practice will give an insight into the place of their component units, so far as the independent action of such units on the international plane is concerned, before and after the Second World War.

Canada:

Although the Dominion of Canada falls within the group of Federal States where treaty-making power is concentrated in the hands of the Central Government, Canadian State treaty-making practices show that there have been and can be cases when the regional governments of the Dominion carry on treaty relations with other States.

The British North America Act of 1867 is very reticent of the powers of the executive, and about the treaty-making power. The Act contains no provision expressly vesting treaty-making power in the Dominion executive or distributing this power between it and the provincial governments. Even though the BNA Act does not contain any provisions like those in the Constitutions of Switzerland, Germany and the USSR, which permit the member-states limited power to make treaties, yet the provincial legislative organs have the competence to legislate on certain enumerated subjects of which that of agreements with foreign countries is one — this matter being within their legislative competence. In this way, some of the provinces such as Quebec and Ontario have, no doubt, made in the past certain agreements with Britain and some of the member States of the United States, for encouraging prospective immigrants and promoting exports. It cannot be denied that the Provinces have wielded diplomatic and treaty-making power in the past.

The current trends in Canadian treaty practice show that the limited power of the provinces to make treaties has not been completely abrogated. On March 1, 1965, the following question was asked in the House of Commons by Mr. Lambert, M.P.: “Since April 21, 1963, has the Government of Canada granted to the government of any provinces of Canada the right or privilege of negotiating and concluding with any foreign state either independently or in conjunction with the Government of Canada any agreement, accord or treaty of a commercial or cultural nature, whatsoever nature, and if so: (a) on how many occasions, to which of the provinces and what has been the nature of such agreement; (b) is it contemplated that any province shall have the right to participate as an independent signatory?”

The Honourable Paul Martin (Secretary of State for External Affairs) replied as follows:

In relation to question (a), there are two occasions, namely:

1. by an exchange of notes dated December 22, 1963 and December 27, 1963, between the Ambassador of France in Ottawa and the Secretary of State for External Affairs, the Canadian Government gave its assent to a program of exchanges and cooperation in the industrial and technical field being agreed upon between the Association pour l'Organization des Stages en France (ASTEF) and the Ministry of Youth of the province of Quebec and the University of Toronto.

2. by an exchange of letters dated February 27, 1965, between the charge d'affaires a.i., of France in Ottawa and the Secretary of State for External Affairs, the Canadian Government gave its assent to an entente or understanding between France and Quebec covering a program of exchanges and cooperation in the field of education being signed by the Minister of Education of Quebec and the Deputy Minister of Education of France and the director general of cultural and technical affairs at the Ministry of Foreign Affairs of France.

These two instruments relate to education and culture. They cover matters such as the exchange of professors, scholarships, research, etc., which have traditionally been the object, on the provincial plane, of informal arrangements between Ministries of Education and universities in the English speaking provinces and corresponding institutions in English speaking countries, particularly the United Kingdom and the United States of America. Generally, these countries prefer the informal non-governmental approach to cultural relations. On the other hand, many countries of Western Europe, and France in particular, prefer to place their cultural relations on a formal inter-governmental basis, wherever possible. This is a fact of international life which the federal government cannot ignore in carrying out its international responsibilities in respect of cultural relations.”

The answer of the Secretary of State for External Affairs to question (b) was in the negative. He explained that: ‘On the international

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plane, the federal government, represents all of Canada and under international law only sovereign states are recognized as members of the international community. One, if not the most important attribute of this international personality accruing exclusively to the Canadian government is the power to negotiate and conclude agreements or treaties of a binding character in international law to bind the whole country or of any part thereof with foreign countries.

The procedure followed on the occasion of the agreements cited above between France and Quebec is a reflection of and accords with the Canadian government's status under international law and the constitutional position in Canada. Standing alone, these agreements between France and Quebec could not have been regarded as agreements subject to international law. The Federal government stands ready to cooperate with any province in facilitating, in appropriate circumstances, the negotiation and conclusion in similar manner of agreements between the provinces and foreign governments in the field of education and culture.7

Some of Mr. Martin's views need to be commented upon. We fail to agree with the opinion of the Honourable Secretary of State for External Affairs that on the international plane, only sovereign and independent states are recognized as members of the international community. Our contention on this and the reasons for holding these views have been stated earlier in this study.

It needs to be pointed out that the expansion of the international community in size and content since World War II, made an increase in the legal persons of various capacities operating within it inevitable. This trend has been, in the main, a response to the evident need arising from international intercourse. The growth of international intercourse in the sense of the development of relations between different peoples was a constant feature of maturing civilizations. This is evidenced in the present position of the contemporary international community. The degree of intercourse among peoples of the world has ultimately called for regulation even by institutional means. To refuse to recognize these facts would tantamount to a rejection of reality. Therefore, for the Honourable Secretary for External Affairs to find the basis for his answers, particularly on question (b), in the principle of the exclusive international personality of sovereign states under international law, is not convincing. It is even more doubtful when one considers the time he was giving the answers (March 1965).

No one doubts the fact that in a federal state such as Canada, where it is not otherwise stated in the constitution, the Central Government reserves the sole right to bind the whole country under an international treaty or agreement. In the case of Canada, the BNA Act of 1867 - the fundamental law on which the constitution is based - was not explicit as to who has the exclusive power to conclude international agreements - the Dominion or, whether such power can be distributed between the Union and the provincial governments. This leads one to at least two presumptions, namely:

1. that only the central government has it; or
2. that the provincial governments may also exercise treaty-making rights.

The Commonwealth of Australia:8

The treaty-making power of the Australian Federation seems to rest, to a large extent with the Commonwealth Government. As with most federations formed with the British Empire or Commonwealth, the executive authority of the federation is vested in the Queen. This authority is exercised by the Governor-General who is the Queen's representative. Under sections 51 XXIX and 61 of the Australian Constitution the Commonwealth Government was not competent to conclude international agreements before 1919. According to the Sydney Draft of 1891 and the Adelaide Draft of 1897, covering clause 7, provided that "all treaties made by the Commonwealth of Australia shall according to their tenor, be binding on Courts, Judges and peoples of every States, and of every part of the Commonwealth, anything in the laws of any state to the contrary notwithstanding". Section 52, XXVI of these drafts vested the Commonwealth Parliament with power to legislate with respect

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8 The Commonwealth of Australia came into being on January 1, 1901. It was created by the Commonwealth of Australia Constitution Act, which had been passed by the Imperial Parliament. The Act received royal assent on July 9, 1900, and was proclaimed on September 17, 1900. It united the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a federal Commonwealth under the title of the Commonwealth of Australia.
to 'external affairs and treaties'. Later in the final draft, the provisions relating to 'treaties'\(^9\) were ultimately dropped from the corresponding covering clause 5 and section 51, on the ground that being a part of the British Empire, Australia could not have treaty-making power of a sovereign state. But before the federation was formed, the individual Australian provincial colonies entered directly into certain agreements with foreign powers on technical matters.\(^10\)

However, an incident took place in 1902 which brought strongly in question, the exclusive nature of the power of the Commonwealth Government to make treaties and power to legislate with respect to external affairs.

In 1902, Mr. Chamberlain, the colonial Secretary asked for a report from the Commonwealth Government of Australia in relation to a complaint made by the Netherlands Government that the authorities in South Australia failed to render help which they ought to have given to the Dutch Consul under article 10 of the Anglo-Dutch Convention of 1856, in connection with the arrest of the crew of a Dutch vessel, the 'Voudel' at Adelaide. The South Australian Premier, Mr. Jenks, refused the request of the Commonwealth Government to furnish it with the necessary particulars. The Commonwealth Government pointed out that its right to ask for particulars rested on the fact that the incident involved the observance of an imperial treaty and 'matters affecting consuls' which fell within federal competence under sections 51 XXIX and 75(i) and (ii).

The Prime Minister of South Australia's refusal was based on the argument that the term 'external affairs' was not included among the subjects with respect to which the Commonwealth Parliament had exclusive competence. In the second place, in the opinion of Mr. Jenks, the term 'external affairs' was very vague, and might or might not mean that the Commonwealth Parliament had power to make laws to enforce imperial treaties. Under these circum-

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\(^10\) Postal Convention between the USA and New South Wales, January 15, 1874; Convention between USA and Victoria on Money Orders, October 5, 1881, etc. See Australian Treaty List (Australia Treaty Series, 1951, No. 1, Department of External Affairs, Canberra), p. 7.

stances, the Prime Minister claimed the right of the State of South Australia to communicate directly with the Imperial Government in all matters relating to the fulfilment of imperial treaties.

In 1906, just before the Colonial Conference of 1907, Australian States claimed the right to have direct representation at that conference.

Their demand was that, unlike the Canadian Provinces they were 'independent of Federal Government' which was not any better than their agent. The second contention was that several of the subjects proposed for discussion at the conference such as law, trade, communication, immigration, education and science affected their state rights.\(^11\)

The Colonial Secretary, Lord Elgin, refused to accept this view. He pointed out that the Commonwealth States were not separate political entities. They had surrendered some of the distinctive attributes of statehood, namely, power over defence, customs and excise, posts and telegraphs, etc. The British Government made an authoritative declaration in 1908, that 'His Majesty's Government is pledged to the view that, so far as the relations of Australia with foreign nations are concerned, the Government of the Commonwealth alone can speak, and that for everything affecting external communities the Government of the Commonwealth is alone responsible'.

The conclusion from the above discussion is that although the treaty-making power of the Commonwealth of Australia Federation seems to be largely vested in the Commonwealth Government, there is reason to think that the states do have dealings and enter into relations with foreign authorities on matters which are clearly seen to affect the interests of the state concerned. Thus, Australian states maintain agents in London for promoting their trade. They also hold direct communication with the United Kingdom Government in respect of certain matters which are not within the federal jurisdiction.

The Australian case shows again that there is in principle nothing inherently impossible in the exercise of treaty-making powers by the component states of a federation. Ultimately, whether they can or not, or can continue doing so, must depend on the Federal Con-

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\(^11\) Correspondence relating to the Colonial Conference, 1907, No. 3340, Statement of Mr. Thomas Price, at p. 9.
stitution and its developments.

The United States of America:

Article 1, Section 10, of the Constitution of the United States of America has two clauses, one of which declares: 'No State shall enter into any treaty, alliance or confederation', and the other says: 'No State shall without the consent of Congress ... enter into any agreement or Compact with another state or with a foreign power'.

There have been wide debates among the United States jurists in establishing the real differences between the two clauses. However, Professor Willoughby thinks that 'the possibility of the States entering into direct relations with foreign Powers, provided the consent of Congress is obtained, is recognized, at least as regards certain but undefined agreements or compacts. How often has the United States Congress consented to a state entering into agreements or compacts in practice?

In 1909, there was a question whether the State of Minnesota could enter into an agreement with Canada without the consent of Congress, for facilitating the construction of a dam on the Rainy River. In giving opinion about this, Attorney General Wickersham denied the capacity of the state to do so. He added, however, that by implication, Act. 1, Sec. 10, C1.3, permits such an agreement to be entered into if Congress had given its consent thereto. In 1917, the Supreme Court of North Dakota heard a case concerning certain counties of that State which had entered into an agreement with a municipality in the Canadian province of Manitoba for the construction of a drain for securing an outlet for surface waters. The contract was made under the authority of the State but without the consent of Congress, and involved expenditure of money in a foreign country. According to the opinion of the State Court, the agreement was not political in its nature and not calculated to encroach upon the authority of Congress. This being the case, it was not within the constitutional prohibition.

In 1934, there was a proposal for an agreement or compact between the State of New York and the Dominion of Canada for the establishment of the Buffalo and Fort Erie Public Bridge Authority. A Joint Resolution was passed by the Congress which ran as follows: 'Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the consent of Congress of the United States of America be, and it is hereby given to the State of New York to enter into the agreement or compact with the Dominion of Canada set forth in Chapter 824 of the Laws of New York 1933, and an Act respecting the Buffalo and Fort Erie Public Bridge Authority passed at the fifth session, seventeenth Parliament, Dominion of Canada, assented to March 28, 1934, for the establishment of the Buffalo and Fort Erie Public Bridge Authority as a municipal corporate instrumentality of the said State and with power to take over, maintain and operate the present highway bridge over the Niagara River between the City of Buffalo, in the State of New York, and the village of Fort Erie in the Dominion of Canada'.

Congress passed a joint resolution in 1947 which brought into effect the Agreement between the United States of America and the United Nations regarding the Headquarters of the latter. By this resolution, limited power was given to the member-States of the Union to enter into agreements with the United Nations. Section 4 of this resolution runs as follows: 'Any States, or to the extent not inconsistent with State law, any political sub-division thereof, affected by the establishment of the headquarters of the United Nations in the United States are authorized to enter into agreements with the United Nations or with each other, consistent with the same: provided that, except in case of emergency and agreements of a contractual character, a representative of the United States to be appointed by the Secretary of State, may, at the discretion of the Secretary of State, participate in the negotiation, and that any such agreement entered into by such States or political sub-divisions thereof shall be subject to approval by the Secretary of State.

The above discussion proves that the Constitution does not totally block the member-states of the United States from making agreements with foreign states, especially if such agreements are seen to be of importance to the State concerned and does not con-

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tradict the general interests of the Union.

Switzerland:

The position of the Swiss Constitution in regard to the treaty-making power of its components has been stated. The Cantons have a reasonable measure of right to enter into treaty relations with foreign powers in so far as the constitution permits. What is interesting here is to ascertain what procedures the member-states are required to follow in the making of treaties within their competence. The Central treaty-making procedure is governed by the provisions of the Federal and Cantonal Constitutions. The essential thing is that the treaties which the Canton have power to make under Article 9 are required to be in conformity not only with the Constitution of the Federation and Federal Laws, but also with the public policy of the Federal Government. Further, they should not be opposed to the rights of any other Canton.

It is often the case that when a Canton wishes to make a treaty it asks the Federal Council to pass its correspondence to the foreign government concerned or to take other necessary action. Once the Council considers the treaty permissible under the Constitution, it begins the negotiation depending on the nature of the treaty. Where the matter involves technical issues on which the Cantonal officers are likely to possess better knowledge, or where local sentiments deserve special consideration, Cantonal officers are appointed as chief representatives. It could happen that at the end of negotiations, the treaty would be signed and concluded by the Federal Government in the name of the Canton, or the Canton itself might conclude it in its own name. In the first case, the treaty is still known as a cantonal agreement, as the rights and obligations under it are considered to be those of the Canton.

Treaties negotiated through the intermediary of the Federal Council but concluded by the Cantons in their own names are numerous. Such treaties relate to double taxation, e.g., the agreements made by Bale-Ville with Prussia in 1910; by Soleurs with Alsace-Lorraine in 1911; by different Cantons with Germany in 1923; cross-frontier intercourse (e.g., the agreements made by Bale-Ville with Baden in 1894 providing for the establishment of a ferry; by Berne with France in 1888, providing for schools in the frontier districts; by Bale-Ville with Baden in 1894 regarding improvement of the river Wiese; by Bale-Campagne and Argovie with Baden in 1907 for the establishment of a hydro-electric plant near August Wyhlen); police matters – e.g., St. Gall with Lichtenstein in 1916, providing for mutual judicial assistance; by Vaud with Austria in 1907, and St. Gall with Austria in 1908, each providing for the execution of civil judgments. Sometimes, member-states of Federation have common frontiers with foreign states. The necessity for occasional agreements between the border communities, particularly in police matters, cannot be denied.

Nigeria:

The Constitution of the Federal Republic of Nigeria of 1963 had no specific provision on the powers of the Federal Government to conclude treaties. At the same time, the constitution did not grant any right to the component units of the Federation to conclude treaties on matters within their respective jurisdictions. The argument has been advanced to the effect that why the 1963 Federal Constitution failed to make clear provisions on treaty-making was because the subject-matter was not considered a problem in Nigeria. According to Ajomo, it is just a matter in the Exclusive Legislative List and it is regarded as the normal responsibility of the Federal Government as part of its external affairs functions. It is submitted that leaving such an important matter in a fluid situation in a constitution, could lead to obvious problems as was the case in the First Republic, when a number of the country's regions made clear incursions into this area of foreign affairs of the Central Government, resulting in far-reaching consequences.

It is always important to determine clearly and without any doubt, whether in a federal structure the central government has or lacks the authority, generally or as to certain topics, to bind the state internationally; whether treaties are signed ad referendum as to international ratification and the constituent or subordinate "states" claim a constitutional authority to grant or deny approval

16 H. Edward, De la Competence des Cantons Suisse de conclure de traites internationaux – Specialement concernant le Double Imposition, Brussels, 1869, pp. 460-462; Huber, H. How Switzerland is governed, Zurich, 1946, p. 69. Recent examples of Cantonal treaties have not been possible to come by.

17 M.A. Ajomo, op. cit., p. 55.

18 See, the Republican Constitution, item 14, para. 1, of the Schedule.
of ratification.

Sometimes, it is possible that a federal state may be able to create an external international obligation that it does not have the power to enforce internally under its constitution. It is also possible that a federal state may have the power to enforce a treaty norm internally under its constitution but as to internal obligation, choose:

(a) to reject the treaty entirely rather than to use its power;
(b) to seek to obligate itself by treaty only to the extent that it chooses to exercise its internal power to enforce it.

Treaty-Making under the 1979 Constitution:

The power to implement such a treaty when made, derives directly from state sovereignty. The specific organs of a state which are considered competent to conclude treaties and the procedure whereby they are brought into force in the territorial domain are set down clearly under the constitutional provisions of any given written constitution. In fact, certain constitutions go as far as to provide for the status of treaties in relation to the constitution and other laws of the state. 19

Regrettably enough, the 1979 Nigerian Constitution is not only silent as to which organs of state can bind her under a treaty (i.e. make treaties) but is also silent as to the status of treaties made on behalf of the State of Nigeria vis-a-vis the constitution itself and other laws of the state. 20

The clearest statement in respect of treaties under the 1979 Constitution concerns implementation of treaties which provides thus:

(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 sub-section (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 House of Assembly in the Federation. 21

According to the Constitution, Nigeria is a federal state, 22 that is to say that it has in effect constitutional arrangements that provide for the allocation of governmental powers between the central and the other nineteen state authorities. Just like Australia, Austria, Canada, India, the Federal Republic of Germany, Malaysia, Switzerland, the United States of America and the Union of Soviet Socialist Republics to mention a few which have offered substantial evidence that treaty performance issues arise, Nigeria certainly could face similar problems.

Many a time, a perusal of the constitutional provisions of some of these Federal and unitary states raises substantial doubts whether certain federalisms serve any significant degree of functional purpose. But perhaps, a brief assessment of the essence of federalism and its bearing upon the enforcement of international agreements by a state may throw some light on the nature of Nigerian Federation in this regard.

The 1979 Nigerian Constitution is not clear as to whether or not any of its nineteen component units reserves a right to enter into any form of international agreements with foreign persons. Furthermore, it does not say which organ of the Nigerian State has the power to bind the country internationally. 23 In the circumstance, it would seem to us that the traditional system of inter-

19 See, e.g. U.S. Constitution, Art. VI (2); Fundamental Law of the Federal Republic of Germany, Art. 25 (for certain elements of international law); Constitution of the French Republic, Art. 55.
20 Certainly a clear statement one way or another as to the status of treaty norms, the constitution and other laws of the state would have been most desirable.
22 See, Section 2 (2), 1979 Constitution.
23 It must be observed that the 1979 Nigerian Constitution recognizes that the National Assembly has competence to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List. (S.4(2) of Independence Constitution, S.64(1)(a); Republican Constitution, S.69(1)(a). The possible conclusion from this provision is that component States are not allowed to participate on their own in the making of treaties.
national law which recognizes only two organs of central government of States — namely, the Head of State and the Foreign Minister to exercise treaty-making capacity on behalf of the country would be the case under the present constitution. The Head of State is considered to possess the *jus omnimodae representa­tiatis*, the right or capacity to represent the state in whatsoever context. If the new Constitution had contained a categorical statement on the relationship between Central Government and State Governments as far as the making and enforcement of treaties are concerned, obviously it would make the job of the courts much easier. Since a state cannot plead inadequacy of its constitution and laws in justification of non-compliance with its international obligations, Nigerian Courts may likely follow the principle that local legislation must be so construed as to avoid conflict with international law.

As has been stated elsewhere in this inquiry, in Federal States, the central government at all times has international legal personality and the constituent states may or may not have international legal existence. If a constituent state does have international personality, it usually has it for limited or restricted purposes only. It therefore follows that if a constituent state has no international legal personality, it cannot as a matter of International law make treaties as distinguished from mere contracts. It cannot obligate itself internationally to enforce them internally. On the other hand, a constituent state, if it has international legal personality and is appropriately authorised, may make international obligations within the scope of its powers and undertake the duty of internal enforcement. Constituent state without international legal existence may under particular constitutional structures be able to object to internal enforcement by the central government on the ground that, whatever the international obligation of the federal state, the internal allocation of powers gives exclusive power to enforce law in particular sectors exclusively to the subordinate state. Under such circumstances, internal enforcement cannot be assured except by the acquiescence of the constituent state to enforcement. In some cases, a constituent state may be authorised by the federal constitution to act for the state internationally, even if the internal entity does not have international legal personality. Finally, a federal constitution may provide that internal enforcement of international agreements shall be either a primary or an exclusive responsibility of the internal state, imposed by the constitutional order, even though the sole international responsibility is that of the central government.

All the above constitute possible arrangements open to drafters of constitutions of federal unions. It is submitted that the way Nigerian Constitution under reference is drafted, the drafters have deliberately decided to sweep these various possibilities under the carpet, the idea being perhaps, to make for a stronger federal association. It is perhaps too early to determine whether the constitution as it pertains to treaty-making and enforcement will deter the component states from intruding into the foreign policy activities of the Nigerian State. Much will depend on the position of the present administration on its foreign policy practice. After just nine months in office, this is yet difficult to gauge.

It is a fact that under the 1960 and 1963 Nigerian constitutions, sufficient evidence abound showing that the Regions participated in foreign affairs of the country through economic missions and delegations sent abroad by regional governments in the quest for foreign loans and credits. Regrettably, this new constitution has not cured this ill, though heavily criticised by a number of Nigerian scholars.

**Constitutional Limitations of Federal States and the Treaty Power:**

The way the Nigerian Constitution is framed in respect of treaty

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25 Restatement II, Foreign Relations Law of the United States (1965), Paragraph 115, Comment (b), Agreement governed by domestic law, makes a distinction that is widely recognized, between a State’s contracts and its international obligation under treaties.

26 But already, a number of state governments have started to court friendship with foreign states. Recently, the Anambra State of Nigeria received an official delegation from Ohio State Government of the United States of America. Their discussions and communique emerging therefrom talk of possible economic cooperation.

implementation calls for some comments on the constitutional limitations of a Federal State and its Treaty Power. Ordinarily, the definition of federalism is that of a division of powers between a general and the regional governments, each independent within a sphere.\(^ {28}\) Where the constitutional system thus diffuses and distributes functions, the definition of the treaty power has given rise to considerable political and legal difficulty. The constitutional limitations of a federal state’s treaty power attempt to strike a balance between the importance of a unified front in international affairs and the value of a federal system to preserve the sovereign rights of constituent states.

A constitution would cease to be federal if the central government, without consultation with the states, could enter into any treaty and by so doing, increase the legislative powers of the central government at the expense of the state legislatures. If the treaty power can cut across all reserved powers and interdict the powers of the member states, then there are no real powers reserved to the internal sovereignties. All such powers are really concurrent.

a) **Capacity Limitation:**

There are two basic types of constitutional limitations on the treaty process, namely ones preventing a State from entering into a treaty (capacity limitations) and those affecting performance of its obligations once the treaty has been validly concluded (performance limitations). Capacity limitations focus upon the negotiation and ratification of treaties. They delimit the types of treaties that can be undertaken and the form and procedure necessary to render the treaty nationally valid.

The treaty making power is usually vested in the executive branch of federal government.\(^ {29}\) It is the scope of the executive’s treaty-making power that is central to an analysis of capacity limitations: the power to negotiate, to ratify, to terminate, or to alter or abrogate the treaty.

Concomitant with executive treaty-making power, other governmental organs participate in the treaty process. Many federal constitutions require legislative ratification of a treaty before it can come into effect, but legislative participation can assume other forms. Can the legislature initiate or conclude treaties? Can it recommend negotiations of a treaty to the executive, or is its role merely that of consent to a treaty negotiated by the executive on its sole initiative?

b) **Performance Limitation:**

A country is entitled under international law to decline, because of its constitutional incapacity, to enter into an international obligation. But once a treaty has been constitutionally concluded, the obligation incurred is one that international law requires to be performed in good faith. Constitutional limitations affecting performance of international obligations are therefore peculiarly important and entirely dependent on the condition of a State’s internal law. Four performance limitations may render a validly concluded treaty nationally ineffective:

(i) those based on separation of powers of the branches of the national government;
(ii) those based on express prohibitions on the power of government in defence of individual rights;
(iii) those based on division of powers between national and state government, and
(iv) those based in abstract notions of constitutional theory.

The above analysis of limitations on the treaty power may be summarized by a restatement of the fundamental difficulty. There are matters of genuine international concern which fall within the constitutionally reserved powers of the constituent units in every federation. This problem is peculiar to federal states and may indicate that they do not have latitude of a unitary state to engage in international intercourse. However, the one thing modern conditions now demand of federal government is that it provide the same effectiveness in the conduct of foreign relations as that provided by a unitary\(^ {30}\) state. Of equal importance is the degree to which the federation and its constituent states are able to find basis of co-operation for their mutual benefit.


\(^{29}\) See, Dowie and Friedrich, Studies in Federalism, 236-267 (1954).

The Obligation of the Federal (Central) Government of a Federal State to Implement Treaties Within the Federal Union:

Under international law, the central government of a federal state is the state internationally. It is therefore the entity which is responsible for proper performance of all its treaty obligations. It is an established rule of international law which has been universally accepted that the central government of a federal union is obligated to its treaty partners to apply within the national territory, the particular rules and principles that are stipulated in the treaty.

While all parties to treaties are obligated to faithfully implement them under the principle of *pacta sunt servanda*, the approach towards their implementation varies from state to state. The important point to observe is that the internal limitations upon the use of the treaty power are immaterial internationally, even if known to or readily ascertainable by the promisee state.31

Unlike earlier constitutions,32 the new Nigerian Constitution not only provides that Parliament may make laws for the implementation of treaties concluded between the Federation and other countries, it explicitly states that a treaty between the Federation and any other country shall not have force of law except the treaty has been transformed into law by the National Assembly.33 By this provision, all treaties in which Nigeria is a party must be executed with the aid of an enabling legislation. This stipulation however excludes treaties which were concluded before the Constitution came into force. Under the constitution, any property, right, privilege, liability or obligation which immediately before the date of coming into force of the appropriate section34 was vested in, exercisable or enforceable by or against the President and Government of the Federation, and the Governor and Government of the state, as the case may be.37

Methods of Internal Enforcement of the Treaties of Federal States:

The means or methods for the internal enforcement of the treaty obligations of a state do not depend on whether the state in question is either unitary or federal. Many a time, the treaty provisions or its instrument of ratification or implementation may stipulate that the provisions of the treaty are norms within the national legal order. In this case, the rules laid down by the treaty have the effects of laying down rights and duties between contesting parties. The major enforcement agency for such legal relationships are the ordinary courts of the land.

In other cases, a State's international undertakings may require it, by criminal, administrative, or other state-enforced commands, to ensure that persons within the state perform in a manner compatible with the state's undertaking to its treaty partners. Again, no particular differences exist between unitary and Federal State systems, for there are practical instances when states, both federal and unitary enter into some regional arrangements for their mutual benefits. They all enforce their common policies irrespective of differences in political structures.38 The normative order as to a particular subject-matter is specified in the organic law as belonging either to the central or to the constituent state governments. This order is not subject to being overridden by the treaty enforcement when this section comes into force and without further assurance than the provision hereof vest in, or become exercisable or enforceable by or against the President and Government of the Federation, and the Governor and Government of the state, as the case may be.37

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31 There is wide acceptance in the authoritative compilations such as Harvard Research in International Law: Treaties (23) and the Restatement of the Foreign Relations Law of the United States (140).
32 Republican Constitution, S. 74; Independence Constitution, S. 69.
33 Section 12.
34 Section 276(1).
35 Section 276(a).
36 Section 276(b).
37 Ibid. The President and Government of the Federation, and the Governors and Government of a State shall be deemed respectively, to be successors to said former authority of The Federation and former authority of the State in question. "Former authority of the Federation" and "former authority of a state", include references to the former Government of the Federation and the former Government of a State, a local government authority, or any person who exercises any authority on his behalf.
38 The European Economic Community (EEC) set up by the 1959 Treaty of Rome illustrates a possibility of the participation of a group of states, some Federal, others unitary in a particular regional arrangement, all enforcing their common policies. The recent ECOWAS Treaty of West African States is another case in point, in which Nigeria as a Federal State has joined with others to set up an economic union.
powers of the central governments.

The 1979 Nigerian Constitution, as has been pointed out earlier in this presentation, stipulates that Parliament may make laws for the implementation of treaties concluded between the Federation and other countries. It went further to provide that a treaty between the Federation and any other country shall not have force of law except that treaty has been ratified, that is, transformed into the law of the land (Section 12). The organ charged with this assignment is the National Assembly.

The Constitution further stipulates under its Second Schedule, the Extent of Federal and State Legislative Powers. It provides for both Concurrent and Exclusive Legislative Lists. It does not provide for any Residual List which would have formed a source of confusion as did the earlier constitutions. By this arrangement, all matters not included in the Exclusive Legislative List may be considered as falling within the Concurrent List. It is submitted that the new Constitution unlike its predecessors, affords the Federal Government the power of fulfilling its international obligations in respect of a treaty without having to plead for the cooperation of any state Governor provided that a majority of all the State Assemblies within the Federation ratifies the action of the National Assembly thereto.

CONCLUDING REMARKS:

The purpose of this study has been to examine the Law of Treaties of Federal states generally. One fact that has emerged from this exercise is that realities of international life may, as a matter of great necessity force states to resort to different constitutional structures or forms resulting in their component units being permitted, according to their respective constitutions, to participate in the making and in the implementation of treaties. It has further become clear from our analysis that nothing in principle, precludes the component states of a Federal State from exercising the right of treaty-making or implementation at least in certain matters unless otherwise prohibited by the constitution of the state concerned. This being so, it means that the extreme traditionalist view, in the face of new facts of life in a fast-changing world, that it is only the collective federal state as such which has treaty-making capacity is no more realistic.

Our discussion also reveals that not all the constitutions give clear indication of the degree of separate participation of their component states in international affairs. The power to make treaties is more evident in some than in others. Under the constitutional examination as we have seen from those of a number of federal states looked into, there are occasions where the component members of such states were granted the right to enter into international agreements with foreign states, even where the constitution was either silent or categorically opposed to such an action.

With particular reference to the practice in Nigeria, it must be pointed out that of all the previous constitutions of the country, that of 1979 made a remarkable improvement in clarifying issues connected with treaty-making and treaty-implementation by the Nigerian State. However, while the constitution clearly shows that the Federal Government has exclusive competence with regard to the question of treaties, it still leaves a number of problems unresolved in this regard.

However, while we recognize the need for Nigeria to maintain solidarity amongst her people, it must be pointed out that for Nigeria to fully attain the goals of its foreign policy, there is great necessity for her to have efficient, flexible, and democratic procedures for the making, modification, implementation and abrogation of international treaties. It is clear from our discussions that the component states of the Nigerian Federation have minimal role to play in the foreign policy process which includes essentially treaty-making. Considering the nature of the Nigerian Federation as well as the diverse cultural and religious interests of its people, it is humbly submitted that an arrangement, in recognition of all these, whereby the component states could go into an international agreement in certain matters with the permission of the Federal Government would be better for Nigeria and will afford them strong-

39 But this is not to ignore completely the possibility for a very strong lobby to be carried out in the State Assemblies of the Federation against the object of a treaty concluded by the Federal Government.

40 For within the period 1979-1983 some States ignored the constitutional stipulations on foreign affairs and went off to parts of Europe and America hunting for loans and other associations – a practice that was most predominant in the experience of the regions in the First Republic. For example, the Anambra State Government of Governor Nwobodo signed a Sister-State Agreement with the former Governor of the State of Ohio under Rhodes during the period. The legal status of that agreement is debatable.
er spirit of belonging while preserving the Union.

This principle received the support of the International Law Commission which while recognizing that there was indeed a rule of general public international law on the subject, felt that each federal constitution had full competence to distribute capacity to conclude international treaties between the federation and its member-states.41

From the foregoing discussions, and in the light of our earlier arguments, we come to the conclusion that component members of a federal state, depending on either their expressed constitutional rights or the state treaty-making practice which can be evidenced, apparently have some measure of international personality, but it is limited personality—not fully sovereign or independent. Consequently, it may be permissible to suggest that any treaty properly concluded by such component members of a Federal state in satisfaction of the acknowledged treaty practice or other rights of the Federal State would be governed by international law.

CHAPTER 12

THE BASIS OF THE TREATY-MAKING CAPACITY OF INTERNATIONAL ORGANISATIONS

1. INTRODUCTORY: DELINEATING THE AREA OF DISCUSSION

Treaty-making is a common method of establishing a relationship with, or creating rights and duties under international law for, public international organisation. In fact, in the years after the second World War, the practice of international organisations in the field of the law of treaties has grown extensively. There has been in the past (as well as in the present) a considerable amount of controversy on the question of whether international organisations possess the capacity to make treaties. Writers have sought different bases for the treaty-making capacity of international organisations and have in the process advanced various theories in an effort to establish the correct grounds. We may observe at this point that once we accept that international organisations have international personality and are therefore subjects of international law, it would be absurd, in our view, not to recognize the fact that they also enjoy some capacity to interact with other subjects of international law including sovereign states. This right of interaction automatically means the capacity to engage in certain international legal acts which will be binding and should be juridically determinable.

The increasing number of agreements concluded by international organisations, particularly since 1945, has been described as an 'agreement explosion' by Professor Reuter in his remarkable first report on the question of Treaties Concluded between states and international organisations or between two or more international organisations. It is also worth recalling that during the 1965 session of the International Law Commission, one of its members, Mr.

Briggs, stated that there were about 200 agreements concluded between international organisations, and over a thousand between international organisations and states.² Hungdah Chin³ in his work on agreements concluded by international organisations also restated this point of fact to the effect that a review of the UN Treaty Series reveals that about one thousand treaties have been concluded by international organisations.⁴

Professor Reuter gives interesting statistical information in his report regarding the amount of treaties concluded by international organisations. According to him, a count through volumes 1-598 of the United Nations Treaty Series gives, for the period 1 January 1946 to 31 December 1965, a total of 1,686 agreements, 1,317 of which were bilateral with one state, 176 between organisations, 47 between states and one organisation and 10 between one state and two organisations.⁵

In order to obtain a proper insight into what the prevailing views in doctrine are and how far these are supported by the jurisprudence and practice of international organisations on the question of the basis of the treaty-making capacity of international organisations, we propose to break down our analysis into three sections, namely:

a. Doctrinal pronouncements and authoritative opinions of writers and publicists on the treaty-making capacity of international organisations,
b. Judicial decisions on the subject; and
c. The work of the International Law Commission (the Subcommittee on Treaties concluded between Two or More International Organisations).

⁴ Ibid.
⁵ A/CN.4/258, para. 7, footnote 16.

2. DOCTRINAL PRONOUNCEMENTS AND AUTHORITIVE OPINIONS OF WRITERS AND PUBLICISTS ON THE TREATY-MAKING CAPACITY OF INTERNATIONAL ORGANISATIONS:

Proceeding on the assumption that capacity to conclude treaties is an attribute of sovereignty, which is not possessed by international organisations, writers have sought different bases for their treaty-making capacity. Some writers consider the possession of this capacity by an international organisation as a test of the recognition of its international personality.⁶ Others take a different position which considers capacity a consequence of international personality.⁷ This position does not seem to differ from the former in essence but in the matter of form.

Another group of writers separates the concepts, and believes that the treaty-making capacity of an international organisation is to be deduced, if at all, not from the mere fact of its 'personality', but from the evidence pointing to its having that sort of personality which involves the capacity to make treaties.⁸

Yet another group of writers takes a somewhat narrower view that such a treaty-making power must be conferred expressly. Kelsen writes that 'the United Nations has legally only the power to enter into those international agreements which it is authorized by special provisions of the Charter to conclude'.⁹

In any event, it seems that as a matter of principle, an organisation cannot make all kinds of treaties. The functional test requires that organisations can only conclude treaties which are in the context of their aims and functions, whether expressly or impliedly attributed.

There has been strong suggestion that the recurrence of past controversies and difficulties on the issue of the treaty-making capacity of international organisations can be avoided by including

in the constitutions of new international organisations provisions
conferred on these organisations either full legal personality or
some measure of legal capacity with a defined content.10 This has
been done in several recent cases. Thus, the Constitution of the
Food and Agriculture Organisation of the United Nations pro-
vides that ‘The Organisation shall have the capacity of a legal
person to perform any legal act appropriate to its purpose which is not
beyond the powers granted to it by this Constitution.’11 The
Articles of Agreement of the International Monetary Fund and
the International Bank for Reconstruction and Development pro-
vide that the Bank and the Fund respectively ‘shall possess full
juridical personality, and in particular, the capacity: (a) to contract;
(b) to acquire and dispose of immovable and movable property;
(c) to institute legal proceedings’.12

The International Civil Aviation Convention provides that
the International Civil Aviation Organisation ‘shall enjoy in the ter-
ritory of each contracting State such legal personality as may be
necessary for the performance of its function. Full juridical per-
sonality shall be granted wherever compatible with the constitu-
and laws of the State concerned’.13 The agreement concerning the
establishment of the European Central Inland Transport Organisa-
tion (ECITO) provides that the organisation shall have the capacity
to perform any legal act appropriate to its object and purposes,
including the power to acquire, hold and convey property, to enter
into contracts and undertake obligations, to designate or create
subordinate organs and to review their activity, subject to a limita-
tion in respect to the ownership of transport equipment and ma-
terial,’14 and embodies undertaking by member governments to
‘recognize the international personality and legal capacity which
the Organisation possesses’.15 The Charter of the United Nations
provides that, ‘The Organisation shall enjoy in the territory of each
of its Members such legal capacity as may be necessary for the
exercise of its functions and the fulfilment of its purposes’.16

The United Nations has limited treaty-making power provided
for in Articles 43, 57, 63, 77-83 and 105. Certainly the agreements
entered into under these Articles are capable of being contracts in
international law sense since some of them, particularly the Conven-
tion on Privileges under Article 105, are entered into with non-
members,17 which takes them out of the category of acts merely
internal to the organisation.

While recognizing that the Charter of the United Nations contains
provisions expressly authorizing certain agreements, Brownlie em-
phasizes that the existence of legal personality does not of itself
support a power to make treaties. According to him, everything
depends on the terms of the constituent instrument of the organisa-
tion which needs to be further interpreted by resorting to the doc-
trine of implied powers to establish the degree of its treaty-making
power.18 In our opinion the matter can properly be given an even
wider basis — see Schneider’s view cited below.

There is little doubt that the inclusion of provisions conferring
either full legal personality or some measure of legal capacity with
a defined content into the constituent instrument of international
organisations is a very useful contribution to test the treaty-making
capacity of any given international organisation. On the other
hand, this certainly does not provide a conclusive solution to the
problem. Schneider points out that ‘constitutions have by no means
adequate provisions to authorize the actual treaty-practice that
is, by and large, uniform. The treaty-making power of international
organisations cannot be completely traced back to their constitu-
tions (only)’:19 ‘There are a number of agreements by which or-
ganizations define more in detail their respective competence which
the constitutions either do not at all or not sufficiently delimit’.20

Schneider also introduced another important view in his argument
which we fully share. He writes that, ‘the organisational movement
after the last war has precisely gained such momentum through the
steadily developing cooperation which does not permit that some
of the interested agencies are lagging behind and cannot fulfil their
part for reasons of insufficient capacities. Because organisations
really form a unity in respect of their external cooperation, the

11 Article XV(1).
12 Fund Agreement Article IX, Section 2; Bank Agreement, Article VIII.
13 Article 47.
14 Article IV(1).
15 Article VIII(13).
16 Article 104.
17 O’Connel, International Law (1st edn.), Vol. 1 p. 115.
also Bowett, The Law of International Institutions, 1964, p. 278.
19 Schneider, Treaty-making power of International Organisations, Geneva,
1959, p. 135.
problem of their external capacities cannot be approached but by taking a general view which founds itself on the uniform practice that has developed in this very field of external relations.  

It is of interest that in certain cases in which the instrument constituting an international organisation does not specify that the organisation will enjoy legal personality it has been found necessary for the organisation to recommend governments to take any action required under their law to enable it to discharge its functions effectively, and governments have found it convenient to take such action in a form tantamount to the recognition of the legal personality of the international organisation. Thus the Council of the United Nations Relief and Rehabilitation Administration adopted at its first session a resolution recommending member governments to take any steps that they might consider necessary to enable UNRRA to exercise within their jurisdiction the powers conferred by Article 1, paragraph 1, of the UNRRA Agreement, which provided that the administration 'shall have power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create agencies and to review the activities of agencies so created, to manage undertakings, and in general to perform any legal act appropriate to its objects and purposes.'

The Soviet attitude to the question of treaty-making power of international organisations is that in exercising treaty-making capacity, international organisations must not exceed the sphere of their right as provided for in their respective constitutive instruments. One or two observations by Soviet jurists of authority on this subject will illustrate this position.

Writing on the treaty-making powers of international organisations, Kozhevnikov states that, 'the subjects of an international treaty are, first and foremost, states. International organs can conclude international agreements within the limits of their powers as prescribed by their constituent instruments. However, in these treaties expression is given to powers delegated by states themselves, representing the principal subjects of international law'.

This stand is more or less re-affirmed and summarized by Tunkin who observes: 'It is well-known that many international organizations are endowed, on the basis of their constituent instruments, with the right to conclude agreements with other international organisations as well as with states ... However, the granting to international organisations of this capacity to enter into international agreements can be placed on an equal footing with agreements concluded by states inter se, nor does it mean that we can automatically extend to the form the application of norms of international law which are intended to regulate inter-state agreements.'

3. JUDICIAL DECISIONS:

It may be recalled that the Advisory Opinion of the International Court of Justice of April 1949 concerning Reparations for Injuries Suffered in the Service of the United Nations affirmed the international personality of the United Nations and found evidence of that personality, inter alia, in the treaty-making powers conferred upon the Organisation under the Charter. Having cited specifically the Convention on Privileges and Immunities of 1946, the Court concluded that 'it is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality'. Further, the Court stated that, 'under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.

In its opinion of Effects of Awards of Compensation made by the United Nations Administrative Tribunal, the ICJ pointed out that the Charter contains 'no express provision for the establishment of juridical bodies or organs and no indication to the contrary, but held that the capacity to establish a tribunal to do justice as between the Organisation and the staff members arises by necessary implication as being essential out of the Charter'.

21 Ibid.
23 Resolution No. 32 of the First Session of the Council, para. 2, as quoted in Jenks, ibid., op. cit., at p. 272.
25 G.I. Tunkin, Voprosy Teorii Mezhdunarodnogo Prava, Moskva, 1962, p. 82. See also the same author, Teoriia Mezhdunarodnogo prava, Moskva, 1970. See also Lukashuk, 'An international organisation as a party to international treaties (1960), YBIL, p. 144.
26 ICJ Reports, 1949, p. 179.
27 Ibid, at p. 182.
4. THE WORK OF THE SUB-COMMITTEE\textsuperscript{29} OF THE ILC ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANISATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANISATIONS:

The question of treaties concluded between two or more international organisations was included by the International Law Commission in its general programme of work.\textsuperscript{30} In its work on treaties, the definition of a treaty adopted by the Commission has been framed broadly enough to allow recognition of the new development in international law — the increased role of international organisations in the field of the law of treaties.\textsuperscript{31} This recognition was again emphatically reaffirmed when the Commission held that, 'International organisations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the Law of Treaties'.\textsuperscript{32}

Moreover, in Article 1(a) of part 1, it defined the term 'treaty' as used in the draft articles, to mean 'any international agreement in a written form ... concluded between two or more states or other subjects of international law', and in the commentary upon this definition\textsuperscript{33} it explained that the term 'other subjects of international law' was designed to provide for treaties concluded by:

\begin{itemize}
  \item a. international organisations
  \item b. the Holy See, which enters into treaties on the same basis as States, and;
\end{itemize}

\textsuperscript{29} The Sub-Committee on treaties concluded between states and international organisations or between two or more international organisations was set up by the International Law Commission (ILC) at its 1069th meeting on 12 June 1970. The members are Mr. Reuter (chairman) and Mesars Alcivar, Castren, Eli-Erian, Nagendra Singh, Ramangasooovina, Rosenne, Sette Camara, Tabibi, Thiam, Tounkara, Ustor, and Sir Humphrey Waldock.


\textsuperscript{32} At its 14th session, the ILC in reaffirming decisions which it had taken in 1951 and 1959 to defer examination of treaties entered into by international organisations until it had made further progress with its draft on treaties concluded by States, however, upheld this view. See Official Records of the General Assembly, 17th Session Supplement No. 9(A-5209), para. 21.

\textsuperscript{33} Ibid., para. 8 of the commentary to Article 1.

\textsuperscript{34} The ILC session for 1972 met in Geneva during the month of April when the first report of the special rapporteur must have been tended on the topic of treaties concluded between states and international organisations or between two or more international organisations.

\textsuperscript{35} The Commission's commentaries to the set of draft articles on the law of treaties provisionally adopted in 1962, and the commentaries to the final draft articles on that topic adopted in 1966, contain some indications of what the Commission had in mind when referring to 'other subjects of international law'. Paragraph 8 of the commentary to article 1 of the 1962 preliminary draft states: 'The phrase 'other subjects of international law' is designed to provide for treaties concluded by (a) international organisations, (b) the Holy See, which enters into treaties on the same basis as states and (c) other international entities such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law'. Further, para. 2 of this commentary to article 3 of the same set of draft articles indicates: 'The phrase 'other subjects of international law' is primarily intended to cover international organisations, to remove any doubt about the Holy See, and to leave room for more special cases such as insurgent community to which a measure of recognition has been accorded.'
is stated that the term 'constitution' had been deliberately used in preference to constituent instrument'. For the treaty-making capacity of an international organisation does not depend exclusively on the terms of the constituent instrument of the organisation but also on the decisions and rules of its competent organs. Comparatively, few constituent instruments of international organisations contain provisions concerning the conclusion of treaties by the organisations. Our understanding of the ILC's commentary is that an international organisation can be a party to treaties in the sense of international law: in other words, that it has the capacity to conclude treaties. The important caveat is that such a capacity is not unlimited, as in the case of sovereign states, for example, but is subject to such limitations as result from its constituent instrument and from the decision or rules made in accordance with it.

The earlier sessions of the ILC at which there was discussion of the place of agreements concluded by international organisations in the different draft articles on the law of treaties presented by four eminent British scholars, namely: Brierly, Lauterpacht, Fitzmaurice and Waldock were characterized by sharp argument about whether to include or exclude such agreements. Professor Reuter in a precise and lucid manner analyses these 'shifts' in emphasis between 'inclusion' and 'exclusion' of agreements concluded by international organisations.

We do not intend to go into details of these debates here, save to observe that the various formulations used in the Commission reflected an attempt to describe a situation which, in the view of all members, was characterized by two elements: the competence of an international organisation to conclude international agreements was limited in principle by its constitutional practice and this competence was not necessarily limited by its written constitution. The members of the Commission could not agree on the precise wording. However, the version which was finally adopted and justified by the Special Rapporteur read: 'The expression “the constitution of the organisation concerned”; had been chosen because it was broader than “constituent instrument”; it covered also the rules in force in the organisation. In most organisations, the treaty-making capacity had been limited by the practice instituted by those who had operated the organisation under its constitution.'

The final position of the Commission on the subject was summarized in the following terms: 'Accordingly, important although the provisions of the constituent treaty of an organisation may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole — the constituent treaty together with the rules in force in the organisation — that determine the capacity of an international organisation to conclude treaties. The observations made by two Governments in 1965 in relation to the question of the treaty-making capacity of international organisations require attention.

Austria took a position in favour of very broad competence for international organisations. In the Austrian opinion: '... capacity to conclude treaties must be an inherent right of any international organisation, if it is at the same time a subject of international law ... the constitutions of many international organisations do not mention the question of the capacity of the organisation in question to conclude treaties. In most of these cases, however, the organs of the organisation in question have considered themselves competent to conclude treaties on behalf of the organisation ... If, on the other hand, the constitutions do contain provisions concerning the conclusion of treaties, they either relate to the questions which organs are competent for the purpose — in which case they

41 Ibid., at p. 19
are of procedural nature — or limit the extent of freedom to conclude treaties, which in principle is all-embracing by stipulating that only treaties on certain subjects are permitted.\(^{44}\)

The United States, having quoted the 1949 opinion of the International Court of Justice, called mainly for the replacement of the word constitution by a less limiting word, for example ‘authority’.\(^{45}\) There was general support for the deletion of the article on capacity to conclude treaties.

Nevertheless, in concluding his report,\(^{47}\) Professor Reuter, while recognizing the capacity of international organisations to conclude agreements, cautioned that just as it was easy to declare that States have the capacity to conclude treaties (1969 Convention, Article 6), because that capacity is merely the expression of their ‘sovereign equality’ so it is difficult to deal with the same question in relation to international organisations, which are characterized by a fundamental inequality as between themselves and States.

6. CONCLUSION:

The following propositions are tentatively advanced by way of a summary:

1. It appears that the prevailing view in doctrine, as supported by jurisprudence and the practice of international organisations is that the treaty-making capacity of such bodies is derived not only from specific provisions in their constituent instruments, but also by implication therefrom.\(^{48}\)

2. One point which should deserve detailed study is the one concerned with the organs through which the treaty-making power of international organisations is exercisable. Some writers have rightly contended that ‘the law of international organisations does not as yet contain any clear rules for determining where the treaty-making power of international organisations resides’.\(^{49}\) It is most difficult to trace what Detter calls the ‘whereabouts of the treaty-making power within the organisation’.\(^{50}\)

3. In order to establish the basis of the so-called jus contrabendi — capacity to make treaties of international organisations, it would be appropriate to study the clauses in international organisation constitutions, from which treaty-making power derives, trying to establish their nature and the circumstances in which they occur so as to arrive at a theory of the sources of the capacity of international organisations to conclude treaties. It is important to find out whether such capacity may spring from tacit authorization or if it will always call for express provisions.

4. Since it is widely accepted that treaties are means of developing peaceful co-operation among nations as the preamble of the Vienna Convention clearly states, and since international law will be only enhanced by the widest possible acceptance of the future rules to regulate treaty-making practice between States and international organisations or between two or more international organisations and other non-governmental international organisations or even between international organisations and other subjects of international law, we dare to suggest that organisations such as the Organisation of American States and the Organisation of African Unity or other similar regional organisations may accept those rules that may be drafted and finally adopted by the ILC’s Sub-Committee if they choose to do so.

5. In general, it would seem possible to conclude that once an international organisation has asserted itself and therefore has international personality, it must be deemed, unless expressly denied, to have the capacity to enter into agreements, which are appropriate to its purpose.

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\(^{47}\) A/CN.4/258, p. 56, para. 82 (1972).


\(^{50}\) Ibid., p. 444.
CHAPTER 13

THE LAW OF THE SEA

INTRODUCTION:

It is a matter of speculation as to when the relationship between man and man and between man and the sea began to fuse into a formalized set of rules which we now refer to as the Law of the Sea. What is certain though, is that the Law of the Sea is one of the oldest components of international law. The Greek city-states, the Roman Republic and later several Italian City States, noticeably Venice, exercised various types of jurisdiction over their adjacent seas. However, none of these early policies resulted in any clear and recognized claims to sovereignty over the sea until Venice, through sheer power, managed to enforce her claim to sovereignty over the entire Adriatic Sea.

The notions of freedom of the Seas and of Coastal State’s sovereignty over at least the adjacent sea developed simultaneously. Both notions contended for dominance in international relations for centuries, particularly in the Mediterranean. In Scandinavia also, attempts were made by States to control fishing, navigation and commerce in waters as far away as Greenland.

The most dramatic and vigorous maritime dispute however, was touched off by the Spanish and Portuguese claims to all the sea in the Southern Hemisphere, based on a series of papal bulls and treaty of Tordesillas of 1494.

During the 16th century, the concept of a territorial sea as belonging by right to each coastal state became well-established in international law. However, the breadth of the sea was not. Throughout the century, the debate between those maritime powers favouring freedom of the seas (mere liberum) and those advocating the right of

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a state to claim as much of the sea as it could defend (*mere clausum*) raged ever hotter. This reached a climax early in the 17th century. After Britain achieved naval supremacy early in the 18th century, she could afford to be more moderate and the doctrine of *mere clausum* faded away.

Meanwhile, the breadth of the territorial sea was a matter of considerable debate. At various times and places in Europe during the 15th through the 18th centuries, territorial waters were viewed as being valuable primarily for protecting nearby fisheries from foreign fishermen. However, there was no agreement on whether they should include all water within sight of land, all water which could be defended by shore-based cannon, or a breadth-based on some fired distance or other criterion. Both the line-of-sight and cannon-shot criteria had the serious drawback of being quite imprecise and variable. The former, moreover, implied a continuous belt of territorial sea, while the latter could only be applied where cannon were actually mounted on the shore. The principal concern of all coastal states was fishing and security as well as trade, customs duties, capturing and landing of prizes of war, tolls charged by countries controlling straits and neutrality of ships during war-time. Gradually, the Scandinavians idea of a Maritime League as a standard breadth of the territorial sea became more widely applied.

Through the centuries preceding World War 1, other issues vexed lawyers, statesmen, fishermen, mariners and military men. Among these were measurement of the territorial sea; protection of fishing grounds; exercise of jurisdiction over customs; fiscal, immigration and sanitary matters; neutrality and security jurisdiction outside the territorial sea and the status of bays and straits.

The above briefly represented the situation with regard to the law of the sea before World War 1 which marked a watershed and little in international affairs remained unaffected by it. One of the most momentous results of World War 1 was the creation of the League

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2 Britain, under the nationalistic Stuarts had left the Dutch, French and Germans to fight the battle for a mere liberum and began to claim the seas surrounding the British Isles.

3 The three miles distance was never accepted as universal international law. For example, the Scandinavians claimed four miles, the Ottoman Empire and several Mediterranean countries claimed six, the Union of Soviet Socialist Republics in 1927 claimed twelve. Other States either refused to recognize the three-mile limit or claimed much broader zones of functional jurisdiction or made no claims at all.
of 1958. However, it participated rather actively in the Third United Nations Conference on the Law of the Sea (UNCLOS III) which has now resulted in the 1982 Law of the Sea Convention to replace the 1958 one when it comes into force.10

Accordingly, our study will cover such areas as the regime of internal waters; the territorial sea; the Continental Shelf; the High Seas; Exclusive Economic Zone; Land Locked States; Fishing and Conservation of Living Resources of the High Seas; the Law of the Sea Conference and the Legal Status of the 1982 Law of the Sea Convention.

INTERNAL WATERS:

The Internal Waters of the State are made up of rivers, lakes, canals, ports, harbours, bays, mouths of rivers and roadsteads and low-tide elevations. The 1958 Convention of the Law of the Sea did not cover internal waters of a state. However, that of 1982, adequately took care of the subject.11 Since the existing law i.e. the 1958 did not provide for internal waters of the state, the operative rules in this regard would be found principally in customary international law. Under customary international law, foreign ships which are in distress12 are in normal circumstances admitted into the internal waters of the state. This does not suggest that as a rule of customary international law, foreign ships enjoy inherent rights of entry into such waters. The extent of jurisdiction of a state over the foreign ships within its internal waters will depend on whether the ship in question is a merchant ship or a warship. This would therefore touch on the question of the legal status of the ship in question. Flowing from the general desire of all sovereign states to interact with one another in the areas of trade and commerce generally, the permission is often granted to foreign commercial ships to enter their ports. In that case, the coastal state reserves the right to apply and enforce its municipal laws in full against foreign merchant ships within its internal waters. But in doing so, the coastal state will not interfere with the right of the flag-state to either try people for crimes committed on board the ship or to exercise disciplinary powers by the captain over his crew. It is only when a crime committed by a member of the crew affects the good order of the coastal state or any of its inhabitants that the coastal state may intervene and try such criminals in its own court.

However, the state of the law is much different in respect of foreign warships. There is no doubt that a foreign warship must observe the coastal state’s laws about navigation and health regulations. For a coastal state to step into such a ship for any act or inspection on the ship, prior permission ought to be granted by the appropriate authorities of the flag-state. While members of the crew are immune from prosecution by the coastal state for crimes committed on board the ship, it is doubtful if the coastal state may not try crimes committed on shore, unless it can be shown that the crew were in uniform and on official duties at the time of the crime. Nothing however, prevents the flag-state from waiving its immunity.

THE TERRITORIAL SEA:13

Under international law, the territorial sea of a state stretches for an undetermined number of miles beyond its internal waters and in the case of an archipelagic state,13A its archipelagic waters. The width of the territorial sea constitutes one of the most controversial questions in international law.14 As has been indicated, though the concept of a territorial sea as belonging by right to each coastal state became well established in international law, the exact breadth of the territorial sea remained an unresolved issue for centuries. Every state reserved to itself the right to establish the breadth of its territorial sea, until 1958 when a Convention was adopted. In the case of Nigeria, her claim of the width of her territorial waters followed the British practice at independence. In other words

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10 As D.J. Harris rightly pointed out, the new Convention when it comes into force will produce a set of complicated treaty relations with the 1958 Conventions continuing in force for the States remaining parties to them.

11 See, Articles 8-12 of the 1982 Convention.

12 Examples are ships fleeing from a tempest, or ships which are severely damaged or which suffer from any serious defect which may result in serious harm to life and property if it does not occur. This is a type of immunity.

13 Sometimes called territorial waters or maritime belt. These terms will be used interchangeably in this discussion.

13A An archipelagic state is a state whose substantial coastal territory (area) projects into the sea. Examples of these states are Spain, Portugal, etc.

14 It was because of lack of agreement that prevented the inclusion in the 1958 Territorial Sea Convention of the rule on the width of the territorial sea.
as a former British Colony, she adopted the three nautical miles width of her territorial sea. Two Acts have been enacted since independence by Nigeria varying the width of her territorial sea. These were the Territorial Waters Act 196715 and the Territorial Waters (Amendment) Act, 1971.16

Thus by the 1967 Act, the width of the territorial waters of Nigeria was extended by nine nautical miles i.e. from three nautical miles to twelve nautical miles.17 Four years later, it was further extended to thirty nautical miles under the 1971 Act.18 By 1967 and 1971, Nigeria had acceded to the 1958 Vienna Convention on Territorial Sea which provides thus:

"The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured".19

Nigeria's 1971 Territorial Waters (Amendment) Act provides that:

"The territorial waters of Nigeria shall for all purposes include every part of the open sea within thirty nautical miles of the coast of Nigeria (measured from the low water mark) or of the seaward limits of internal waters".20

It has been argued that Nigeria's territorial claim is contrary to her treaty obligations under the Geneva Convention of 1958 on the Law of the Sea and therefore illegal in international law.21 On the other hand, two other Nigerian scholars on the subject hold a contrary view. While Nwogugu22 contends that the twelve miles limit represents the minimum limit that can be claimed under available evidence of State practice, Ajomo,23 holds the view that in the absence of a clear regulatory rule of international law, it seems that extension of the Nigerian territorial sea to thirty nautical miles does not constitute a breach of any established rule.

With greatest respect, we neither share the views of Nwogugu nor that of Ajomo on this question. It appears that Akinsanya's stand is much more satisfactory. If the interpretation to be given to the provision of Article 24(2) of the Vienna Convention on Territorial Sea 1958 is that it is permissive and not definitive as my learned colleagues Nwogugu and Ajomo believe, it will tantamount to rendering the rule of international law as contained therein meaningless and useless. Certainly it cannot be reasonably argued that that was the intention of the large number of States that adopted and ratified the law on the matter.

Clearly, taking a broad view of the matter and in furtherance of international law, the better view is that the provision under the 1958 law is directive within a circumscribed position rather than merely being permissive. In other words, it seems to us that under the rule, nothing stops a state party to the convention from claiming a width of territorial sea less than twelve nautical miles but may not exceed this limit. Consequently therefore, Nigeria's claim of thirty nautical miles is in conflict with the provision of the law on the question. It is hereby suggested that the provision must be brought in conformity with the international law rule enacted by Article 24(2) of the 1958 Convention. It is submitted further that the proper interpretation to be ascribed to the term "may not" as used in the article is obligatory and any deviation therefrom boaders on a breach of an international obligation. All state - parties to that law must be enjoined to bring their internal laws in conformity with that rule. It does no longer sound persuasive to argue on non-existence of a uniform convention on this issue in view of the clear stipulations of the 1958 Convention on the Law of the Sea which was the first of its kind since mankind on this controversial subject in which a near consensus was reached by the world international community.

Jurisdiction and Sovereignty over the Territorial Sea:

Under the Geneva Convention on the Territorial Sea 1958 the coastal state exercises sovereignty over its territorial sea.24 However,

15 No. 5, 1967.
17 Section 1(3)(a).
18 Section 1(1).
19 Article 24(2).
20 Section 1(1).
24 Article 1.
the coastal state’s sovereignty is subject to a very important limitation, i.e., the right of innocent passage by foreign ships through the territorial sea. Passage is considered to be innocent so long as it does not disturb the peace, good order or security of the coastal state. The purpose of the passage must be either of traversing the sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters. It also includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress. The coastal state must not hamper innocent, and must give warning of known dangers to navigation in the territorial sea.

The coastal state’s sovereignty over the territorial sea includes the exclusive right to fish and exploit the resources of the sea bed and subsoil; exclusive enjoyment of the airspace above the territorial sea; exclusive right to transport goods and passengers from one part of the coastal state to another; right to enact regulations concerning navigation, health, customs duties and immigration; power of arrest over merchant ships exercising a right of innocent passage and over persons on board such ships.

A number of legislations enacted by Nigeria in these regards are in conformity with international law rules on the subject. Take for example, the ownership and title of the territorial waters of the country is vested in the Federal Government. By the Territorial Waters Act, 1967, any act or omission which is committed within the territorial waters of Nigeria, whether by a citizen or a foreigner will be an offence as if committed in any part of Nigeria. Such an offender will be arrested, tried and punished for the offence as if he had committed it in that part of the country. The provision would apply in the case of a foreigner on board a foreign ship, the foreignness of the ship notwithstanding.

25 Article 14(4).
26 Article 14(2).
27 Article 14(3).
28 Article 15.
29 Article 2.
30 Articles 19 & 20.
32 Section 2(1), Territorial Waters Act, 1967.
33 Section 2(2), Ibid.

The Continental Shelf:

The quest for fish was among the motives that led some European States to make excessive claims to jurisdiction over parts of the sea. Before 1945, the freedom of the high seas meant, that every state had the right to exploit the seabed and subsoil of the high seas. In general, the hussle for maritime space took place among only a handful of countries which managed to keep one another in check so that the extension of national maritime jurisdiction was relatively slow and moderate. All this changed, however in 1945 when President Hany S. Truman of the United States of America issued two proclamations. The first announced that the U.S. would regulate fisheries in those areas of the high seas contiguous to its coasts, but that these zones would continue to be high seas with no restrictions on navigation. The second one which asserted United States jurisdiction over the resources of its continental shelf set off the great sea rush of the twentieth century.

The operative clause of the proclamation stated that “the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control”.

Only a month later, Mexico claimed all the rights of the two Truman proclamations in one proclamation by President Avila Camacho. Argentina in 1946, claimed not only its extra-ordinarily broad continental shelf but also its “epicontinental” or superjacent waters. In 1947, Chile and Peru extended not only their jurisdiction but also their sovereignty over an adjacent maritime zone 200 miles wide, which incorporated nearly all the rich fisheries of the Humboldt Current. Soon afterwards, the U.S.S.R. and countries of the European Economic Community made similar claims of about 200 miles exclusive economic zone. The action of the United States in this regard created a precedent which other states copied in the years after 1945.

While this great rush was gathering force, the United Nations was embarking on its task of developing and codifying international law, and the law of the sea had a very high priority. In 1957, the United Nations General Assembly voted to convoke a full-dress conference.

34 September 28, 1945.
to develop one or more conventions incorporating all of the law of the sea. Armed with four draft conventions, prepared by the International Law Commission, the United Nations Conference on the Law of the Sea convened in Geneva in 1958.35

The 1958 Convention added more details to the rules. Thus Article 1 defines the Continental Shelf as:

"The sea-bed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial seas to a depth of two hundred metres or, beyond that limit, to where the depth of the superjacent waters of the exploitation of the natural resources of the sea area".

The relevant Nigerian legislation which though not particular on the continental shelf makes reference to it, is the Petroleum Act 1969.36 The Act defines continental shelf as:

"The seabed and subsoil of those submarine areas adjacent to the coast of Nigeria the surface of which lies at a depth not greater than two hundred metres (or, where its natural resources are capable of exploitation at any depth) below the surface of the sea, excluding so much of those areas as lies below the territorial waters of Nigeria".

The above definition of continental shelf under the Petroleum Act is more limited in its territorial coverage than the Geneva Convention. As has been argued above, since Nigeria is a party to this Convention, it is in keeping with her obligations therefrom by claiming an area of continental shelf less than that allowed by the Convention. According to the Petroleum Act, the entire ownership and control of all petroleum in, under or upon any lands is vested in the State.37

The exploration and exploitation of the continental shelf must not cause unreasonable interference with navigation, fishing, conservation of fisheries or scientific research.38

In the North Sea Continental Shelf Cases, the International Court of Justice, in determining how parts of the continental shelf lying off the coasts of adjacent states should be apportioned between them stated:

"What confers the ipso jure title which international law attributes to the Coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion — in the sense that, although covered in water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural — or the most natural — extension of the land territory of a coastal state, even though that area may be closer "to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State — or at least, it cannot be regarded in the face of a competing claim by a state of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it".39

Although what the Continental Shelf Convention gives to the coastal states are only limited rights and not sovereignty, the Continental Shelf is a very important area in view of the enormous living resources it harbours. There is need for Nigeria to enact a law specifically on the Continental Shelf which will give full effect in Nigeria to the Vienna Convention.

The Exclusive Economic Zone:

The exclusive economic zone has its roots in the notion of the exclusive fishing zone and the doctrine of the continental shelf. The exclusive fishing zone is a zone of the high seas adjacent to a coastal state's territorial sea within which the coastal state has exclusive jurisdiction over fishing.

In 1978, Nigeria enacted the Exclusive Economic Zone Act.40 This Act makes provisions for the exclusive economic zone of the Federal Republic of Nigeria. Seven years before the Economic Zone Act was promulgated, the Sea Fisheries Act of 1971 was enacted.41 This Act repealed all former legislation on the subject.42 Under
the Act, it is mandatory that a licence be obtained from the appropriate Nigerian authority before a person can operate or navigate any motor fishing boat within the territorial waters of Nigeria. The license to operate the fishing is to be applied for and obtained from the Director of the Federal Department of Fisheries or any person appointed by him to carry out any of the provisions of the Act.\(^{43}\) The duration for which the license may be granted could be for a year or for a quarter.\(^{44}\) It could be cancelled, suspended or renewed.\(^{45}\) An appeal could be made to the Minister in charge of fisheries by any person aggrieved by any refusal by a licensing officer to issue or renew a license or by the cancellation or suspension of a license. But this appeal must be made within a period of fourteen days from the date of receiving notice of such a refusal.\(^{46}\)

Any person operating or navigating a motor fishing boat without a licence will be liable on conviction, to imprisonment for one year or to a fine of one thousand naira for each day during which the offence continues, or to both such fine and imprisonment.\(^{47}\) The provisions in respect of obtaining a license will not apply to any motor fishing boat entering the territorial waters of Nigeria not for fishing or the disposal of fish, but solely for refuelling at any port or for shelter, or solely because the motor fishing boat is in distress or there is any other emergency.\(^{48}\)

Under the Nigerian Economic Zone Act, the exclusive economic zone is an area extending from the external limits of the territorial waters up to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial waters is measured.\(^{49}\) Subject to the laws of Nigeria and any neighbouring littoral state the delimitation of the exclusive zone between Nigeria and such state must be the median or equidistance line.\(^{50}\) The meaning attached to the term “median or equidistance line” is that the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Nigeria and state concerned are measured.\(^{51}\)

The delimitation of the exclusive economic zone set out above is in conformity with the provisions of the Informal Composite Negotiating Text (I.C.N.T.) of 1977 which states that the zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in Part V of I.C.N.T. under which the rights and jurisdictions of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of the present Convention.\(^{52}\) By a consensus the international community endorsed the 200-mile exclusive economic zone which emerged at UNCLOS III and provision is accordingly made for such a zone in I.C.N.T.\(^{53}\) Without prejudice to existing legislations,\(^{54}\) sovereign rights for the purpose of exploring and exploiting of the natural resources of the sea-bed, sub-soil or superjacent waters of the exclusive zone is vested in the Federal Republic of Nigeria and such rights must be exercisable by the Federal Government or by such Federal Minister or agency as that Government may from time to time designate in that behalf either generally or in any special case.\(^{55}\) Such sovereign right is however subject to the provisions of any treaty to which Nigeria is a party with respect to the exploitation of the living resources of the exclusive zone.\(^{56}\) Any act or omission which takes place on, under or above an installation in a designated area or any waters within two hundred metres of such an installation and would, if taking place in any part of Nigeria, constitute an offence under the enactment in force in that part, will be treated for the purpose of that law as taking place in Nigeria.\(^{57}\) The prosecution of any offence under the Exclusive Economic Zone Act is at the instance of the Attorney-General of the Federation, and such offences will be triable by the Federal High Court whether or not such offences would, if actually committed in Nigeria, be triable under the applicable enactment by a Court other than the Federal High Court.\(^{58}\)


\(^{44}\) Section 3(3), *Ibid.*


\(^{48}\) *Ibid.*

\(^{49}\) Section 1(1) of the Act.

\(^{50}\) Section 1(2), *Ibid.*


\(^{52}\) Article 55 of the I.C.N.T. 1977.


\(^{54}\) Territorial Waters Act, 1967 as amended by the Territorial Waters (Amendment) Act 1971; the Sea Fisheries Act 1971.

\(^{55}\) Section 2(1) of Nigeria Exclusive Economic Zone Act, 1978.


THE HIGH SEAS:

The portion of the world ocean remaining after the territorial sea, internal waters, economic zone and archipelagic waters have been subtracted is still considered the high seas.59 As a general rule, a ship on the high seas is subjected only to international law and to the laws of the flag state.

A “flag state” really means the State whose nationality the ship possesses. Under international law, nationality creates the right to fly a country’s flag.

Freedom of the High Seas:

The old “freedom of the seas” is dead, and rightly so, for it meant, among other things, freedom to over fish and freedom to pollute the sea. Those traditional high seas rights which tend to serve community interests, in other words, have been protected and even enhanced by more detailed specification, while those inimical to community interests have been subjected to some limitations. The High Seas Convention reflects customary international law.60

Freedom of fishing is now subject to the coastal state’s exclusive fishing or economic zone. The freedom to conduct scientific research, and freedom to use the high seas for the testing of weapons and naval exercises as well as freedom to observe the naval exercises of other states are recognized by general principles of international law. It is submitted that since the use of the high seas should be limited to peaceful purposes,61 freedom for the testing of weapons, or sometimes use of the high seas to make show of strength off the coast of other states ought to be excluded.

Disturbance of Ships on the High Seas:

Only the flag state is permitted in international law to exercise jurisdiction over a ship on the high seas.62 However, the rules of international law applicable to warships differ in a number of ways from those applicable to merchant ships. For example, only the flag state can interfere with warships. While the same general rules apply, some exceptional circumstances exist in which the warship of one state could interfere with a merchant ship of another state. These situations include Exclusive fishery zones, exclusive economic zones, and contiguous zones, Hot pursuit,63 piracy,64 self defence, treaties and stateless ships. A ship is not prohibited from sailing without a flag. However, when and if it does, it is treated as if it is a person without a state. Thus in the Naim Malvan v. Attorney-General for Palestine,65 the Judicial Committee of the Privy Council stated:

“No question of comity nor of breach of international Law can arise if there is no state under whose flag the vessel sails ... Having no (flag) ... the Asya could not claim the protection of any state nor could any state claim that any principle of international law was broken by her seizure”.66

Jurisdiction of Municipal Courts over crimes committed on the high seas:

The ordinary rules of international law with regard to criminal jurisdiction apply to crimes committed on the high seas. The basic principle of customary international law that “vessels on the high seas are subject to no authority except that of the state whose flag they fly” is stated and emphasised upon by the Permanent Court of International Justice in the Lotus Case.67 Thus, the Court stated:

“A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of that state the flag of which it flies, just as in its territory, that state exercises its

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59 Generally speaking, the concept that the (diminished) high seas is a mere liberum has been respected and retained. At the UNCLOS III, there was debate among the classical legal scholars over whether the sea is res nullius, belonging to no one and thus subject to abuse and appropriation, or res communis, belonging to the community of states who thus may use it freely but are obligated to protect it.

60 Articles 1 and 2 of the High Seas Convention.

61 See, I.C.N.T. Article 88.


63 Article 23, ibid.

64 Articles 14-22, ibid.

65 (1948) A.C. 351 at pp. 369-370.

66 It has been argued by Akehurst that the Privy Council’s reasoning should not be carried too far for it is possible that arbitrary confiscation or destruction of a stateless ship would entitle the national state of the ship-owners to make an international claim. See, Akehurst op. cit., p. 173.

authority upon it, and no other states may do so”.

However, some exceptions to the exclusive administrative jurisdiction of the flag state on the high seas exist. Smith comments on them as follows:

“The right of any ship to fly a particular flag must obviously be subject to verification by proper authority, and from this it follows that warships have a general right to verify the nationality of any merchant ship, which they may meet on the high seas. This “right of approach” (verification du parillon ou reconnaissance) is the only qualification under customary law of the general principle which forbids any interference in time of peace with ships of another nationality upon the high seas. Any other act of interference (apart from the repression of piracy) must be justified under powers conferred by treaty. Provided that the merchant vessel responds by showing her flag the captain of the warship is not justified in boarding her or taking any further action, unless there is reasonable ground for suspecting that she is engaged in piracy or some other improper activity ... In the past, the question of the right of approach has been the subject of some controversy and has occasionally given rise to friction. Under modern conditions, the general use of wireless and other developments have made the matter one of very small importance”.

Nigeria exercises jurisdiction in respect of offences committed in ships on the high seas. Once any complaint is made to any proper officer in a foreign country that any master, seaman or apprentice belonging to a Nigerian ship or any unregistered ship required to be registered in Nigeria, has committed an offence on the high seas, the proper officer may enquire into the case, and take such steps in his power for the purpose of placing the person alleged to have committed the offence under the necessary restraint and of sending him as soon as practicable in safe custody to Nigeria.

Pollution:

Interest in the prevention of the pollution of the sea by oil dates back at least to 1926, when the international conference of experts on the subject was held in Washington at the request of the United States. Most of what has been done so far to prevent pollution of the sea has been the work of IMCO, the Inter-governmental Maritime Consultative Organisation, another affiliate of the United Nations, though the matter has traditionally ranked low in its scale of priorities.

Generally, states have resisted restrictions designed to prevent pollution by ships because they generally raise shipping costs, and enforcement is always problematic.

Public awareness of actual and potential pollution of the sea as a result of such dramatic events as the Toney Canyon disaster, the voyage of the Manhattan through Canada’s Arctic waters and the Saxta Barbara Channel oil spill from offshore wells has catalyzed ship-owners, governments, international agencies, oil companies and UNCLOS III into serious efforts to prevent more disasters at sea. There is still too little concern, however, with the long term effects of more subtle forms of pollution, mostly from the land and atmosphere.

Pollution is defined under Nigerian law as contamination with any chemical or other substance in such a quality as to be injurious to animal or vegetable life. The pollution of the water course in the course of mining or prospecting operations or in any works connected therewith. Every person who uses water in connection with mining operations, whether for the generation of power for the removal of mineral substances or for concentrating, milling or otherwise, must make such provisions as will ensure that all water so used does not contain injurious substance in quantities likely to prove detrimental to animal or vegetable when it leaves the mining area in which it has been so used.

Furthermore, Nigeria has taken positive steps in joining other nations to ensure the prevention of pollution of the sea by oil spillage. She is a party to the International Convention for the Preven-

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70 Section 399 1(b), Ibid.
71 It was not covered at the Hague Convention and the 1958 High Seas Convention has only two articles on it.
72 In 1967.
73 In 1969.
74 In 1969.
76 Section 46 of Nigeria Minerals Act.
77 Section 47, Ibid.
tion of Pollution of the Sea by Oil, 1954, as amended in 1962.\textsuperscript{78} To give effect to this Convention, the Oil in Navigable Waters Act, 1968, which Act provides for various penalties in respect of pollution.

Other relevant Conventions in respect of pollution on the High Seas include the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969\textsuperscript{79} and the International Convention on Civil Liability for Oil Pollution Damage 1969.\textsuperscript{80}

**THE PLIGHT OF THE LAND-LOCKED STATES:**

There are at present 30 land-locked states, comprising about 20 per cent of the world’s independent or nearly independent countries, 8.5 per cent of its land area and 4 percent of its population. It is no coincidence that of the 29 states listed by the U.N. in 1976 as the “least developed among the developing countries”, 15 are land-locked.

Six others — Botswana, Uganda, Bolivia, Mongolia, Paraguay, Swaziland and Zambia — are somewhat less poor countries handicapped by “land-lockedness”.

The lack of a seacoast is a handicap for several reasons. First, sheer distance from a seaport increases the costs of transporting both imports and exports of the land-locked state. These costs are multiplied by such factors as difficult terrain, adverse climates and in-transportation routes and equipment. Since most of the states across which developing land-locked countries must transit are themselves poor, they frequently find their ports and transport facilities inadequate for their own expanding needs, to say nothing of having a surplus capacity for the use of a land-locked neighbour. Delay in delivering transit traffic of land-locked states often result from cumbersome procedures, shortages of competent staff, inadequate and unreliable communications, and similar problems. These delay increase costs through loss, damage, detenoration and pilferage; higher insurance rates, credit charges and demurrage; and sometimes higher prices charged by exporters to inland countries.

Many of these problems are also encountered by the interior districts of coastal states, but they do not have to deal with the additional difficulties of crossing international boundaries. Land-locked states, moreover, suffer disruptions of transit traffic due to strikes, civil disturbances and war in the transit states, even though they themselves are not directly involved.

As the developing land-locked states attempt to expand their economies, international trade becomes more important to them and these impediments to trade become more costly and troublesome. Finally, seaports have always served as “windows on the world” through which flow people and ideas, as well as goods, to stimulate change and growth; countries which lack seaports are therefore inhibited in their efforts to modernize.

From ancient times, land-locked territories have often faced obstructions, restrictions, tolls or heavy transit fees on goods and persons en route to or from the sea. Gradually, however, insistence on absolute sovereignty by transit states began to give way to a recognition of the advantage of a free flow of trade. During the nineteenth century, principles of free transit became established in Europe as recognition grew that such transit was necessary for the development of commerce and industry to the benefit of both land-locked and transit states.

The League of Nations sponsored a series of conferences during the 1920’s which produced both bilateral and multilateral treaties aimed at the facilitation of free transit. Of these, the most important were the Barcelona Convention and Statute of 1921 and the Convention and Statute on the International Regime of Maritime Ports, signed at Geneva in 1923, which set minimum standards for the transit and other rights of the land-locked.

**The European Example:**

After World War II, several important events and trends conjoined to improve access to the sea for land-locked states. For example, territorial reorganisations in Europe eliminated the Polish and Finnish Corridors and enhanced international cooperation in both overland and water transportation. An elaborate system of internationalized rivers and canals, free zones and free ports, and
special transit arrangements have made Europe today important in discussions of access to the sea largely as an example of how landlocked and transit states can develop harmonious and mutually satisfactory arrangements.

During the last quarter century a relatively new concept has developed, that access to the sea is essential for the expansion of international trade and economic development. The achievement of independence by many former colonies in Asia and Africa stimulated increasing emphasis on this relationship, rather than on the traditional stress on "rights" and "duties". Afghanistan, for example, whose access to the sea through Pakistan had been cut off in 1950, 1955 and again in 1961-63, was a leader in the battle for a "free and secure access to the sea". So was Bolivia, who was trying to win back some or all of the seacoast province which she lost to Chile in the War of the Pacific (1879-1883). These efforts produced Article 3 of the Convention on the High Seas in 1958. This represented progress, but pressure increased for a more definitive answer to the question.

As a result, the 1964 United Nations Conference on Trade and Development (UNCTAD) at Geneva adopted eight Principles on access to the sea for land-locked states and several Recommendations, including one for a full-dress conference of plenipotentiaries in July 1965.

The 1965 New York Convention, while certainly giving a measure of "status" to the problems of access to the sea for developing land-locked states, did not solve them. Its effectiveness is limited, moreover, by the fact that only a few transit states have ratified or acceded to it and only one of these (Nigeria) provides transit for developing land-locked states, in this case Niger and Chad. Despite its importance as a yardstick, it is simply another step in the long drive of developing land-locked states to reduce to a minimum the difficulties inherent in their mediterranean ("in the middle of the land") location.

Since 1965, they have continued to strive in this direction in a variety of ways which can be grouped into five major categories:

1. Internal development, particularly of transportation systems;
2. Bilateral negotiations for improved transit;
3. Practical measures to improve transport facilities in transit states and also develop alternate routes to the sea;
4. Regional economic integration; and
5. Continuing efforts in the United Nations and its specialized organs to establish and implement a right of transit.

These categories of activities are discussed in turn below. Expansion and improvement of transportation systems are particularly important for land-locked states. Bolivia, for example, is concentrating on developing road and rail networks in the eastern lowlands and connecting them both with the main economic centers of the Altiplano and with the existing networks of Brazil, Paraguay and Argentina. As development in general progresses and internal transport improves, some of the handicaps of isolation are reduced, but at the same time need for improved transit across coastal states is intensified.

**NEPAL'S Case:**

While international law provides some general principles, some basic requirements and a broad framework guiding the relationships between land-locked and transit states, specific transit arrangements, especially in Africa, Asia and South America, still depend on bilateral negotiations.

Because of the enormous disparity between the two countries in size, population, wealth and power, because of their close and complex relationship, and because Nepal has no practicable routes to the sea except through India, these negotiations are most difficult. Thus, for example, Nepal may use only Calcutta port, faces difficult restrictions in the use of containers and trucks, has inadequate security at the port and trans-shipment points en route, and is hampered by cumbersome and expensive procedures and documentation. Nevertheless, traffic does move between Nepal and India.

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82 Besides, Nigeria has Economic and Trade Agreements with Niger and Chad which were signed in September, 1969 and April, 1971 respectively. Recently, the Chadian President announced after a visit to Nigeria that the countries would establish a Nigeria-Chad Commission.

83 Nepal's transit trade across India, for example, is governed by a 1971 treaty which has since been renegotiated.
the sea and is likely to continue to do so — but only on terms acceptable to India.

The recent world-wide emphasis on expanding and upgrading seaports is also benefiting land-locked states, as port congestion has hurt them even more than the coastal states. Afghanistan is a classic example of a country which has, because of its frequent disputes with its principal transit state, Pakistan, been vigorously developing arrangements and facilities for transit through other neighbouring countries, Iran and the Soviet Union.

Regional integration, or merging the economies of countries in a region to some degree, is a logical and, short of political union, ultimate method of reducing the significance of the political boundaries between land-locked and transit states, but only Uganda of all developing land-locked states has thus far enjoyed any significant degree of integration with its transit states. Even if a high degree of integration is attained, as in the case of Uganda, it is no guarantee of “a free and secure access to the sea”, as the events of July 1976 clearly demonstrated. After the Israeli rescue of the Entebbe airport hostages, the border between Kenya and Uganda was closed for some time, causing a severe shortage of petroleum products in Uganda and even in Rwanda, whose supplies normally pass through Uganda.

**United Nations AID:**

The United Nations family has been increasingly active in taking “special measures related to the particular needs of the land-locked developing countries”, as the U.N. phrases it. UNCTAD has produced a number of valuable studies and recommendations concerning both transit facilities and transit procedures, and has provided technical assistance to such countries as UPPER VOLTA for a shipping project and Nepal for transit negotiations.


In 1967, the evolution of the Law of the Sea received another explosive stimulus. On August 17, Dr. Arvid Pardo, Permanent Representative (Ambassador) of Malta to the United Nations, proposed to the Secretary-General the inclusion in the agenda of the 22nd Session of the General Assembly an item entitled: “Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind”.

An accompanying memorandum suggested that the seabed and ocean floor be declared a “common heritage of mankind”, and proposed the creation of an international agency to assume jurisdiction over this area” as a trustee for all countries and control all activities therein.

Pardo’s proposal set off a chain of events that are having the most profound effects in all history on the Law of the Sea. The General Assembly in December 1967 established an ad hoc Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor Beyond the Limits of National Jurisdiction, commonly known as the Seabed Committee. Its 35 members set to work but soon discovered that the task was beyond them. In 1969, the General Assembly enlarged the Committee (which ultimately had 91 members) and it became essentially a preparatory committee for a new Law of the Sea Conference. Its chairman was Ambassador Himilton Shirley Amarasinghe of Sri Lanka, who later became, and still is, President of the Third United Nations Conference on the Law of the Sea (UNCLOS III).

Why this sudden interest in the seabed and ultimately in a new Law of the Sea conference? As usual, there are a number of reasons. First, the four conventions adopted at Geneva in 1958 and one on land-locked states at New York in 1965 left a number of serious matters unsettled and as time passed, they grew more pressing. The conventions, moreover, were far from being universally accepted and were even challenged as being insufficiently authoritative to establish binding norms.

Second, the pace of decolonization suddenly accelerated. Between the 1958 Geneva Conference and the end of 1967 41 new countries joined the United Nations, 17 of them in 1960 alone. They developed a sense of solidarity out of which grew “The Group of 77” poor countries, which has since grown to 114. They shifted the emphasis in the General Assembly from political and security affairs to economic and social matters, and broke United States control of the United Nations. They wanted a “piece of the action”, both in the exploitation of new resources and the development of international law.

Third, the potential value of manganese nodules which were discovered on the world’s first oceanographic research expedition by
the British vessel HMS Challenger in 1873-1876, was for the first time understood and then publicized in the early 1960's. Nodules are round or potato-shaped lumps containing at least 27 elements in varying proportions and at least 14 other constituents, also varying widely. Their chief components, however, are manganese, nickel, copper and cobalt. They litter the floors of the continental shelves and all the ocean basins and are even found in shallow waters in some fresh-water lakes. They are not rocks, but are constantly being created by precipitation out of the water itself. Their potential value is estimated in the trillions of dollars, and the technology has been developed to harvest and process them on a small scale.

Fourth, growing population pressure and new technology has been developed to harvest and process them on a small scale were resulting in an enormous boom in the harvest of fish, seaweed, marine mammals and other valuable "living resources" of the sea, and in the entry into marine fisheries of many new countries. Some species were being fished to the brink of extinction and something clearly had to be done.

Fifth, the superpowers were developing techniques for placing on the sea floor, even at very great depths, surveillance devices and nuclear and other weapons of mass destruction capable of destroying not only each other but nearly everyone else as well. Their nuclear submarines were ranging the sea, posing perceived threats from accident to many coastal states. And their navies were reaching into waters hitherto free of great-power rivalry, such as the polar seas and the Indian Ocean.

Sixth, the Torrey Canyon oil spill disaster of 1967 dramatized for the world that modern science and technology were generating unexpected and dangerous side effects. We were, in fact, seriously damaging the sea. It was clearly a problem spanning national boundaries, yet there was no international mechanism available for dealing with it adequately.

Seventh, the International Geophysical Year (1957-58), the International Indian Ocean Expedition (1959-65), and other cooperative ventures in scientific exploration not only amassed a great deal of new information about the sea, but demonstrated more clearly than ever before how little we really know about the marine environment. It also pointed out the importance of international, as well as interdisciplinary, cooperation in marine scientific research.

Eighth, intensifying exploitation of the riches of the continental shelves, notably fish and petroleum, were impelling countries to stake out more and more of these riches for themselves, keeping "foreigners" as far from them as possible. By the end of 1967, about a dozen countries were already declaring some sort of jurisdiction beyond 12 nautical miles or the 200-metre iso-bath, and by 1970, the number had increased to 18. This was still not a very large number and did not include any important maritime states, but was clearly indicative of a dangerous trend.

Fortunately, in 1969, the United Nations General Assembly passed a "moratorium" resolution calling on States and persons to refrain from all activities of exploitation, pending the establishment of an international regime with competence over the area. The Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, declared the resources of the Seabed as the "common heritage of mankind". Out of 320 Articles of the 1982 Law of the Sea Convention 59 articles and 2 out of the 9 Annexes dealt with the question of seabed mining.

Overall, the 1982 Law of the Sea Convention is an important historic document which when it comes into force will be of immense use to mankind in regulating through law, what can be described as the "last frontier of mankind on this planet". Delegates of 117 countries and organisations approved the Law. In the history of conference diplomacy, the Third United Nations Conference on the Law of the Sea (UNCLOS III) which started in 1973, and attracted over 4,500 delegates is the longest and largest.

The number of participants — between 135 and 150 delegations per session — is triple the number that attended the Hague Conference of 1930 and nearly double the number that wrote the four Geneva Conventions of 1958. The new law was a victory for developing countries which made up two-thirds of the 150 states that negotiated it. It afforded them the first opportunity to reflect their values and interests in the Law of the Sea which hitherto reflected European interests. This however, is not to underscore the fact that many of the newcomers not only have had no experience in creating international law, but have no maritime experts or tradition of any kind.

84 G.A. Resolution 2574 (XXIV).
85 G.A. Resolution 274 (XXV).
Nigeria as well as a number of states of the Third World played significant role in bringing this law about. Her role in formulating the definition of the Exclusive Economic Zone which can be regarded as a new concept in the Law of the Sea is a case in point. The Committees of various sessions of UNCLOS III Conferences in Caracas, New York and Geneva were chaired by distinguished personalities from the Third World. For example, the First Committee, chaired by Paul Bamela Engo of Cameroon wrested with the most difficult problem of establishing an international regime for the sea-bed and ocean floor beyond the limits of national jurisdiction. The Second Committee, chaired by Angres Aguilar of Venezuela dealt with a multitude of traditional Law of the Sea matters, and some newer ones, such as the exclusive economic zone. Third Committee chaired by Alexander Yankov of Bulgaria, was responsible for three major items; marine scientific research, preservation of the marine environment, and transfer of marine technology from the rich, “developed” countries to the poor, “developing” countries.

All through the negotiations of what has emerged as the 1982 Convention on the Law of the Sea, Nigeria threw her weight around as much as it could in seeing that it came to a satisfactory end. This can be further evidenced in the excerpt of a statement by Chief R.O.A. Akinjide (SAN), then Attorney-General of Nigeria who led the Nigerian delegation to the Montego Bay Conference on the Law of the Sea between December 6th and 10th, 1982. He stated:

“The new Convention on the Law of the Sea in balancing the interests of states, be it developed or developing with free market economy or state controlled, big or small powers, reflects the principle of the new international economic order. It is also an example of a just redistribution of wealth and power. This is why Nigeria will sign this Great Convention. This is why other nations too should sign it. No national legislation, no “mining treaty or no agreement entered into by the “reciprocating nations” under any nations’ municipal mining laws would provide a good title as long as a global Convention exists under the United Nations Conference on the Law of the Sea adopted in accordance with its rules and procedures. If there are areas which give concern, it is my view that it is better to try to stay within the Convention i.e. to be a signatory; and canvass to get these areas reviewed rather than stay outside the Convention. Mini-Treaties are not the answer to effective participation. They will only create confusion and conflicts. It is in this spirit that my delegation commends the Convention to my colleagues”.

Overall, the new law of the sea can be rightly referred to as a huge success for the advanced powerful states of the world. At the same time, it must be recognized, as one author recently did, that the Draft Convention reflects an appreciable progress in the law, for it takes into consideration the interests of the developing countries, the land-locked states and the geographically disadvantaged states. Hitherto, this balancing of all interests of those concerned was not exactly the case.

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88 See, Chief R.O.A. Akinjide (SAN), Statement at the Plenary Session of the Law of the Sea Conference, Montego Bay, Jamaica, 6th-10th December, 1982, pp. 3-11 at p. 11.

CHAPTER 14
CIVIL WARS

INTRODUCTION:

In the history of international relations, civil wars are known to have been fought for a number of considerations. In some cases, a civil war is fought in order to change the control of the government of a state.\(^1\) In others, the war may have been brought about by the desire of a part of the population of a state to secede and form a new state of its own.\(^2\) While success or failure recorded in each of the two types of civil wars mentioned, depends largely on the political will of the parties coupled with material resources and support available; the legal problems which result in each case are almost indistinguishable to merit any different treatment.

LEGAL STATUS OF CIVIL WARS:

International law has no rule against civil wars. Naturally, from the point of view of municipal law, each side to the crisis will regard the other side by all sorts of name varying from rebels to traitors. Certainly, none of the parties, i.e. the authority in power or the insurgents are in breach of international law.

With the formation of the United Nations Organisation after the Second World War, some provisions were enthrenched in its charter in respect of Laws of War generally. For example, under the United Nations Charter, all the members are enjoined to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.\(^3\) Further, all members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent

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1 A good example of this type of civil war is that of the Republic of Chad which has now raged for some years.
2 Examples are far and between. Mention must be made of the cases of Bangladesh, the Kurds of Spain; Eritrea (Ethiopia) and that of former Biafra (Nigeria) to mention but a few.
3 Article 2(3) of the United Nations Charter.
with the purposes of the United Nations.\(^4\)

It is submitted that the above provisions of the Charter only prohibit the use or threat of force in international relations. The framing of the said article refers to members, but it would appear that it applies to all states in international community since it is commonly understood to state a rule of customary international law.\(^5\) In other words, all states whether they are members of the Organisation or not are bound by the provision.

In keeping with the United Nations General Assembly Resolution 1514 (XV) there is now a legal rule which makes it illegal to apply armed repression of peoples under colonial rule. Indeed Afro-Asian countries as well as Socialist countries hold their view that it is lawful for states to give assistance to insurgents in colonial territories who are fighting a “war of national Liberation”\(^6\). However, this argument is rejected by Western State.\(^7\)

A number of legal problems are yet unresolved with respect to civil wars. For example, to what extent may other states i.e., foreign states render assistance to the insurgents in a civil war? Here, the nature of assistance referred to, is such which if given, would constitute a breach of the obligations imposed by international law on neutral states. Would it be right to argue that in all circumstances, assistance given to the authority in power is always legal? If not, where is the line to be drawn? There is the rule of international law that when the insurgents have been recognized as belligerents, the rules of neutrality come into play.

It is not necessary for our purposes to devote time to an exhaustive inquiry into these issues. Rather, it is proposed in this study to briefly re-examine some of the legal issues involved in the Nigerian Civil War which the present writer discussed elsewhere some three years after the end of the crisis.\(^8\)

\(^4\) Article 2(4), ibid.
\(^5\) D.J. Haris, op. cit., p. 664.
\(^6\) See, United Nations General Assembly Resolution 2105(XX) passed on 20 December 1965, “invites all states to provide material and moral assistance to the national liberation movements in colonial territories”.
\(^7\) The Western states abstained or voted against the resolution.
\(^8\) For a detailed analysis of the problem, see Okeke, C.N. op. cit., Chapter 9, pp. 158-177.
The Head of State and all the Military Governors including some top military personnel attended the meeting. At the meeting, vital and far reaching agreements were alleged to have been reached which touched adversely on the future constitutional structure of the Nigerian Federation. The preferred arrangement in view of the situation in the country was said to be a confederation which was to be implemented immediately on return to Nigeria. Soon after, problems of interpretation of the Aburi Agreement arose. The Federal Government was no longer willing on the implementation, probably as the full consequences of the agreement emerged.

Consequent upon this disagreement, General Ojukwu summoned a meeting of the members of the Consultative Assembly of Eastern Nigeria to deliberate on the matter. In the meantime; he suspended payment of all federal revenue collected from the region, including the oil royalties to the Federal Government. The Consultative Assembly resolved to empower him to declare former Eastern Nigeria an Independent Sovereign State under the name “Republic of Biafra”.

Initially, the conflict between the Federal Government and Biafra started purely as an internal dispute. Hence, the Federal Military Government first declared a police action against the Biafrans. It soon became clear that the tag “police action” given to the operation by the Federal Government notwithstanding, a full scale civil war was already raging in a number of fronts. Indeed, it has been rightly argued that the said conflict had been a civil war from the beginning; the fact that the Head of State first called it a police action was immaterial.¹¹

In spite of the efforts of the Federal Government to regard the war against Biafra as strictly an internal affair, all through events that followed brought the matter within the bounds of international concern, in the first instance to Africa, and secondly to the world at large. A number of elements of the case that emerged subsequently serve as a pointer to this assumption.¹⁰

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⁹ See, ITALAYE, Was Biafra Ever a State in International Law? A.J.I.L.
¹⁰ These have been fully highlighted in another place. See, Okeke, C.N., op. cit., pp. 158-159.
¹¹ See, Okeke, C.N. Chapter 2, pp. 20-31.
is true of every other war. We may here recall the point we have made earlier to the effect that during the second World War and during earlier wars, the legitimacy of Provisional Governments and governments in exile was never questioned on the grounds that such governments had no contacts whatsoever with the people they claimed to represent. This position is still recognized in contemporary international practice.

Biafra officially proposed that a plebiscite be held to determine whether the people would like to remain Biafrans or be Nigerians on 29 June 1968. A statement said: ‘The Government of Biafra offers a plebiscite to Nigeria as the converse of her insistence on a cease-fire first in regard to a negotiated settlement. Without asking Nigeria to drop her quarrel with Biafra, it only asks that this be prosecuted peacefully. It offers honourable peace in place of bloody battles. The Government of Biafra accepts the principle of self-determination ... The inhabitants of the disputed areas must be given the opportunity to decide by a free plebiscite whether they want to belong to Biafra or to Nigeria’. This offer was rejected by Nigeria.

For a state to qualify as one under international law, it is fundamental that the government formed to handle its affairs should have a representative character, or at least, be in effective control of the ‘national’ territory. Is the new government entitled to speak in the name of the state, so that on the one hand it may assert the legal claims of the state and on the other hand assume responsibility on the part of the State for its conduct? An affirmative answer to these questions could be given if the available evidence showed that the new government held office with the assent, or at least with the acquiescence, of the people. In the Biafran case, it is true that the Biafran Government could not persuade the Nigerian Government to accept the holding of a plebiscite to ascertain the wishes of the people in the disputed areas. However, it is also true that in normal usage, assent or acquiescence is implied from the fact that the new government is in actual control of the administrative machinery of the state, is performing normal governmental functions, and is not meeting with open resistance to its authority. ‘Stability’ is the word which is often used to describe the de facto situation, and it is in practical application the equivalent of ‘effective possession of authority’. There can hardly be any doubt that the Biafran movement had maximum support from the population concerned. It was not just the affair of a handful of people, but a national movement of national character and scale in which the Biafran will was manifested on a national basis. The governmental machinery functioned reasonably effectively until the end of the conflict, in so far as the circumstances permitted. There was never anyinstance of a wilful breakdown of law and order during the period of the twenty-seven months of its existence. In fact, a government is considered to have acquired a reasonable degree of internal stability, if the government has been enjoying the habitual obedience of the bulk of the population.

International law follows the realistic rule of regarding such de facto control over a given period as implying the general acquiescence of the people. We can imagine the government though exercising effective de facto authority is nevertheless doing so clearly without the assent of the people it purports to represent. How long third States must wait before reaching the conclusions that there is general acquiescence, is another matter.

We must observe here that the fact that past international law lent support and recognition to de facto control of a territory over a given period, as implying the general acquiescence of the people and as a decisive element justifying the legitimacy of a government is unfortunate. We submit that this position is highly unsatisfactory and should not be allowed to persist. Contemporary international law should no longer be satisfied with mere de facto control of a given territory as a yard-stick for determining the right government, but should interest itself how in actual fact the control is attained and being sustained. The important issue is whether the government in control enjoys the support of the people it governs or not.

By this stand, we do not, of course, mean to suggest — and this we have observed before in the example of the Czechoslovakian Government — that in recent times, there do not exist governments which are factually in de facto control of certain territories, but nevertheless do not enjoy the support of its people. There is nothing one can do except to recognize this fact. It is lamentable and should be condemned and discouraged. The other question

13 Ibid.
of willingness on the part of the new government to observe the rules of international law and to fulfil the international engagements of the states — has normally been judged by its actual performance after it has come into power.

A discussion of the territorial question of Biafra cannot, in our opinion, be separated from a discussion of the more general and controversial question of the concept of territorial integrity of States. It can hardly be disputed that Biafra started its war against Nigeria on a defined territory to which she continued to lay claim throughout the conflict. It is clear that the possession of a territory, a population, and a sphere of jurisdiction is seen as a postulate of statehood itself, rather than as a right conferred by international law on the State.

Those opposing the implementation of the principle of equal rights and self-determination of peoples, with regard to peoples already under the jurisdiction of sovereign and independent States, often point to the fact that it poses a great and continuous danger of conflicting with other norms of law, e.g. those of non-interference and non-intervention in the internal affairs of other states; of the illegality and possible nullity of territorial changes brought about by force, as well as of course the illegality of the use of force itself. The case was made against Biafra to the effect that recognition of her sovereignty would destroy the territorial integrity of Nigeria. Let us see how far this stand is correct.

The preservation of the territorial integrity of the State is an idea to which all States pay at least lip-service. Many international treaties and conventions contain clauses for the protection of the boundaries of the signatory powers. The United Nations Charter and the Charter of the Organisation of African Unity are cases in point.

But by binding one another to assist in preserving the existing boundaries, states are often driven not by any high-minded motives, but by the fear of losing territory already in their control.

The concept of territorial integrity was designed to discourage the ambitions of those states which did not adhere to it with regard to the territories of other states. It did not necessarily protect those states which regard themselves as bound by it. It has never been designed to guarantee the states that there will be no uprising from within the state itself. Moreover, like many international law precepts, it had in the last resort only a moral sanction, for international law recognized the right of states to acquire territory by conquest.

The Organisation of African Unity in a Charter reminiscent of many aspects of the United Nations Charter has embraced the idea of the sanctity of the territories of member-states. The purpose stated in Clause (c) of Article 2 of the OAU Charter is to defend the sovereignty and territorial integrity and independence of member states. This aim is repeated in Clause (3) of Article 3 in which member-states affirm their respect for the sovereignty and territorial integrity of each State and for its inalienable right to independence.

When the OAU resolves to defend a member's territorial integrity it intends to defend it only under certain circumstances. For, to protect the territorial integrity of member states at all cost and in any circumstances would inevitably lead to situations of absurdity. For instance, suppose the member-state, in response to internal stresses within it, decides to break up into two or more states (Mali federation) — could the OAU go to war to prevent it from ruining its territorial integrity? Obviously not, because it would lead to the legal absurdity of interfering in the internal affairs of the other states which clause 2 of Article 3 clearly provides against. The intention, it would appear, is merely to protect the territory of a member state against other states and not against forces inside the state itself.

Again, could the OAU employ force or diplomatic pressure to compel a body of citizens of a member state, which has opted for self-determination against the will of that member state, to renounce their independence in order to preserve its territorial integrity? It could not, because when it dis-approves of the action of the break-away section of the state, it treats the matter as an internal affair, which does not permit of discussion under Clause 2 of Article 3 of its Charter. When it approves of, or is neutral to the action of the new State, the only boundaries left for the OAU to protect are those boundaries of the original state that remain after the boundaries of the new state shall have been excluded.

15 We must remark that the point is not that it only had a moral sanction whereas other parts of international law had more than that, but that international law itself legitimized conquest, so only moral sanctions could prevent it.
The OAU recognizes the right of a new state to emerge from an existing state through the process of self-determination. The preamble to the OAU Charter states that the Heads of African States and Governments are 'convinced that it is the inalienable right of all people to control their own destiny. It is pertinent to note that the OAU Charter does not limit the application of this principle and does not condemn secession in any member state, nor has the Charter been amended to insert this item.

Apart from the legal trip wire which could inevitably bring down the OAU if it sought to compel a part of a member state to abandon its claimed independence, there is also a moral and philosophical argument in favour of part of a country breaking away in certain circumstances. This argument is derived from Locke's theory of society and government. The exercise of political power by the State springs from the will of the people. The power of the people over government, however, is still not quite as complete in Locke as it came to be in later and more democratic theories. Rousseaus's theory of a social contract between the State and its citizens has some relevance in the present question under discussion. The exercise of political power by the State emanates from the will of the people by what he called the 'social contract'. Government exists as a result of a tacit agreement with each individual governed; the State contracting to protect the life and property of the citizen who, for his part, surrenders the exercise of the powers of government to the State. Should the State prove unequal to the duty of protecting the lives and property of the citizens entrusted to her care, those citizens are justified in regarding the 'social contract' as at an end.

The application of this theory, not directly in relation to cases of secession, but rather significant as regards the implementation of the 'theory of right of resistance' has freed many nations from the shackles of absolutism and monarchical tyranny. For instance, it led in England, to Cromwell's revolution which swept away the Stuarts and their 'divine right of Kings' ideas and replaced them by the parliamentary democracy. And in France, it led to the people's revolution of the 1790s and to the overthrow of the Bourbon monarchy by republican democracy. In recent times, it has resulted in the birth of a new nation of Bangladesh as a result of the repressive and ruthless military rule of President Jahya Khan against its citizens in the Eastern wing of the country. It must be made clear that the Bangladesh case differs from the foregoing examples in that the uprising was aimed at secession and the creation of an independent State, while the revolutions in France and England aimed at changing the 'system' of government. But the common feature is the crucial element of the right, and aspiration of the people to effect such fundamental changes.

Unfortunately, there is still a very weak spot in legal reasoning — the failure to develop a clear formula in solving the problem of secession. Legal thoughts up till now have often centred around a nation, a government or a State.

From what has been said so far, the following conclusions emerge. Firstly, in breaking away from Nigeria, Biafra was not in breach of international law, nor of the Charter of the OAU, nor yet of any other recognized law. Secondly, there is nothing sacred about the concept of territorial integrity, for the territories of a state alter with the changing fortunes of the state, and sometimes even disappear altogether.

Before passing on to the special field of the recognition and treaty-making competence of Biafra, let us summarize what has been discussed so far. In carrying out our general analysis of the essential elements of statehood in international law, it has become clear that Biafra satisfied those minimum conditions. There is no doubt that Biafra met the requirements of population, government, permanence and a reasonable measure of effectiveness — for the time it lasted. It had a defined territory, the controversy on this being mainly restricted to the areas inhabited by the so-called minority groups of the region. The legal status of this part would have been finally determined through democratic means, in the event of a halt of hostilities, as was proposed by the Biafran government. The state of Biafra was not in fact subject to any other government and Nigeria was not in effective control of that territory which was in effective control of Biafra. The factual conditions constituting the basis of independence and sovereignty (two categories often used synonymously) are factual conditions which were present in the case of Biafra.

16 George H. Sabine, A history of political theory, pp. 517-541.
17 Ibid, at pp. 575-596.
THE QUESTION OF RECOGNITION AND TREATY-MAKING COMPETENCE OF THE BIAFRAN REGIME:

In present times, the founding of a state on a territory which is res nullius, belonging to no one, is such a rare phenomenon that it can well be left out of account. The modern occurrence is that new international entities originate mostly on or from the territory of existing States. In most cases, they are established as a result of the division of an existing state or as the result of secession. The new States or entities start their new legal life side by side with the old state on the international plane.

Modern writers on international law hold the view that the question of recognition has become a political, rather than a legal affair. Bot writes that the granting or withholding of recognition is nowadays often largely determined by political factors. This may be so, but if this observation actually represents the present trend of State practice with regard to recognition, we are inclined to doubt it, if it follows that every regime recognized by a certain number of governments would necessarily be held in strict law to have the characteristics of a state or government. We have our reservations on this: for political motives often inspire a course of action not consistent with legal prerequisites. But if, on the other hand, Bot has in mind the recognition of regimes or entities which answer all the essential criteria of statehood in international law as mentioned above, he will be right. It definitely does not follow that all regimes or entities so endowed will become ipso facto recognized states, for recognition may be withheld for political reasons. This is one aspect of the opposition between the declaratory and the constitutive theories of recognition. It would however be incorrect to assert that the fact of a denial of recognition of a regime that has satisfied the essential elements of statehood suffices in itself to deprive it of statehood in law.

It should be borne in mind that a secession from an existing state, although constitutionally a breach of the law and therefore from the point of view of the parent state illegal, is not on that account contrary to international law. Certain authors maintain that, it is a duty of States to recognize a new State which has come into existence as a result of secession. For example, according to Lauterpacht, although rebellion is treason in the eyes of municipal law, it results, when followed by the establishment of an effective government wielding power over the entity of national territory, with the consent or the acquiescence of the people (for a reasonable period of time) in a duty of other states to recognize the change and to treat the new government as representing the state in international sphere.

The explanation for Lauterpacht’s stand is not far to see. He is a recognized protagonist of the doctrine by which entities must be accepted as subjects of international law by the mere fact that they possess the normal characteristics of statehood. Recognition by other states is a recognition of this situation.

It would, however, seem that the practice of states does not support the view that new states like Biafra can have no legal existence prior to recognition. We consider it unnecessary to go into this any further here as we have discussed it in much more detail on the Rhodesian question. Certain quarters have argued that Nigeria recognized Biafra by accepting to go into peace talks with Biafra.

Without going deeper into the technicalities of the legal effects of the attitude of not recognizing the independent existence of Biafra, which was adopted by a large number of the members of the Organization of African Unity (OAU) — an attitude based on political rather than legal motivations — or the recognition of Biafra by four African countries and one Latin American country, or the official statement of support by a European country (France) or the fact that Nigeria herself maintained relations with Biafra, at least during the peace talks under the auspices of both the Commonwealth Secretariat and the Organisation of African Unity, we must not fail to observe that there can hardly be any force of reasonable argument to deny the fact that the conflict was internationalized, to such an extent that Biafra’s existence was accepted as a fact, even if objected to on the basis of political and legal queries by her opponents. In the practice of states, the gap between the elements of the legal maturity of a state regime, and political acknowledgement of it, widens gradually and in more and more cases. Even though third states may wait indefinitely before according recognition to what is happening, nevertheless, the legal facts or actual state of affairs cannot be denied. The decision of either the

19 Lauterpacht, Recognition in International Law, 1947, p. 409, (Italics added).
20 See the section on ‘The Personality of Unrecognized States in International Law’, Part D, Chapter S, infra.
21 Tanzania, Gabon, Ivory Coast, Haiti.
incumbent or third states not to make its recognition of the legal facts based on the consideration of the political consequences with regard to its allies goes to widen the gap between the fact of legal maturity and political acknowledgement of that fact. But then what explains the fact that the widening of this gap is not consistent in the practice of States? It is true that in some cases the gap closes. In international practice, recognition is sometimes even given to entities which are not yet in control of the territory. There are examples to illustrate this. For instance, Cuba and some other states recognized the Provisional Government of South Vietnam as opposed to the recognition by other States of the Republic of South Vietnam which is no longer in full control of the territory.21

As regards the Biafran case under consideration, it would be difficult to deny that Biafra was tacitly recognized as having at least, lawful belligerent status. With regard to the question of Biafra's treaty relations with other subjects of international law, it must be admitted that there is no evidence of this fact. This is consequential upon the fact that states are reluctant to make public their dealings with states and entities whose international personality still remains a matter of open controversy. Consequently, there is shortage of basic literature in this field.

In any event, there does not appear, in our opinion, any question of the right of the new revolutionary government to administer, so far as it can, the domestic affairs of the territory it purports to represent. It is the business of foreign diplomatic representatives to decide on which subjects they are convinced could be treated with the de facto authority. The established practice in this situation is that before a treaty may be signed with the de facto government, or other commitment entered into, third states seek to assure themselves that the government in question is sufficiently well-established to be taken as spokesman for the people of the State. To this extent, there is no avoiding some procedure which, if not recognition in form, would be the equivalent to it and leaves little or no doubt with regard to the fact that the de facto government is understood to represent an international legal person and is a subject of international law.

21 But according to the orthodox view such recognitions are considered premature and not justified on the facts — therefore not really legitimate, and a specie of intervention.

THE INTERNATIONAL RESPONSE TO THE BIAFRAN CASE:

It was very difficult initially to determine the external forces that were involved in the conflict. However, on 30 July 1967 (barely two months after the declaration of the independence of Biafra) Chief Enahoro, Federal Nigerian Commissioner for Information and Labour and Mr. Ogbu, Permanent Secretary at the Federal Ministry of External Affairs were alleged by the Biafran authorities to have visited Moscow to negotiate for arms.22 This allegation was immediately denied by the Nigerian Embassy in Moscow on 1 August.23 On 19 August, a total of 15 Soviet Antonov transport aircraft carrying inter alia six MiG fighters and six MiG trainers were reported to have landed at Kano Airport with about 170 Russian technicians for assembling the aircraft.24 Arms did not come only from the Soviet Union but also from other communist countries in Eastern Europe. Two Czechoslovak-built jet fighters were reported on 8 August to have left Accra for Lagos; on 16 August a Polish ship was reported to be unloading five jet aircraft and supporting armament from unknown sources to Lagos. It would appear that even though the Soviet Union and some other Western powers, particularly Britain, had at the outbreak of the conflict characterized it as an internal matter, both countries took action which eventually, and because of the way the situation developed and the character which the struggle took on, might be considered of an 'interventionary' nature.

In Britain, the grounds for the British position were laid in a message delivered by Mr. Michael Stewart (the then Foreign Secretary) to the British House of Commons during an emergency debate on 12 June 1968 concerning the Government's policy of continued arms supplies to the Nigerian Federal Government when he said: 'If Britain had withheld arms from the Federal Government after Nigeria's independence, it would have been tantamount to saying: We have put the Nigerians in a position where they are heavily dependent on us. Now that they are faced with a challenge, we are

23 An agreement described as dealing with cultural co-operation between Nigeria and the Soviet Union was signed the following day, August 2nd in Moscow. According to Tass, the official Soviet Government information media, this agreement was negotiated in Lagos in 1966.
going to put them at a heavy disadvantage'. Sir Alec Douglas-Home (the previous Foreign Secretary) added weight to the argument supporting this policy by stating: 'If arms shipments ceased, Britain would lose all influence with the Federal Government. We cannot intervene in the internal affairs of an independent Commonwealth country. If we tried to do so, the Commonwealth would quickly disintegrate'.

There are other statements put out in defence of this policy which we do not consider necessary to reproduce here. Since those statements failed to differ substantially from the two quotations reproduced, they may be taken as endorsing the British Government's popular and official explanation for her persistent arms shipments to the Federal Government. It thus became evident that the British Government became a supporter for the preservation of the territorial integrity of Nigeria. It is perhaps, early to say how consistent the British Government's policy was in this case. It is also doubtful how convincing the arguments advanced in support of this stand are. For the moment, we may state that there has been little evidence of British influence with the Nigerian Government been put to the test, if indeed it existed at all. The time it should have been put to the test was before the Kampala peace talks took place and if this had been successful these talks might not have been so inconclusive.

The other prophecy of the Commonwealth crumbling just because of a possible withdrawal of a member country must be rejected as improbable since events have conclusively proved that theory wrong.


26 Ibid.

27 If a conflict is described as internal, and is clearly so, then by definition no government has the right to intervene or try to influence the course of events in any manner. But the British Government tried to influence the Nigerian peace moves, which was put to the test when Lord Shepherd was in Lagos.

28 The Kampala talks began on 23 May 1968 but broke down on 31 May over conditions for a cease-fire, the Biafran delegation maintaining that the armistice must be unconditional, while the Federal Government insisted that it must be preceded by a renunciation of Biafra's secession.

29 Pakistan's withdrawal from the Commonwealth as a result of the recognition of Bangladesh by some members has produced no such effect.

30 An Organisation including leading members of all three British political parties, the missionary societies, some ex-Colonial administrators (including two former Governor-Generals of Nigeria).
However, despite the attention with which Lord Brockway and James Griffiths were received by both General Gowon and General Ojukwu, no progress was made in the direction of implementing Lord Brockway’s peace plans.

An important aspect of the British attitude to the Nigerian crisis concerned the dispute over payments of rents, royalties and taxes to the Biafran regime by the British oil company Shell-BP, which was operating on Biafran territory. 31

General Ojukwu signed a decree on 21 June 1967, ordering all oil companies operating in Biafra to supply information on oil revenues payable, under penalty of £25,000 for failure to comply. The Federal Government, on the other hand, claimed that all revenues were, as hitherto, payable to the Federal authorities. As a result, Shell-BP was faced with a dilemma of whether to pay the Federal Government revenue in respect of property over which the latter no longer had de facto control, or whether to accede to demands by the unrecognized regime in Enugu (capital of Biafra) which was in physical control of the Shell-BP assets in Nigeria. The British Government refused to make any foreign exchange available for payment to Biafra, and in fact, no payment to the Biafran Government was made, although she proceeded to press her claim.

The British Government’s steps to block payments to the Biafran regime do not seem to agree with precedents in international law in general and the British practice in particular. As to whether there is an obligation on the part of an alien with respect to payment of taxes to insurgent authorities in de facto control of a territory, it is undisputed that taxes are properly payable by an alien to insurgents in de facto control of an area and accordingly, in a position to compel payment of taxes. 32 There have been various incidents in international law, whereby taxes of the USA and UK were paid by aliens to insurgents in de facto control of an area and accordingly, in a position to compel payment of taxes. While we do not intend to undertake an elaborate illustration to prove this, a few examples are considered desirable. The United States Consul at Chihuahua, Mexico, informed the Department of State on March 23, 1912 that the Provisional Government of the insurrectionary forces in that place had demanded the mine taxes due to the Federal Government at the close of the month. The Consul was instructed by the Department of State on 27 March that such taxes should be paid under protest, that the protest should be made a matter of record in each case so far as possible and that properly authenticated receipts should be secured for all taxes paid. Americans were obligated to pay taxes to persons in de facto authority. 33 However, the US Ambassador in Mexico City was instructed to lay the matter before the Mexican Government, calling attention to the extradition of taxes by insurrectionary forces and stating that the Government of the United States of America would regard payments of such taxes to persons exercising de facto authority as completely relieving American citizens from further obligation with reference to taxes paid in that way.

The next incident similar to the one just mentioned provides some further material of interest to the topic under discussion. On 29 August 1914, General Carranza, as first chief of the constitutionalist army ‘in charge of the Executive’ of Mexico issued a decree declaring null and void all matters transacted, or decisions rendered since 19 February, 1913 by the Departamento de Fomento and later, during the Huerta regime by the so-called Departamento de Agricultura y Colonizaciones. The American Consul at Chihuahua reported to the Department of State on 21 November, 1914 that Mr. Louis Lane, an American citizen had on 26 August 1913 filed claims to 12 pertenencias of mineral land before the proper office in the city of Chihuahua and he now wished to know, what steps should be taken to protect his titles, in view of the Carranza decree of 29 August 1914. The Consul pointed out that, though the mining interests of the Republic of Mexico were exclusively under the central government, nevertheless, no further relations were then maintained between the State of Chihuahua and the Central Government.

The Department of State replied on December 1914: ‘So far as concerns the individual cases of American citizens affected by this decree, it would seem that the Department could offer them no further advice than to inform them that if they consider it advis-
able to attempt to comply with the provisions of the decree, under generally accepted principles of international law, they are entitled to pay taxes to persons in de facto authority.\textsuperscript{34}

In March 1915, the Department of State instructed the Consul at Mexico City to advise American citizens that they were obligated under international law to 'pay taxes upon their property in Mexico to persons in de facto authority ...' and that they would do well to consider the matter of the local control of the territory in which their properties are situated.\textsuperscript{35}

With respect to British practice, the following appears typical: In 1865 an insurgent group was in possession of a custom house in Peru. The \textit{de jure} Peruvian government issued a decree declaring that all duties collected by the insurgents would be considered as not paid and the government would require such duties to be paid again to its own offices as soon as its authority was re-established in the port. The British Law Officer Phillimore instructed the British Charge at Lima thus: 'That, according to the universal usage of nations, dues paid by foreigners who take no part whatsoever in a civil war which breaks out in the country where they are peaceably resident and carrying on trade under the faith of Treaties and general international law, to a \textit{de facto} Government which demands and has the power of compelling this payment must be considered to be paid to the Government of the country.\textsuperscript{36}

It seems to us that international law and custom governing the question of payment of taxes and royalties to insurgent authorities in \textit{de facto} control of a territory has been so consistent practice, that it is doubtful whether the British Government was acting in accordance with international law when forbidding her subjects to pay royalties to the \textit{de facto} authority of Biafra.

If the stand of the British Government was based on the consideration of the fact that Biafra was neither recognized as an insurgent nor as a belligerent by the British Government, it would still appear to contradict the British practice in such cases.\textsuperscript{37}

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It must be observed that the British practice in this respect distinguishes belligerency from recognition of either the parent or insurgent governments as the legitimate government. As stated by the British Foreign Secretary in 1937: 'Recognition of belligerency' is of course quite distinct from recognizing any one to whom you give that right as being the legitimate government of the country. It is a conception simply concerned with granting rights of belligerence which are of convenience to the donor as much as they are to the recipients.\textsuperscript{38} Thus, in 1937, Britain conceded \textit{de facto} recognition to the insurgents in the Spanish Civil War, in regard to the territory under their control, and also went so far as to exchange agents.

One would immediately pause to ask: where does the true explanation of the British attitude in the Biafran case actually lie? Was the Nigerian Federation really so sacrosanct when the colonial federations within the Commonwealth had failed to be of any practical value? Could the reason be as certain quarters often tend to explain, the fact that two different governments handled both cases, Bangladesh and Biafra? Our view is that the British government took the wrong decision and this decision was wrongly implemented throughout.

As concerns the position of other governments, the United States Department disclosed on 11 July, 1967, that it had refused a request by the Nigerian Government for military aid on the grounds

Before the grant is made, consideration should be given to the length of time that the insurrection has continued, the number, order and discipline of the insurgent forces; and whether the newly constituted government is capable of maintaining international relations with foreign states. It is generally known that the operations of insurgent forces may attain such a degree that they are in effective occupation of, and constitute the de facto authority in a large part of the territory formerly governed by the parent government. In this case, the problem is not raised for outside powers of entering into some contact or intercourse with the insurgents as the de facto authorities in order to protect their nationals, their commercial interests and their sea-borne trade in regard to the territory occupied. We believe that the actual war between the Federal forces and the Biafran forces reached such dimensions as from 9 August 1967, when the Mid-Western State of Nigeria fell to the Biafran troops, that outside powers were compelled to treat the war between the Federal military forces and the Biafran forces as a real war between rival powers and not as a purely internecine struggle — in other words, recognition of belligerency.

that the dispute with Biafra was a purely internal matter to be settled by the Nigerians themselves.39

The Kingdom of the Netherlands and Belgium supplied arms to the Federal side for a part of the war. However, Dr. Joseph Luns, the then Netherlands Foreign Minister, announced in the Lower House of the States-General on 6 June 1968 that all arms deliveries to the Federal Government would be immediately suspended and that the Netherlands Government would ask other countries to do the same pending a cease-fire in the civil war.40

Mr. Pierre Harmel, the Belgian Foreign Minister, told Parliament in Brussels on 5 July 1968 that all arms shipments to the Federal Government had been frozen, and on 15 July the Belgian Government announced its intention to withdraw licenses for the export of arms to Nigeria following the confirmation of reports that a Sabena aircraft (the national airline of Belgium) which had crashed near Lagos on 13 July, 1968 had been carrying arms for the Federal Government under an already existing contract.41

APPRAISAL OF THE STATUS AND TREATY-MAKING CAPACITY OF ORGANS OF NATIONAL LIBERATION MOVEMENT:

The United Nations Charter refers to self-determination as a principle in Articles 1(2)42 and 55.43 Even though the Universal Declaration of Human Rights is silent on the subject, both of the international covenants — the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights adopted

by the General Assembly in 1966 — provide in identical language in the first article that:

All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.44

Six years earlier, in 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples45 acknowledged the ‘right’ of ‘all peoples’ to self-determination.

At its 25th session, the General Assembly unanimously declared that all peoples have the right to determine their political, economic, social and cultural destiny without any external interference.46 Concomitantly, it urged all states to promote the principle of self-determination of peoples.47

If self-determination refers to ‘the freedom of a people to choose their own government and institutions and to control their own resources’, there seems to be a striking contradiction between the right of ‘all peoples’ to self-determination and the right of a state to its ‘territorial integrity’, the latter precluding secession. This contradiction is also obvious in the UN prescriptions and practice in self-determination as well as in the practice of States as can be seen from the foregoing analysis of the Bangladesh and Biafra cases. For example, in the Nigerian conflict, only five states recognized the Biafran claim to independence and despite a protracted struggle lasting over two and half years, neither the United Nations nor the Organization of African Unity spoke for Biafran self-determination. Earlier, during the Congo crisis, the United Nations had been responsible for offering an organized opposition which prevented the Katangan claim to secession.48

There are many other instances where the world community has ignored claims for self-determination such as exist in Sudan, Chad,
Ethiopia, Tibet, Kurdistan, Formosa and Guinea-Bissau before independence.

CONCLUSION:

A paramount conclusion which, in our respectful submission, can, and should, be drawn from our discussion so far is that the demands of self-determination must, in the last resort, be placed above those of the ‘territorial integrity’ and ‘non-interventionist’ stands taken by the United Nations. But the question is largely one of timing. Initially, these latter principles must prevail. Rebellion inside a state, even if it gathers momentum so as to become a civil war or a bloody conflict — call it a revolution, should never be encouraged or exploited by outside forces or powers. No state big, medium-size or small, should try, through a treaty written or unwritten to exploit such a situation. The tragic position, in which humanitarian, economic and political problems are mixed in such a way as almost to defy distinction between them, presents a challenge to the international community as a whole which must be met. Under certain circumstances, a claim to self-determination, even in a non-colonial setting, may be valid under international law.

Third states must recognize and appreciate the concomitance of two competing international personalities. They should refrain from giving support to either of them, precisely because both of them still enjoy international personality and as such, should be protected by international law. If an insurrectionist movement has acquired sufficient force and stability to call for a recognition of its character as a movement of genuine self-determination — which is not to say recognition of the insurgent authority as a government as such, other states are entitled, even bound, to recognize that they deal with the insurgent element qua belligerent not necessarily as a recognized government. It is but essential to recognize the legitimacy of its aim if it can achieve it, and if its status as a regular belligerent in the process, and for the purpose of doing so, if the situation warrants this.

INTRODUCTION:

The study of international law in Nigeria within the last two decades has occupied a very important place more than ever before in the legal education of Nigerian lawyers. It is very likely that its importance is bound to endure for a long time to come as Nigeria occupies her leadership position in African affairs and as she continues to play noticeable role in the shaping of modern international relations. For this reason, the study of international law is included in the programme for the legal education in Nigeria.

Accordingly, the teaching of international law in Nigeria aims at fulfilling the following basic objectives, namely:

(i) To expose the students to a clear understanding of the fact of interdependence that in contemporary world, states and other subjects of international law, do not live in isolation, but rather...
must necessarily be interdependent;
(ii) To teach the students to appreciate the universal principles and rules designed to ensure normal relations between states and other subjects of international law irrespective of the differences in their economic, political and social systems;
(iii) To educate the students in the spirit of humanism, democracy and respect for the sovereignty of all nations and peoples;
(iv) To make the students to be constantly aware of the need to fight for the extermination of the remnants (traces) of colonialism and all forms of racial and national oppression.

From the attainment of the country's independence, this objective has continued to form the centre-piece of Nigeria's foreign policy. Successive governments in Nigeria have emphasised that this goal is one of the most important aims of its international relations.

It should be pointed out that with the extension of international contacts between Nigeria and foreign countries of both East and West European countries as well as Asia and Africa, the law faculties of Nigerian Universities are becoming vital centres of research in the sphere of international law and relations. Consequently, they represent the ready sources for replenishing the various offices and organisations involved with foreign affairs. This apart, lawyers with training in international law are better equipped in their private practice to handle international legal problems ranging from negotiations of agreements between foreign firms and their Nigerian counterparts or the States to arbitration of disputes between the parties.

FORMAL STUDY OF INTERNATIONAL LAW IN NIGERIA:

At the present time in Nigeria, all legal education involves the teaching of international law. This is carried out in recognized Nigerian Universities. There is practically the teaching of international law in all the existing Nigerian Universities with the exception of one. In most cases, it is an elective degree course in these Universities.

It is usually offered in the final year of study in the pursuit of a law degree. It must be pointed out that although it is an optional subject, in most of the Universities, a majority of the graduating students in these institutions nowadays offer international law. This shows that there is better appreciation and interest in the subject. What more, its usefulness and importance are being much more felt. Originally, the attitude of students of law in studying international law had been that of reluctance, because according to some of them, it is not one of the so-called "quick bread and butter" legal subjects, like commercial law, land law or company law, for instance. They have however, come to realise that they are not better off than those who offer international law in addition to these other municipal law subjects.

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3 Universities in Nigeria may be classified into Federal and State Universities. All the private Universities which sprang up all over the country during the period 1979-1983 have been banned by the present Federal Military government of Major-General Buhari. Mention must be made of the much debated Open University — a federal concern which took off just before the military intervention in the country. This has equally been suspended owing to the difficult financial constraints of the country.

4 The Universities in which international law is studied (Federal and State Universities inclusive) are the Universities of Ibadan which just produced its first law graduates in August 1984, the University of Nigeria, Nsukka, University of Lagos, University of Ife, Ahmadu Bello University, Zaria, Bayero University, Kano; University of Maiduguri, University of Sokoto, University of Benin, the University of Jos, Imo State University, Rivers State University of Science and Technology, Ogun State University. A Lagos State University has been proposed to take off in October 1984. It is not yet quite clear if it will start with a Law Department. While the University of Ibadan was the first University to be established in the country, its law faculty is clearly one of the youngest. Those of Universities of Nigeria, Ife and Lagos were the first law faculties to be established, in that order some twenty two years ago.

5 The Federal University of Port Harcourt does not have a law faculty so far. The same is applicable to all the Federal Polytechnics and Universities of Technology as well as some State Universities of Technology.

6 The position is however different in the University of Calabar where like other Law courses offered, it is a compulsory subject for all the graduating students.

7 For example, in the pioneer Law Faculty of the University of Nigeria at Enugu, in 1974, only nine students out of a class of seventy-five offered international law. The number of students doing this subject continued to show significant increase following, of course, the increase in intake. With the introduction of part-time law programme in 1976, at Enugu, the number of students who offer international law rose to over 145 in a graduating class of about 200 students. It is not unlikely that this type of trend could be noticeable in the other law faculties in Nigerian Universities based, of course, on the relative student strength in each of them.
Today, instruction in international law provides for an average of about sixty hours in the final year. In doing this, attention is given to the students' general theoretical preparation which takes over eighty-five percent of the time allocated for the study of the subject. A large part of the remainder of the time is devoted to the preparation of the Philip Jessup Moot Court Competition problem in international law among the country's law faculties.

Between the period 1976 and now, the Nigerian Society of International Law under the Presidency of Judge T.O. Elias of the International Court of Justice at the Hague in recognition of the growing importance of international law to Nigeria in particular and the world in general has consistently felt the need to make the study of international law compulsory in Nigerian Universities.

The point has been made which we share, to the effect that by reason of Nigeria's membership and seemingly active participation in ECOWAS and because of Nigeria's current activist role in foreign affairs in regard to the African continent, its development of law and indeed of international law, (emphasis ours) can no longer be described as inward-looking. Legal parochialism cannot be the basis of Nigeria's activist role in African affairs or in world affairs for that matter.

INFORMAL STUDY OF INTERNATIONAL LAW:

Apart from the normal lectures and instructions held at law faculties, international law is "studied" in Nigeria through other means short of the typical classroom, just like any other branch of learning. Indeed, in Nigeria certain bodies have been foremost in articulating the theory of international law. The individual contributions of these bodies have been overwhelming. Furthermore, useful contributions have been made by Nigerian scholars and jurists in discussing different burning topics of international law. While some of these discussions have appeared in learned journals, others have been published in Nigerian newspapers and further discussed at times on radio and television. This is in the interest of the wider Nigerian public. A discussion of the activities of some of these bodies is considered desirable at this point.

(a) The Nigerian Institute of International Affairs (NIIA):

Among the bodies which play vital role in the advancement of the knowledge of international law in Nigeria, the Nigerian Institute of International Affairs is in the forefront. The Institute was established in 1971 as a body corporate with perpetual succession and a common seal as well as clearly set down objects which are:

(i) to encourage and facilitate the understanding of international affairs and of the circumstances, conditions and attitudes of foreign countries and their people;
(ii) to provide and maintain means of information on international questions and promote the study and investigation of international questions by means of conference, lectures and discussions, and by the preparation and publication of books, records, reports, or otherwise as may seem desirable so as to develop a body of informed opinions on world affairs;
(iii) to establish branches of the Institute in Nigeria and to organise, maintain, and co-ordinate their activities so as to facilitate the study and discussion of the above objects; and
(iv) to establish contacts with other organisations with similar objects.

Through its research department, the Institute has published a number of research papers and has organised lectures on current topics of international law. Experts in various fields of law, diplomacy and international relations have been invited from Nigeria and other foreign countries to deliver lectures in their respective areas of specialisation. These lectures are later published as lecture series of the Institute. While we recognise the effort of the Institute to attain the prescribed objects, we hold the view that it has not per-

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8 Of three terms or two semesters, depending on the yearly time-table of studies of the given University. Most of the Universities now follow semester system. However, the University of Nigeria still runs the terms system. The hours indicated is in respect of each of the two branches - private and public international law.
9 Nigerian students of international law started to take part in the Competition after the Civil War.
11 Ibid.
12 Section 2 and 3 of the 1971 Act establishing the Institute.
formed up to expectation judging from the financial and other supports extended to it by the Federal Government of Nigeria. It is our considered view that the Institute rather than distinguishing itself in the publication of serious works in the areas of international law and relations, excels in pushing out lecture pamphlets. However, we recognise that the Institute could offer a very useful source of study of international law and diplomacy just like its counterparts in other parts of the world. To achieve this end, its method of operation has to be drastically reviewed.

(b) The Nigerian Foreign Service Academy (NFSA):

Until 1983, the Nigerian Foreign Service officers were sent to various Western Universities and Institutes to receive training in international law and relations considered indispensable for their functions either at one of the departments of the Foreign Ministry in Lagos or in any of the Nigerian Missions abroad. This practice was heavily criticised for a long time from all quarters and rightly so. Apart from the fact that the practice was a drain on the country’s foreign exchange resources, such training did not reflect adequately the special circumstances and interests of Nigeria’s orientation in international law.

As a result, the Nigerian Foreign Service Academy was set up in Lagos in 1983. The principal purpose of setting up this Institute was to train Nigerian foreign service officers at home. The various subjects considered necessary in the functions of a foreign service officer such as international law, politics, political economy and international relations are distributed to individual Nigerian Universities who design the content of the courses. The basis of distribution of these subjects is on expertise and extent of specialisation in these areas. Accordingly, the lecturers are drawn from these Universities. The course is more or less a crash programme which lasts for a rather short period, considering the importance and scope of the subjects concerned. It would appear that the aim is principally to expose the newly recruited officers to the elementary knowledge of the subjects offered.

At the end of the course, there is an examination. Certificates are awarded to the participants. They are in no way regarded as academic certificates in the sense of postgraduate qualification. The programme is certainly a welcome one which is hoped to be reviewed and improved upon constantly. It is commendable in a number of ways. Firstly, it shows that the authorities are fast appreciating the relevance and importance of some knowledge of international law, diplomacy and international relations by the country’s foreign service officers. Secondly, it is also a recognition of how important it is to groom these officers in the art of diplomacy from the Nigerian perspective and by Nigerian scholars. This is very important if the officers are to carry out their assignments whether at home or abroad satisfactorily.

(c) The Nigerian Society of International Law (NSIL)

Unlike the Nigerian Institute of International Affairs discussed earlier, the Nigerian Society of International Law is not a statutory body. However, it has made very significant contribution in the development of the theory and practice of international law in Nigeria. It is a prestigious academic society whose membership is made up of jurists, political scientists, diplomats and economists with a profound knowledge and interest in international law. The guiding spirit of the Society has remained Judge T.O. Elias.

The Society has the following objects:

(a) to foster the study, dissemination and advancement of Public and Private International Law, Comparative Law and institutions, international relations and related subjects.
(b) In particular the Society will:

(i) promote research,
(ii) encourage publications,

14 The Academy is located in the same complex housing the new Headquarters of the Nigerian Ministry of External Affairs at the Broad Street in Lagos.
15 These officers are all graduates of Universities with degrees in diverse disciplines, mainly in political science, law, economics, languages, sociology, etc.
16 The University of Nigeria’s Faculty of Law teaches international law in the programme and the present writer has had the privilege of participating in teaching the courses.
17 It was established in 1968 at the height of the Nigerian civil war.
(iii) organise conferences, seminars and colloquia;
(iv) cooperate with societies and organisations with similar aims and objects, and
(v) engage in such other activities as are considered necessary for the achievement of these purposes.

The above enumerated objects clearly demonstrate the concern of the Society in the task of study and dissemination of international Law. The Society has held a number of conferences in which papers were read by both members and invited experts ranging from topics in law to economics and diplomacy. The proceedings are later published. Also published by the Society is the Nigerian Annual of International Law which is done in collaboration with the Nigerian institute of International Affairs. Unfortunately, in recent times, the publication of both journals which enjoy a very wide readership in Nigeria and abroad has been in arrears. However, it is hoped that the situation would change when the nation's economy improves.

(d) The Federal Ministry of Justice:

The Federal Ministry of Justice contributes a great deal to the study of international law in the country. The Ministry has a Department or Division which is essentially responsible for matters on international law. The Division plays a leading role as one of the principal, though by no means exclusive legal advisory unit to the Federal Government of Nigeria on matters of international law and practice. Apart from rendering considered legal opinions to the Government as occasion demands, the Division of International and Comparative Law of the Ministry drafts treaties, trade agreements and conventions in which the Government is a party. Above all, law officers drawn from this Division represent Nigeria in important international conferences abroad, such as the Law of the Sea Conference, or that of the Convention on Law of Treaties, to mention a few.

(e) The Ministry of External Affairs:

This Ministry occupies a foremost position in the articulation of Nigeria's stand in international affairs. It does very limited job in the study of international law as most of its legal questions are referred to the Federal Ministry of Justice. However, it is through this Ministry which posts the Nigerian diplomatic representatives in foreign countries that the country's practice of international law is brought to a sharp focus.

THE COURSE CONTENT OF INTERNATIONAL LAW:

In Nigeria, the syllabus in international law just like the syllabus in any other courses studied in the faculties of law are not centrally planned by any accepted central educational organ as may be the case in some countries. Individual law faculties plan their syllabus. As a consequence, there is no uniformity as such, and the appropriateness or otherwise of the syllabus of a given faculty will depend largely on the background and training of the academic planners of such a curriculum.

At the moment, international law curriculum in Nigerian Uni-

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19(a) The practice of drawing Nigerian delegates for specialised conferences of international law from the Ministry of Justice alone regardless of the presence of very distinguished scholars in international law in Universities and other institutes has been heavily criticised. It is known that very few of these officers can claim any expertise in these areas. This trend is hoped to change in the country's interest.
20 Ministries responsible for the foreign relations of states go by different names. Some countries call theirs Ministry of Foreign Affairs, while others go by the name International Affairs, Foreign Office (United Kingdom), State Department (USA), etc. In Nigeria, it is called the Ministry of External Affairs.
21 Hereinafter called syllabus (programme or curriculum -- all the terms to be used interchangeably.
22 In the Soviet Union, the teaching of international law is conducted in accordance with a programme authorised by the Ministry of Higher Education of the USSR. This practice is the same in other East European countries. The programme is compiled and designed by leading professors and takes into account recommendations made by the lecturers and is periodically revised and supplemented.
versities’ Law Faculties is narrow — a characteristic of the general legal development in the country. We agree with the submission that those Nigerian academics who plan law curricula share much of the blame. And this is hardly surprising, considering their predominantly British academic background with its basic assumption of ethnocentricity.  

Although the course content in public international law is not exactly the same in all faculties, an empirical test conducted by the present writer shows that they invariably include the following branches: Nature and History; Sources; International Law and Municipal Law; International Personality; Sovereignty; Recognition; Jurisdiction; Rights and Responsibilities of States; the State and Individuals; International Representation; Disputes and Hostile Relations; War and Neutrality; International Institutions; the United Nations and its organs; Patterns of International Law and Organisation.

That of private international law includes choice of jurisdiction and choice of law — origin and growth; classification; domicile; matrimonial cases; tort; contract; crime; legitimacy; legitimation; adoption; infancy and mental disorder, negotiable instruments and assignments, wills and intestate succession; proof of foreign law; recognition and enforcement of foreign judgment; types of marriage under the Marriage Act and under Customary Law; conflict within various groups of provinces.

The lack of uniformity in the curriculum in international law has clear disadvantages. While a unified university programme ensures an approximately equal volume of study and material for all the students offering the course, the present ununified system does not. Uniformity of syllabus makes it possible to define the range of the literature and documentary sources which the students should use. Above all, it would help lecturers in this field in the writing of text-books, manual reference books etc. It will offer the opportunity for constant re-assessment of the practice of Nigeria in international law. By so doing, it will be easy to effect some revisions of the syllabus reflecting the areas that either need to be emphasised or supplemented.

THE TEACHING TECHNIQUE:

The method used in the study of international law is essentially the same as those used in the teaching of other law courses. The subject is therefore taught by means of lectures, tutorials and symposia. While lecture periods are used for a general exposition of the subject matter, the tutorial time is used to discuss and illustrate in detail the complex aspect of the topics. In some law schools, the use of maps of the world is introduced to illustrate the location of places cited in the course of lectures in terms of political and economic importance. While in some faculties the presentation of the course is done from a purely traditionalist point of view, though in others, a comparative method is applied. By this method, the student is exposed to the major existing attitudes in the study of international law, namely the Western European approach, the East European approach and that of the so-called third world countries. This latter method is certainly to be preferred for a number of reasons. Firstly, it broadens the outlook of the student and makes for greater sophistication in approach. Secondly, it enables the student to understand better and appreciate the workings of his country’s theory and practice of international law and to spot out more easily any special merits or flaws in it. For the Nigerian student, much of what is being said in this field had in all probability been demonstrated in relation to the legal tradition of

23 V.M. Ngoh, op. cit., p. 58.
24 See, course descriptions of the various Faculties of Law in Nigeria.
25 The unification of the programme would not restrict the initiative of the teachers, since it indicates merely the basic subjects of the course and leaves the lecturer free to choose the order and arrange the subject and also any other problems of international law which in his considered view the student should know.

26 The term “technique” as used refers to the method of imparting the knowledge as well as of source materials used in so doing.
27 Stating the law from the point of view of West European standpoint principally.
28 A legal tradition is to be distinguished from a legal system. Merryman in his book “The Civil Law Tradition”, Stanford University Press, 1969, distinguishes the two notions thus: “A legal system ... is an operating set of legal institutions procedures and rules but a legal tradition ... is not a set of rules of law about contracts, corporations and crimes although such rules will almost always be in some sense a reflection of that tradition. Rather, it is a set of deeply-rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or
the so-called common law countries.29 

The predominant orientation of a majority of the teachers of international law today remains British or from countries with common law systems of law. This in turn unfortunately affects the type of literature recommended to the students. Because of the narrow orientation and language difficulties, it is impossible for them to wade through the copious, scholarly materials from other parts of the world like the Union of Soviet Socialist Republics, Poland, Yugoslavia, China, etc. There is no denying the fact that for a subject such as international law, the comparative method of study represents the most realistic and satisfactory approach at the present time.

Furthermore, as future leaders of Nigeria, Nigerian law students similarly need to take an active interest in the legal systems of other African countries, particularly as it affects international law. This is particularly relevant in the context of our avowed political and economic cooperation within the Organisation of African Unity leading to eventual political integration of the African continent.30

It must be pointed out here that the emphasis which hitherto was placed on foreign source materials must of necessity shift to indigenous literature on the subject. There is no doubt that a number of Nigerian and other African experts have done a great deal of work in many aspects of international law which ought to be more relevant to our own circumstances and needs.30(a) This is not to say, however, that foreign materials should be done away with completely. Rather than form the primary source materials as they appear to be in some faculties at the moment, they should be secondary, or at least be in combination with indigenous literature. Indeed, they should form supplementary sources.

Documentary sources, collections of international agreements and conventions to which Nigeria is a party, the rules of international organisations and all kinds of diplomatic papers should occupy a special place in the teaching process.

RECOMMENDATIONS AND SPADEWORK TOWARDS CHANGE:

Thus, there is abundant evidence to call for a more purposeful study of international law in Nigerian Law Faculties. Indeed, it should in addition be studied in more advanced institutions in the country such as the Nigerian Defence Academy, the Nigerian Police and Air Force Academies, the Nigerian Institute for Policy and Strategic Studies, Administrative Staff College of Nigeria, and other similar educational and research establishments.

The instances discussed above are supported by the following reasons and suggestions: Firstly, and most importantly, international law is certainly a fundamental and indispensable branch of the law for any nation in the present stage of the development of international relations. It is even much more important for a developing country like Nigeria in view of its foreign policy objectives and her role in African and world affairs.

Secondly, the study and knowledge of international law offers the student a good understanding in any sphere of jurisprudence which interests him for an independent creative work which will not only be useful to himself but to the whole country at large. His understanding of why States behave the way they do on the international scene — will be adequately enhanced.

Thirdly, at the present level of Nigeria's development as an independent and sovereign state, she is fast increasing her international participation in foreign affairs thereby fortifying her stature. Her Embassies are spread in most parts of the world and these are to be manned by qualified personnel, knowledgeable in the appropriate fields of learning of which international law is one.31
Even though appointments to these positions are not done at the moment on the basis of those with suitable qualifications, there is no doubt that the present trend is bound to change in due course. Indeed the study of international law should be an advantage for aspirants to positions in the country’s foreign ministry, representations in international organisations such as the United Nations Organisation, Organisation of African Unity, Economic Community of West African States etc. The era is gone when persons not trained in appropriate fields of law are sent to negotiate agreements and draft treaties on behalf of Nigeria.

Fourthly, an important role in the study of international law generally is played by textbooks and papers on the subject. Already, teachers in Nigerian Law Faculties though few but highly qualified, should be encouraged financially to conduct more research in order to produce more relevant textbooks in furtherance of Nigerian Science of International Law.

Fifthly, further extension of international contacts of Nigerian Universities and Institutes, development of research and active participation by University teachers in the affairs of the Nigerian Society of International Law will undoubtedly stimulate interest in studying international law and enhance its importance among students.

Finally, the comparative method of study of the subject must be adopted. It is no more right as one writer put it, for Nigerians like their English mentors to need a lot of persuasion before coming out of their parochial shells to embrace other legal traditions than the common law in which they have been nurtured. This departure is inevitable.

Whereas British Universities are restructuring their law curricula to attune them to the realities of present-day Europe and the world, their Nigerian counterparts remain blissfully content with ignoring the existence of other legal traditions.

The attitude of isolationism and feeling of self-sufficiency is a great obstacle to the realisation of Nigeria’s foreign policy aims and constitutes a cardinal disincentive to a serious study of international law. Such an attitude is unfortunate and unrealistic in today’s economically-interdependent world.

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32 The difficulty in recruiting law teachers in Nigerian Universities is now of general public knowledge. This fact was emphasised at the opening ceremony of the just concluded 22nd Annual Conference of the Nigerian Association of Law Teachers held at the University of Calabar (April 3-5 1984) by Professor Adamu Mohammed, Vice-Chancellor of the University. He admitted his difficulty in recruiting law teachers who are versed in Nigerian system. He added that this problem is not peculiar to the University of Calabar but to all other Nigerian Universities which have law faculties.

33 See, V.M. Mgo, op. cit., p. 58.

34 Ibid.
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This is a comparative analysis of some carefully selected topics to illustrate Nigeria's theory and practice of International Law.

Chapters one to four treat the general attitude towards International Law: the evolution and growth of Nigeria's practice of International Law; the legal status of Federal States and their component states, with particular reference to Nigeria; and Jurisdictional Immunity.

Chapters five to fifteen examine the Nigerian Nationality and Citizenship Law; Law of Aliens: Extradition Practice; Nigeria's Aims, Participation and Attitude in Selected Organisations; Law of Treaties of Organisations; Law of the Seas; Civil Wars; and also International Law in Legal Education in Nigeria.

*The Theory and Practice of International Law in Nigeria* is one of the various works of Dr. Chris Nwachukwu Okeke, a distinguished International Law scholar; a one-time Acting Head of the Department of International Law and Jurisprudence, University of Nigeria, and currently Reader in the Department of Law and Dean, Faculty of Humanities, Anambra State University of Technology (ASUTECH) Nigeria.

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ISBN 978 156 242 0