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Appraising the Doctrine of Sovereign Immunity in Nigeria

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This article appraises the doctrine of sovereign immunity in Nigeria's constitutional and statutory framework. It interrogates the historical foundations of the doctrine, tracing its colonial inheritance and its entrenchment in Nigerian jurisprudence, particularly through constitutional provisions on executive immunity and judicial interpretations of state liability. It argues that while sovereign immunity was originally justified as a mechanism for preserving governmental stability and preventing frivolous litigation, its contemporary application in Nigeria often undermines accountability, access to justice, and the rule of law. Through doctrinal analysis of key constitutional texts, statutes, and judicial decisions, the article demonstrates how the doctrine has been expansively interpreted to shield public officials and government institutions from legal responsibility, even in cases involving violations of rights and commercial transactions. It further situates Nigeria's approach within a comparative context, drawing lessons from jurisdictions that have adopted restrictive or qualified immunity regimes. It concludes that Nigeria's current framework is normatively and functionally deficient and calls for a recalibration of sovereign immunity that balances effective governance with constitutionalism, accountability, and the protection of individual rights.

Keywords: sovereign immunity, accountability, access to justice, constitutional jurisprudence

Introduction

The doctrine of sovereign immunity is one of great antiquity. It is a direct consequence of the emergence of sovereignty in international law through the formulation of Jean Bodin in the 17th century (Okogbule, 2006). Linked to the Roman Law maxim "*Par in Parem non habet jurisdictionem*", no state can claim jurisdiction over another sovereign state, to the maxim of English law that the king can do no wrong, and to the time when most states were ruled by personal sovereigns, who, in the real sense, personified the state. At that time, it was thought that the exercise of authority on the part of one sovereign over another inevitably indicated either the superiority or overlordship or was interpreted as the active hostility of an equal. It was based on these understandings that it was generally accepted that there exist certain principles of international law according to which a sovereign state is held to be immune from the jurisdiction of another sovereign state (Schreuer, 1993).

The rule is said to rest on the circumstance that, in general, the judgment of a municipal court could not be enforced against a foreign state, as the attempt to enforce it might be regarded as an unfriendly act. The rule is

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naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights.[1] Over the years, however, the extent of immunity to be accorded to the states has become a subject of intense controversy.

Considerable controversy exists in international law on the exact scope of state immunity in relation to activities of the state in what may broadly be termed the commercial sphere. Attempts at a logical statement of the applicable rules are impeded by the doctrinal clash between capitalism and socialism and the scope and rationale for the state's involvement in commercial activities.

In earlier times, nearly all states were in agreement about the general rule that a state cannot, without its consent, be made subject to the judicial jurisdiction of another. That is absolute immunity. The United Kingdom was the chief proponent of this absolute immunity doctrine, and Nigeria appeared to have adopted the same. However, over the years, there has been a dramatic change in this direction, and the restrictive doctrine appears to be the general position in most states today. The purpose of this paper is to examine this rationale for this transition and how Nigeria fits into this global development.

Historical Development

In *The Schooner Exchange v McFaddon*,[2] the United States Supreme Court affirmed the judgment of a lower court which dismissed the action of two American citizens against the Schooner Exchange, a vessel alleged to be a public vessel of France. The Schooner Exchange was a warship, thus making it possible that the case would probably be decided the same way had it arisen today.

The commercial aspect was put squarely in *Berrizi Brothers v S. S. Pessaro*.[3] Cargo owners brought a libel *in rem* against the Pessaro, a merchant vessel owned and operated by the government of Italy and engaged in carrying Olive oil from Italy to the United States, for damage to a shipment, because the vessel was owned and operated by the Italian Government. The United States Supreme Court upheld the Italian claim of immunity. The opinion of Devanter J. is apposite:

We think the principles (of absolute immunity) apply alike to all ships held and used by a government for public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires means and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

Numerous decisions along this line of thought exist, especially in common law countries. Thus, in *The Parlement Belge*,[4] the British Court of Appeal upheld the plea of sovereign immunity in respect of a mail, merchandise, and passengers' ship belonging to the King of the Belgians. A similar decision was reached by the same court in *The Porto Alexandre*,[5] where an attempt to issue a writ in rem against the ship for salvage services rendered to it when it ran aground failed.

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[1] *Re Cristina* (1938) A.C. 485.
[2] (1812), 7 Cranch 116.
[3] (1926), 271 U.S. 562.
[4] (1880) 5 PD 197.
[5] (1920) 30.

Recognition of the principle of absolute immunity has by no means been limited to issues touching ships or similar objects. As Earl Jowitt observed in *Dollfus Mieg et Compagnie S. A. v Bank of England*,[6]

The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, even goes wandering into the jurisdiction of foreign courts. Although I agree ... that the doctrine of immunity should not be yet, I think that we unduly limit the doctrine if we were made to decline to apply it to any bailment which might be made by or on behalf of the foreign sovereign in which the action is brought against the bailee…[7]

In this case, the British House of Lords stayed the proceedings instituted against the Bank of England, as bailee in respect of certain bars of gold for the allied governments of the United States, United Kingdom, and France, on the ground that the doctrine of sovereign immunity applied to a claim to recover property in the hands of a bailee for a foreign sovereign.

In *U Kyaw Din v Government of the United Kingdom and the Union of Burma*,[8] the Plaintiff instituted an action to recover a sum of money for goods destroyed by the government of Burma during the Second World War on the eve of the evacuation of Rangoon pursuant to a scheme of destroying all goods and installations that might be of use to the enemy. The court refused to entertain the action for want of jurisdiction, reasoning that.

There is a considerable body of weight and unanimous authority for (Oppenheim's view) (Oppenheim, 2017) that although states can sue in foreign countries, they cannot, as a rule, be sued there, unless they voluntarily submit to the jurisdiction of the court concerned.

It should be stressed that these are merely illustrative cases and that the decisions do not necessarily represent the current view of the state of the decision in relation to sovereign immunity in the Western world. Nigerian courts, however, in the few decided cases, have upheld the view of absolute immunity. In *Kramer Italo Limited v Kingdom of Belgium and Its Embassy in Nigeria*,[9] the plaintiff sued the defendant for failing to pay the bills for a building constructed for it by the company. The defendant objected to the action on the ground that it was covered by the principle of sovereign immunity. They cited S. 1 of the Diplomatic Immunities and Privileges Act of 1962.

The Plaintiff contended that a sovereign state can only claim sovereign immunity in respect of governmental acts and that sovereign states which engaged in commercial activities were not covered by sovereign immunity. The action was struck out on the ground that the defendants could not be sued, i.e. that sovereign immunity applied.

As noted earlier, some states responded to the increasing involvement of states in commercial activities by making a distinction between acts of government, *jure imperii*, and acts of government *jure gestionis*, denying immunity to the latter. Thus, if, according to this view, the act of the government is of a commercial nature, *jure gestionis*, that state government would be subject to the jurisdiction of the court of the forum. The case law in this regard can be briefly examined. Thus, in *Mgntefiore v The Belgian Congo*,[10] the Plaintiff, the holder of

[6] (1952) Int. L. Rep. 163.
[7] (1952) Int. L. Rep. 166, 167-170.
[8] (1948) Ann. Dig. 137.
[9] The Guardian, March 7, 1987.
[10] 22 Int. L. Rep. 226 (1955).

government bonds issued in 1901 by the then independent state of the Congo, brought an action for payment of interest on the bonds based on their equivalent value in goods. A claim of exemption from the jurisdiction of the Franch Courts in the action was rejected by the tribunal. The tribunal said, *inter alia*,

…a loan issued in France by a foreign state does not constitute an act of authority which is free from the control of the French Courts, because a state which disputes the existence or extent of the rights of bondholders conducts itself like an ordinary litigant.[11]

Similarly, in *Alfred Dunhill of London, Inc. v Republic of Cuba*[12], it was stated that:

The United States of America abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to causes of action arising out of its commercial or proprietary actions. This has been the policy of our government.

The facts of that case were that, in 1966, a Cuban Revolutionary Government confiscated the assets of five companies operating in Cuba, under Cuban law, and owned largely by Cubans. The United States was a major market for the Cigars produced by these companies. The Cuban Government continued to export to the United States Cigars after expropriation. Former owners fled to the United States, and there brought a suit against the importers for:

(1) Trademark infringement, and for

(2) Purchase price of the company's product imported since seizure, as well as a refund for payment made to the Cuban Government on purchase before the takeover.

On the question of the applicability of the Act of State doctrine, the Supreme Court held that "purely commercial function of a government will not constitute an Act of State".

The Judicial Committee of the Privy Council was confronted with a similar issue in *The Philippines Admiral*.[13] The vessel was a merchant ship owned by the Reparations Commission, which was an agent of the Republic of the Philippines, and which operated in accordance with the policies laid down in the Reparations Act. The vessel came into the possession of a private Philippine corporation by virtue of a contract of conditional sale and was operated for commercial purposes. When the ship was in Hong Kong, various actions *in rem* were commenced by repairers and charterers in the local courts, and the Reparations Commission sought to rely on the doctrine of sovereign immunity.

The Privy Council adopted the principle of restrictive immunity. More precisely, their Lordships did not favour the application of the doctrine of sovereign immunity to "ordinary trading transactions".[14]

The *Parlement Belge*[15] was distinguished in that case. That it was authority for the proposition that a foreign sovereign cannot be sued *in personam*, but immunity from an action *in rem* only applied if the vessel is being used substantially for public purposes, as was the case in the *Parlement Belge*.[16] *The Porto Alexandre*[17] was

[11] Ibid 227
[12] 15 I.L.M. 735.
[13] (1976) W.L.R. 214.
[14] (1976) 2 W.L.R. 232-233.
[15] (1880) 5 PD 197.
[16] Ibid.
[17] (1920) Probate 30.

stated to have been decided *per incuriam* in that the Court of Appeal had misconstrued the *Parlement Belge*, which had left open the position of vessels engaged in ordinary commerce.

However, the Judicial Committee's insistence on the distinction between proceedings *in personam* and in rem as a means of distinguishing the effects of the *Parlement Belge* is awkward in some respects. *First*, it confirms the doctrine of immunity in respect of proceedings *in personam*. *Second*, it is unacceptable that the application of a principle of international law should depend upon concepts peculiar to the system of domestic law. Finally, the ship was described by the Judicial Committee as an ordinary trading ship for the doctrine of sovereign immunity, despite the facts that her operations were under the terms of a contract with the Reparations Commission and were subject to the provisions of the Reparations Act. In terms of Philippine law, the vessel was operating for public purposes. The difference between this case and the cases of requisitioned ships is very fine indeed.

Application of the Doctrine in Nigeria

There are very few Nigerian cases on the rule of absolute immunity, though Nigerian Courts will certainly be guided by cases decided in England when they are seized of such matters. The earlier cases, which illustrate the way in which the principle of absolute immunity, as distinguished from the doctrine of restrictive or relative immunity, has been applied, are largely concerned with ships and actions *in rem*.

In *Planmount Limited v Republic of Zaire*,[18] a builder sued the defendant for the balance of money due under a contract for official work done to the official residence of the Ambassador of Zaire in London. It was held that the defence of state immunity could not avail the defendant. The locus classicus on this transition in Nigeria is the case of *Trendex Trading Corporation v Central Bank of Nigeria*,[19] Lord Denning in that case adopted the doctrine of incorporation of international law to municipal law and reasoned that as many nations of the world had gradually moved towards adopting the doctrine of restrictive immunity, England should not be left behind and this has thus become the law in England. Specifically, Lord Denning declared[20] that.

It was suggested that the original contracts for cement were for the building of barracks for the army. On this account, it was said that the contracts of purchase were acts of a governmental nature, *jure imperii*, and not of a commercial nature, *jure gestionis*; they were like a contract of purchase of boots for the army. But I do not think this should affect the question of immunity. If a government department goes into the marketplaces of the world and buys boots or cement as a commercial transaction, that government department should be subject to all the rules of the marketplace. The seller is not concerned with the purpose to which the purchaser intends to put the goods.

The facts of the above case are based on a contract. 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 army barracks in Nigeria. When, under instructions from the Nigerian Government, the bank refused to honour the letter of credit, the plaintiffs brought an action *in personam* against the bank in the English

[18] (1981) A11 E.R. 1110.
[19] (1977) 14 Q.B.2.
[20] (1977) 2 W.L.R. 369.

High Court. The bank successfully claimed sovereign immunity before Mr. J. Donaldson, but the decision was reversed on appeal.[21]

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

All the hearings we were taken through the Act of 1958 under which the Central Bank of Nigeria was established were established, and the amendments to the Act were made by later decrees. All the relevant provisions were closely examined. The upshot of it may be summarised as follows:

I. The Central Bank of Nigeria is a central bank modelled on the Bank of England.

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

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

V. It acts as a 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 as 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.[22]

African Reinsurance Corporation v Fantaye[23] was by way of appeal against the decision of the High Court of Lagos to the Federal Court of Appeal in Lagos. The issues are two-fold: *first*, whether the appellant enjoyed immunity from legal actions in Nigerian Courts; *second*, if the answer to (1) above is in the affirmative, whether the Appellant has waived its immunity in the present case.

The facts were that the Respondent had sued the Appellant in the High Court of Lagos for the wrongful termination of his employment. On the 24th February 1984, the defendant entered a conditional appearance. Subsequently, the plaintiff brought a motion for the interim injunction against the defendant, who opposed the motion, though without success. Having been out of time, the defendant brought an application for an extension of time within which to file its defence. The defendant then brought an application praying the court to strike out or dismiss the plaintiff's claim for want of jurisdiction on the ground that since the defendant was an International Organisation, it enjoyed diplomatic immunity from suit or legal process. It relied upon a certificate issued by the Ministry of External Affairs, but this was rejected by the trial judge. After hearing arguments, the trial judge ruled that he had jurisdiction to entertain the action on the ground that the defendant had waived its immunity in the matter. After the ruling, the Minister of External Affairs issued the Diplomatic Immunity and Privileges (African Re-insurance Corporation) Order 1985, conferring the status of an International Organisation on the Defendant/Appellant. This Order was sought to be relied upon by the Appellant in the Court of Appeal.

The issue to be concerned with in this case is that of diplomatic immunity and privileges, and the extent of them. The ground of appeal is that the Lagos State High Court erred in holding that it had jurisdiction to entertain the plaintiff's action against the defendant on the ground that the latter had waived its diplomatic immunity and

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[21] L. J. Stepson and Shaw agreed with Lord Denning on the status of the Bank and that international law had changed to a doctrine of restrictive immunity.

[22] The judges were unanimous in allowing the appeal.

[23] (1986) CLR 6 (f) (SC).

submitted itself to jurisdiction. The Appellant is seeking to nullify the Ruling on the ground that a finding of immunity on the part of the appellant substantially disposes of the whole action.

The protocol officer of the defendant/Appellant corporation deposed *inter alia*.

The African Reinsurance Corporation is a corporation established between 36 African member states of the Organisation of African Unity and the African Development Bank by agreement dated 24th February 1976, and also by the Head Quarters Agreement and Supplementary Headquarters Agreement both dated 10th August, 1977 made between the then Federal Military Government and the African Reinsurance Corporation establishing the Headquarters of the Corporation in Nigeria.

The defendant, by virtue of its constitution, is an international organisation and enjoys all the privileges, exemptions, and immunities accorded to International Organisations in Nigeria:

The issue, however, upon which the learned trial judge dismissed the objection of the appellant, is not whether the appellant was immune from being sued, but whether the said immunity was waived. In his ruling, the learned judge said:

In the case of the Appellant, I hold that it is an International Organisation recognised by the Federal Republic of Nigeria. It enjoys immunities, privileges, and exemptions. It has the power to waive or curtail its own immunities. It can waive them permanently or as the occasion arises.

The learned trial judge next considered the Agreement establishing the corporation, particularly Articles 47 and 48. It is relevant to reproduce the provisions of those two articles because the decision of the learned trial judge hinges on their interpretation.

Article 47 is all about status in member countries.

The Corporation shall possess full judicial personality and, in particular, full capacity:

(1) to contract;

(ii) to acquire and dispose of immovable property; and

(iii) to sue.

Article 48: Legal process.

(1) Legal actions may be brought against the corporation in a court of competent jurisdiction in the territory of a country in which the corporation has its Headquarters or has appointed an agent for the purposes of accepting service or notice or process, or has otherwise agreed to be sued.

(2) Disputes arising from reinsurance contracts entered into by the corporation shall be subject to conventional practices or to ordinary legal processes applicable to comparable business, as shall be agreed in the respective contracts. In all cases, the corporation and its property and assets, wherever located and by whomsoever held, shall be immune from all forms of seizure, attachment, or execution before the delivery of final judgment against the corporation.

The learned judge found that the provisions of Articles 47 and 48(1) and (2), reproduced above, amounted to a waiver of immunities, privileges, and exemptions and ruled that he had jurisdiction to entertain the claim. It could be argued on the one hand that it may seem that the corporation intended to establish its international personality by the provisions of Articles 47 and 48. As a subject of International Law, the corporation can sue and be sued in any court of competent jurisdiction. It could also be argued, on the other hand, that the purpose of

Sections 47 and 48 of the corporation is to eliminate any purport of absolute immunity since it is engaged in commercial transactions. This line of argument is, however, in line with the doctrine of restrictive immunity.

The respondent counsel in his brief argued that it was inconceivable that a corporation with powers, *inter alia*, as provided in Article 4 of the Agreement or issue shares as provided in Articles 7 or declare profit as provided in Article 39, would want to appear to be under or seek the protection of Diplomatic immunity in its mercantile transactions. The learned counsel submitted that the framers of that Agreement did not intend to protect the appellant from being sued, once its main object was to undertake mercantile transactions. Article 46 of the Agreement directed the member states to deal with the corporation and grant it the status, immunities, exemptions, and privileges as set out in the remaining articles of Chapter 14. Thus, it would be wrong for any member state which is a signatory to that Agreement to fail to recognise the legal status of the corporation. Corporations or other establishments dealing in commercial transactions are not normally accorded privileges and immunities from being sued. J. C. A. Mohammed, reading the Lead judgement, agreed with counsel's submission. He cited L. J. Singleton in his minority judgment in the case of *Baccus v Servicio Nacional del Trigo*[24], which referred to an American case of *Elen and Company v Bank of Gospondartwa Krajowejo National Economic Bank.*[25] Where the Court of Appeals of the state of New York held that:

A Corporation organised by either a domestic or a foreign government for commercial objects in which the government is interested does not share the Sovereign immunity from suit.

And in another part of his judgment, L. J. Singleton said that the state of Spain created the defendants as a legal entity and enabled them to trade with citizens of, or with corporate bodies in, other countries. In such a case, the defendants ought to be bound by the ordinary practice. I say the same thing in respect of the appellant in the case in hand. I see no justification in making the appellant immune from civil litigation once its stock in trade is a mercantile transaction. J. C. A. Mohammed agreed that the appellant had submitted to the jurisdiction of the Lagos High Court and therefore had waived its immunity from suit.

We quite agree with the dismissal of the appeal in favour of the respondent. However, a point of concern is the inherent illogical conclusion in that decision. The Court of Appeal allowed itself to be influenced by the High Court of Lagos on the issue of waiver of immunity from suit, as against the widely accepted restrictive immunity from suit, especially when the transaction in dispute is of a commercial nature. In this sense, the court omitted to consider the doctrine of restrictive immunity and the validity of the Order issued by the Minister of External Affairs. The problems of waiver are related to the controversy over the extent of immunity, and courts utilise a doctrine of implied waiver to restrict immunity. For English Courts, on the other hand, it is pertinent to mention that at present the principle of restrictive immunity is widely adopted to exclude ordinary commercial transactions from the ambit of sovereign immunity.

As to the statutory provision of diplomatic Immunity and privileges in Nigeria, the Diplomatic Immunities and Privileges Act[26] provides in Section 1(1) that:

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[24] (1956) 3 All E.R 71.
[25] (2) 24 N.Y.S.C.2d. 201.
[26] No. of 1962 (Laws of the Federation).

Subject to the provisions of this Act, every foreign envoy and every foreign consular officer, and the members of the families of those persons, shall be accorded immunity from suit or legal process and inviolability of residence which they were respectively so entitled.

Section 2 of the Act provides that:

A foreign envoy or foreign consular officer, with the consent of his government, may waive any immunity or inviolability conferred by or under this Act on behalf and without the necessity for such consent, may waive immunity conferred on a member of his official or domestic staff, or on a member of his family or of the family of a member of his official staff.

Section II also provides: (1) This section shall apply to any organisation declared by the Minister by order to be an organisation the members of which are Sovereign powers or the Government. (2) The minister may, from time to time, by order in the Gazette-(a) provide that any Organisation to which this section applies, shall to such extent as may be specified in the order, have the immunities and privileges set out in the first schedule to this Act, and shall also have the legal capacities of a body corporate. According to Section 18, if in any proceedings any question arises whether or not any organisation or any person is entitled to immunity from suit and legal process under any provision of this Act or of from suit and legal process under any provision of this Act or of any regulations made under this Act, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact:

It is the provisions of Section 11(1)(2) and Section 18 that prompted the Minister of External Affairs to make the Diplomatic and Privileges (African Reinsurance order).[27] Section 2 provides:

i. The Corporation shall have the legal capacity of a body corporate and shall have full capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings.

ii. Except insofar as in any particular case the corporation expressly waives its immunity shall extend to any measure of execution arising out of any action to which Subsection (3) of this section relates.

iii. Disputes arising from reinsurance contracts entered into by the corporation shall be subject to conventional practices or to ordinary legal process applicable to comparable business, as shall be agreed in the respective contracts.

It may appear from the above that the Order by the Minister seeks to establish that African Re-insurance. A corporation is an International Legal personality and should therefore be guided by the sanctity of contracts entered into by it. Hence, the validity of the Diplomatic Immunities and Privileges Act of 1962, and the Diplomatic and Privileges (African Reinsurance) Order of 1985 made by the Minister of External Affairs, are not directly in issue.

The issue is as to what amounts to a waiver on the part of the corporation. It was held, therefore, that by Article 48(1) of the agreement establishing the appellant, it is clear that legal actions can be instituted against it in Nigeria. It was also held *inter alia* that by appearing without protest to contest an application for interim injunction brought against it by the Respondent, in the Lagos High Court, and also applying for and obtaining leave to file its statement of defence in the substantive cases, the appellant must be taken to have voluntarily

[27] 1985, Sections 2(1), (2), and (3).

submitted to the jurisdiction of the High Court of Lagos state and therefore waived its diplomatic immunity from legal process.

One may argue on the grounds that Article 3 of the agreement establishing the corporation has the effect of nullifying the act of any person who waives diplomatic immunity, privileges without the authority of the Board of Directors. Hence, that Article provides:

...the Board of Directors may waive, to such extent and upon such conditions as it may determine, the immunities, exemptions, and privileges provided in this chapter in cases where its action would, in its opinion, further the interest of the corporation.

There is no doubt that Article 3 stands as a proviso to the provisions of the remaining articles. The framers of those agreements were conscious of the immunity the corporation enjoys in the member states of the organisation. The Agreement is specific as to the waiver of the immunity from suit, and the further proviso that the Board of Directors could waive the immunities, exemptions, and privileges provided for in the statutes cited above. In fact, there are authorities to support this view.

In the case of *The Republic of Bolivia*,[28] it was held that diplomatic privilege could be waived, only with the full knowledge of the parties and with the sanction of his Sovereign or his official superior. Furthermore, in the case of *Baccus v Servicio Nacional del Trigoit*,[29] it was held thus.

The defendant's immunity had not been waived. Since the steps taken by the defendants in the action were taken on the authority of Cc, a servant subordinate to the Spanish Minister of Agriculture who acted in ignorance of any right to immunity being there by prejudiced and without the authority from a proper representative of the sovereign state of Spain was necessary to enable the defendants to submit to the jurisdiction.

It is to be noted that in the referred cases, subordinates of the sovereign authorities submitted to the jurisdiction of the English courts without the sanction of their respective sovereign authorities directing them to do so. It was held that the issue of immunity is a sovereign's right and only the sovereign could waive it. In the instant case, it is the Board of Directors that could waive immunity, not the protocol officer of the appellant.

Having reviewed Article 3 in the light of supporting English authorities, it could be deduced that the instant case is largely weakened, and its hope of succeeding in the Supreme Court of Nigeria is faint. The learned trial judge and the judges of the Court of Appeal leaned too much on the issue of waiver, thereby weakening the decision arrived at in that case. The proper direction for the courts would have been to refer themselves to development in other jurisdictions on the issue of immunity.

The concluding question is whether Nigeria should adhere to the rule of absolute immunity, one of its many common law legacies or change its policy to one of relative immunity, which seems to be the prevailing legal order in Western European countries and the United States. Perhaps the first important issue to be resolved is the determination of the exact scope of the rule governing state immunity in international law. A primary source of the rules of international law is "international custom, as evidence of a general principle of law". Some writers usually classify the practice accepted as law[30], while other writers usually classify the elements of custom into

[28] (1914) 1 Ch 139.
[29] (1956) 3 All E.R. 71.
[30] Article 38(1) (b) statue of the I.C.J.

four: the duration of a practice, the uniformity and consistency of the practice, the generality of the practice, and an *opinio juris et necessitatis* (Postema, 2012).

Little wonder that in the face of conflicting or perhaps shifting evidence of states' practice in this area, various writers have drawn diverse conclusions from the available data. A number are of the view that the law is uncertain. Some think that the wider principle of absolute immunity represents the rule, while others maintain that the preponderant practice supports a principle of restrictive immunity based on the distinction between acts *jure imperii and acts jure gestionis.*

We contend that a critical analysis of this area of international law reveals that the only matter on which there is a unanimous view is that no state may exercise their judicial jurisdiction over acts *jure imperii* of the other state. But this does not imply an acceptance of the principle that states may exercise their judicial jurisdiction where the act of the other state is a private matter (act *jure gestionis*).

Considerable difficulties lie in the way of accepting the restrictive view of state immunity, according to which acts classified as *jure gestionis* do not confer any immunity on the acting state. The first problem is how to make a distinction between acts *jure imperii* and acts *jure gestionis*. As the Court of Appeal of Amsterdam pointed out in the case of *Weber v Union of soviet Socialist Republics*,[31] the distinction between acts performed *jure imperii* and those performed *jure gestionis* is irrelevant. It is an altogether useless criterion for the definition of judicial competence, for in the various states the opinions differ widely on such matters as state and government and the purposes and limits of state interference with economic life.

Some test is sometimes offered for distinguishing between acts *jure imperii* and acts *jure gestionis*. It has been suggested that if the transaction can be made by an individual, then it is *jure gestionis*. Lord Danning, in his judgment in the *Trendrex Corporation case*, stated that if an individual can make a contract and if a state makes one, then it can expect no immunity.

Such arguments, pursued to their logical conclusion, would mean the end of state immunity as we know it. In what other manner may a state purchase boots or cement besides a commercial transaction, as Fitzmaurice has observed?

The truth is that a Sovereign State is because it performs acts which a private citizen might perform (Brownlie, 1980).

Moreover, a private citizen cannot purchase boots for the army or cement for army barracks simply because a private citizen cannot have an army. Only states can perform such functions. Even courts are eager to adopt the restrictive principle of immunity usually classify.

The distinction between act *jure imperii* and act *jure gestionis* also does not consider the single contract situation. The advocates of the restrictive theory of immunity might perhaps have a point in contending that justice demands that the state, which is perpetually engaged in running an airline or merchant shipping ventures, should operate in the market as it finds it. There is simply no other method of exercising a sovereign right in such a direction besides the conclusion of a commercial agreement. In *Guggenheim v State of Vietnam*,[32] the Plaintiff concluded a contract with the State of Vietnam to supply a large quantity of cigarettes intended for the use of the

[31] A. M. Digest. Supp. 1. 1919-1942, No. 74, Beiman ASIL. Proceedings (1969) 183-184.
[32] 84 J.D.I. (1957), 408, Int. L.R. 22 (1955), 224.

armed forces of Vietnam. He later instituted an action in France to enforce the contract. The court of first instance upheld the plea of immunity, although Vietnam was not an independent state at the material time. The Court of Appeal of Paris affirmed the decision, holding that in purchasing cigarettes for the use of the Armed Forces, the State is acting in its sovereign capacity. It is submitted that decisions like this are more in line with practical experience and less likely to give rise to difficulties.

A favourite argument of supporters of the restrictive principle of immunity is that the recognition of immunity in simple commercial transactions negates the idea of the rule of law. It places the individual in an unfavourable position in that he might be denied justice, but then it should be noted that an individual who deliberately does business with a foreign state ought to be aware of the fact that the state might enjoy some form of immunity. It is futile to argue about the equality of the parties; they are not equal. And if the individual is willing to undertake the risk, the issue of a denial of justice ought not to arise.

Furthermore, a distinction between acts *jure imperii* and acts *jure gestronis* usually involves what might be termed a doctrinal determination. It involves a determination of the proper role of the state in commercial enterprises. Thus, arguments such as these, deduced by Lord Denning in the *Trendex Corporation Case*,[33] are usually offered.

In the last 50 years, there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state, or creates its own legal entities, which go into the marketplace of the world. They charter ships… This transformation has changed the rules of international law relating to sovereign immunity.

But such developments reflect the desire of developing countries to catch up with the so-called developed ones. These countries are faced with problems that the developed countries could hardly imagine, and state participation in activities aimed at ameliorating these human wants and sufferings is considered by many economists as imperative. Legal exponents of the *laissez-faire* theory will disagree with such an approach.[34] The participation of these states in such activities, then, could be seen merely as the exercise of their sovereign rights. It is surely absurd to contend that an act directed at taking care of the army of a state may be classified as *jure imperii* whereas an act directed at taking care of the army of a state may be class attaining some reasonable welfare of the population which can only be classified as *jure gestionis*. As the United States Supreme Court rightly observed in *Berizzi, Bros v S. S. Pesaro*,[35]

…when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires means and operates a ship in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force…

It is our humble submission that it is in the interest of the developing countries, like Nigeria, to adhere to the absolute immunity doctrine. It is these countries, and the socialist countries, that are usually in the market. Subjecting them to petty litigations around the world over impedes the speedy attainment of their goals and

[33] (1977) 2 W.L.R. 366.
[34] (1977) 2 W.L.R. 366.
[35] 271 U.S. 562 (1926).

dissipates hard earned money and materials, which are not in any case readily available. This does not, of course, imply the repudiation of responsibility, but a plea for the recognition of a peculiar situation; the Nigerian situation offers some illustration.

In the *Trendex Case*,[36] the country was in a desperate situation with regard to the availability of cement. There was hardly any other method of making the commodity available besides the manner the country wants it. At all material times, the various contractors were aware that they were dealing with a state, not a private individual. A state in such a situation ought not to be made an unwilling party to litigation in a foreign jurisdiction.

One important question deserves some attention. Is immunity granted because of the nature of the function being performed, or was it conceived only as an aspect of sovereignty, not activity? The latter view seems more appropriate. Immunity is a consequence of the sovereignty and equality of states. This principle was recognised as long as 1880 in *The Parlement Belge.*[37]

We believe. That as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the sovereign or ambassador of any other state, or over the public property of any state… though such sovereign ambassador property is within its territory, and therefore, but for common agreement, subject to its jurisdiction.

Perhaps a way out of the present confusion in this area of law is a recognition by states of the destruction between the perpetual on a trader and a simple commercial transaction, agreeing that a state that decides to trade should operate in the market as it finds it. Thus, activities such as operating commercial airlines, shipping business, or insurance corporation would not enjoy any immunity as they might put such state enterprises at an unfair advantage over others operating in the market (Elhauge & Geradin, 2011). However, a single purchase of an item in the market cannot amount to a commercial activity.

Conclusion

Ultimately, sovereign immunity in Nigeria sits at a crossroads where constitutional norms, global accountability trends, and practical governance needs collide. The doctrine's persistence makes sense historically, but its rigid application now feels out of sync with a legal culture pushing for transparency, remedy, and rights-centred governance. Nigeria does not need to abandon immunity entirely; it just needs to recalibrate it so public authorities are not shielded from legitimate scrutiny. A refreshed approach anchored in judicial clarity and legislative courage would keep the state functional while making justice more accessible (Brown & Okogbule, 2020). That balance is the only sustainable path for future governance and meaningful public accountability in Nigeria.

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[37] 5 P.D. 197 (1880).

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