

State Practices on Foreign State Immunity and Diplomatic Immunity: A Confusion of Legal Thoughts by the Nigerian Courts

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With the coming into prominence of the diplomatic and state immunity, there has been an issue as to whether such immunity should be absolute or restricted to certain intercourse. While some developed countries, like England and the United States have codified their practices on both diplomatic and sovereign state immunity in their state legislations, their case laws have also indicated a shift from absolute to restricted immunity. In Nigeria, however, apart from the fact that there is no state immunity legislation, the case law faced with issue of diplomatic and sovereign immunity merely misinterpreted the Nigeria's Diplomatic Immunity Act (1962) to cover the ground. This legislation only applies to diplomatic and consular officers, their staff, and members of their family as expressly stated, but not to "sovereign states". The Nigerian courts follow the absolute immunity approach by holding always that both the foreign state and their envoys are immune to court jurisdiction in all matters including commercial transactions and tortious liabilities they are involved in. This article employs a case law analysis of the Nigerian position and posits that there is a distinction between sovereign state immunity and diplomatic immunity and that the Nigerian courts should hold that foreign sovereigns ought to be held accountable for their obligations under non-state matters, such as commerce and other civil obligations which they willfully entered into with a third party within that distinction as it obtains in the United Kingdom and the United States. Hence, there should be no immunity to court jurisdiction in the receiving state on such civil matters.

Keywords: diplomatic immunity, jurisdiction, Nigeria, state practices

Introduction

The principle of sovereignty is central to international law. All independent states of the world are sovereign states. Thus, no matter how small a state may be geographically, it still retains some measure of equality with other states with respect to its legal personality and capacity under the international legal order. The Latin maxim *par in parent non habet imperium* meaning "an equal cannot exercise authority over an equal" preserves this assertion.

The consideration of the extent of diplomatic immunity enjoyed by a foreign sovereign and its envoys came into prominence in the 18th century. It then became an issue whether such immunity should be absolute or restricted to certain intercourse. The then prevalent absolute sovereign immunity was, however, given a twist

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by the English decision in *Trendtex v. Central Bank of Nigeria*¹. This has been adopted under the customary international law of countries, like England, which following the *Blackstonian* theory which regards customary international law as being part of the laws of England. However, some countries, especially Nigeria, have retained the absolute immunity approach.

Some developed countries, like England and the United States (U.S.) have attained a stage of codification of their customary practices in their various state legislations, stating instances where immunity will be denied foreign sovereigns thus making it easier for the courts to easily pronounce on related issues in a uniform and coherent manner.

In Nigeria, case law faced with issue of diplomatic and sovereign immunity merely glossed over it. The Nigerian courts though recognise the emerging international law custom of restrictive jurisdictional immunity; they timidly follow the absolute immunity approach.² They reach this conclusion based on the argument that the Nigerian Diplomatic Immunity Act (1962) laid down the absolute immunity standard. While this is true, Nigeria case law reveals that this standard as adopted by the courts is not only applied to diplomatic and consular officers, their staff, and members of their family as expressly stated in the said legislation, but also to “sovereign states” which was not expressly mentioned or covered by the Act.

The situation is made more difficult for the Nigerian judiciary because Nigeria has no state immunity legislation, like its United States and England counterparts. The question now arises: Since there is no state immunity legislation, can Nigeria fall back on the common law in England? If the question is answered in the affirmative, then the restrictive immunity approach as adopted in the *Trendtex* case should be followed as regards state sovereign and immunity rather than extending the provisions of the Diplomatic Immunity Act (1962) to cover state immunity rather than those it covers, i.e., diplomatic and consular officers, etc.

In the alternative, if the English decisions are dismissed with the flimsy legal argument in Nigeria that they are only of persuasive authority and therefore cannot be binding on Nigerian courts, there is still a way out by ratifying and domesticating the United Nations’ Convention on the Jurisdictional Immunities of States and Their Properties.³ The Convention made considerable compromise in many areas of divergence between states that follow restrictive immunity *inter se*, and those that follow the absolute immunity approach.

This article adopts a case-law analysis research technique of the Nigerian legal position as reflected in the judicial decisions of the various superior courts by comparative analysis of the positions in both the United Kingdom and the United States of America as reflected in their various legislations as a rationalization for the necessity by the Nigerian government to legislate on state immunity as it is in those developed comity of nations.

The Principles of Diplomatic and Sovereign Immunities

Diplomatic immunity is a form of legal immunity and a policy held between governments which ensure that diplomats are given safe passage and are considered not susceptible to lawsuits or prosecution under the host country’s law. Though there is a much longer history in international law, many principles of diplomatic immunity are now considered to be customary international law.

¹ [1977] 1 All ER 881.

² Akpata JCA in *Krama Italo Limited v Government of the Kingdom of Belgium and Anor* [unreported judgment of I.O Agoro J in suit no LD/1689/86 dated 6/3/87].

³ Established by the General Assembly Resolution 55/150 of December 12, 2000.

Diplomatic immunity as an institution developed to allow for the maintenance of governmental relations, including during periods of difficulties and even armed conflicts. When receiving diplomats formally, representatives of the sovereign, the receiving head of state grants certain privileges and immunities to ensure that they may effectively carry out their duties on the understanding that this will be provided on a reciprocal basis.

Foreign sovereign immunity, on the other hand, is the right or privilege of a state from suit jurisdictional immunity, which may be claimed by it or its recognized alter egos, institutions, or agencies, for exemption from civil or criminal proceedings in the courts of another state (Olaniyan, 2013, p. 287).

It is worthy of note, however, that without state or sovereign immunity, diplomatic or consular immunity would not have arisen. It is protection the states enjoy that is extended to such officers and organizations that serve the state in another state which recognises its immunity and agrees that same be extended to its officers and organisations as well. In the common law jurisdiction, an independent sovereign state cannot be sued in the court against its will and without its consent. The doctrine of sovereign immunity evolved from rules of international law and the same has been internalised and made part of common law of England, which is an ample source of the Nigerian legal system.

Sovereign immunity only operates as a procedural bar from the jurisdiction of the forum courts based on the maxim *par in parem non habet imperium*⁴. The reason behind the immunity accorded states and their recognized alter egos, institutions, and agencies in foreign territory is not that they are not liable at all but courtesy demands that they are not dragged before the courts of another sovereign state or at worse, they should only be sued with the consent of the sending state (Olaniyan, 2013, pp. 287-289).

The above maxim was succinctly explained by Marshall C. J. in *The Schooner Exchange v. MC Faddon*⁵ as follows:

...one sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated are reserved by implication and will be extended to him. This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Under the common law, exercise of court's jurisdiction against the sovereign is deemed incompatible with the superior authority of the sovereign state. The doctrine is founded upon the broad consideration of public policy, international law, and comity rather than on any technical rules of law.⁶ Under the doctrine, the protection avails not only the state but also the head of state while in office personally, and to the government of the state or its component parts or any of their departments.⁷ Thus, it has been contended that states and its diplomatic agents are the same and interchangeable as it is one that gives rise or breathes life into the other⁸.

⁴ An equal cannot exercise authority over an equal.

⁵ 7 Cranch 116 (1812), U.S. Supreme Court.

⁶ *Campania Naviera Vascongada v S S. Christina* [1938] 1 All E.R., 719 per Lord Atkin at 720.

⁷ *Duke of Brunswick v King of Hanover* [1844] 6 BEAV1, *Wads-worth v Queen of Spain* [1851] 17 QB 171, *Duff Development Co. Ltd. v Kelanan Government* [1924] AC 797, *Rahimtoola v. Nizam of Hyderabad* (1958) AC 379.

⁸ *Rahimtoola v Nizam of Hyderabad* [1958] AC 379.

Sovereign immunity may also be distinguished from the act of state doctrine. The act of state doctrine forbids forum courts from adjudicating over conducts or acts of a foreign state occurring within the territory of the foreign state (Olaniyan, 2013, p. 290). The doctrine is a municipal law doctrine which has been adopted by the United States (U.S.)⁹, United Kingdom (UK),¹⁰ and a host of other states¹¹ for the purposes of ensuring that the fruitfulness and essence of their foreign policy is not hampered by unbridled exercise by their courts of judicial power.

Established in large part by the Vienna Convention on Diplomatic Relations (VCDR) of April 18, 1961 and Vienna Convention on Consular Relations (VCCR) of April 24, 1963, diplomatic immunity is granted to individuals depending on their ranks and the amount of immunity they need to carry out their duty without legal harassment.

The Vienna Conventions are explicit on the fact that it is the duty of all persons enjoying such privileges to respect the laws and regulations of the receiving state. In spite of this, there is a plethora of cases in which abuse of immunity is in issue in the receiving states. Violations of diplomatic immunity include specific personal offences, such as espionage, smuggling, child law custody violations, rape, and even murder. For example, in 1984, in London, a Police woman, Yvonne Fletcher, was killed on the street by a person shooting from inside the Libyan embassy, the incidence caused a breakdown of diplomatic relations between the two nation states until Libya admitted general responsibility in 1999. The defense of diplomatic immunity has also been raised when cases are brought to enforce business transactions or contractual rights against diplomatic agents in personal injuries and damage to property suits, and in contract of employment cases, etc.

The Trend Towards Restrictive Jurisdictional Immunity¹²

There are two main approaches to sovereign immunity: absolute sovereign immunity and restrictive sovereign immunity. Although it is not correct to say the former has been completely eradicated, it is the case that restrictive sovereign immunity has gained ground globally over the last two decades. The approach associated with absolute sovereign immunity is called “structuralist” (*ratione personae*), while the approach associated with restrictive immunity is called “functionalist” (*ratione materiae*).

Structuralist Approach

This approach is concerned with the status of the party claiming sovereign immunity. The structuralist approach still finds favor in some jurisdiction (i.e., those adhering to absolute sovereign immunity). Here, the creation of a separate state entity gives rise to a presumption that the entity is effectively separate from the state. Thus, the fact that a state entity has a distinct legal personality would defeat any claim to immunity. Communist and socialist states follow this principle. State corporations in these countries have rarely laid claims to sovereign immunity because their character as separate legal entities was believed to exclude the “danger that the foreign trade corporation would claim for themselves the immunities and prerogatives which belongs to the state and its property”. A strict structuralist approach will lead to absolute immunity if the entity is established as a public entity that is inseparable from the state. Then, everything the entity does will be entitled to immunity.

⁹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Belhas v. Ya'Alon*, 466 F. Supp. 2d. 127 (D.D.C. 2006).

¹⁰ *Buttes Gas and Oil Co. v. Hammer* [1982] AC 888.

¹¹ In Australia for example, see *Attorney General v. Heinemann Publishers Australia Pty Ltd.* (1988) 165 CLR 30.

¹² “*Maniruzaman*”, an article on state enterprise arbitration and sovereign immunity issues: A look at recent trends. Dispute Resolution Journal, August-October 2005, AFM, <http://fmdarticles.com/p/articles> (last visited November 24, 2014).

Functionalist Approach

The functionalist approach is concerned with the subject matter that is the conduct forming the basis for the claim of sovereign immunity. Recent trend seems to be towards the functionalist approach which has little or no regard for the state enterprise. The functionalist approach embodies the restrictive doctrine of sovereign immunity. Under the functionalist approach, when a state enterprise has a distinct legal personality (i.e., one detached from the state itself) and it performs acts of a private and commercial nature, it cannot claim sovereign immunity. To the functionalists, the status of the state enterprise is irrelevant, only the nature of its acts really matters for purposes of jurisdictional immunity.

The above view is consistent with the view of the United Nations International Law Commission (ILC) which has made relentless efforts to qualify the universally accepted rules in state jurisdictional immunity over the last two decades. Thus, the recent Convention on Jurisdictional Immunity of States and the ILC's final draft articles of 2003 define the word "state" to include inter alia "agencies or instrumentality of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state". Under the definition, a legal action or arbitration commenced against a state's agency, enterprise, or instrumentality would be considered to be against the state.

The approach enshrined in the quoted ILC definition appears to be functional rather than structural, given the phrase "to the extent". Thus, no matter what the status of the state agency, instrumentality or enterprise is *viz-a-viz* the state, so long as the enterprise is entitled to perform and is performing acts in the exercise of sovereign authority of the state, it can invoke sovereign immunity as the state.

However, progressive developments, whether through treaties or state practice, have ensured that the concept of immunity did not remain static. In its earlier conception, immunity was thought of as being absolute but today, a foreign sovereign or a diplomat cannot escape a suit brought against it to enforce an obligation acquired by it in the forum where it has acted *jure gestionis*¹³. In England, for example, the judicial practice was in favour of absolute immunity until around the 1970s, when the English courts in the cases of *The Phillipine Admiral*¹⁴ and *Central Bank of Nigeria v. Trendtex*¹⁵ applied the restrictive immunity rule in an *in rem* and *in personam* actions against a foreign sovereign and its agency respectively.

In 1978, the UK legislature enacted the State Immunity Act which severely restricted immunity permitting suits against a foreign state where, for instance, it engages in commercial transaction otherwise than in the exercise of sovereign authority.¹⁶ By this time also, UK had ratified the European Convention on Immunity which adopted restrictive standard (Olaniyan, 2013, p. 291).

Nigeria at independence in 1960 inherited from Britain, the absolute concept of immunity. At the time, UK and U.S. changed their state practice, which offered sound rationalization for a call for a change, the Nigerian state practice has remained unchanged despite the fact that Nigeria ratified but yet to domesticate both the Conventions on Diplomatic and Consular Relations. The situation is further worsened because there is no State Immunity Act which could have attempted to list certain exceptions to immunity like in the UK.

¹³ Having acted as a private entity rather than a state or governmental action. Also, state alter egos who violate *jus cogens* norms in respect of which treaty or customary international law confer universal jurisdiction may be charged for the crimes in foreign states: *R' Bow Street Magistrates Ex Parte Pinochet* [2001] 1 AC 147, House of Lords.

¹⁴ [1977] AC 373.

¹⁵ [1977] QB 529.

¹⁶ Section 3 of the UK State Immunity Act. See also Sections 4, 5, 6, 7, 8, and 10.

Nigeria, in 1962, enacted the Diplomatic Immunities and Privileges Act¹⁷ to confer absolute immunity on diplomatic and consular officers, their staff, and members of family¹⁸, as well as on representatives of commonwealth countries¹⁹ and international organisations certified as such by the Nigerian Minister of Foreign Affairs.²⁰

This legislation has not been amended despite the ratification of the United Nations Conventions which restrict the immunity of diplomatic and consular officers. The Vienna Convention on Diplomatic Relations, for example, qualifies the immunity of diplomatic agents in both civil and administrative jurisdictions generally.²¹ Foreign consular officers enjoy no immunity from courts of the receiving states in respect of their private acts.²² Judicial practice of some states adopted the approach of looking at the nature of the act of the sovereign complained of. Distinction is made between purely sovereign acts or “*acta jure imperi*” and commercial or private acts “*acta jure gestionis*”. The state could invoke immunity in respect of the latter but not in respect of the former. This broad test is, however, difficult to apply in individual cases.²³ To salvage this lacuna, states’ legislations and the European Union Convention adopted a style of listing and discussing the exceptions to immunity.²⁴ This approach is likely to make the court’s task in deciding whether or not to sue the foreign state on the ground that its acts are private or governmental in nature much simpler and straight forward. As it is under the current Nigerian position, pursuant to the 2005 case of *Oluwalogbon v Gov. of UK*²⁵, the courts must, before applying the doctrine, be very cautious and be fully satisfied that from the plaintiff’s claim, it is manifest that the state has acted in a manner inconsistent with its superior authority.

English and American Jurisdiction Explored

The position in these two jurisdictions where will be explored below as not only a rationalisation for the need for a judicial change by the courts’ interpretations in favour of restrictive immunity other than the absolute immunity in matters of commerce or tortious liability involved or committed by the foreign officers in the receiving states but also a justification for the need for Nigeria to promulgate a law on state immunity as it exists in the afore mentioned jurisdictions.

The Position in the United Kingdom

It is in this sphere of customary international law that the doctrine of incorporation has become the main British approach. It is an old system dating back to the 18th century, owing its prominence at that stage to the considerable discussion then taking place as to the precise extent of diplomatic immunity.

In *Buvot v Barbuit*²⁶, Lord Talbot declared unambiguously that “the law of nations in its full extent was part of the law of England” hence a Prussian commercial agent could not be rendered liable for failing to

¹⁷ Cap. D9, Laws of the Federation of Nigeria, 2004.

¹⁸ Section 1, Nigerian Diplomatic Immunities and Privileges Act, 1962.

¹⁹ Section 3, *ibid.*

²⁰ Section 11, *ibid.*

²¹ See Article 31(1).

²² Article 43(1), Vienna Convention on Consular Relations.

²³ See for example, The House of Lords decision in *The Congreso Del Partido* [1983] 1 AC 244 HL, the Lords could not agree on the facts and on whether certain acts or transactions were governmental or private.

²⁴ See for example Sections 3-11 of the UK State Immunity Act, Section 1605 of the U.S. Foreign Sovereign Immunities Act and Art. 27 of the EU Convention.

²⁵ [2005]4 NWLR 760 per M.D *Muhammed JCA.*

²⁶ [1737] Cases T Talbot 281.

perform a decree. This decision was followed 27 years later in *Triquet v Bath*²⁷ where Lord Mansfield, in discussing the issue as to whether a domestic servant of the Bavarian minister to Britain could claim diplomatic immunity, upheld the earlier case and specifically referred to Talbot's statement.

In the English Court of Appeal decision in *Trendtex Trading Corporation v Central Bank of Nigeria*²⁸ which is widely acknowledged to be "the definitive absorption by common law of the restrictive theory of sovereign immunity",²⁹ the Central Bank of Nigeria had in 1975 issued a letter of credit in favor of the plaintiff, a Swiss company, for the price of cement to be sold by the plaintiff to an English company which has secured a contract with the Nigerian government to supply it with cement for the construction of an army barracks in Nigeria. When under instruction 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 plaintiff brought an action *in personam* against the bank in the English High Court. The bank had successfully pleaded sovereign immunity before Donaldson J., and the plaintiff appealed. In resolving the dispute, the Court of Appeal formulated the following two broad issues for determination:

(a) Whether the Central Bank of Nigeria should be considered in International law as a department of the Federation of Nigeria?

(b) Whether English court could apply the rule of restrictive immunity?

On the second issue, the court unanimously found that international law has changed from the rule of absolute immunity. Lord Denning M. R and Shaw L. J. posited that the Court of Appeal could apply a new rule of international law even though there were Courts of Appeal decisions to the contrary. Put differently, the majority of the Court of Appeal in *Trendtex* case found that the act involved in that case was purely commercial and that the position of customary international law as opposed to the state of judicial precedent in England as at that date would require that immunity should not be extended to those acts. Finally, the court held that what the court should apply was the current position in English customary international law and not the position of English case law on the matter³⁰. This approach was reaffirmed by the Court of Appeal in *Maclaine Watson v Department of Trade and Industry*.³¹

On the other hand, treaties are not applied *ex proprio vigore*. Unless and only to the extent that an enabling legislation had been enacted by parliament allowing treaties to be enforced by English courts. Since treaty making falls within the prerogative of the crown, application of a treaty domestically without parliamentary approval would have been tantamount to a violation of the established relationship between the crown and the parliament. Nonetheless, it must be emphasized that not every treaty requires the consent of parliament for its realisation. Transformation is necessary only where and when the treaty in question would affect private rights or liabilities or will result in a charge on public funds or will necessitate modification of the common law or an existing statute.³²

With the promulgation of the English State Immunity Act of 1978, the United Kingdom (UK) adopts the practice which requires or renders the certificate of the executive conclusive in the determination of such issue

²⁷ (1764) 3 Burr. 1478.

²⁸ [1977] 1 All ER 881.

²⁹ Per Lord Diplock in *Akom Ltd. v Republic of Columbia* [1984] AC 580.

³⁰ The decision on this point departed from the same English Court of Appeal decision in *Thai-Europa Tapioca Service Ltd v Government of Pakistan* [1975] 1 WLR. 1485.

³¹ (1983) 3 WLR 1033; 80 ILR 49.

³² *International Tin Council Appeal* [1988] 3 All ER. 257; 3 WLR 969.

as to whether an entity or party claiming immunity is a state, or whether it should be regarded for the purpose of immunity as the head of government of a state.³³

In the relatively recent case of *Alamieyeseigha v The State* (Vanguard, 2005; Olaniyan, 2006, pp. 128-156), the certificate of the UK secretary of state reads:

The Federal Republic of Nigeria is a state for the purpose of the Act. Bayelsa state is a constituent territory of the FRN; a federal state for the purpose of part 1 of the Act. The claimant is the governor and chief executive.

The UK Act reversed the common law functional approach in respect of claim of jurisdictional immunity by federal states in civil cases where the federal state qua state invokes immunity (Harris, 1998, p. 335). The recent case of *Alamieyeseigha* had turned upon the personal immunity of the sovereign or other head of state which is not covered by the Act.³⁴ The UK test is a restatement of the common law.³⁵ It deemphasises the issue of whether the state organ is a separate entity, or the degree of control which the state has over it. Instead the emphasis is on the nature of the act of that separate entity upon which the UK proceedings were founded.

Section 5 of the UK Act permits the proceedings, i.e., will preclude the foreign state from invoking immunity only if the death or personal injury or damage to or loss of tangible property was caused by an act or omission in the UK.

United States of America's Position

In the United States of America, the attitude of the courts in respect of customary International law generally follows the British approach (Oyebode, 2010, p. 46). The rule of International law is, however, subject to the Constitution and the U.S. courts reserve the right to give effect to a later statute as against a rule of customary international law in consonance with the maxim: *lex posterior derogat legi priori*.³⁶

However, the practice with regard to treaties is markedly different to that of the British in consequence of relevant provisions of the Constitution³⁷ and the practice of distinguishing between “self executing” and “non-self executing” treaties³⁸ as well as the wide spread resort to the so-called executive agreements. Thus, depending on the nature of the treaty, it may be implemented either through an enabling statute, or directly without need for such legislation or by administrative action.

It is worthy of note that the customary International law of the U.S. and UK have undergone sufficient progressive development and both countries have enacted their Sovereign Immunity Act which contains the respective state's view or practice on the subject, recognising state immunity as a general rule and proceeding to list exceptional circumstances when states would not be able to invoke immunity from the jurisdiction of the forum courts. Many other states have, however, taken a cue from this and have enacted state immunity legislation.

Under the U.S. Federal Sovereign Immunity Act (1976), the requirement that courts of the forum state

³³ Section 21 UK State Immunity Act.

³⁴ Sec. 14(1); the reference to “state” in the act is limited to the sovereign or other head of that state in his public capacity. If *Alamieyeseigha* was qualified to immunity in his personal capacity. It would partly have been because Bayelsa state was considered to be a sovereign state and partly because he is to be treated as the head of a diplomatic mission under Section 20.

³⁵ See *The Congresso Del Patrido* [1983] 1 AC 244, H.L.; *Tredtex v CBN* [1977] Q.B.529; *Baccus v S.R.L Servicio Nacional del Trigo* [1957] 1 QB 439.CA; *Mellenger v New Brunswick Corporation*. All these are cases which followed this test before the enactment of the 1978 Act.

³⁶ *The Over The Top* [1925], 4f[2d]842; *Tag v Rogers* [1959], 267f.(2d).664.

³⁷ Articles 2[2], 6[2].

³⁸ *Forster v Nielson* (1829), 2 pet. 253 at 314.

should “on their own initiative” determine that the immunity of the other state is respected, without an incursion by the executive is strictly followed under the U.S. law. It also adopts the functional approach by defining foreign states to include the constituent states of a federation and the political subdivision of foreign states respectively.

This Act defines a “foreign state” to include an agency or instrumentality of a foreign state. “Agency and instrumentality” of a foreign state is then defined to include any entity:

- (i) which is a separate legal person, corporate or otherwise;
- (ii) which is an organ of a foreign state, or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or a political sub division thereof ;
- (iii) which is neither a citizen of the U.S. as defined nor created under the law of any 3rd country.

Section 1605(7) forbids a foreign state designated as sponsor of terrorism from invoking immunity in proceedings in which money damages are sought against the foreign state for personal injury or death that was caused by an act of torture, extra judicial killing, aircraft sabotage, hostage taking or the provision of material support or resources for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency³⁹. The attitude as expressed in the above provision no doubt is influenced by the experience of the U.S. The statute is not quite clear as to what the case is if the state concerned is not designated a terrorist state.

United Nations’ Convention on Jurisdictional Immunity of States and Their Property (2004)

An International treaty (United Nations’ Convention on Jurisdictional Immunity of States and Their Property, 2004) has emerged to harmonize and crystallise these divergent codified state practices. Unfortunately, neither of the countries mentioned (i.e., U.S. and UK) has ratified this Convention. The purport of Article 9(1) of the Convention is that the issue whether a foreign state or an entity claiming to represent that state is entitled to invoke immunity is a question to be determined entirely by the courts. Also, Article 27 of the Convention adopts the common law functional approach. All these are in consonance with the U.S. standard.

This Convention ignores the issue of control or of separate incorporation under the municipal law of the foreign state. It simply provides that “state” for the purpose of the convention, means “agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of the sovereign authority of the state”⁴⁰. This is in consonance with the UK standard.

This approach, it is submitted, is better in that forum courts will under it have less reference to the foreign state law to determine status of the state corporation involved. When a foreign state corporation does an act that is governmental in nature, it or the state should be able to invoke immunity, irrespective of the corporation’s status and degree of control which the foreign state wield over the said agency.

Under the Convention, however, in order for a tortfeasor state to be able to invoke immunity, the following requirements must be met.

- (1) The torture or other tort must have occurred in the forum state.
- (2) The author of the act or omission must have been present in the forum state at the time of the act or omission.

³⁹ There are exceptions.

⁴⁰ Article 2(1).

It should also be noted that the Convention, like the UK law does not reckon with the nationality of the victim, but rather emphasises the localisation of the tort.

Nigerian State Practices on Foreign State Immunity—Confusion of Diplomatic Immunity With Sovereign Immunity

There are two clear sources from which one can deduce Nigeria state practice. These are legislation and case law.

Nigerian Legislation on Immunity

Nigeria at independence inherited from the British colonialists, the absolute concept of sovereign immunity. At the time, the United Kingdom, the United States of America, and other Western powers changed their state practice; the world appeared to be divided along ideological lines. As was highlighted earlier, the restrictive view was obviously antithetical to states sticking to structuralist approach which was the prevailing socialist philosophy, which held that politics and trade were inseparable aspect of the state and that a socialist state acted qua state in all its dealings. With the collapse of the Soviet empire come a great social and political change in Eastern Europe, which has slowly influenced state immunity practice in the formerly communist countries. The shift towards restrictive immunity was brought about by the participation of the former Soviet countries especially Russia in the development of market economies and participation in global commerce. Nigeria and other developing nations being non-aligned and socialist states may have been justified in their initial reluctance to adopt the restrictive view of immunity. Such justification clearly no longer exists. Like the United Kingdom and U.S. before 1978 and 1976 respectively, Nigeria has no legislation on state immunity, but in line with its practice of absolute immunity, the Nigerian Diplomatic Immunities and Privileges Act⁴¹, enacted in 1962 was believed to have conferred absolute immunity on diplomatic and consular officers, their staff, and members of their family⁴² as well as on representatives of common wealth countries⁴³ and international organizations certified as such by the Nigerian Minister of Foreign Affairs⁴⁴.

Although the immunity of diplomats, consular officers, and chief representatives of commonwealth countries are conferred on the basis of reciprocity, it is only the minister who can certify that grounds do exist for withdrawal or restriction of immunity in respect of any foreign state's diplomatic or consular officers or chief representatives of any common wealth country⁴⁵.

This is in spite of the fact that Nigeria ratified both the Conventions on Diplomatic and Consular Relations, both of which severely restricted the immunity of diplomatic and consular officers. The Vienna Convention on Diplomatic Relations⁴⁶ qualifies the immunity of diplomats in civil and administrative jurisdiction in the cases of:

- (1) A real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission.
- (2) An action relating to succession in which diplomatic agent is involved as executor, administrator, heir, or legatee as a private person and not on behalf of the sending state.

⁴¹ Laws of Federation of Nigeria, 2014.

⁴² Section 1.

⁴³ Section 3.

⁴⁴ Section 11.

⁴⁵ Section 8.

⁴⁶ Article 31(1).

(3) An action relates to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official function.

On their own part, foreign consular officers enjoy no immunity from the courts of the receiving states in respect of their private acts.⁴⁷ Nigeria has also more recently ratified the treaty establishing the International Criminal Court, which removes immunity of foreign sovereign for purposes of prosecution in Nigeria for crimes against humanity.

It should be pointed out, however, that it is not enough for Nigeria to ratify treaties; such ratified treaties should also be domesticated for it to have force in Nigeria. The above treaties though ratified but have not been domesticated for it to be applied in the Nigerian courts. It is submitted though that in the absence of a State Immunity Act therefore, Nigerian courts should follow the emerging progressive International law trend of restrictive immunity as regards foreign sovereign and states.

However, it is recommended that the absolute immunity approach be held unto in relation to diplomatic and consular officers, their staff, and members of their families, representatives of commonwealth countries and other international organizations alone. This is for the reason that the immunities so conferred pursuant to the Nigerian Diplomatic Immunity and Privileges Act (1962) on the foregoing officers are merely to prevent them from being sued in their personal capacities when they act for the sending foreign state in the receiving state.

An action against the embassy or the sending foreign state, on the other hand, is like an action against a “disclosed principal” in commercial law in respect of obligations acquired on its behalf by its agent—the diplomatic or consular envoy under the rule *qui facit per alium facit perse*. Hence, the principal should not be allowed to benefit from the incapacity of his agent (Olaniyan, 2013, p. 304).

Nigerian Case Law on Sovereign and Diplomatic Immunity

The nature and purpose distinction made by Lord Denning in the *Trendtex* case seems to have no relevance in the Nigerian courts. According to his lordship in the celebrated case of *Trendtex v Central Bank of Nigeria*⁴⁸, the purpose of a transaction is irrelevant in determining its character as a commercial transaction. In his famous words:

If a government department goes into the market place of the world and buy boots or cement, as a commercial transaction, that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.

A review of Nigerian cases shows that Nigerian courts lays credence to the *purpose* of the transaction, hence any transaction carried out for the purpose of a foreign government will automatically be coated with absolute immunity when a cause of action arises from such transaction irrespective of the fact that such transactions are commercial in *nature*. Secondly, Nigerian courts have not only applied absolute rule of immunity to instances governed by the Nigerian Privileges and Immunities Act (1962), they have applied it in cases clearly coming under sovereign as opposed to diplomatic immunity, which are not regulated by any statute.

Below are some Nigerian judicial decisions which show the attitude of the Nigerian courts towards the subject.

⁴⁷ Article 43(1) Vienna Convention on Consular Relations.

⁴⁸ See *Trendtex v. CBN supra* note 28.

In *African Reinsurance Corporation v Abate Fantaye*,⁴⁹ the plaintiff, Abate Fantaye had commenced proceedings in the High Court of Lagos against the defendant, an International organisation for wrongful determination of his employment with the defendant. The defendant then brought an application praying the court to strike out or dismiss the plaintiff's claim for want of jurisdiction on the grounds that since the defendant was an International organisation, it enjoyed diplomatic immunity from suit or legal process. A certificate from the Ministry of External Affairs to this effect was relied upon by the defendant, but it was rejected by the court which ruled that the defendant had waived its diplomatic immunity. The defendant [now appellant] appealed against the ruling of the High Court, relying *inter-alia*, on the order issued by the Ministry of External Affairs, titled "African Re-insurance Corporation Order 1985". The order was issued after the High Court ruling and conferred immunity on the appellant against all suits except those relating to re-insurance and where the appellant expressly waived its immunity.

On appeal, several articles of the treaty establishing the appellant, an international organisation founded by members of the African Union with headquarters in Nigeria were considered pertinent to the suit.

Article 48(1) of the treaty provides that:

Legal action 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 for the purpose of accepting service or notice or process, or have otherwise agreed to be sued.

Article 46 on status of the organisation provides:

To enable the corporation effectively fulfill its purpose and carry out the function entrusted to it, the status, immunities, privileges set forth in this chapter shall be accorded the corporation in the territory of each state member and each state member shall inform the corporation of the specific action which it has taken for such purpose.

Article 53 on waiver provides:

The immunities, exemptions and privileges provided in this chapter are granted in the interest of the corporation. 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.

The appellant's counsel submitted that the certificate and the order issued by the Minister was very decisive. The respondent's counsel conceded that the appellant was an international organization, which enjoys diplomatic immunities and privileges but submitted that the immunity must be taken as having been waived by virtue of Article 48 of the treaty establishing the appellant or by virtue of the steps which the appellant had taken to defend the action at the High Court.

The Nigerian Court of Appeal dismissed the appeal on the ground that the framers of the agreement establishing the appellant did not intend to protect it from being sued once its main object was to undertake mercantile transactions and that at any rate the appellant had waived immunity by taking steps to defend the matter. The court reasoned that "a corporation or other establishments dealing in commercial transaction are not normally accorded privileges and immunities from being sued".

On further appeal to the Nigerian Supreme Court, the apex court unanimously allowed the appeal holding *inter-alia*, as follows:

⁴⁹ [1986] 1 NWLR (Pt. 14) 113 CA; [1986] 3 NWLR (Pt. 32) 811 SC.

(a) That the appellant was an International organization so recognised by the minister by virtue of Section 11 of the Diplomatic Privileges and Immunities Act (1962).

(b) That by virtue of that fact and the order issued by the Minister to that effect, the organisation was entitled to immunity from jurisdiction.

(c) Although the immunity could be waived, such waiver must be expressly done by its board of directors in line with Article 53 of its treaty and that the requirement having not been met, the lower courts were in error to have held that the immunity had been waived.

(d) Article 48 of the organization's treaty which renders it capable of being sued at the locus of its headquarters can only be enforced between state members of the organisation and not by the respondent.

(e) By virtue of the West African Court of Appeal decision in *Grisby v. Jubwe*, and under customary international law, a foreign sovereign cannot be sued in the court of another sovereign in any legal proceeding either against his person or for the recovery of specific property or damages, neither can his property or property in his possession be seized or detained by legal process and there is no difference in principle between sovereignty and immunities accorded a state and those of institutions.

In *Krama Italo Limited v Government of Kingdom of Belgium & Anor.*,⁵⁰ the plaintiff claimed *inter alia* against the government of the Kingdom of Belgium and the Embassy of Belgium in Lagos for an outstanding payment in respect of the building of the Embassy residence at Victoria Island, Lagos, which building had been completed. The defendant then brought a motion to set aside the issue and service of the writ of summons and also to strike out the entire action on the grounds that:

(a) At common law, the defendant cannot be sued in a Nigerian court.

(b) The Belgian envoy and the several members of the staff comprising the Belgian Embassy are immune from suit and legal process pursuant to section 1 of the Diplomatic Immunity and Privileges Act (1962).

(c) The writ of summons issued herein and purportedly served on each defendant is void.

Counsel to the plaintiff, however, argued that sovereign immunity would not avail the defendant who had entered into commercial undertaking with the plaintiff in respect of the construction of the embassy building for the government of the kingdom of Belgium. He relied on *Plan Mount Ltd v Republic of Zaire*⁵¹ and *The Congresso Del Partido*⁵². Plaintiff also argued that the 1962 Immunities and Privileges Act apply only to foreign envoys, chief representatives of common wealth countries and foreign consular officers and not Embassies.

The learned trial judge held that the ground for the plea of immunity in the instant case was sovereign immunity and that the 1962 Nigerian Act did not apply to foreign sovereign.⁵³ He, however, located the source of Nigerian law on the subject in International law⁵⁴ and erroneously cited the Vienna Conventions on Diplomatic and Consular Relations respectively to support this proposition⁵⁵. He also said clearly in error, that Section 12(1) of the Nigerian Constitution, which required domestication of treaties does not extend to

⁵⁰ Unreported Judgment of I.O Agoro J. in suit NO. LD/1689/86 dated 6/3/87.

⁵¹ [1981] 1 All E.R 1110.

⁵² *Supra* note 35.

⁵³ This, in my view, represents the correct position of the law in Nigeria.

⁵⁴ Though the trial judge referred to public international law as a whole, the correct position is that only customary international law is a source of law in Nigeria because by virtue of Section 12 of the Nigerian Constitution, 1999, treaties need to be domesticated before they can have force of law before our courts.

⁵⁵ The Conventions do not relate to sovereign immunity and though ratified by Nigeria, have not been domesticated in Nigeria.

multilateral treaties, convention, and agreement, which should be regarded as self executing.⁵⁶

On the main issue before the court as to whether or not the state of Belgium and/or its Embassy in Nigeria could be sued in Nigerian courts in respect of breach of contract, the trial judge seemed to agree that by virtue of the doctrine of restrictive immunity

the fact of each case must be examined carefully in order to ascertain whether any particular transaction complained about could be regarded as purely commercial transaction in respect of which sovereign immunity could not be claimed by a foreign state or government or government department.

Hence, the court, unfortunately and without any serious analysis, concluded that

It is safe to assume that the contract was made for and on behalf of the government of the Kingdom of Belgium. It seems clear to me therefore that the purpose of this action is to bring an independent foreign sovereign before this High Court, and thereby sue the said foreign sovereign.

The court, therefore, declined to exercise jurisdiction.

On appeal to the Court of Appeal, the court, after reviewing the English authorities, took the view that there is no common ground amongst all nations on the restrictive doctrine of immunity and that it is in the 1978 State Immunity Act in England which has no application to Nigeria that finally ensured that the restrictive concept was applied to England. The court held that

While I hold the broad view that a foreign sovereign should have no immunity where it enters into a commercial transaction in the true sense, such as buying and selling of goods and commodities, not every contract can pass for a commercial transaction that should deny a foreign sovereign immunity. The intrinsic nature of the transaction is an essential factor for consideration in determining whether the transaction was of a commercial, or governmental nature. I find it extremely difficult to classify a contract whereby an embassy as in this case commissions a contractor to build a residence for the ambassador as a commercial transaction and not governmental in nature.⁵⁷

The Court of Appeal further held that on the ground of diplomatic immunity, the action is incompetent as against the second respondent and that it would destroy the basis of diplomatic immunity pursuant to the Nigerian 1962 Act if a foreign sovereign is made answerable in court for the action of his envoy who enjoys diplomatic immunity.

In *Ehiosu Oder v The High Commissioner for Malaysia & Anor.*,⁵⁸ the plaintiff sued the defendant for recovery of the balance of an amount incurred and expended by the plaintiff on behalf of the defendant at the defendant's request in pursuance of the defendant's obligation under the terms of the lease agreement dated 23rd of August, 1984. The defendant pleaded immunity. The learned trial judge at the Lagos High Court employing words which were not entirely different from those employed in the *Krama Italo Ltd.* case⁵⁹ held that:

While I hold the broad view that a foreign sovereign should have commercial transaction in the true sense, such as buying or selling of goods and commodities or as in the case in hand, not every contract will pass for a commercial transaction that should deny a foreign sovereign immunity. The intrinsic nature of the transaction is an essential factor for

⁵⁶ It is obviously not true that any treaty or convention can be self executing in Nigeria. If, however, Nigeria ratified a treaty which has been predominantly ratified by other states of the world, this could be a basis for assuming that that treaty represents customary International law and Nigeria state practice. In the absence of superior source of law such as legislation to the contrary, a court will be right to apply the treaty as Nigerian law.

⁵⁷ Emphasis mine.

⁵⁸ Unreported Suit No. LD/1733/89 of Lagos High Court delivered on 29/09/89.

⁵⁹ *idem*.

consideration in determining whether the transaction was a commercial or governmental nature. I find that the contract whereby an embassy as in this case takes a lease as a residence for the staff is a commercial transaction and not in a governmental capacity but in a private and commercial one.

He, however, further held that under the 1962 Act, the High Commissioner of Malaysia was immune from suit and legal process because, like the Court of Appeal reasoned in *Krama Italo* case, it would destroy the basis of diplomatic immunity granted in the 1962 Act if the defendant is made answerable in court for the action of his envoy who enjoys diplomatic Immunity.

In *African Re Corporation v Aim Consult Limited*,⁶⁰ the appellant and the respondent entered into an agreement under which the respondent provided building construction consultancy services to the appellant. An article of the said agreement stipulated that dispute between the parties must be referred to arbitration. A dispute arose between the parties over the respondent's professional fees and in accordance with the terms of the agreement, a reference was made to an arbitral tribunal, the arbitral tribunal gave its award in favor of the respondent. The respondent then filed an originating summons at the high court to enforce the arbitral award in its favour. In response, the appellant filed an application seeking to set aside the respondent's suit on the ground that the appellant was immune from legal process and that the court lacked jurisdiction to entertain the respondent's suit. In response to the issue whether the appellant enjoys any immunity from suit or process in respect of commercial transactions undertaken by it, the Nigerian Court of Appeal held, dismissing the appeal, that:

Where an act is of a commercial nature, the fact that it was done for government or political reasons by a department of a nation state does not attract sovereign Immunity. In other words, a government department that enters into a commercial transaction is not immune from legal action instituted in respect of any dispute arising from the transaction. In the instant case, the dispute between the parties arose from a commercial transaction. In the circumstances, the appellant was not immune from the suit of the respondent....

The above decision, though given in contradiction of other earlier Court of Appeal and Supreme Court decisions, is very commendable and it is quite remarkable to find some Nigerian judges reason this way.⁶¹ The question which follows is whether the Supreme Court will view the matter from the same perspective. It could rightly be said that with the previous Supreme Court decisions still in place, an appeal by the appellant to the Supreme Court will definitely see the above position upturned⁶². However, it can be said that this observation by a Nigerian judge is a step in the right direction, and it is hoped that judges will take a cue from this in subsequent cases.

In *Oluwalogbon v Government of the United Kingdom and Anor.*,⁶³ the appellant had an accident involving the first respondent's land rover defender jeep and the first appellant Nissan urban bus. As a result of the accident, the appellant sued the respondent and severally claiming damages they suffered following the respondent's negligence that resulted in the accident. The respondent challenged the jurisdiction of the trial court to try the appellant's suit on the ground *inter alia* that the 1st respondent was a foreign state whilst the 2nd respondent was a member of the 1st respondent's diplomatic mission in Nigeria and that they enjoyed and were entitled to absolute immunity from suits and legal processes. The trial court heard arguments from counsel

⁶⁰ (2004) 11 NWLR 223.

⁶¹ See also Mohammed and Kutigi JJCA in *African Reinsurance v Abate Fantaye supra*.

⁶² Following *African Reinsurance v Abate Fantaye supra*.

⁶³ [2005] 4 NWLR 760.

on both sides and upheld the respondent's objection to its jurisdiction and consequently struck out the 1st respondent's name from the suit. Being dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal. The Court of Appeal unanimously dismissed the appeal on the ground that where the cause of action against a foreign state or her diplomat or consuls is in tort they cannot be sued in Nigerian courts.

The Court of Appeal in this case declined jurisdiction against the plaintiff because the liability arising there from is tortious. It is not clear if the court would have assumed jurisdiction over the foreign sovereign if the liability had arisen from a commercial transaction. But bearing in mind the trend of the previously discussed Nigerian cases, particularly the Supreme Court's decision in *Abate Fantaye v African Re-insurance*, the answer may most likely be an emphatic "no" because the court has hinted that "The applicable common law, in the absence of a statute on sovereign immunity in Nigeria is the common law that was in force in England prior to 1st Jan. 1900".⁶⁴ Hence, most of the common law decisions which supported the restrictive immunity doctrine were decided after 1900.⁶⁵ In effect, if the above decision is to be reckoned with, restrictive immunity has no place in Nigeria in the absence of a statute on sovereign immunity in Nigeria.

The above decisions demonstrate the reluctance of the Nigerian courts in the absence of a state legislation to apply the restrictive rule of state immunity. The reluctance has no justification given that Nigeria generally received the common law and her courts ordinarily follow the decision of the highest courts in England and other common law jurisdiction. English cases cited to the courts in *Krama Italo* and *Ehiosu Odeh's* cases properly applied the nature and purpose distinction and none of them is compatible with the conclusion of the courts in both cases. It follows that if the courts had properly applied the restrictive theory, they ought not to have made a heavy weather of the fact that the defendant was the embassy of a state. The relevant provisions of Vienna Convention on Diplomatic Relations (1961) and Vienna Convention on Consular Relations (1963), as far as immunity from suit and/or criminal process is concerned, protect the diplomatic envoy or consular officers in his private capacity and not the embassy which for all intent and purposes is a department or agency of the foreign state. The issue in those cases was, therefore, state immunity and not diplomatic immunity as the courts variously held.

Rationalising Restrictive Immunity Under Current Nigeria Law

The Nigerian courts in sticking to the absolute doctrine of immunity assumed that they remained bound by the pre-1900 common law position until the Nigerian legislature intervenes. There is the view that alternative rationalization could logically have been employed to support the judicial adoption of restrictive immunity in Nigeria through a more progressive approach without standing logic on its head (Olaniyan, 2013, p. 304). If Nigeria state practice has clearly changed from the absolute to the restrictive, the Nigerian courts should not hesitate to apply the restrictive doctrine.⁶⁶ State practice is gathered from such means as a state's policy statement, municipal legislation, judicial decisions, ratified treaties, etc. (Harris, 1998, pp. 25-26). Where a state has a provision in its Constitution requiring it to domesticate ratified treaties in order for them to be applied internally, the treaties so ratified but not domesticated could still be evidence of state practice unless they are inconsistent with enacted legislation.

⁶⁴ *Ibid* at p.792 Para. F.

⁶⁵ E.g. the locus classicus—*Trendtex v Central Bank of Nigeria* *supra* note 28 was decided in 1977.

⁶⁶ Based on the maxim *cesante ratione cassat ipsa lex* meaning "when the nature of things changes, the rule of law must change too". See Willes C. J. in *Paries v Powell* [1737] Willes 46 at 57.

If Nigeria state practice was absolute under the Diplomatic Immunities and Privileges Act (1962), there are good reasons as stated below to rationalize a change in the Nigeria state practice. First, the absolute standard was only adopted on the basis of reciprocity.⁶⁷ Where therefore, other states do not extend that standard to Nigeria, why should her courts and authorities continue to extend that standard to them? As far as immunity of diplomats and other categories of persons covered by the Diplomatic Immunities and Privileges Act (1962) is concerned, until the Minister issues an order to that effect, the court is bound to apply absolute standard to them. That, however, cannot be said of the foreign sovereign because the Act does not copiously cover immunity of foreign state sovereign.

Secondly, Nigeria has subsequent to the 1962 Act ratified a number of treaties which accord more with restrictive immunity.⁶⁸ Although individual litigants are not parties to those treaties as to be able to enforce them and at any rate the treaties have not been domesticated, the fact of their ratification by Nigeria should have constituted evidence of state practice. Nigeria, by ratifying them, is not only agreeing that the less than absolute standard contained in them should be applied by other state contracting parties to Nigeria, but also that no national of a state party will be denied jurisdiction of Nigerian courts where he sues in Nigeria the sovereign of another state in circumstances identical to the former situation.

Subject to the foregoing, this perceived change of practice, however, should have limited effect on Nigeria national courts and Constitution in relation to the diplomatic/consular immunity. This is because the courts cannot, ignore the provisions of existing statutes, i.e., the Diplomatic Immunity and Privileges Act 1962,⁶⁹ which confers absolute immunity to diplomatic and consular staff just on the excuse that that provision has remained in default of the exercise of requisite power by the Minister. Consequently, it is only with regards to foreign sovereigns that the restrictive doctrine should be given effect in Nigerian courts.

Conclusions

It is still in the cloud as to whether or not the Nigerian state practice has changed and the courts have failed to apply the nature and purpose distinction even when they have expressed the view that the restrictive concept of immunity is acceptable to them in line with the global trend. The only way to assure correct application of restrictive immunity by the courts is by enacting a state legislation on foreign state immunity. The Nigerian state practice should be enacted into law by the National Assembly in line with the variously ratified international treaties and conventions on the subject. This should be done by the passage of law to domesticate all these international legal instruments with a view to giving effect to the restrictive immunity in consonance with the international standard.

Absolute immunity is no longer in vogue in the international arena and Nigeria, being a member of the international comity of nations can no longer afford to still stick to the absolute immunity with its attendant injustice especially in the areas of commerce and tortuous actions. It should be noted also that although the convention is, no doubt, not without its shortcomings, it attempts to broker a compromise and sustains the divergence in practice on the issue of how to characterise an activity either as commercial and private or as governmental and public. The qualifications also provided by both the UK and U.S. positions provide a useful template for the Nigerian legislature in a bid to promulgate a law on state immunity.

⁶⁷ See Section 8, Nigerian Diplomatic Immunity and Privileges Act, 1962.

⁶⁸ Namely, the VCDR, VCCR, and the Rome Statute of the International Criminal Court [ICC].

⁶⁹ Laws of the Federation of Nigeria, 2004.

The continuous sticking by Nigeria to the absolute standard of immunity has seriously disadvantaged its citizens and distorts the sanctity of commercial transactions in the country as highlighted in the cases espoused above. It also affords Nigeria a lopsided treatment in the international arena by extending to other states, the kind of favour it cannot themselves get from those other states by way of reciprocity because the legal regime and state policies of those foreign states especially the developed states have moved since from absolute to restrictive immunity.

The Nigerian courts are not receptive of the clear change in approach from absolute to a restrictive practice of immunity in other common law jurisdiction and the U.S. In spite of the absence of state immunity legislation, the Nigerian courts should, it is recommended, follow English courts decisions in such cases as *Trendtex* which provides a search light on the subject rather than erroneously relying on the restricted 1962 Diplomatic Immunity and Privileges Act which did not cover state immunity. It is high time that the Nigerian courts came out of this reluctance to make a distinction between state immunity and diplomatic immunity as it is done in developed countries such as the U.S. and UK and in international law. In the famous words of Lord Denning:

If a government department goes into the market places of the world and buys boots or cement—as a commercial transaction – that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods.⁷⁰

Nigeria has nothing to gain but everything to lose by religiously adopting absolute rather than restrictive immunity as state practice. Comity or reciprocity cannot justify the extension to any state a favour which that state will not extend to Nigeria. If the Nigerian State or its Embassy abroad had been sued either in Belgium or Malaysia, in circumstances similar to those in respect of which *Krama Italo* and *Ehiosu Odeh* cases arose, it is certain that the courts in both countries would have assumed jurisdiction based on their state practices and legal regimes.

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⁷⁰ *Trendtex* case (1977) 2 WLR 356.