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Arrest of Ship, Sovereign Immunity and the Nigerian Law

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ABSTRACT: *Use of the world oceans as a veritable means of transport and communication cannot be overemphasised. This is largely achieved by the use of Ship. Where the ship used commits an offence, an action in rem can be maintained against the ship by way of arrest. However, where the ship belongs to a sovereign, its arrest can be challenged by a plea of Sovereign immunity. The article appraised the law on Sovereign immunity in the light of the new Global convention, signed and ratified on the subject in 2007 viz-a-viz its applicability in Nigeria because of the Constitutional impediment placed on the the application of Treaty and its domestication in Nigeria*

I. INTRODUCTION

The world is fast becoming a global village where commercial activities are being carried out almost on hourly basis.[1] States or their agencies are also involved in many of these activities.[2] In carrying out these activities, goods are being transported and most of them have to be imported from advanced countries, which in most instances, because of the bulky nature of these goods, they are transported through the sea by way of shipping. Ordinarily, when sovereigns enter into the market place, the rule of demand and supply has to give in. However, there are circumstances when a sovereign will not pay for the goods or services rendered and in an action to recover the cost, by way of legal action, the court will hold that no action can lie against such a foreign sovereign because of one legal impediment or the other.[3] This paper examines the circumstances where action will or will not lie against such a foreign Sovereign particularly when the issue involves arrest of ship.

II. ADMIRALTY LAW

The vast water areas known as the High Seas[4] until recently constituted the major highways of communication across the world, linking nations for good and for bad, commerce and culture as well as for hostilities and

[1] Global Commerce dated back to the olden days when the world is not even as civilized as this. In present times, commercial activities across the continent was on the increase even with the introduction of computer and the increase in the Internet usage. Commercial activities via the internet otherwise known as e-commerce has come to stay, and it is in almost all spheres of human endeavour.

[2] Noticeable after the collapse of second republic in Nigeria in 1983, its economy was badly affected owing to the corrupt nature of the politicians in that republic. The citizenry were affected and the ways out of this economic situation necessitated the government of the day then to engage in buying and selling to alleviate their suffering. This is done by government supplying some essential commodities like sugar, milk detergent etc in bulk and be distributed to the affected staff only for the cost of the items to be deducted from their salaries at the end of the month. In fact a national agency-The Nigerian Natural Supply Company was assigned this responsibility.

[3] This process is referred to as the doctrine of Sovereign Immunity.

[4] It is sad to note that despite the years spent on the convening and ratification of the *L*aw of the Sea Convention, the definition offered for the High Sea was far from being satisfactory. Article 86 of the 1982 Convention however defined the high sea negatively in the following terms.

> *The provisions of this part apply to all parts of the seas that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.*

See Bouchez, L.J. (1973): "The Freedom of the High Seas: A Reappraisal." in Bouchez, L.J. and Kayen L. (eds.) *The Future of the Law of the Sea*, Martinus Nijhoff, The Hague, p.24.

Under the equivalent Article 1, 1958 High Seas Convention, the High Seas begin where the territorial sea ends whereas under the 1982 Convention, concept of the high seas is a more limited one, applying only beyond the limit of the exclusive economic zone. Harris D.J. (1988): *Cases and Materials on International Law*, London, Sweet & Maxwell. P 420 The regime of the high seas does not apply to international lakes and land-locked seas and these are not open to free navigation except by special agreement. See Brownlie I. (1992) *Principles of Public International Law*, 4th edn., Oxford, p.182. However, by acquiescence and custom, perhaps

exploitation. The seas have long dominated much of mans endeavour and have greatly influenced civilization across diverse societies.[5]

Admiralty law (also referred to as maritime law) is a distinct body of law which governs maritime jurisdiction and offences. It is a body of private international law governing the relationships between private entities which operate vessels on the oceans.[6] Seaborne transport ,being one of the most ancient channels of commerce, rules for resolution of disputes involving maritime trade developed very early in recorded history. Classical sources of this law include the Rhodian Law, of which no primary written specimen has survived, but which is alluded to in other legal text. This contract for the carriage of goods by sea is known as Contract of Affreightment.[7]

III. DEFINITIONAL PERSPECTIVES OF A SHIP

One of mans earliest inventions, the sail, which utilizes the power of the wind, was the most important means of propelling boats and ships for most of maritime history. A ship is a unique subject matter of law.[8] It is for some purposes, such as being a negotiable asset of value, a chattel, but it is not only a chattel, because it has the capacity to carry with it the law and jurisdiction of sovereigns.[9]

Historians are not unanimous in their determination of the birth of ships, but from evidence, man venture on water before 6000 B.C probably at first on log. Later on logs tied together. Pre historic man however used primitive tools or fire to hollow out logs to form the earliest displacement vessel; the dugout canoe, still in use in some corners of the earth. Other forms of early floating devices were fashioned from hides of animals inflated with air and sealed or stretched over branch to make lighter and faster canoes[10]

There is no universally accepted definition of a ship,[11] rather the meaning depends upon the purpose of the law or International Convention in question,[12] and it may be inclusive or exclusive of objects from one context to another for the purpose of this paper, few of the definitions of ship will be examined as follows.
The Merchant Shipping Act 1894 defines a ship in the following language.
"a ship includes every description of vessel used in navigation not propelled by oars."

However, Merchant shipping Act 1995[13] contained almost the same definition in as the 1894 Act but leaving out "Not propelled by Oars."From this definition, Hill observes that to fall within the statutory definition, a ship must be used in navigable waters, whether inland or on the open sea. She must be constructed for navigation, but it seems need not have her own means of propulsion to proceed.[14] The definition provided by the court is not in anyway better. In *Edwards V. Quickkenden and Forester*[15] the court had this to say.

> *The definition "ship" includes or embraces every description of vessel, which in turn, if one refers back to the definition of ship any vessels of any description is only included if it is not propelled by oars. In otherworld, no vessel, which is propelled by oars is within the definition of vessel.*

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reinforced by conventions on particular questions, Seas which are virtually landlocked may acquire the status of high seas: this is the case of the Baltic and Black Seas of which such status is described as doubtful

[5] Brien J.O. (2002) *International Law.* 1st Ed. Cavendish publishing Co, London P.421

[6] See Wikipedia

[7] A contract made either by charter party or Bill of lading by which a shipowner agrees to carry goods in his ship for reward is known as a Contract of Affreightment. See Chorley & Giles (1970) *Shipping Laws* 6th Ed. Pitman Publishing, p 103.For a detailed discussion of this Concept see Babatunde I.O (2005) "Contact of Affreightment in International Sales Transactions: A critical Appraisal". *Quintessential Journal of Contemporary Law & Practice* Vol. 1. Page.105.

[8] See Gidel C (1932) Le *Droit International Public de lamer.* Vol. 1 p.72 cited by O'Connel DP (1984) *The International Law of the sea.* Vol II. Claredon Press, Oxford. P 747

[9] *ibid*

[1010] for a detailed discussion on the evolution of ships, see *Encyclopedia Britannica* Vol. 16 p.677

[11] As a lawyer and form the legal point of view, it is difficult tao proffer an all encompassing definition of a legal concept. The term what is law is not free from this definition problem. For further reading on this subject, see Okuniga AOA (19) *Transplant and the Mongrels.*

[12] See Tetley W (2002) *International Maritime and Admiralty Law*, Editions Yvon Blais Publishers, Canada P.33

[13] Section 313 thereof

[14] Hill C (200) *Principles of Maritime Law.* 1st edition, London p.7

[15] (1939) P. 2.61

The International Regulation for preventing collisions at sea 1960, defined a vessel as any description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on water.[16]

IV. USES OF SHIP

Aside from the fact that ship is used for commercial purposes, ships are also being used for the prosecution of war. During the war, many nations, including the United States, had acquired commercial fleets or had requisitioned[17] or chartered commercial vessels. In times of peace, state-owned or operated vessels continued to be engaged in the maritime transport business.

The Revolution in Russia brought about the nationalization of business enterprises on an unprecedented scale.[18] During the Napoleonic wars in France, First and Second World Wars, ships were widely used for their prosecution. In addition to the above mentioned purposes, ships were equally used for relaxation and tourism[19] purposes.

Types of Foreign State-Ships

There are basically two types of foreign ships,-Public Ship of foreign state and State Owned Commercial Ships.

Public Ships of Foreign States

Warships and public vessels of foreign States while in ports or internal waters of another state are to a large extent exempt from the Territorial Jurisdiction. For this purpose, a private vessel chartered by a State for public purposes, for example, the transport of troops, transport of war materials is a public vessel.[20] Proof of character as warships or as public vessels is supplied by the ships flag in conjunction with the ships documents. For example the commission issued and signed by the authorities of the state to which she belongs.

UNCLOS III defined a warship as follows:

> *A ship belonging to the armed forces of a state bearing the external marks distinguishing ships of its nationality, under the command of an officer duly commissioned by the Government of the state and whose names appear in the appropriate services list or its equivalent, and manned by a crew which is under regular armed force discipline.*[21]

State Owned Commercial Ships

For some time, foreign governments have embarked in trade with ordinary ships, and have been competing with shippers and ship owners in the wind markets. Nigeria is not excluded. It was an record that after the ousted Shagari's administration in 1983 by Buhari/Idiagbon administration, the Nigerian economy was seriously battered to the extent that government became directly involved in the distribution of certain goods and services to her citizens on credit and afterwards deducted the cost from the worker's salary at the end of the month. The goods were sold at highly subsidized costs. In carrying out the shipment, a Nigerian Company-Nigerian National supply Company Limited was floated and a ship for its operation was purchased. It was the ship that was used for that purpose "M V Ogbese" that was arrested and detained in India sometimes in 1993.[22]

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[16] Rule 1 © of the 1960 Regulation were revised and incorporated in the Convention on the International Regulations for Preventing Collisions at Sea.

[17] See *Compania Naviera Vascongado v SS Cristina (1938) A.C 485.*

[18] See Yiannopouloss (1983) "Foreign Sovereign Immunity and the Arrest of State Owned Ship; The need for an Admiralty Foreign Sovereign Immunity Act*" 57. Tulane Law Review 1274*

[19] A good example is the ship named Freedom of the Seas the largest cruise ship in the world. She sails seven-night Western Caribbean cruises from Miami visiting Cozumel, Mexico; George Town, Grand Cayman; Montego Bay, Jamaica; and Royal Caribbean's private destination, Labadee, Hispaniola. Freedom of the Seas passengers experience cruise industry firsts including FlowRider, the first surfing simulator at sea; an interactive water park; two cantilevered whirlpools that extend 12 feet out from the sides of the ship; a family suite that sleeps up to 14 people; and a full-size boxing ring

[20] See Starke J.C (1984*) Introduction to international Law.* 9th ed; Butterwortus,, London. P.217.

[21] Article 29 of the United Nations Convention on the Law of the Sea 1982.

[22] For a detailed analysis of the legal issues raised in this discourse See Afolabi Olayinka (2002)" Legal Implications of the Arrest of Nigerian National Supply Company Ship "M.V Ogbese" in India in 1983." An LL.M Seminar paper (Unpublished) presented to The International Economic Law Class, Faculty of Law, Obafemi Awolowo University, Ile- Ife.

Concept Of A Foreign Sovereign

The phrase "Foreign sovereign" broadly relates to any foreign monarch, ruler or head of state,[23] any recognized foreign state[24] or the government of such a state including any department of a foreign government and other emanation of government or department of government.[25] The precise nature of these entities naturally varies enormously as between different states, but nonetheless they customarily assume the form of trading corporations, boards, agencies and Central Banks.[26]

Whether an entity, which is an emanation of government is to be considered for the purposes of Sovereign Immunity as part of the government of a foreign state turns on whether the entity is an organization fully under government control and exercising government functions.[27] Where, having regard to all the evidence, this question is answered in the affirmative the entity is considered as "part and parcel" or "an arm" or the alter *ego* of the government and entitled to claim sovereign immunity.[28] In Contrast, if the entity retains an element of self determination in the discharge of its functions and in the precise manner in which it does business, the inclination of the Courts is to deny the entity governmental status even though the entity is otherwise subject to a substantial measure of government control.[29]

It was formally established that the fact that an entity is separately incorporated and therefore a distinct juristic person does not preclude it from being considered as part and parcel of the total machinery of government,[30] nor is a certificate or affidavit given by the ambassadors of a foreign state conclusive of the sovereign status of any such entity.[31]

While the claim that a federal unit, can in certain circumstances partake of the sovereignty of the state as a whole and obtain state immunity was shown by the decision of the court of Appeal in *Mellenger v. New Brunswick Development Corporation,*[32] the court held that a Governor and chief executive of a state, which is a constituent part of a federal state is not entitled to immunity because it is not a foreign sovereign contemplated by law in *Alamieyeseigha v.CPS*.[33] Expatiating further, Professor D.A Ijalaye submit that

> *..Hence, for the purposes of international Law, it is only the president that enjoys independent Sovereign immunity in a true Federation like Nigeria, in contradistinction to the situation in a confederation or a quasi confederal state like Canada where each of the constituent states enjoys independent sovereign immunity in foreign countries.*[34] *Consequently, at international law, head of a constituent state within the Federal Republic of Nigeria will not qualify as a foreign sovereign for the purpose of according him sovereign immunity*.

Immunity of the Sovereign

Certain categories of persons, their properties and conducts are exempted from the jurisdictional competence of a state, which they enter, reside or where their conducts take place. These categories of persons

[23] See *De Haber v Queen of Portugal* (1851) 17 QB 171
[24] *Duff development corporation v. Government of Kelantan* (1924) AC 797
[25] *Krajina v. Tass Agency* (1949) 93 S J 539
[26] *Ibid.*
[27] *Tredtex Trading Corporation v. Central Bank of Nigeria* (1977) QB 529 per Land Denning MR at p..560.
[28] *Baccus SRL V. Servicio Nationale de Trigo* (1957) 1 QB 438.
[29] *Krajina V Tass Agency* Supra.
[30] *Ibid.*
[31] *Ibid.*
[32] (*1971) 1 WLR 604.*
[33] *(2005) EWHC 2704.*
[34] See Ijalaye DA (2005)" Sovereign immunity and Government DSP Alamieyeseigba" *The Guardian*, October 11.P 67 The learned emeritus professor submitted further that each of the 36 states of Nigeria does not constitute an independent sovereign state and its governor cannot, therefore claim sovereign immunity in international law. Afterwards the rational for independent sovereign immunity in international law is *par in parem non habet imperium*… it cannot therefore be over emphasized nor sovereign, it cannot operate on the same footing as independent and sovereign states under international law.

include the sovereign or its representatives. A concomitant of the privilege to enter and remain is normally the existence of immunity from jurisdiction of the local courts and the local agencies of law enforcement.[35]

In the context of public international law, the law of state immunity means that a foreign state is exempted from the process of the municipal court of the granting state. In other words, he cannot be summoned, *subpoenaed* or tried by the court. He cannot be impleaded by being made a party to civil proceeding against its will.

Similarly, in respect of property, no proceedings *in rem* could be instituted leading to the attachment, seizure, detention, or any judicial disposition of property belonging to the Sovereign.[36] States have traditionally accorded a variety of immunities to foreign sovereigns, their representatives and instrumentalities and their property.[37] The roots of these immunities could be found deep in history.[38]

The foundation of foreign sovereign immunity remains a disputed matter. According to one view, the members of the international community are bound by public international law to accord immunity to foreign sovereigns because of their equality and independence; a refusal to do so is a breach of an international obligation.[39] Another view was of the opinion that foreign sovereign immunity is founded on comity.[40] In the absence of an international treaty, members of the international community are in no way bound to accord immunity to a foreign sovereign and if they do so, it is by virtue of international rules of law.There is unanimity of mind, however, that, the purpose of sovereign immunity is to avoid friction in international relations.[41]

Immunity of the sovereign is therefore predicated on the reasoning that *par in parem non habet imperium* that is one sovereign cannot exercise jurisdiction over the other but only over inferiors or alternatively on the principle *parem in parem non habet jurisdictionem* that is, legal persons of equal standing cannot have their dispute settled in the courts of one of them.[42]

It was in *The Constitution*[43] that the principle of sovereign immunity was first granted by the English Court in 1879 to a foreign war vessel but it was the case of the *Parlement Belge*[44] that firmly established the principle whereas the decision in *Porto Alexandre*[45] merely followed the principle laid down in the *Parlement Belge.* [46]

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[35] See Brownlie 1 (1990*) Principles of public International Law*. 4th ed. Oxford University Press, Oxford. P 322. For further readings, see Bouchez L.J (1979) " The Nature and Scope of State Immunity From Jurisdiction and Execution" Vol. 10 *Netherland Yearbook of International Law.* P 3.

[36] See *Compania Naviera Vascongado v. Ss Cristina* supra.See also Thomas D.R (1980) Maritime Liens:British Shipping Laws. Vol. 14, London, Stevens & Sons. P 78: Fitzmaurice. G.G (1833)" State Immunity from Proceedings in Foreign courts" *B.Y.B.I.L*. p 101:Higgins R. (1979) Vol. 10 Netherland Yearbook of International Law. P 35.

[37] The various immunities are discussed in standard treatises on Public International Law. See Carter BE and Trimble PR (1995) *International Law.* 2nd ed. Aspen publishers inc. USA P. 587: See also Kincaid P.J (1976) "Sovereign Immunity of foreign State-Owned Corporations." Vol. 10, *Journal of World Trade Law,* p 110.

[38] For a detailed discussion on the historical roots of the doctrine of sovereign immunity see Hill "A Policy Analysis of the America Law of Foreign Sovereign Immunity" 50 *Fordharm Law Review* P.155.

[39] See Lauterpatch H (1951)" The Problem of Jurisdictional Immunities of Foreign States" 28 *British Yearbook of International Law.* P. 220 at P. 228.

[40] *Verliden B V* v. *Central bank of Nigeria (1983*) 421 U.S 480.

[41] See Schwarzenberger A and Brown E (1976) *A Manual of International Law* 6th ed, PP 78-84.

[42] See generally the principle of law laid down by Marshall C J in *The Schooner Exchange. V. M' Faddon (1812)* 7 Cranch. P 116.

[43] (1879) 4 P D 39.

[44](1880) 5 P.D 197. Sir Robert Phillimore although believing that proceedings *in rem* should be permissible against property used by a sovereign in trade, did not go as far as to contend that there should not always be immunity in respect of proceeding against a sovereign *in personam.*

[45] (1920) P.30.

[46] *Supra.*It has come about that absolute immunity had been established in respect of in rem actions. There was virtually no dissent on this proposition although in *Swiss Israel Trade Bank* v. *Government of Salta* [1972] 1 Lloyds Law Report, 497 Mackenna. J carefully left open the question whether a state –

V. ARREST OF SHIP

The jurisdiction of the Admiralty court has long extended to foreign ships on the High seas[47] except ships in the ownership or possession of a foreign sovereign state and used for public purposes[48] and over injurious acts done on the High Seas.[49]

Originally, a suit in Admiralty could be commenced by the arrest of the person of the defendant or of his goods, whether or not the ship or goods in question constituted the subject matter of the offence, the purpose being to make the defendant put up bail or provide a fund for securing compliance with the judgment, if any, when it is obtained against him.[50] Arrest has also been described as the seizure of a ship by the authority of a court of law either as security for a debt or simply to prevent the ship from leaving until a dispute is settled or for contravening the laws of a country.[51]

An action *in rem* is an action against the ship itself. The foundation of an action *in rem* is the lien resulting from the personal liability of the owner of the *res.*[52] Thus, an action *in rem* cannot be brought to recover damages for injury caused to a ship by the malicious act of the master or the defendant's ship.[53]

The Admiralty jurisdiction of the High Court may be invoked by an action in rem against the ship or property in question in the case of claims to the possession of a ship or ownership of a ship or a share therein,[54] questions arising between co-owners of a ship as to possession, employment or earnings of a ship or against a "sister ship".

VI. CIRCUMSTANCES UNDER WHICH A SHIP MAY BE ARRESTED

The admirably jurisdiction of the High Court of Justice is derived partly from statute and partly from the inherent Jurisdiction of the High Court of Admiralty.[55] A ship can be arrested by any person asserting a maritime claim specially provided for under the law.[56]

A ship may be arrested in the following circumstances:[57]

1) loss or damage caused by the operations of the ship
2) Death or personal injury whether on land or on water, in direct connection with the operation of the vessel.

a) Salvage operations or any salvage agreement, including, if applicable special compensation relating to salvage operations in respect of a ship, which by itself or its Cargo threatened damage to the environment.
b) Damage or threat of damage caused by the ship to the environment, coastline or related interest, measures taken to prevent minimize or remove such damage; compensation for such damage, costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken, loss incurred or likely to be incurred by third parties in connection with such damage, cost, or loss of a similar nature to those identified in this paragraph (d)
c) Wreck removal
d) Agreement for use or hire of ship (Chapter party)

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owned vessel was immune from English jurisdiction if it was being wholly used or substantially used for trade.

[47] See *The Zeta* (1983) A.C.468.

[48] See *The Parlement Belge* (1880) 5 PD 197 ; *Compania Naviera Vascongado* v. *S S Cristina*[1938] A C 485.See further notes) Mann. F.A,(1939 " Immunity of Sovereign States." Vol. 2 *Modern Law Review.* P 57.

[49] See *The Tubantic* [1924] P 78 at 86.

[50] See *The Banco* [1971] P 137 at 150; *The Dictator*(1892) P 304 at 311.

[51] See Brodie Peter .*Dictionary of Shipping Terms*. 2nd ed,197. Cited in Igokwe M.I "Arrest of Ships and Release A Synoptic Guide on Procedure and Laws." in Tobi N (ed) *A Living Judicial Legend. Essays in Honour of Hon. Justice A.G.Karibi-Whyte.* Florence & Lambard Nig Ltd. Ibadan. P.271 at 273.

[52] See *The Utopia* (1893) A C 492 at 499.

[53] See *The Idea* (1860) Lush 6.

[54] See Section 1(1) (a) Administration of Justice Act 1956.

[55] See the Administration of Justice Act 1956 S(1)(1); (1)(1) of the Admiralty Jurisdiction Decree (No59) of 1991.

[56] Article 2(2) International Convention on Arrest of Ships 1999.

[57] Article 1(1)(a)-(v)of the International Convention on the Ships 1999; Section 2(3) (a)-(u) Admiralty Jurisdiction Decree (1991).

e) Agreement relating to carriage of goods or passengers
f) Loss or damage to or in connection with goods
g) General average
h) Towage
i) Pilotage
j) Goods , materials provisions, equipment (including containers) supplied or services rendered to the ship for its operations, management, preservation or maintenance
k) Construction, reconstruction, repairs, converting or equipping of the ship
l) Port canal, dock, harbour and other waterway dues and charges
m) Wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf
n) Disbursements incurred an behalf of the ship or its owners
o) Insurance provisions (including mutual insurance calls) in respect of the ship by or on behalf of the ship owner or demise chatterer.
p) Any commissions, brokerages or agency feed payable in respect of the ship by or on behalf of the ship owner or demise charted
q) Any dispute as to ownership or possession of the ship
r) Any dispute between co-owners of the ship as to the employment or earning of the ship
s) A mortgage or a "hypotheque" or a change charge of the same nature
t) Any dispute arising out of a contract for the sale of the ship

Apart from the problems above, a ship may be arrested at international law when the ship or any person on board commits any of the offences entrenched in the Third United Nations Convention on the Law of the Sea. For instance, ships are required to sail under the flag of one state only and are subject to its exclusive jurisdiction.[58] A ship that is stateless and does not fly a flag, may be boarded and seized on the high seas. This point was accepted in *Naim Molvan V. Attorney-General for Palestine.*[59] Aside from the above, one of the most formidable of the exceptions to the exclusive jurisdiction of the flag state and to the principle of the freedom of the high seas is the concept of piracy. Any state may seize a pirate ship or aircraft whether on the High Seas or on *terra nullius,* and also arrest the persons and seize the property on board.[60]

By virtue of Article 111 of the 1982 law, the Hot Pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of the state. The pursuit must commence within any of the delimited zones up to the High seas. The pursuit must stop when the offending ships enter its own territorial sea or that of a third state.[61] It can be arrested but where the ship escapes and resists arrest, it can be fired at and sunk.[62]

Other circumstances that many warrant a ship being arrested include but not limited to Acts like unauthorized broadcasting,[63] using ship for slavery and slave trade[64] and engaging the ship in the trafficking in drugs and psychotropic substances.[65]

Arrest of Government Ships and State Immunity

[58] See the Lotus Case [1927] PCIJ Rep. Series A No. 10 p 18.
[59] [1948] AC 351; *US V.Marin0 – Garcia* (1982) 679 F. 2d 1373.
[60] See the dissenting opinion of Judge Moore in *The Lotus Case* (1927) PCIJ Series A, No 10 P. 70: Article 105 of the 1982 United Nations Conventions on the Law of the Sea. See also *Athens Maritime Enterprises Corporation* V. *Hellenic Mutual War Risk Association* (1983) I All ER 590.
[61] . *The I'm Alone* (1935) 3 RIAA 1609, *The Itata* Moore Digest Vol. 2 page 985; *The Newton Bay* (1929) 36 F.2d; R.V. Mills (1995) 44 ICLQ 949; C.K.U. (1982): "The Doctrine of "Hot Pursuit: A New Application", *The Michigan Law Review*, Vol. 26 No. 5, pp. 551-555 ; Gilmore, W.C. (1995): "Hot Pursuit: The Case of *R v. Mills and Others" ICLQ*, Vol. 44 No. 4 pp. 949 – 958;
[62] Article III (3)See also *The Newton Bay* (1929) 36 F.2d.

[63] *The I'm Alone* (1935) 3 RIAA 1609, *The Itata* Moore Digest Vol. 2 page 985; *The Newton Bay* (1929) 36 F.2d; R.V. Mills (1995) 44 ICLQ 949.
[64] Article 109 and 110 of the 1982 Laws.
[65] Article 99, 1982 Laws. *U.S* V. *Williams* (1980) 617 F.2D 1063, *US* v. *Rubies (*1980) 6.12F, 2d 397.

The position of the law on sovereign immunity and state owned vessel used for public purpose is more or less settled[66] This is because where a public vessel is in port; no legal proceeding will lie against it, either in **rem** for recovery of possession, or for damages for collusion or in respect of its crews. But the jurisdictional immunity extends only so far as necessary to enable such public vessels to function efficiently as an organ of the state and for the purposes.

> *The sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with and members of the Crew withdrawn from its services, by local jurisdiction.*[67]

The area of the law that is far from being settled is where the state owned vessel is used for commercial purposes, that is *act jure gestionis***.** The question has therefore arisen whether the ordinary principles as to immunity to public vessels should apply to ships engaged in commercial purposes, and this has involved much the same considerations as touch the issue of the jurisdictional immunity of foreign states or head of states. The argument for the support of absolute immunity has been based on the ownership of these vessels, and on the risk of impleading a foreign state when exercising jurisdiction in respect of the ship.[68]

Stricto sensu, an action *in rem* may be brought against a cargo belonging to a state only in circumstances when, at the time when the cause of action arose, both the carrying ship and the cargo were in use or intended for use for commercial purposes.

The Position under Classical International Law

Under classical international law, the position is that whether a state-owned ship, operated for an act *jure gestionis* or *jure imperii***,** immunity will avail. In *Schooner Exchange V. MC'faddon*[69], Marshall C J held that a sovereign ship discharging a public function is immuned from arrest under a proceeding *in rem*. Equally, there exist no doubt that vessel owned and used for the pleasure of a personal sovereign is equally immuned from a suit *in rem***.**[70] Contention has arisen in respect of ships owned or in the exclusive possession or control of a foreign sovereign and which are not used *publicis usibus destinata* but in the ordinary course of trade. It is in this regard that the absolute and restrictive doctrines of sovereign immunity come into direct conflict.

Mention must be made of two important court decisions on this matter, In Berrizzi *Brothers V S S Pesaro*,[71] Sovereign immunity was extended to commercial vessels operated by a foreign state. In this case, a libel *in rem* was brought against a vessel, owned and operated by the Italian government, for, failure to deliver cargo shipped by a private party from Italy to New York. The United States Supreme Court reviewed the authorities and concluded that commercial ships must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United states evincing a different purpose.[72]The court then held that the grant of jurisdiction to federal courts in all civil causes of admiralty and maritime jurisdiction was not intended to include a libel *in rem* against a public ship, such as *Pesaro* of a friendly government.

Similarly in *The Porto Alexandre*[73] salvage services were rendered in the Mersey to the Porto Alexandre, which was a vessel, owned by the Portuguese Government and employed in ordinary trading voyages. Although there was no doubt that the Porto Alexandre was being used otherwise than for a purpose of state both Hill J, at first instance, and the Court of Appeal interpreted *The Parlement Belge* as conferring an absolute immunity upon vessels of a foreign states and set aside the writ *in rem* brought by the salvors. The

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[66] For a detailed examination of this position, see generally, Brandon (1954) "Sovereign Immunity of Government –owned Corporations and Ships." 39 *Cornell L. Rev*,425, Friedmann, (1956) "Some Impacts of Social Organisation on International Law" 50 *AJIL* 465,Garcia-Mora,(1956) "The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications" 42 *Va. L. Rev*.335; Reeves (1957) "Bound-Sovereign Immunity in a Modern World" 43, *Va. L. Rev*.529, and Setser (1954) "The Immunities of the State and Government Economic Activities" 24 *Law and Contemporary Probs*. 291.

[67] *Chung Chi Cheung* v R {1939} AC 160 at 176.

[68] For the reasons adduced in support of the retention of the doctrine of absolute Sovereign Immunity, see Lauterpacht H (1951) " The Problem of Jurisdictional Immunities Foreign States" *Supra* at 224-226.

[69] (1812) 7 Cranch 116.

[70] *The Charkieh* (1873) LR 4 A &E 59.

[71] (1926), 271 US 562; 3 ILR P. 186.

[72] *ibid* at 574, Lower Federal Courts extended immunity to State Owned that were operated by private persons under charter from the government Cf *The imperator*. (1992) AMC 596 .

[73] (1920) P.30.

Court of Appeal affirmed Hill J's interpretation of the principle to be extracted from *The Parlement Belge,* which the learned judge expressed in the following terms.

> *a sovereign state could not be impleaded either by being served in personam or indirectly by proceeding against its property; and if that was the principle it mattered not how the property was being employed.*[74]

All the judges in *The Porto Alexandre* arrived at the conclusion with reluctance and with full awareness of the difficulties, which could arise from the adoption of the absolute doctrine of sovereign immunity in a changing world wherein sovereign states increasingly involve themselves in matters of trade and commerce. No such reservations were however felt by Lord Wright in *The SS Cristina* who again advocated the absolute theory of sovereign immunity.[75]

Contemporary International Law Position

Contemporary international law with respect to the immunity of the vessels of a foreign state applies the doctrine of restrictive immunity, which implied a distinction between government ships that serve a public purpose and those that are engaged in commercial operations. The former are entitled to immunity but the later occupy the same position as privately owned commercial vessels

In *The Philippine Admiral V Wallem Shipping Ltd*[76] a vessel owned by the Government of the Philippines but operated by a private corporation under the terms of a conditional sale was arrested in an *in rem* proceeding in Hong Kong. Plaintiff sought payment for supplies furnished to the vessels, reimbursement for disbursements, and damages for the breach of a charter party. The Government of the Philippines made applications for order staying the actions on grounds of sovereign immunity, but the full court of the Supreme Court of Hong Kong dismissed the application on the authority of Porto Alexandre whereupon, the Philippines appealed to the Privy Council

In a characteristic display of bold judicial activism, the Privy Council jettisoned the principle laid down in the *Parlement Belge* and Lord Cross in an *ex-cathedra* pronouncement averred that the application of restrictive immunity is in consonance with justice. The doctrine of restrictive immunity was applied by the House of Lords (with Lord Wilberforce and Lord Edmund – Davies Dissenting) in the controversial and complex case of *I Congresso del partido.*[77]

Codification of the Law Sovereign Immunity

The earlier part of the evolution of the doctrine of sovereign immunity was developed by the courts as shown in the plethora of legal authorities, already discussed above. With the controversy the issue generated, the international community felt they owe the world an obligation of codifying the law on sovereign immunity. This solution was initiated in the 1910 Brussels Conventions for the Unification of Certain Rules of Law with Respect to Collision, Between Vessels[78] and for the Unification of certain Rules of Law Respecting Assistance and Salvage at sea. [79] As a follow up to the 1910 convention the Comite Maritime International prepared the draft that became the 1926 Brussels Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ship.[80] Notwithstanding the express provisions of the convention, States practice still shows a clear departure from the spirit of the law.[81] The criticism leveled against the Convention was captured by Lord Wilberforce in *I Congress de partido* [82]

> *The appellant invoked at considerable length the international convention For unification of certain Rules concerning the immunity of state owned ship 1926 (Brussels mis 2 (1938: Cmd*

[74] Ibid at p. 31 Followed in The Jupiter (1924) P. 236
[75] *Compania Naviera Vascongado* v. *Steamship Crisina* (1952) AC 582.
[76] {1976} 1 All ER 78.
[77] [1981] 2 All E.R 1064. This case had earlier been discussed,
[78] See International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23 1910.
[79] See International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept 23, 1910,37 Stat,1658,TS No, 576. See further, Yiannopolous. *op cit* 1286.
[80] April 10,1926,LNTS 199.
[81] The Convention and its protocol were in operation when the following cases were decided. *The Parlement Belge, The Porto Alexandre, SS Cristina* where the courts held that notwithstanding that the state involved carried on *actus jure gestionis,* immunity were still upheld.
[82] [1981] 2 All ER 1064 at 1069 .

> *5672). The convention was ratified by the United Kingdom in 1979 and has never been accepted by the Republic of Cuba. The number of states bound by it has always been limited and has not included states important in maritime commerce yet it is invoked, as I understood the argument, as a statement of generally accepted international law. Now there may be cases in which a multilateral convention may become part of general international law so as to bind states not parties a proposition not uncontroversial) but at the least, the convention must bear a legislative aspect and there must be a wide general acceptance of its law making, over a period, before this condition is accepted. The Brussels Convention does not nearly meet these requirements, it was a limited agreement between a limited number of States. At the very most it may, together with its progressive, though not numerous, ratifications and accessions be evidence of the gradual seepage into international law of a doctrine of restrictive immunity. For that purpose, we do not need it.*

However, in 1976, the United States of America, after the 1952 Tate Letter, and full consideration of cases like *The Phillipines Admiral*, *Trendtex Trading Corporations* v. *Central Bank of Nigeria* and allied cases, enacted The Foreign Sovereign Immunities Act in 1976[83] while in 1978 The United Kingdom followed suit by enacting the 1978[84] Sovereign Immunities Act. In 2007, a global Convention was put in place by codifying the existing customary law rules.[85] The Convention in Part III deals with proceedings in which State immunity cannot be invoked. Article 16 of the convention provides that immunity will not avail if at the time the cause of action arose, the ship was used for any purpose other than government non-commercial purposes[86]. A commercial purpose, for the purpose of the Convention was defined in Article 2(1) of the convention. Article 2(2) of the Convention further provided for guidance in determining whether or not the transaction is commercial or otherwise by referring to the nature and purpose of the transaction.[87]

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[83] For comments on the Foreign Sovereign Immunities Act 1976 see, Feldman M.B (1986) "The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founders View" Vol. 35, *International and Comparative Law Quarterly* 302; Delaume G.R (1994) "The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later." Vol. 88 *AJI*L,p 257: Brower C.N et al (1979) " The Foreign Sovereign Immunities Act of 1976 in Practice." Vol. 73 *AJIL*, p 200:Delaume G.R (1977) " Public Debt and Sovereign Immunity:The Foreign Sovereign Immunity Act of 1976." Vol. 71. *AJIL*. p.399 : Delaume G.R (1977) "Sovereign Immunity in America: A Bicentennial Accomplishment, Vol. 8 *J Mar L* 349: Mehren V. (1978) "The Foreign Sovereign Immunities Act of 1976," 17 *Colum J Transnat'l Law*, p 33: note, " The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court,"46, *Fordham L. Rev*. 543; note, " Sovereign Immunity: Limits of Judicial Control: The Foreign Sovereign Immunities Act of 1976," 18 *Harv. Int"l L.J* 429.

[84] Literature abound on this Act. See the following: Delaume G.R (1979)" The State Immunity Act of United Kingdom" Vol. 73, *AJIL*. p 185: Higgins R (1977) "Recent Developments in the Law of Sovereign Immunity in the United Kingdom" Vol. 71, *AJIL*, p 423: Sornarajah M (1982) " Problems in Applying the Restrictive Theory of Sovereign Immunity." Vol. 31 *International and Comparative Law Quarterly*, p 661: Mann. F.A (1980)" The State Immunities Act 1978." Vol. 51 *B.Y.I.L* p 43 : Bowett D.W.(1978) "The State Immunities Act 1978" 37 Camb. L.R 193: Crawford J. (1981) " Execution of Judgments and Foreign Sovereign Immunity."Vol. 75 *AJIL*,p 820.

[85] See United Nations Convention on Jurisdictional Immunities of States and their Property.

[86] See Art 16(1) of the Convention.

[87] This has been a very complicated provision in the sense that it is indirectly re introducing the problematic interpretational problem encountered in distinction between *acta jure gestionis* and *acta jure imperii* which was hitherto thought had been scrapped. The ramification of applying the 'nature of the act test' as compared to the 'purpose of the act test' is keenly illustrated in the following examples, using the nature of the act standard, an Italian court denied immunity to the Romanian government wich had contracted to purchasing provisions for its army. See Judgment of March 13, 1926, Corte Cass, Italy. 51 Foro It/584 1926 Giur,Ital. 1744, reprinted in part in "Draft Convention on Competence of *Courts in Regard to Foreign States'' 26 Am J. Int.l Supp. 626-29* (hereinafter cited as convention Draft).The Italian Court acknowledged the public purpose of the activity but discounted this finding as a basis for granting immunity, stating that. " such purpose does not after the nature of the contract of purchase, inasmuch as means were employed for its realization which were extraneous to the exercise of sovereignty and suited to the ordinary course of action of private individual."

Although several years earlier, an American court in *Kingdom of Rumania v. Guaranty Trust* CO.250 F.341 (2d cir. 1918), held that the foreign sovereign was entitle to immunity on a breach of contract since the contract, under which the sovereign was to purchase shoes and other equipment for its armies. Was for a public purpose, Later, however, in *Etve Balik Kuruma v. B.N.S. Int' sales corp. 25Misc.2d 299,204 N.Y.S. 2d 971 9sup.*

At the municipal level, the government of the Federal Republic of Nigeria enacted the Admiralty Jurisdiction Decree (No 59) of 1991 now an Act which conferred admiralty jurisdiction on the Federal High Court. However, the law is silent on the applicability of sovereign immunity. Today, Nigeria is a signatory to the 1999 International Convention on Arrest of Ships which provides that sovereign immunity will not avail ships that are engaged in commercial activities and can therefore be arrested in satisfaction of a maritime claim. The merchant Shipping Act of Nigeria is another legal instrument put in place in Nigeria for the purpose of addressing the issue of sovereign immunity and maritime claims in Nigeria.[88]

VII. CONCLUSION

Attempts have been made in this paper to analyse the doctrine of sovereign immunity, which began at the time when the king was regarded, as incapable of doing any wrong. This was derived from the fact that the duties given to them were restricted to the preservation of peace, security and government within its domain. With the spate of development after the Second World War, there was the need to expand the medieval duties imposed on the sovereign to encompass the welfare of its subjects. To accomplish these tasks, the sovereign found itself in the market.[89]

However, at the time when the doctrine was developing, trading activities were majorly conducted on the Sea thereby making use of ships to be on the increase. This accounted for the myriad of cases involving the sovereigns in Arrest cases arising out of collision at sea, claim for salvage debt, pilotage, bottomry, just to mention a few. Arrest of ship as a judicial remedy to secure maritime claim became rampant but whenever such cases are called, there is always a defence of immunity usually being raised on the part of the sovereign, thereby prejudicing innocent claimant. Whereas, once a sovereign found itself in the market, it must of necessity be bound by the principles of market forces.

The courts later found a way round this difficulty by moving away from absolute immunity doctrine to restrictive immunity whereby immunity is granted for governmental acts while commercial activities are not covered. These positions were given legislative backing at global, regional and municipal levels. Although Nigeria is yet to ratify and domesticate this global Convention, its provisions which was more or less a codification of existing customary international law is part of the Nigerian Law.[90] Prior to the promulgation of this International Convention, Nigeria has its own law that regulates the activities of sea-going vessels as it affects the immunity of the sovereign.

The law as it is today has put smile on the faces of common traders when they know that whatever they sell whether to individual or Government can be judicially remedied in terms of adjudication and execution in case of default in payment. The successes so recorded by the coming into effect of the Global Convention will still create some bottlenecks with the retention of "the purpose" and "nature of transaction" in the same Article of the Convention in the definition of Commercial transaction. There may be the need to revisit this part of the Convention in the area of commercial activities definition if trade and commerce on the International plane must grow.

Ct.19600. aff'd 17 A.D. 2d 927.233 N.Y.S. 2D 1013 991962), The New York Supreme Court, applying the nature standard, ruled that the purchase of meat to supply the Turkish army was a non-government act.

[88] See section of the Merchant Shipping Act..

[89] See *Trendtex Trading Company* v. *Central Bank of Nigeria* (*supra*).

[90] Through the adoption or incorporation theory. For a detailed and comprehensive study of this doctrine, see Babatnde I.O "Treaty Making and its Application Under Nigerian Law: The Journey so Far " which will soon be published.