COLONIAL BOUNDARIES AND ECONOMIC INTEGRATION IN AFRICA WITH PARTICULAR REFERENCE TO THE AEC AND ECOWAS TREATIES

BY

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A Thesis submitted to the Postgraduate School of Ahmadu Bello University, Zaria, in partial fulfillment of the requirements for the Award of the Doctor of Philosophy (Ph.D) in Law.

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DECLARATION

I, TERLUMUM ABEN THOMAS YAGBA, do hereby declare that this Thesis has been written by me and that it is a record of my own research work. No part of this Thesis has been presented or published anywhere, at anytime, by anybody, institution or organisation or the award of any academic degree.



TERLUMUN ABEN THOMAS YAGBA

OCTOBER, 1996

DEDICATION

This Thesis is dedicated to my darling wife, WANGER and my dear daughter, MNGUHENEN AND TO ALL PAN-AFRICANISTS

CERTIFICATION

This Thesis entitled **Colonial Boundaries and Economic Integration in Africa with particular reference to the AEC and ECOWAS Treaties**, meets the Regulations governing the award of Doctor of Philosophy (Ph.D) Law of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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ABSTRACT

Africa's existing international boundaries are a product of the colonial partition in the 19th Century. Following independence, the colonial territories became sovereign nation states divided by the lines of colonial demarcation along with a series of commercial, linguistic, political and legal barriers.

These barriers, imposed and reinforced by the international law regime relating to state boundaries, and sovereignty constitute impediments to inter-state or intra-regional intercourse and overall economic development on the continent. One major obstacle has been the narrow territorial frameworks or limited internal markets of individual countries which hamper economies of scale, higher productivity and international competitiveness.

Several regional economic co-operation projects have been tried within the context of existing international law and inter-state diplomacy with little or no success. This work is an effort to assess current efforts at regional economic integration at the continental and sub-regional levels against the background of the rules governing international boundaries and their impact on inter-state or intra-regional economic relations. Particular alien!ion is focused on the

Treaties establishing the African Economic Community (1991) and the Economic Community of West African States (1975 as revised in 1993).

Chapter one is the general introduction. It sets out the conceptual framework and objectives of the the work; the research problem and scope of the work. It also highlights the significance of the study, and its methodology.

Chapter Two deals with the history of border and economic relations in Africa. It attempts to provide historical glimpses into the state of pre-colonial political economy and trade on the continent before the contact with Europe from about the 14th century. It also examines the notion of boundaries in Africa's precolonial political formations. Lastly it looks at the European penetration and subsequent colonisation of Africa and their impact on indigenous commercial intercourse and state organisation.

Chapter Three looks at the legal implications of independence for colonial territories in Africa and the associated problems of legal title to territory arising from the principles of classical international law. The chapter also examines the problems of stale boundaries in

African economic relations especially in connection with informal transborder trade.

Chapter Four considers the historical background to the idea of continental economic integration in Africa. It discusses existing integration projects on the continent. It also attempts to outline the legal framework, structure, status and scope of the African Economic Community as reflected in the Abuja Treaty of

Chapter five examines the provisions of the Abuja Treaty which seek to address the constraints to inter-state or intra-regional trade, namely the rules stipulating for freedom of movement, residence and establishment for citizens of member states in each other's territory. These are compared to free movement regimes in other regions and the legal harmonisation framework that supports those regimes.

Chapter Six addresses the problems of integration in Africa with particular reference to the experiences of ECOWAS. Strict border maintenance policies and undue attachment to notions of sovereignty are identified as the major obstacles to integration against the socio-economic realities in the sub-region.

Chapter seven then identifies the major responses to the

prevalence of strict border regimes in the Nigerian and African contexts and evaluates these against the wider imperatives of continental economic integration. It recommends an enabling framework for trans-border co-operation that may be adopted from the European model.

Chapter Eight summarises the major recommendations of the thesis. It concludes by reiterating the desirability of economic integration in Africa and the necessity for instituting more liberal border management policies that would

reduce the negative, exclusionary functions of international boundaries on the continent while promoting free movement and intra-regional intercourse across the continent.

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CHAPTER ONE

GENERAL INTRODUCTION

BACKGROUND TO THE STUDY

Africa today consists of a large number of states cloistered behind a series of commercial, linguistic, political and legal barriers of all sorts. Relative to its landmass, Africa is the most divided of all continents with several micro-states and many land-locked or geographically disadvantaged states. This arbitrary fragmentation of the continent into numerous nation-states is the heritage of the colonial territorial distribution effected by the European powers which divided and ruled the continent in the nineteenth century.

The colonial units carved out by the European scramble for Africa emerged as nation-states after decolonisation. In international law therefore, each of them enjoys the full attributes of international personality, including full independence or self-determination, territorial sovereignty, sovereign equality and full exclusive jurisdiction within its state territory.

These attributes of territorial exclusivity are reinforced by the establishment of international boundaries as limits of state jurisdictional competence. Boundaries therefore impose several barriers to inter-state

relations among the countries on the continent which constitute strong obstacles to their economic development.

After three decades of independence characterised by sluggish economic performance by virtually all African countries, it has become obvious that rapid economic growth is not realisable within the narrow territorial frameworks or limited internal markets of the individual nation-states. On the other hand, the historical and contemporary demands of the regional economies require that there must be inter-state co-operation in planning and development.

It is in realisation of these requirements that in several regions of Africa efforts have been on for many years to establish bilateral, multilateral or regional structures for economic co-operation. The defunct East African Common Market, the Maghreb Arab Union and several Francophone groupings in West and Central Africa were started in the 1960s. The Economic Community of West African States (ECOWAS) took off in 1975 while the Preferential Trade Area (PTA) and the Southern Africa Development Co-ordination Conference [SADCC] were set up in 1980.

Today, each region of Africa has one or more economic groupings. In West Africa alone, over 40 such groupings may be identified.

Examples include the Mano River Union, Lake Chad Basin Commission, River Niger Commission, Organisation des Etats Riveraine du Senegal and the Communaute Economique de L'Afrique de L'Ouest. However, the pace of integration throughout the continent has been rather slow. Compared to Europe or even other developing regions like South East Asia and Latin America.

To accelerate the pace of African economic integration and to rationalise the conflicting web of intergovernmental micro-organisations, the Organisation of African Unity (OAU) at its 27th Annual Summit in Abuja, Nigeria in 1991 sponsored the conclusion of a Treaty establishing the African Economic Community (AEC). The ultimate objective of the Treaty is to create an African Common Market and monetary system, by abolition of all barriers to inter-state and intra-regional commerce and socio-economic intercourse.

This work seeks to examine how far such objectives are compatible with the existing legal regimes of international boundaries, which sustain the present exclusionary character of African boundaries. By their nature, the arbitrary and artificial boundaries superimposed by European colonialism constitute strong obstacles to the mobility of factors of production especially the inter-state exchange of labour, goods and services.

Both the 1991 AEC Treaty and the legal instruments setting up the various regional economic groupings in Africa, recognise that no meaningful economic integration can be achieved without deliberate effort to remove or at least reduce these obstacles to intra-regional trade. However these integration schemes were conceived without full regard to the need to reconceptualise the legal nature and functions of interstate boundaries existing on the continent. The challenge for scholars and statesmen is how to convert boundaries from the dividing lines which they represent in classical international law to bridges of contact which economic integration demands.

1.2 THE RESEARCH PROBLEM

One of the main features of international economic relations since World War II has been the emergence of regional economic groupings in various parts of the world. Economic groupings have developed in important regions of the world like Europe, North and South America, South East Asia and the Carribeans.

The United Nations, notably through the Economic and Social Council (ECOSOC) and its regional organisations, has promoted economic groupings as a constituent element of a new international economic order. This has seen the emergence of several groupings in the developed and

developing worlds. These tendencies have had a revolutionary impact on the structure and underlying assumptions of the existing state-centric international legal order. Consequently much of modern international economic law has been concerned with the legal framework for international economic co-operation, especially regional economic institutions.

Today, international economic law has transcended its traditional scope, leading to the evolution of an international law of development as a distinct discipline. This emergent discipline is founded on two main requirements, namely the right to development and the correlative duty to co-operate for development. These concepts reinforce the expectation that states should shed off some elements of their sovereignty in order to support supra-national institutions for promoting regional economic development.

Within this context, it is projected that the global economic scene in the next millennium will be dominated by the transition from the old structure of antagonistic nation-states acting on the basis of narrowly defined "national interests" to a system of regional blocs and multi-state economic groupings pursuing collective interests through collective arrangements.

Already, regional economic integration has become a crucial dynamic in the reconjugation of the post cold war world economy. In Africa, integration has been widely accepted as Africa's response to the hegemonic economic power of European, American and Asian groupings and a self-sustaining strategy for continental economic development. There is widespread unanimity that economic integration is one viable option open to the continent to overcome its internal limitations and external dependency.

Despite this unanimity, the road to economic integration in Africa has been littered with dead or dying micro-organisations. The famous East African Community collapsed in 1977 amidst political disagreements among the leaders of the member States. Similarly the Union Douaniaire des Etats de L'Afrique de L'Ouest (UDEAO) was folded up in 1972, only six years after its formation. Even of the more visible, surviving ones like ECOWAS and SADC, the story has been largely one of motion without progress.

This thesis seeks to provide answers to the main issues which are partly responsible for the not so successful efforts at economic integration in Africa. The major questions to be resolved are: can present efforts at Africa's regional and continental economic integration resolve the

constraints to inter-state trade arising from the juridical character of inter-state boundaries on the continent? How can the classical notions of State Sovereignty be attenuated to provide the necessary impetus for economic integration? How far does the present legal framework for economic integration in Africa address these constraints? And how can these constraints be overcome or ameliorated within the structure of a nation-statist international legal order?

1.3 SCOPE OF THE STUDY

In spatial terms, the thesis looks at all of the African continent and will concentrate on the 1991 Treaty signed by the OAU Assembly of Heads of State and Government at Abuja, Nigeria as the major point of reference.

However, since theCommunity is yet to fully take off and in any case it contemplates that the regional communities will be the building blocks for the eventual African Common Market, the 1991 Treaty will be discussed in the light of the experiences of the Economic Community of West African States (ECOWAS/CEDEAO).

Thus although the study focuses primarily on the prospects for continental economic integration, it is situated within the narrower

framework of existing regional economic communities, with particular emphasis on ECOWAS. The choice of ECOWAS is for a number of reasons.

First, ECOWAS represents the largest regional grouping in Africa, in demographic terms with a population of 234 million encompassing Anglophone, Francophone and Lusophone countries. Secondly, it has the longest history of post-independence integration at the sub-regional level.

Thirdly, the West African subregion has in historical perspective been a natural regional free trade area. Located between North and Sub-Saharan Africa, it provided the meeting point of inter-regional trade for centuries before Africa's contact with Europe. It is striking that vestiges of the pre-colonial regional commercial networks have survived to date despite the strict enforcement of border controls by colonial and post-colonial states in the region.

The thesis therefore uses West Africa to examine the case for regional integration in the continent. Accordingly it will appraise the ECOWAS Treaty of 1975 as a forerunner to the AEC Treaty of 1991. In many places, the work will use West African examples.

In terms of time scope, the thesis will concentrate on the post-colonial era, particularly the period from 1960 to date when most African countries gained independence from colonial rule. Nonetheless to provide historical evidence in support of integration, the thesis will attempt a cursory look at pertinent aspects of pre-colonial and colonial commercial patterns or state organisation that have had enduring impact on the structure and economy of contemporary Africa.

Pre-colonial period here, will be limited to the period before colonisation, in which the relationship between Europe and Africa was essentially trade-based. References to earlier periods will be restricted to demonstrating the crystallization of certain patterns of African society, especially her cultural and political landscape.

The colonial era for our purpose is that period in the 19th century when the European powers, notably Britain, France, Germany, Portugal, Belgium and Italy, divided up the African continent and imposed direct or indirect rule within their apportioned territories. This episode changed the relationship between Africa and Europe in a fundamental sense and has left indelible marks on African history. We shall focus in this work on what is considered the major legacy of European colonialism, namely the creation of a large number of distinct territorial units which assumed the legal status of nation-states after independence.

Subsequent chapters will show, however, that there is nothing rigid about this periodisation as each period crosses into another. For example, both in terms of duration and impact, colonialism started earlier in some parts of Africa and has been more profound for some than others.

Ultimately therefore, it is the post-colonial era that will be covered in much of the work. This period is also used loosely as various countries gained independence at different times, by different means or in different contexts. This rich historical tapestry and the interplay of social, economic and ethnographic factors is reflected in the methodology of the study which is multi-disciplinary.

1.4 OBJECTIVES OF THE STUDY

This thesis seeks to demonstrate that the failures of the several economic groupings on the continent are partly traceable to inadequate attention being given to the legal regime of international boundaries and the legal infrastructure to support and sustain economic co-operation. Other important factors which need to be dealt with are the lack of political will or commitment to implement community decisions. In legal terms, these represent a marked hesitation to concede some measure of state sovereignty to regional institutions to enable them take appropriate action to foster integration. A good example of this was the original ECOWAS Treaty of 1975.

The underlying assumption of this thesis is that integration, like other economic phenomena, has strong political and legal dimensions which are crucial to its ultimate success. The thesis shows that ignoring the legal perspective, as national economic planners in developing countries often do, has hampered the realisation of the aims of economic integration in Africa.

The basic objective of this work is therefore to assess the legal framework for economic integration in Africa under the Abuja Treaty of 1991 against the rules of customary international law, especially the regime relating to state boundaries. The significance of this research effort would be in identifying the legal constraints to regional integration in Africa which arise principally from the state-centric doctrines of classical international law. The work will also attempt to suggest a framework which would offer the necessary regional bias to a legal regime that can support and accelerate economic integration in Africa.

For purposes of clearly delineating the research objectives, it is necessary to succinctly formulate the issues that arise from the character of African boundaries and the legal regime upon which they rest and which are likely to impede the process of regional economic integration.

First, the existing international boundaries as noted above are of colonial origin, being the result of arbitrary and artificial divisions drawn by European imperialists in the 19th century. These lines, superimposed on Africa's pre-colonial, social and political communities, cut through homogenous communities placing them on opposite sides of inter-colonial boundaries and severely restricting those on one side from interacting with kinsmen on the other side. Without exception, all the hundreds of boundary lines were created by European colonialists without regard for African realities. On nearly all international boundaries separating the over 50 different states on the continent, there are communities that have been bifurcated or even vivisected into two or more states. The dynamics of this ethnic or population overhang factor (as some writers call it) will be demonstrated in the context of the problem of unregistered, unofficial transactions across inter-state boundaries, inspite of strict boundary maintenance policies by all post colonial states on the continent.

It must however be pointed out here that despite their arbitrariness, these boundaries have been accepted as the legal definitions of the territorial framework of post-colonial nation-states in Africa.

Secondly, the evolution of nation-states in Africa in the mould of the classic European model, and within the bounds traced by European powers impels African countries to uphold the sacro-sanctity of inter-state boundaries as the logical foundation of the nation-statist heritage. Classical international law as expressed in the *Montevideo Convention on the Rights and Duties of States, 1933* requires that to qualify as a state, an entity must have a defined territory and a permanent population among other attributes.

Over the past three decades or so, since colonial states in Africa achieved independence, the major political trend has been a concern with demarcating and strengthening national boundaries and the barriers which separate them from one other. The main drive has been towards promoting internal integration of "nation-state" societies by strictly enforcing the political, economic and social boundaries between the emergent nation-states.

This insular attitude to state boundaries in Africa is sanctioned by the international legal concept of territorial sovereignty and the concomitant principles of state equality and inviolability of frontiers. This work aims at demonstrating that the existing legal regime relating to international boundaries in itself undermines Africa's desire for economic

integration. It inhibits trans-border co-operation in planning and development which is a necessary condition for sustainable and self-reliant development in Africa. It also preserves and sustains the administrative, political, legal and commercial barriers to transborder and intra-regional trade which constrain the free exchange of goods, capital, labour and services.

The thesis is built on two main postulations. The first is that rapid economic growth and development in Africa is not realisable within the narrow territorial frameworks of the individual nation-states. The second point is that modern state-centric nationalism ignores Africa's long standing traditions of long distance trade or regional commercial networks and the communal exploitation of transboundary resources.

To support these postulations, the thesis will elicit evidence that intra-regional or inter-state trade has a long history in Africa with several centuries of long standing commercial relations between Arab traders to the North and merchants from the hinterland or coastal areas to the South. These created in many regions of Africa, especially in the West and East, large economic communities which allowed free flow and exchange of goods, services and people.

According to historians the phenomena of long distance trade and migrations in all directions in the pre-colonial epoch had made the Western Sudan and other subregions, natural common market zones of considerable antiquity.[1]

The thesis then shows that the regime of nation-statist international boundaries in modern-day Africa fundamentally conflicts with these established historical patterns. For this reason the work has tried to put in perspective, the historical and contemporary factors responsible for the irrational colonial distribution of territory, the resultant laceration of homogenous communities and complementary economic regions, and how these constitute obstacles to regional economic integration in Africa. The ultimate question to be resolved in this research is whether or not the legal framework for economic integration in Africa sufficiently addresses these obstacles.

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1 Asiwaju, A.I.(1983): "Socio-Economic Integration of the West African Sub-region in Historical Context: Focus on the European colonial Period" in Akinyemi & Ors (ed.); READINGS AND DOCUMENTS ON ECOWAS (Lagos: NIIA), p.31 at 34.

1.5 SIGNIFICANCE OF THE STUDY

The thesis will put in focus the historical antecedents and contemporary imperatives of economic integration in Africa. This will be done first by a historical account of pre-colonial trade links between the various parts and different peoples on the continent which were distorted or stultified by the contact with Europe from about the 14th century. The diversion and disorientation of trade relations from the inland intra-regional commercial and their redirection networks towards Europe and North America was firmly instituted through the periods of both the slave trade and legitimate commerce, and ultimately by imposition of formal colonial administration in the 19th century.

Secondly the study will examine the process of consolidation and entrenchment of colonial boundaries and other barriers to intra-regional or inter-territorial trade. This work will demonstrate that the major impact of the inter-colonial boundaries superimposed on Africa's cultural, economic and political facets was to completely disrupt socio-economic intercourse, particularly the free flow of trade between the peoples of the continent. Colonial force and the institution of customs, tariffs and monetary barriers were deployed to enforce these negative, exclusionary functions of colonial boundaries. The aim was to limit or control social or economic relations across the artificially defined spheres of European colonial rule.

Thirdly, the study will illustrate that the artificiality of the imposed boundaries made it impossible, inspite of repressive colonial policies, to eliminate social and economic relations across the inter-colonial boundaries. Socio-economic intercourse not only survived the colonial era but has become even more resilient in the face of post-colonial struggle for nationhood. Large-scale informal trade across the length and breadth of Africa's international boundaries is irrefragable evidence of the illogicality of the existing boundaries themselves and the prevailing legal regime. The thesis will present the evidence and analyse the policy implications of unregistered, trans-border trade from an integration point of view.

Fourthly, the study will make the case that the resilience of the phenomenon of unregistered cross-border trade provides a transcendental justification for contemporary efforts at building regional common markets which will formalise and better regulate existing informal inter-state and intra-regional commerce.

Finally the thesis will examine the detailed instrumental provisions of the Treaty of Abuja establishing an African Economic Community in the light of the experiences of earlier integration experiments on the continent and elsewhere. Particular attention will be paid to the

experiences of ECOWAS and the European Economic Community (EEC).

At the end, the thesis will proffer policy prescriptions that will make the continental integration project more viable, with particular emphasis on the framework for trans-border co-operation and legal harmonisation.

Underlying these suggestions is the assumption that state boundaries are unlikely to wither away soon in Africa or elsewhere. Neither is the nation-statist legacy itself likely to disappear. They also reckon with the fact that any attempt at a comprehensive revision of Africa's present political map may in effect precipitate a new scramble for Africa.

The policy prescriptions recommended explore a more plausible alternative; namely, that of transforming the character and legal functions of Africa's existing international frontiers to reduce their divisive nature. If the significance of the boundaries as dividing lines is obliterated in favour of contact and co-operation, it would foster the longstanding commercial and cultural relations on the continent. Such policy re-orientation is the key to overcoming Africa's fragmentation and underdevelopment by enhancing the continent's integration in the years

ahead.

In summary therefore, the main focus of this thesis will be to inject the legal perspective into the search for the necessary political, social and economic dynamics in support of continental integration in Africa. The work is an effort to emphasise the inter-dependence of economic needs and legal framework which is often neglected in the planners' concept of economic problems in the developing world. The integration process itself clearly raises difficult questions of both local and international law. Sometimes however the issues defy strict legal solutions and demand wider inter-disciplinary perspectives.

It is for this reason that even though the thesis will be primarily concerned with the legal dimensions of economic integration in Africa, due regard will be given to the relevant historical, ethnographic, economic and institutional factors that will influence a continental integration scheme.

The thesis is nonetheless not designed to cover all aspects of the subject. It will be mainly concerned with the interplay of international boundary regulations on the legal framework of economic integration.

1.6 METHODOLOGY OF THE STUDY

The main approach to this work will be doctrinal. This means that existing legal doctrines relating to state boundaries will be analysed in the light of historical and contemporary data and literature on the subject of economic integration. The work will therefore be largely based on library and archival research.

Primary and Secondary sources of data will be consulted. The primary sources here include official documents of the Organisation of African Unity, the Economic Commission for Africa and the Economic Community of West African States. Other primary documents to be used will be those of the United Nations, its agencies such as the Economic and Social Council and its Commissions like those on Transnational Corporations and International Trade Law. Also for comparative purposes, documents of the European Economic Community (EEC) and other functional regional economic organisations will also be used where necessary. Lastly, reference will also be made to official papers and reports of the Government of Nigeria or any other country, particularly the official version of treaties in force.

The main secondary sources will be published and unpublished works of scholarship in the relevant areas. These include books, journals, articles, seminar papers, mimeographs and dissertations. Newspaper and magazine articles will also be used.

The research will stress a multi-disciplinary approach. Materials from history, geography, economics or political science which shed light on the legal analysis will be routinely consulted and cited. This approach will put in focus the socio-economic environment within which regional economic organisations must operate. It will also show that legal and economic structures for integration cannot work in isolation of society.

Lastly, the thesis will adopt a functional analytical approach. That is to say the law will be tested against social reality: how do the boundaries really work? Do they or can they stop routine social intercourse between border inhabitants? In doing this, the thesis will place premium on the situation of local inhabitants who live in the grassroot communities around the boundaries and who are directly and acutely affected by efforts of nation-states to enforce boundary controls.

This approach has been described by Professor Asiwaju[2] as "a micro or grassroots, level of analysis". It is to be distinguished from the official perspective shared by diplomats and central government personnel, which is analytically termed the "nation-state, structural perspective".[3]

As Professor Asiwaju has shown in his leading works, the people who live around the boundary regions and who are separated from their kith and kin by such boundaries tend to hold radically opposing views vis-a-vis their own governments, on the desirability of the boundaries. For its part, government considers the boundary as a necessary demarcation of its jurisdiction and power. On the other hand, border inhabitants at the grassroots regard the line as an intangible irritation, to be better ignored or avoided. Hence for them, cross-border intercourse, often proscribed by government as illicit, is normal and a matter of mutual necessity, if not even survival.[4]

The functional approach is aimed at building the case for a fundamental policy re-orientation which would reconceptualise boundaries as bridges of human intercourse rather than as barriers to social and

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2. Asiwaju, A.I (ed) (1984): Partitioned Africa-Ethnic Relations Across Africa's International Boundaries (London; C. Hurst & Co, Lagos: University of Lagos Press.

3. *Ibid*. p.1

4. Asiwaju, A.I. (1989): "Borderlands Policy Implications" in Asiwaju, A.I. and Adeniyi, P.O.(ed): Borderlands in Africa: A multi disciplinary and Comparative Focus on Nigeria and West Africa (Lagos University of Lagos Press) p. 73

economic relations between states and peoples.

1.7 ORGANISATIONAL LAYOUT

The thesis will be divided into eight chapters. This first chapter will be a general introduction covering the conceptual framework and scope of the research. It will also highlight the objectives, significance and methodology of the study.

Chapter two will deal with the history of border and economic relations in Africa. It will attempt to place in historical context, the state of African development and commercial organisation before the contact with Europe. It will also examine the notion of boundaries in Africa's pre-colonial political formations. The last part of the chapter will look at the European penetration and subsequent colonisation of Africa and their impact on indigenous commercial intercourse and state organisation.

Chapter Three will look at the legal implications of independence for colonial territories in Africa and the associated problems of legal title to such territories arising from the principles of classical international law. The chapter will also examine the problems of state boundaries in African economic relations especially those connected with the phenomenon of informal transborder trade.

Chapter Four will consider the historical background to the idea of continental

economic integration in Africa. It will also discuss the existing integration projects on the continent. It will further outline the legal framework, structure, status and scope of the African Economic Community as reflected in the Abuja Treaty of 1991 and assess whether or not those provisions are capable of achieving the objectives of integration.

Chapter Five will examine the provisions of the Abuja Treaty which seek to address the constraints to inter-state or intra-regional trade, namely the rules stipulating for freedom of movement, residence and establishment for citizens of member states in each other's territory. The chapter will then compare the African free movement regime to similar regimes in other regions against the background of the legal harmonisation frameworks that support such regimes.

Chapter Six will identify the problems of integration in Africa with particular reference to the experiences of ECOWAS. Strict border maintenance policies and undue attachment to the Eurocentric notions of sovereignty are identified as the major obstacles to integration against the socio-economic realities in the sub-region.

Chapter Seven will seek to identify the major responses to the prevalence of strict border regimes in the Nigerian and African contexts. It will evaluate these against the wider imperatives of continental economic integration. It then considers an enabling framework for trans-border co-operation that may be adopted from the European model.

Chapter Eight will present the major recommendations of the thesis. It will conclude by reiterating the necessity of economic integration as a viable development option for Africa and the necessary legal conditions for implementing it especially the institution of more liberal border management policies that would reduce the negative, exclusive functions of international boundaries on the continent while promoting free movement and intra-regional intercourse across the continent.

CHAPTER TWO

HISTORY OF BORDER AND ECONOMIC RELATIONS IN AFRICA

2.1 INTRODUCTION

In order to put the contemporary dimensions of the study in proper perspective, it would be desirable to explore briefly at the start the historical patterns of border and trade relations in Africa. This is necessary for three reasons. First, the present political and economic order in Africa is essentially a product of past events, especially the balkanisation of Africa by European colonial powers in the 19th century.

Secondly, many of the problems of post-colonial development in Africa are traceable to the neglect of pre-colonial historical realities by the colonising powers. Hence any study aimed at investigating some aspect or the other of these problems must begin by reconstructing the historical irrationalities that produced them in the first place.

Thirdly and more fundamentally, the historical perspective is indeed invaluable in answering the nagging question; "how did the societies on the African Continent come to be as they are today?"[1]

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1 Curtin, P. *et al* (1978): African History (London: Longman), P.vii.

An attempt to look at history however immediately raises organisational problems of periodisation. As usual, the difficulties stem from the absence of consensual guidelines for locating watersheds of history which demarcate one period from another. Historians worldwide spend a great deal of effort locating such dividing lines, and disputing about whose lines are more significant.[2]

As earlier delimited in the scope of this work, the important periods fall broadly into three:

(1) the pre-colonial era;

(2) the century of European colonisation of Africa; and

(3) the post-independence era.

This chapter will briefly focus on the first and second periods. The post-colonial era will be discussed in chapter 3.

2.2 THE PRE-COLONIAL ERA

By the turn of the 13th century, Africa's culture and political foundation had virtually crystallized. Even though state formation had not attained the territorial and jurisdictional exclusivity of the European

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2 *Ibid.*

nation-state system, identifiable empires and kingdoms were evident in many areas of the continent. Examples of the earliest empires which had risen and fallen at different times include the old empires of Ghana, Mali, Songhai and Kanem-Bornu in the Western Sudan; the Kongo, Luba and Lunda Kingdoms in Central Africa and the Nyore, Shamban and Nkore Kingdoms in East Africa.[3] In the century before colonisation, there were in existence a number of significant states which colonial expansionists had to confront notably the Sokoto Caliphate in Northern Nigeria, Sheikh Umar in the Western Sudan, the Bini, Yoruba, Dahomey and Ashanti Kingdoms on the coast of West Africa; the Zulu and offshoots of the Mfecane in Southeastern Africa and the congeries of secondary empires in East and Central Africa.

These settled patterns of cultural and political organisations were ignored in the colonial partition and administration. Africa was carved out arbitrarily on the basis of the legal assumption that it was *terra nullius*. Nonetheless it is useful to stress the dynamics of change and continuity in pre-colonial African history. The first reason is that African society today represents literally a millennia of experimentation and experience. And it is that experience which explains why social systems, values, cultures and inter-group relations did not fade away when European norms and rules were introduced with colonial rule.

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3 *Ibid.*, Chapter 1,5,8 especially PP.33-36.

The second reason for focusing on the pre-colonial period is that they stand out as the most undocumented period of African history. Except for North Africa which became part of the Islamic civilisation and its associated culture of urbanisation and literacy, most of Africa's pre-colonial history is unwritten. In the case of North Africa, since its incorporation into the muslim world about the 7th century AD, it maintained a high level of historical documentation. These written accounts of North African societies do supply valuable perspectives about the historical processes which took place in other parts of Africa, especially the state of social, economic and political development on the continent before colonialism.

For the rest of Africa, written historical sources only emerged with the southward spread of Islam from North Africa from about the 8th century and the contact with European adventurers and traders from the 14th century.[4] By a combination of these, the immediate pre-colonial centuries became a much more documented period of African history which can be studied even by the non-professional historian.

The third reason for this brief historical account is that Africa became so overshadowed by Europe in the colonial period. As a result,

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4 *Ibid.*, at P.108.

unless special emphasis is placed on the period just before the European impact became overwhelming, the internal dynamics of pre and post-colonial developments in Africa may be lost. The enduring effects of the disruption of pre-colonial economic and political systems by European imperialism tend to give the wrong impression that African societies were rudimentary and unorganized before the imposition of European rule. Colonialism is then justified as a civilising mission to emancipate "primitive natives in the savage backwoods."[5]

Modern African historiography establishes beyond doubt, to quote the conclusion of Philip Curtin, and others[6] that:

> "the picture of a 'traditional' and unchanging Africa simply reflects--ignorance about much of the detailed patterns of change at earlier periods. From the glimpses we do have, however, it seems clear that African societies changed and readjusted at much the same rate as other societies in other parts of the world did between the agricultural and industrial revolutions".[7]

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5 Davidson, B. (1992): The Blackman's Burden: Africa and the Curse of the Nation State (Ibadan etc: Spectrum Books) P.44.

6 Curtin, P.; *et al*: African History, *op.cit.*, note. 1.

7 *Ibid.*, at PP.36-37.

2.3. TRADE AND POLITICAL ECONOMY IN PRE-COLONIAL AFRICA

The phenomenon of long distance trade in Africa dates from antiquity. The history of the trans-saharan trade, for example, is closely linked to the emergence of the earliest Sudanic states. Archeological work in Mauritania suggests that between 800 and 600 B.C. an incipient state existed in the Tchitt area. After 300 B.C. the movement towards state formation began again which culminated in the rise of the kingdom of old Ghana by 400 A.D. or later. About 100 A.D. the state of Takrur had emerged on the Senegal River and by 800 A.D. other states had independently arisen in Gao on the Niger and Kanem, east of Lake Chad.[8]

The location of these early states in West Africa suggests that they arose, as states have done elsewhere, to meet the needs of trade and the problems of defence. However it would be an over-simplification to account for the rise of those states on long distance trade alone. In most cases, it was only after the states had attained certain power that their ruling classes could express an interest in long-distance trade and provide the security to permit that trade to flourish.

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8. *Ibid.*, P.33.

Thus trade and state formation were clearly interrelated especially in West and East Africa. Similarly in the gold-bearing areas of Zimbabwe and the copper-producing areas of Katanga, states arose where trade flourished. However long distance trade in itself was insufficient to explain political development in other regions. In the East African Lake region, for instance, trade and state were infact parallel developments. In the Hausa city states, each city evolved as a commercial centre only after it was organized as city-states. It was only then that they became a major terminus for the trans-saharan trade.

On the other hand, it is also not possible to account for long-distance trade in African history solely on the basis of the link between economic structure and political development. There are other factors which facilitated the growth and significance of long-distance trade across the continent and especially in the West African sub-region.

The first of these was the existence of dual ecological belts in most regions. In West Africa, these belts supported nomadic cultures in the Northern zones and sedentary life in the Southern zones. While this was often a source of friction, it also held out prospects of co-operation through trade. For example, the savanna belt had no salt supplies whereas there lay large salt deposits in the Sahara and in the forest regions towards the coast.

Exchange at the desert edge became well established and this became linked to more distant trade. The savanna people could draw in gold and kolanuts from the forest regions. While, the nomads could draw in manufactured products from North Africa.

Secondly, the history of long distance trade in sub-saharan Africa was also linked to the spread of Islam. Merchants in long distance trade were infact the principal carriers of Islam into West Africa in the same way as Greek and Phoenician merchants had been the initial carriers of the Hellenic synthesis into the Western basin of the Mediterranean.

As the importance of trade increased in the Western Sudan from the 11th century onward, the muslim long-distance traders moved their network of trade deeper South from the desert cities on the Sahel. They spread as a trade diaspora, sending out emigrants to settle at all the principal trading points in order to establish strong business links. The Arabic sources refer to all these traders as "wangara".

By 1500 A.D. at least three separate networks were firmly established. The first one was the main line of trade southward from Timbuktu by way of the Niger. This extended to cover the Akan goldfields, through Jenne on to Begho just north of the forest. The main

traders on the route were of Soninke origin. Subsequently, through assimilation with the Malinke, they took on their own ethnic identity as Juula (French: Dyoula) which means merchant in Malinke. Well before 1500 A.D. these traders were reaching down to the coast itself.

The second route ran westward from the Niger to the Bambuhu goldfield. Its principal base was at Jakaba with a reach out to the Atlantic Ocean through Mali. This route was dominated by a Soninke-Malinke extraction known as the Jahanke (French : Diakhanke). To date, their semi-independent states strung out along the trade route still remain evidence of their old trade diaspora.

The third of the early trade routes was completely Hausa dominated. The Hausa city states established trade links with the Air Massif to the desert which was a convenient entrepot for the trans-saharan trade. The links spread to the South-West toward the forest of present-day Ghana, where kolanuts were a very important export to all of the savanna. Another route reached down to the Yoruba states and Benin.

Well before the 15th century, the Hausa traders were strongly linked with Soninke traders known as Wangarawa who settled in Hausa towns and established a trade route through present-day Burkina Faso to

the Juula trade network. Hausa trade also reached eastward to tap the trans-saharan trade entering Kanem Bornu.

The trans-saharan trade had a number of special characteristics. One was the use of the camel as the 'Ship' for crossing the desert. This was, in practical terms, equivalent to the European achievement of crossing an ocean. The towns which the camel caravans entered on either side of the desert were called 'Ports'.

Secondly, the long-distance trade in turn stimulated both local trade and the growth of trading cities such as Walata, Timbuktu, Gao, Jenne and Kano. Thirdly it brought the literate Islamic culture into sub-Saharan Africa and led to great diffusion of knowledge.

Finally it strengthened state power. It enabled the ruling lineages to transform themselves into a permanent aristocracy. Control of the trans-saharan trade was decisive to the fate and fame of the incorporative trade empires of old Ghana, Mali and Songhai. In particular each state had to control the desert ports and the desert-savanna fringe which was the point of contact to blanket the access of rival states in order to emerge as the effective power in the region.

Dr. Walter Rodney[9] catalogued the "long list of African products" which were commonly traded on a long distance basis to include--

> salt from the Atlantic Coast and the Sahara, kolanuts from the forests of Liberia and Ivory Coast, gold from Akan country in modern Ghana, leather from Hausaland, dried fish from the coast, cotton cloth from many districts and especially from the central areas of the Western Sudan, iron from Futa Djalon in modern Guinea,shea butter from the Upper Gambia, and a host of other local articles. In addition, the trade of the Western Sudan involved the circulation of goods originating in North Africa, notably fabrics from Egypt and the Maghreb and coral beads from Ceuta on the Mediterranean Coast.

Rodney appropriately concluded that "the pattern of Western Sudanic and trans-saharan commerce was integrating the resources of a wide area stretching from the Mediterranean to the Atlantic Ocean".[10]

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9 Rodney, W. (1972): How Europe Underdeveloped Africa (Dar Es Salaam: Tanzania Pub. House) P.69.

10 *Ibid*.pp.72-79.

Similar patterns of state formation, long distance trade and economic integration were also well established in other regions of Africa. Notable examples are in the Interlacustrine zone[11] and the Zimbabwe area.[12] In the Zimbabwe area, to take one case, the presence of gold was a strong stimulus to external trade and the presence of Arab traders as far South as Sofala in the Mozambique Channel spurred mining of large quantities of gold for export.

When the Mutapa State was set up in the region by a Shona-speaking dynasty from the Rozwi Clan, it concentrated on encouraging production for export trade, notably in gold, ivory and copper. Arab merchants came to reside in the kingdom and the Zimbabwe region became involved in the network of Indian Ocean commerce which linked them with India, Indonesia and China.

The Rozwi lords of Mutapa organised a unified system of production and trade and exacted tribute from communities in the kingdom. Foreign trade was therefore a crucial factor in the strength of the Mutapa State and its ruling strata.

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11. Today known as the Great Lakes region.

12 Zimbabwe is used in historic perspective to designate the entire Zambezi-Limpopo culture area of Southern Africa

This is just one more illustration of the many instances in pre-colonial Africa where control of trade contributed to state formation. These early cases of trade-based political power provided a glimpse of what was to become so decisive in later centuries, namely that the stability of a king's rule ceased to be dependent on his relations with tribute-paying subjects but on his relations with outside traders.

The problems of maintaining control in a trade-based state became very evident with the arrival of Europeans in African trade. By the late 17th century, Europeans were already meddling in African affairs as even minor sub-chiefs had alien trading partners and therefore strived to exercise independent political authority. This hastened the disintegration of many kingdoms and in turn weakened their individual and collective strength. This was probably one explanation as to why trade with Europe easily gave way to colonialism.

However before examining how the contact with Europe changed the political economy of pre-colonial Africa, it is important to also briefly put in perspective the character of 'state' boundaries in the early states which emerged from or controlled long distance trade on the continent.

2.4. BOUNDARIES IN PRE-COLONIAL AFRICA

We have just seen that trade was a key factor both in the rise and fall of the early states in the western Sudan and other regions of Africa. Being trade-based, one common feature of all such states was their incorporative character. Although they were usually based on ruling dynasties from one tribe, group or clan, such states held together several clashing social formations and ethnic groups. The very strength of the state was expressed in terms of its capacity to restrain the component communities from clashing so as to allow production and trade to go on in peace.

This concern with military capacity was also a way of dealing with external aggression. The survival of a state depended on its ability to ward off attack from neighbouring states or communities. Its expansion was dependent on its capacity to conquer and subjugate its neighbours.

In a sense therefore it can be said Africa's pre-colonial state formations were conscious of territorial boundaries and the need to protect them from being violated. Infact in some pre-colonial states like the Hausa States of Western Sudan and Rwanda Kingdom in the Interlacustrine zone, policing of frontiers was a crucial function of state.

In the Hausa states like Zazzau and Kano, the boundaries of the City-states were built up with tall walls to prevent infiltration. The walls built by Queen Amina of Zaria still stand today as a monument of pre-colonial civilisation. Another example is that of Rujugira, who was a famous Mwani or head of the Rwanda Kingdom in the 18th century. He is reputed to have put his frontier zones under the exclusive authority of a military commander and to have stationed strong contingents of soldiers there. He also put permanent military camps at strategic places. These practices were similar to the boundary maintenance framework in feudal European societies. Then "marcher provinces", as frontier zones were known at the time, were placed under military law.[13]

In general, the development of medieval empires in Africa seemed to have corresponded in historical time frame with the rise of the regnum or kingdoms in Europe after the fall of the Roman empire. This provides interesting parallels which European historians often choose to ignore. Like in Africa, the common pattern in Europe was for a dominant warrior group to create a 'regna' enclosing several ethnicities. The best examples are those of England and France.[14]

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13 Rodney, W. (1972), *op.cit.*, P.139.

14 Davidson, B. (1992), *op.cit.*, P.92.

Basil Davidson pursues the parallels further in relation to the big political formations South of the Sahara in medieval Africa. He observes that each "state" was the product of an ambitious core people - Soninke in Ghana, Malinke in Mali, Songhai in Songhai, and Kanuri in Kanem, and each was able, just like the Normans in the empire of the Franks or the Germans in the Holy Roman Empire, to enclose a vast area within its rule and to extract from it both tax and tribute--- In Africa as in Europe (and one could of course extend the parallels to Asia) the core peoples of the regna fostered trade and production for commerce, and in due course technological and innovative change and thus new arts and sciences.[15]

This is collaborated by Malcolm Shaw who noted that until about the 14th century, political and social life in Europe revolved around individual and tribal allegiance to a sovereign and to the church. It was only around the middle of that century that communities began to be seen in terms of territorial entities and the notion of a state began to emerge.[16] Specifically, the modern European nation-state system owes its origins to the Peace of Westphalia, 1648.

In Africa however, the regna seemed to have fallen apart at some point in history, notably by about the beginning of the 17th century. It was not until the

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15 *Ibid.*, PP. 93-94.

16 Shaw, M. (1986): Title to Territory in Africa (London: Clarendon Press,) P.2.

18th century that a number of Islamic states again rose to prominence. But by then, European presence had began to affect trade and state formation processes along different lines.

It must however be pointed out that by the international law of this era up to the time of the European colonisation, not even the large muslim states such as the Sokoto Caliphate, the Maasina Caliphate of Hamdullahi in the Niger Valley above Timbuktu or the Futaanke empire of Sheikh Umar Taal were regarded as nation-states on the Westphalian model. The main reason was that all such states lacked the firm, clearly defined territorial base which was the most critical ingredient of international identity and personality in the Westphalian system.

In Africa of the 18th century, the conception of linear boundaries, that is to say political boundaries physically demarcated on the ground was not widespread. The point of course is that most African societies had no need to adopt boundaries in that sense.

However it is preposterous to say that boundaries as such were non-existent in pre-colonial Africa. As one authority has asserted, the very existence of a clan or tribe always includes two ideas, a people and its

land.[17] And as societies became more organized over the centuries, the need to demarcate lines of authority became more and more felt. The examples of the Rwanda Kingdom and Hausa States given above are vivid illustrations. The same was true of the states which arose in different parts of Africa like Bini, Jukun, Ife and Borno. In all such states, the administrative unit was a territorial unit and political rights and obligations were territorially delimited.[18]

Clearly in societies with some form of centralized authority and administrative machinery such as old Ghana, Mali, Songhai, Kanem and the Hausa states, the existence of 'regna' based on ties of allegiance by subordinate entities made it impossible to rule out concepts of territory or of legitimacy related to space, and consequently of frontiers. For example, Professor Stewart recorded one case of a frontier dispute between the Sokoto and Maasina Caliphates in the early 19th century.[19] Therefore it is not entirely true to say that in traditional centralized societies, authority was purely defined by reference to persons rather than territory.

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17 Semple, E.C. (1911) : Influences of the Geographic Environment. (New York : Holt), P.51.

18 Shaw, M. (1986) : Title to Territory in Africa *op.cit.*, P.28.

19 Stewart, J. (1976) Vol.17, Journal of African History, PP.497-514 at 499.

Furthermore, Professor Brownlie argues that agricultural peoples also had a conception of territory and legitimate land holding. He also says that pastoral peoples too had a conception of territory in the form of grazing grounds.[20] Anthony Allot takes the point further. According to him, within a given indigenous community internal boundaries may be necessary to separate the areas of exploitation of neighbouring lineages, villages or other local groups.

He further states:

> My experience has been that in any area where there is no shortage of occupiable land a sort of no-man's land is left between neighbouring communities. As population increases or the demand for exploitable land develops, this no man's land is gradually brought into effective occupation. As and when a more precisely defined boundary of separation is needed, this almost inevitably follows a natural feature, such as a river, though it is by no means always the case that nature has conveniently provided a suitable feature in the right place. Sometimes all that can be done is to define boundaries by imaginary

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20 Brownlie, I. (1979) : African Boundaries - A Legal and Diplomatic Encyclopaedia, *op.cit.*, P.8.

lines drawn between conspicuous objects, such as large rocks or trees.[21]

On the whole therefore, it is clear that although the modern need for precise boundaries did not exist in pre-colonial Africa, this was not necessarily incompatible with the concept of a frontier. The differences between African and European notions of boundary were traceable to the different views of the concept of territory.

Bozeman has said that in both ancient African and later Muslim communities, "territorial consolidation was nowhere a major concern".[22] Therefore African states did not evolve regional rules for defining the territorial and national configuration of political entities. Again in societies that embraced Islam in pre-colonial times, their conception of territory also differed from the modern European paradigm.

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21 Allot, A.: 'Boundaries and the Law in Africa' in Widstrand, C.G. (Ed.)(1969): African Boundary Problems (Uppsala: Scandinavian Institute of African Affairs).p.45

22 *Ibid.*, PP. 10-11.

The International Court of Justice recognized these differences in the conceptions of territory in the WESTERN SAHARA CASE[23] and indeed showed some preparedness to move towards the acceptance of legal particularism in defining the status of pre-colonial territories.[24] At the end of the day however, the court diluted its position by applying the general international law of that period as the framework for determining whether or not particular territories were *terra nullius* and open to occupation.On the basis of the rule of inter-temporal law, this determination was made in the light of the European state practice at that time. We shall examine in the next section how the concept of *terra nullius* became the legal spearhead of European colonisation in the 19th century.

2.5 AFRICA AND EUROPE IN THE PRE-COLONIAL EPOCH

By its proximity to Europe, North Africa was the first part of the continent to come into contact with European culture. Egypt in particular which had an early civilization had always been a vital element in what some historians call the intercommunicating zone in world history.[25] This zone refers to the Afro-Eurasian region where people "were in easiest touch with one another, and hence were able to borrow innovations and achieve a rapid rate of technological change".[26] The Egyptian empire was indeed the heir to the Mesopotamian

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23 (1975) I.C.J. Rep. 68.

24 Shaw, M. (1986), *op.cit.*, PP.28 and 55 to 58.

25 Curtin, P. *et al*: African History, *op.cit.*, P.44.

26 *Ibid.*

civilisation of the Bronze age, which flourished between 3500 and 3000 B.C. The first united Egyptian Kingdom was in place by 3100 B.C. under the famous Pharaohs who built the famous pyramids of sun-dried brick and introduced hieroglyphs as the art of writing. The Pharaonic period lasted until 332 B.C. when Egypt was conquered by the armies of Alexander the Great of Macedonia. Egypt became part of the Roman Empire just before the birth of Christ.[27]

The conquests of Alexander the Great and the creation of the Roman Empire incorporated Egypt, the Maghreb and other parts of North Africa into the wider Hellenic world where a very broad and intense interchange of cultures was taking place. Indeed even before the formation of the Macedonian empire, Greek commerce based on the export of wine and olive oil reached into the western mediterranean and Egypt.

Egypt gradually merged into the Hellenic world in the centuries that followed. By 300 A.D. when the Roman empire provided the articulating framework of the new form of Hellenic synthesis, a large part of Northern Africa fell into the Roman sphere. By 600 A.D. Roman rule and commerce as well as its religion of christianity had spread to Nubia and Ethiopia.[28]

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27 *Ibid.* P.47.

28 *Ibid.*, Chapter 2, Passim.

From the middle of the 7th century, Islam emerged from Arabia as the third heir to the Hellenic synthesis. By the death of the Holy Prophet Muhammad, the founding father of Islam in 632 A.D., the whole of Arabia was under Islamic rule. His successors quickly conquered the whole of the Middle East from Egypt to Persia by 651 A.D. The Ummayad dynasty (named after Umar, the second Khalifa) lasted until 750 A.D. uniting all muslims in a single state, perhaps for the only time in Islamic history.

The muslim drive through the Maghreb changed Africa's relation to the intercommunicating zone. It incorporated all of North Africa into the muslim world. Through it the influence of Islam spread into sub-saharan Africa. In the thousand years between 750 and 1750 A.D. muslim civilization came to the fore as the most successful and creative heir of Roman and Sassanian civilisations. Hence this period is generally referred to in world history as the "Islamic Age".[29]

From this same perspective of world history the period that followed was the "European Age". In this age, Europe replaced Islam as the central turntable of world history. The origins of the shift can be traced to the maritime breakthrough of the late 15th century but it was not until about 1800 that the balance had clearly swung to Europe.

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29 *Ibid.*, Chapter 3, P.75.

The maritime revolution gave Europe the capability of reaching every continent by sea. For the first time this enabled new parts of the world to establish links with the intercommunicating zone. This was true for the Americas as well as the whole west coast of Africa south of the equatorial forest. Of course for Africa north of the forest and all down to the east coast, the Mozambique Channel and beyond, the Islamic world remained the vital link with the inter-communicating zone until well into the 19th century.

The maritime revolution of the 15th century nonetheless profoundly affected all of Africa. Over the short period between 1433 and 1488, Portuguese mariners opened direct access to the West coast of the continent from Tangier to the Cape of Good Hope. Some years later, their rounding of the Cape gave them access to the eastern shore as well. In 1444, the first European reached as far South as the Senegal River and sailed back to Europe.

By 1490, the Portuguese had regular trade relations with the Gold Coast enough to justify building an expensive castle at Elmina in 1481. They had also reached beyond the forest to the Southern Savanna. These explorations were soon followed by sailors from Spain, Britain, France and other maritime powers of Europe.[30]

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30 Curtin, P. *et al*: African History, *op.cit.*, pp.75-76.

In time, an expansive commercial network was developed between African merchants who controlled the inland trade and European traders who remained at coastal points. With enhanced knowledge of African economic geography, the Europeans identified and tapped the sources of gold supply and other African products.

The trade across the Atlantic soon took over the supply of copper and brass from North Africa through the old trans-saharan caravan trade. The impact of this on inland trade was a reversal of the direction of trade flow along the North-South overland routes towards the seashore rather than the desert shore. Along the Gold Coast - Juula trade route alone, more than 410 kilograms of gold were exported by Portuguese merchants yearly between 1500 and 1520.[31] This adversely affected inland states such as Songhai which survived on control of the gold-salt trade on the Sahel fringe.

The reversal of trade flows were even more significant in other regions like in the Senegal valley where the strongest kingdom was the Jollof empire. Portuguese activities at the coast diverted gold from the Bambuhu fields through the Senegal and Gambia Rivers. The resulting wealth of African merchants at the coast precipitated the split between coastal Jollof and metropolitan provinces in the interior.

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31 *Ibid.*, P. 188.

Dr. Walter Rodney[32] has cited a number of cases involving re-orientation of African trade towards Europe in the pre-colonial epoch, from the West African coast to Angola. Notable examples were the Gold Coast (Ghana) and Benin trade prior to the Portuguese arrival in the 1470's; the Maghreb and Mauritania; the Upper Guinea Coast, the famous Kongo trade to the Angolan coast and of course the trans-saharan trade between the Western Sudan and North Africa. He then concluded that:

> The kind of relationship which Africa had with Europe from the very beginning has worked in a direction opposed to integration of local economies. Certain inter-territorial links established on the continent were broken down after the 15th century because of European trade.[33]

It was only in the Central Sudan that the Hausa States and Borno tried to maintain their orientation toward the North. Political power in Hausa land was consolidated around its set of fortified cities. After the rise of Kebbi in the 16th century and the resurgence of Borno under Mai Idris Aloma (1580-1617), the Central Sudan some how managed to keep out of the rising Ottoman empire. By their location, they could also rapidly adjust to the seaward trade through established routes for kolanut and other supplies from Yoruba land, Benin and other forest regions.

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32 Rodney, W. (1972) : How Europe Underdeveloped Africa, *op.cit.*, Note 9, PP.119-123.

33 *Ibid.*, P.123.

However the decisive turning point in the character of intra-African trade was the introduction of the Trans-Atlantic slave trade. Trading in slaves from one part of Africa to another had been part of the intra-African trade for ages. With this in view, when Europeans moved out to establish plantations for sugar production on the American continents, the demand for slave labour naturally turned to Africa.

Just as it was possible to short-circuit the trans-saharan gold trade, it was also possible to divert the trans-saharan slave trade to the coast of the Gulf of Guinea. By the second half of the 15th century, even before an American demand for slaves appeared, Africa was already exporting 500 to 1000 slaves a year to Portugal and the Atlantic Islands.[34]

During the second half of the 16th century, the old centres of production like Madeira, Canary Islands and Sao Tome gave way to production from Brazil and the Caribbean Islands. The British and French soon set up production in Chile, Mexico, Peru and the British mainland colonies of North America. This spread of slave plantations, based largely on improving maritime technology and nascent European capitalism, was reflected in the rising import of slaves.

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34 Curtin, P. *et al* (1978), *op.cit.*, Chapter 7.

From an average import of about 2000 slaves in the 16th century, the figure rose to an annual average of more than 80,000 in the 1780's. This discounted the millions who died in the course of the voyage known as the "Middle Passage".[35]

Thus the striking irony of Africa's history was the fact that maritime contact with Europe which ended the long isolation of large parts of the continent from the intercommunicating zone rapidly led to a situation in which Africa's main export was her own people. The losses of lives and population drain associated with the violence of capture and enslavement, and the dangers enroute from land through the Atlantic did not reflect fully the impact of the slave trade on African societies. This is because the debilitating experiences of the slave traffic and the dehumanizing institutions of plantation slavery are not any measure of 'the might-have-been' if Africa's creative energy had been turned instead to some other end than that of building a commercial system capable of capturing and exporting some eighty thousand people a year."[36]

For the purpose of this work, what is most important in historical terms is the fact that the 'triangular', slave trade destroyed the indigenous commercial system. It replaced long-distance, regional inland trade in locally produced commodities with the trans-Atlantic trade in human beings.

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35 *Ibid.*, P.219.

36 *Ibid.*, P.248.

In contemporary perspective, one enduring consequence of the slave trade identified by African anthropologists, had been the alienation of the 'state' from its citizenry. This in itself partly laid the ground for the colonial dispossession that ensued. The slave-trading African state, as it evolved after about 1650, became dependent for its viability on external sources, mostly the export of slaves and the import of firearms for slave raids or defence against them. From this dimension, such states had been described as protocolonial states.[37]

The internecine wars for slave captives either generated state-sponsored violence or undermined the state's capacity to prevent violence. Thus according to Peter Ekeh:

> the state grew apart from society to a point that citizens sought other forms of self-defence. As the slaving state became increasingly a predator in its sponsorship of the slave trade, kinship ties were strengthened as a means of protection against the violence of the slave trade.[38]

Basil Davidson draws a striking analogy between the predatory character of the slaving state and the post colonial nation-state in Africa. He submits that the latter by its alienation and hostility has also provoked self-defence by kinship

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37 Davidson, B. (1992) : The Blackman's Burden - The Curse of the Nation-State in Africa, *op.cit.*, P.226.

38 Ekeh, P.P. (1990) : "Social Anthropology and Two Contrasting Uses of Tribalism in Africa" in Comparative Studies in Society and History Vol.2, No.4, P.660.

ties, pejoratively termed tribalism. Such ties to some extent account for state subversion and economic crime across state boundaries especially in partitioned culture areas.[39]

The last crucial phase of European contact with Africa is generally referred to as the era of legitimate trade. A number of factors, the most important of which was the European industrial revolution, brought slave trade to a gradual end around the 1890s. The need to obtain raw materials from Africa to feed the new industries in Europe became more significant and profitable than to send human labour to the New World.

The end of the slave trade therefore brought a revolutionary growth of other exports from Africa. Palm oil from West Africa to England alone rose from about 1000 tons a year in 1820 to 30,000 tons a year in the 1850's. This change in the articles of trade reflected purely the requirements of European industrial production. The main items included gum, timber, beeswax, gold, hides and palm oil.

Apart from the ultimate incorporation of Africa into the capitalist commercial system of imperial Europe as a peripheral supplier of raw materials, there were other immediate effects of the new trade. The first was that it

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39. Davidson, B. (1992), *op.cit.*, PP.226-230.

fundamentally altered the commercial demography of Africa still further. Regions which had profited from the slave trade found themselves outside the new trade. The goods being demanded came from new and fewer regions. Slave merchants who did not live near the zones of new production could hardly adjust to the new trade.

Secondly, legitimate trade required more European presence on the coasts than the slave trade had done. This led to the building of numerous trading posts and coastal settlements. The cultural contact that this opened up resulted in the birth of many Afro-Europeans. It also created a small African middle class with European values. Along with recaptives who had either been resettled in the slave colonies of Sierra Leone and Liberia or returned to their ancestral homes, these three groups became instrumental allies in the subsequent Europeanisation and eventual colonisation of Africa.

As the pressure of industrial technology precipitated greater demand for raw materials, European presence continued to enlarge. By the 1820's some informal commercial empires were already in place. This era is sometimes described as that of "free trade imperialism".[40]

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40. Hargreaves, J.D: "The Making of the Boundaries - Focus on West Africa" in Asiwaju, A.I.(ed.); (1984): Partitioned Africans, *op.cit*, p.19.

In summary therefore, the new commerce had several consequences. It shifted income from people and regions who captured slaves to those who had palm oil and other products demanded by Europeans, or those in a position to profit as middle men. The new trade also brought a new dependence on the ports where the Europeans were. This further annihilated inland long distance trade. The immediate upshot was that a web of informal coastal influence gradually stretched inland and provided the cushion for the establishment of formal European rule in the 19th century.[41] The colonial subjugation that followed was therefore the logical culmination of the lopsided relationship between Africa and Europe in the preceding centuries.

2.6 THE COLONIAL PARTITION AND COLONIAL BOUNDARIES

The nature of Africa's contact with Europe from the 15th century through the periods of the slave trade and legitimate commerce slowed down the rate of development on the continent in social, economic and political terms.

Production and trade became directed towards meeting external demands and largely responded to external stimuli. The resulting dependence crippled local industry; disoriented local trade and ultimately stagnated the process of development of social and political institutions. Zealous missionary expeditions and subtle political pressure also facilitated a cultural imperialism that produced

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41. Curtin, P. *et al* (1978), African History, *op.cit.*, PP.376-390.

many influential allies who actively promoted the colonial project when it finally sought to crystallize into formal European rule.

Thus even before the imposition of full colonial government, Africa had come under the shadow of Europe. As at 1884-85 when Europeans sat down in Berlin to balkanise the continent, Africa was already so dissipated and ravaged that it could barely muster a feeble resistance to the colonial onslaught. The technological changes in Europe which created the need to penetrate Africa also created the power to conquer the continent. Africans who fought alien political rule were subdued by superior force.

The decade of the 1880s therefore became a major turning point in African history. The gradual encroachment, economic penetration and religious missions of the previous era gave way to overt territorial acquisition with half a dozen European powers moving rapidly and in some cases brutally, from one territory to the next. This 'scramble' for Africa brought the continent rapidly into the colonial period.[42]

The agreement at the Berlin Conference in 1884 was that effective occupation was to be a condition for recognition of any colonial territorial acquisition. This gave the starting shot for the inward expansion of the relatively

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42. Curtin, P. *et al* (1982) *Ibid*, P.444.

small coastal colonies maintained by most European powers. In West Africa, France moved eastwards from Senegal, Northeast from Conakry, and Northwards from Abidjan and Porto Novo. Britain followed the Gambia River from Bathurst on the coast; they expanded from Sierra Leone and the Gold Coast and British companies moved up North from the Gulf of Guinea. Germany on her part created Togoland from a narrow coastal strip.

In central Africa, the target for the race seemed to be Lake Chad. The French came from the west and south from the Northern banks of the Congo River. The British extended present Nigeria to the Northeast and the Germans stretched Cameroon up to the Lake.

In East Africa, the Germans expanded from the coast to Lake Tanganyika and Lake Victoria to constitute German East Africa. The British created theirs to the North, together with the protectorate of Uganda.[43]

The first major amendment to the system of colonial frontiers was brought about by the First World War. After the defeat of the Axis powers, territories formerly under German rule were transferred to Mandates under the League of Nations. The map of Africa, emerging from this process, showed a large French area in West and Central (or Equatorial) Africa, with a few British intrusions here

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43. Svendsen, K.E. (1969) : "The Economics of the Boundaries in West Central and East Africa" in Widstrand, C.G. (Ed.): African Boundaries Problems; *op.cit.*, PP.34-35.

and there. Belgium ruled over the vast Congo Colony while Britain controlled the three East African territories.

The nature of the European partition of Africa tells a lot about its consequences on the character of the emergent nation-states which succeeded to the colonial territorial apportionments.[44] At the Berlin Conference, the European powers, via an intricate diplomatic charade, arbitrarily marked off the African map and agreed among themselves which power should be allowed to claim and then to acquire various parts of Africa.

The paper division was completed by about 1900. The process of demarcating territories however went on until 1914 and even after 1945 when German territories in Africa were redistributed to the victorious allies.

Following the conference, there was rapid expansion of 'jurisdictional imperialism' through the elastic device of the protectorate.[45] This nebulous legal concept became a popular device because it seemed to create rights over territory which other European states could recognise. It was also thought to be less shocking to African sensibilities of sovereignty. As a result, many of the early partition treaties only sought to establish protective arrangements or to allocate

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44. This is fully dealt with in Chapter 3.

45. Hargreaves, J.D (1984), *op.cit*, p.21.

fiscal resources and responsibility for maritime police. But the fiction of a protectorate depended on the consent of African rulers. This has raised difficult questions relating to title to state territory in Africa which will be dealt with in the next subsection.

The point of interest here is that the so-called protectorate agreements with African rulers helped many colonial governors to expand the frontiers of their political power and colonial empires. Such protectorate building and the accompanying boundary making in the period of the partition took place in circumstances which inhibited reference to rational considerations.

European diplomatic bargaining led to the construction of parcels of territory upon broad principles, evidenced graphically by liberal resort to straight lines and general features such as drainage basins and watersheds. The accidents of prior exploration and military penetration for example influenced the delimitation as between Britain, France and Germany more seriously than ethnological or indigenous cultural considerations.

Some American historians[46] have demonstrated how this combination of factors fashioned the map of present day West Africa. They note that France took the initiative in this region by the conquest of the Futanke State of Sheikh Umar

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46. Curtin, P.; *et al op.cit.*, Ch.15.

Taal. She then embarked on a west to east process of acquisition from Senegal. They observe that:

> Both the French initiative and the West-East direction of conquest are symbolically portrayed on the present-day map of West Africa. The British colonies in the far West - The Gambia and Sierra-Leone --- lost most of the hinterland trade area they had once served. Because there was more time for the French push to alarm British authorities at the center, Liberia and British coastal posts further east had more time to protect themselves. As a result, each non-French enclave in West Africa kept a larger hinterland in proportion to its distance from the West; thus, Sierra Leone's was larger than Gambia's, Liberia's larger than Sierra Leone's the Gold Coast's larger still, and Nigeria's largest of all.[47]

Two points of importance deserve emphasis here. The first is that this division of territory while generally serving the export production objectives of the colonial economy well enough were in some cases most inconvenient even in the colonial context. For example, the Gambian colony was often a nuisance to the French. The interior of Guinea and the whole of Upper Volta (present-day Burkina Faso) had to circumvent British territory to get to the sea.[48]

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47. *Ibid.*, at P.456.

48. Svendsen, K.Z. (1969) in Widstrand, C.G. (ed.) : African Boundary Problems, *op.cit.*, P.35.

Secondly, the colonial spheres thus created rarely corresponded to the territorial spaces within which Africans carried on their activities. An early example of this was the Anglo-French division of the Northern rivers of Sierra Leone. An agreement of 1882 allocated the basin of the Mellacouric to France, that of the Scaries to Britain.

This division bisected not only Samu Chiefdom but also the commercial, religious and political unities of a wider historical arena within what has been termed the "Sierra Leone - Guinea system".[49] It also destroyed established African trade routes and instituted customs on either side. These disruptions created serious problems of future government in the region on both sides which could have been avoided by some wider arrangement or at least more neighbourly co-operation. But by the time the disadvantages of the line became manifest, interests and attitudes had hardened. Thus any substantial revision of previous agreements proved beyond the range of European statecraft.[50]

By 1889, the colonial powers formally agreed to replace the system of free trade imperialism with one involving fixed colonial boundaries. Britain and France, for example, by virtue of an "Arrangement" of 10 August 1889 agreed on lines which would keep them apart in four areas of colonial conflict. From a

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49. Hargreaves, J.D. (1984), *op.cit.*, Note 49, P.21.
50. *Ibid.*

metropolitan viewpoint, it seemed to be irrelevant where the lines were fixed. It was better, they agreed, to have any line than to have no line.

Two alternatives were considered in the process. One was a crude carve up of the regions into two with both sides exchanging settlements on the other side. The second one was to fragment the regions to reflect the bits and pieces of British and French interests. The rivalries of that time were resolved in favour of the latter approach. This then made it necessary to draw many boundaries.

An Anglo-French Commission of diplomats and colonial experts had to be constituted for the purpose. Commenting on the task of the commission, one of its members, Lord Salisbury observed:

> We have been engaged in drawing lines upon maps where no man's feet have ever trod; we have been giving away mountains and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and lakes were.[51]

This loudly attests to the fact that inspite of the explorations and expeditions of many years, European knowledge of both the physical and human

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51. Speech by Lord Salisbury; 6 August 1890; reported in The Times 7 August, 1890.

geography of Africa was still insufficient at the time of the partition. Ignorance and intransigence among colonial experts and negotiators led them to choose a combination of natural features and of lines of latitude and longitude capable of objective survey.

The problem was further compounded by the fact that European 'experts' were not persuaded to follow existing African frontiers. Their major reason was that well defined territorial sovereignty had not become the general rule in Africa. As one colonial memorandum put it: "The tribes themselves have as a rule no idea of territorial limits; their locations are constantly changing, and there often exist small tribes between the large ones which owe allegiance to the one and sometimes to the other.[52]

In the case of France, for example, the official policy was that rather than follow the boundaries of states whose rulers might not be able to describe them precisely, it was preferable to allocate territory along natural features. But even the use of topographic features sometimes created its own difficulties.

A classic illustration was the case of the Rio del Rey accepted as the river through which the southernmost part of the Nigeria - Cameroun boundary was to

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52. F.O. 84/1899, Memo by Lake and Darwin (M.I.D) 16 July, 1889.

be drawn in the Anglo-German Exchange of Notes, April-June, 1885[53] and the Agreement of 14 April, 1893.[54] It turned out that the Rio del Rey was not a river but a large estuary receiving several small streams into the Sea.[55] This error forced the colonial powers to renegotiate the boundary severally which culminated in the controversial treaty of 1913. The boundary alignment in that sector still remains a source of dispute and friction between Nigeria and Cameroun.

This leads to the second question as to why colonial frontiers ignored ethnological considerations and traditional polities? Except in a few cases such as the Northern and Western boundaries of Nigeria where colonial authorities tried to build upon traditional political structures, these factors were generally not given much weight.

Among other reasons advanced by Professor Ian Brownlie[56], these colonial attitudes can be explained on the basis that pre-colonial territorial alignments were not clearly demarcated with the precision required by the conditions of colonial territorial competition and concepts of administration. At the end, from whatever perspective these boundaries are examined, the bottom

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53. Vol. 76 British and Foreign State Papers (B.F.S.P.), P.772; Hertslet, E. (1976) : Map of Africa by Treaty,Vol.III, 3rd ed., P.868.

54. 85 BFSP, 38; Hertslet, *Ibid.*, P.910.

55. Anene, J.C. (1970) : The International Boundaries of Nigeria (London: Longman), Chapter 3.

56. Brownlie, I. (1979) : African Boundaries - A Legal and Diplomatic Encyclopaedia, *op.cit.*, P.8.

line is that they were at once superimposed, largely geometrical and therefore arbitrary and artificial.

Admittedly they were superimposed even in the literal sense that the demarcations were decided by external powers without input or regard to the peoples being divided. More fundamentally however, they were superimposed in the wider sense that they were drawn after Africa's cultural landscape had crystallized but without much regard for the pre-existing cultural frontiers. In most cases, geometrical constructions simply ran through the centres of living communities.

The colonial boundaries are also said to be geometrical in the sense that they were drawn:

> In terms of straight lines, meridians of longitude, parallels of latitude, areas of a circle or lines parallel to or equidistant from a coast or a river. They are without exception artificial boundaries, and as geometrical lines they may prove difficult to describe precisely. For geometrical lines on flat maps may have very

> different properties from lines through
>
> corresponding points on the earth's surface."[57]

According to Barbour, approximately 44% of the boundary mileage in Africa was defined according to parallels and meridians, 30% by straight lines, arcs of circles and so on; and the remaining 26% by reference to topographical features such as rivers, streams, watersheds, mountains and valleys.[58]

Thus in terms of the traditional classification into natural and artificial boundaries, nearly all African boundaries inherited from the colonial partition are artificial. However in a sense all boundaries anywhere are artificial creations in that they are man-made. As has been rightly explained:

> All boundaries are human creation, although many boundary lines follow landmarks or physical features, none could be described as natural. It is not natural to divide drainage basins, dissect common plains, split mountain ranges, or divide up surface and

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57. Cukwurah, A.I. (1967) : The Settlement of Boundary Disputes in International Law (Manchester University Press), PP.22-23.

58. Barbour : "A Geographical Analysis of Boundaries in Inter-Tropical Africa" in Barbour & Prothero (ed.), 1961, Essays in African Populations, P.305.

underground water resources (and even partition the air space). Yet this is precisely what boundary lines do."[59]

Thus it is correct to say that in reality, all boundaries are artificial in that they are established by persons and as Professor Yakubu says are more imaginary than real. It is just that some coincide with geographic or ethnic divisions and others do not.[60] Yet the fact remains that nowhere else is this artificiality more loudly proclaimed than in Africa.

Africa possesses the greatest total length of land boundaries of any continent, because relative to its landmass, it is the most politically divided continent. Most African states like Nigeria have borders with at least four or five other states. Others like Niger have borders with seven other states; Sudan has with eight and Zaire with nine.[61]

In itself the artificial character of Africa's superimposed and geometrical boundaries meant that they were at variance with the boundaries of existing settlements as well as the established patterns of political and economic organization. Jean Suret - Canale,[62] a leading Guinean historian captures the picture clearly in relation to Guinea (Conakry) when he said:

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59. See International Boundaries: Man-Made Lines that Divide the World, Geographical Magazine, June 1990, P.10. See also Asiwaju: Artificial Boundaries, University of Lagos Inaugural Lecture, 1984.

60. Shaw, M. (1986), *op.cit.*, P.224.

61. *Ibid.*, P.229.

62. Suret-Canale, J. (1970) : La Republique de Guinee, P.13 Quoted in B. Davidson (1992) : *op.cit.*, P.203.

> Like most frontiers in Africa, those inherited by Guinea from the colonial partition are completely arbitrary. They do not reflect the limits of natural regions, nor the limits of separate ethnic groups.

Recent studies have confirmed that the French administrative divisions that metamorphosed into post-colonial nation-states were so arbitrary that in the case of Guinea (Conakry), it shares common cultural groups partitioned into two separate states with all seven of its neighbours.

Between Guinea (Conakry) and Guinea Bissau, the boundaries put the Bambaraca, called the Baydyaranke in Guinea (Conakry), on opposite sides of their international boundaries. The Mandinka and Tchien are split between that country and Cote D'Ivoire. The Tukulor, Dioula and Maijak are to be commonly found in both Guinea and Senegal. Similarly the Mende, Susu and Baga ethnic groups are to be found in both modern Guinea and Sierra Leone. To the North, Guinea shares the Bambara ethnic group with Mali.

Some of these ethnic groups are even spread through more than two states. An example is the Juula (French : Dyoula) who can be found in Ghana, Cote D'Ivoire, Guinea Bissau and Senegal. Apart from being in Guinea (Conakry) and Sierra Leone, the Mende are also found in Cote D'Ivoire and Liberia. Some other groups such as the Fulani and Hausa are so widely spread as to be found virtually

in all of West Africa and even parts of Central Africa.[63]

The continental extent of this phenomenon was fully reflected in Professor Asiwaju's checklist of partitioned culture areas in Africa. He identified 103 of such cases in the continent-wide study. This number roughly corresponds with about the same number of international boundaries in Africa.[64]

For the purpose of this work, one point which must be emphasized is that many of these partitioned groups like the Juula and Hausa were important agents of long distance trade before the contact with Europe. The disorientation of these patterns of internal trade and the networks of intra-regional commerce by trade with Europe was to be finally completed by the colonial partition. This fact will be vividly brought out in our discussion of colonial boundaries and economic policy in the next section.

2.7 COLONIAL BOUNDARIES AND ECONOMIC POLICY

Once the boundaries between the colonial powers were provisionally agreed upon each moved quickly to erect customs walls and to institute preferential or discriminatory tariffs as well as other barriers to trade, migration and political association.

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63. Davidson, B. (1992), *Ibid.*, PP.205-206.

64. Asiwaju, A.I. (ed.) (1984) : Partitioned Africans - Ethnic Relations Across Africa's International Boundaries 1884-1984, *op.cit.* PP.252-259.

This tightening of colonial grip on partitioned territories easily affected economic and social interaction across the boundaries. Erstwhile homogenous communities found themselves split into two separate territorial units. Neighbouring Africans or even blood relations speaking the same language found themselves subjected to different languages and doctrines in school and colonial administration. It was within the borders established by colonial territorial apportionments that the culture, institutions and technology of the several European powers made their impact during the 20th Century.

The different educational systems and cultural orientation on opposite sides of colonial frontiers tended to accentuate the centrifugal forces which further divided homogenous pre-colonial communities.

For the purpose of this work however, it was colonial economic policy regarding internal and external trade that had the most critical impact. It finally nailed the coffin of free inter-territorial trade relations which existed in pre-colonial Africa and which had been earlier disrupted by the contact with Europe and in particular by the slave trade.

The end product of the colonial division of territory was to cut up Africa into narrow strips of territory usually running from the coast into the hinterland. The land locked colonial territories could have access to the coast only through

contiguous territory owned by the same colonial power. Thus exports from Niger were passed through Dahomey (now Republic of Benin) rather than the shorter route through Nigeria.

European economic interests revolved around production for export. These required that communication networks should be directed towards the coast. Rail and road connections were only designed to link production centres in the interior with the coast. An excellent example of this phenomenon is the case of the Nigerian rail network, which only runs from east to north and west to north.

The rail lines passed through the east, which produced palm oil and palm kernels, to the north where cotton, groundnuts and hides and skin were obtained. The west was rich in cocoa, and so both lines terminated at the main ports of Lagos and Port-Harcourt from where the raw materials were shipped to Liverpool and other British industrial cities. In consequence there are no lines taking the west to the east nor the north west to the north east. In the few cases where the lines were extended, such as from Kafanchan to Jos or Zaria to Kaura Namoda, they were abruptly terminated at the fringes of the production belt of a major mineral or industrial raw material.

Thus colonial infrastructure and administrative organisation emphasized territorial inclusiveness. The principal reason was to secure a monopoly over internal and external trade over such territory, which could then be exclusively exploited as a source of raw materials and as a market for industrial goods from the metropolitan power. For this purpose, local or territorial economies were not encouraged as a matter of deliberate policy even within the same colonial territories. Each area was independently stimulated to respond to the colonial division of labour and specialisation.

The key component of colonial economic policy was the establishment of customs and border posts on opposite sides of inter-colonial boundaries as well as the institution of tariffs, fiscal and monetary restrictions to control economic intercourse across the boundaries. These steps had the far-reaching effect of transforming the boundaries into effective political and economic dividing lines.

This point is well illustrated by the case of the Nigeria - Benin borders. This boundary is traceable to the Anglo-French Agreement of 10 August 1889 and the subsequent Protocol of 14 June 1898. Most of its course was the direct result of the imperialistic rivalry between Britain and France beginning on the Atlantic Coast in the early 1860s. The British moved into the hinterland through Lagos and Badagry while the French expanded from their coastal settlement at Porto Nuovo.

The boundary between what came to be the British colony and Protectorate of Nigeria to the east and the French West African colony of Dahomey to the West was physically demarcated by a series of Anglo-French Boundary Commissions in 1895-96; 1906 and 1912. Based on the comprehensive boundary agreement of 14 October 1906, boundary markers and pillars were erected and customs posts established by authorities on both sides between that year and 1912.

Professor A.I. Asiwaju in examining the partitioning effect of the Nigeria-Benin border on the indigenous cultural landscape identified three "concentric ecumenes" situated in the areas through which the boundary was drawn.[65]

The first were communities having identical culture, kinship ties and political organisation which were bifurcated by the boundary line when it came to be physically demarcated. An example of these was the Gun sub-group of the Aja-speaking peoples in Badagry (Nigeria) and Porto Nuovo (Benin).

The second example was that of the Yoruba-speaking groups such as the Awori in Ado-Odo (Nigeria) and Itakete (Benin); the Ifonyin in Ifonyintedo (Nigeria) and Ifonyinle (Benin). Other Yoruba sub-groups placed on opposite sides of the border were the Ohori, the Ketu and the Sabe.

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65. Asiwaju, A.I. (1986): Problem Solving Along African Borders: The Nigeria-Benin Case since 1889" in Martinez, O.J.(ed); **Across Boundaries; Transborder Interaction in Comparative Perspective** (The University of Texas at Elpaso: The Center for Inter-American and Border studies) p.159.

The third instance was the Borgu Kingdom of Nikki. This was split into two by the boundary such that Nikki, the capital was placed in Benin while the rest of the traditional state, including Yashikera, Kaima, Okuta and Ilesa was situated in what became the Nigerian side of the border.

The second level of the 'concentric ecumenes' is represented by the links between the specific communities directly affected by the boundaries and the wider adjacent cultural areas such as the Aja, the Yoruba and the Borgu. For example, the Gun sub-group which was directly split by the boundary were linguistically, culturally and historically linked to the other Aja-speaking peoples to their east, west and north west such as the Wenenou and Fon. Similarly the Western Yoruba subgroups astride the border share a sense of community with the rest of the Yoruba culture area in present-day Lagos, Ogun Oyo, Osun, Ondo and Kwara states of Nigeria to the east; and the more westernly sub-groups such as the Jaluku, Mayibiri, Ana and Fe in the middle latitudes of Benin and Togo Republics.

Thirdly, these wider culture areas also had complex and numerous cultural and historical affinities which in turn operated within even wider ecumenes. These presumably included Nupe land to the north; the Edo-speaking peoples to the east; and the Ewe of Southern Togo and Ghana.[66]

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66. *Ibid.*, at p.166.

This level of ethnic coherence as well as economic and social interlock in these areas is important to an understanding of the border in question. The key issue is that the interlink between Badagry and Porto Nuovo and between them and the Aja-Yoruba-Borgu interior has continued to militate against the barrier functions of the Nigeria-Benin border. The Nigeria Police Force once publicly expressed its incapacitation in handling the theft and smuggling of vehicles across the boundaries and acknowledged the need to enlist assistance from elsewhere.[67]

The same is true of other sections of Nigeria's international boundaries as a seminal study of the subject by the National Institute for Policy ans Strategic Studies (1988) empirically demonstrated.[68]

Social and economic intercourse between the people on opposite sides of the colonial boundaries continued unabated throughout the period of colonial rule. The fundamental reason was that movement of people and goods across the boundaries was simply inevitable. This was so because the lines split not just cultural entities but also closely knit kinship groups anal economic units including farmlands, fishing rights in riverine areas and trade.

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67. See Daily Times (Midweek Magazine); Seme to Cotonou ...Haven for smugglers; Wednesday, June 2; 1993 at p.79

68. NIPSS Studies on Nigeria's International Borders, Vols. 1-5, (NIPSS: 1988) Also see Chapters 6 and 7, infra.

The phenomenon of smuggling therefore naturally evolved as a form of local response to the divisive character of the new boundaries. The temptation to smuggle was made evermore irresistible by the development of two distinct market conditions on both sides, ranging from the variety of goods available to the different prices obtainable, as one crossed from one side to the other.

These flows of unregistered and traditional trade persist to date and are discussed in chapter 3 as factors necessitating economic integration in Africa. Inspite of harsh and repressive government counter measures, smuggling continues to thrive across all inter-state boundaries in Africa especially where the inhabitants on both sides of the boundaries lived in homogenous economic and cultural 'ecumenes' before the artificial colonial divisions were imposed. In the case of Nigeria - Benin, Nigeria - Niger and the rest of West Africa, it is estimated that smuggling accounts for two thirds of intra-regional trade and trade between each country and another.[69]

In the colonial era, these tendencies compelled European colonial powers in adjacent territories to abandon their policies of mutual isolation and competition to communicate with each other with regard to common problems and interests. Cooperation was particularly essential in dealing with political agitations, armed revolts, protest migrations and smuggling.

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69. Federal Radio Corporation of Nigeria, FRCN Network News Analysis, October 27, 1993.

Furthermore in order to minimize costs and administrative inconvenience, the colonial powers worked out strong inter-territorial links within their areas of authority. For example in 1895 France established regional governments for French West Africa (AOF) and French Equatorial Africa (AEF). These made the colonies, both de facto and de jure, an integral part of the French Union, to the extent of having seats in the French Parliament. Within that framework, French West Africa had a common currency, a customs union and a range of common services.

In effect, these integrated the economies of the colonies especially in relation to France. Many of these ties have survived the independence of such states from the French colonial empire. To date, they remain closely tied to each other and collectively to France.

In the case of British West Africa, no such close paternal ties with the colonial power were established. Nonetheless a number of common services including a common Court of Appeal, Central Bank, Produce Control Board etc were set up. In East Africa, the level of economic integration achieved was even much higher.

Most of these joint institutions collapsed shortly after independence, although a few gains still survive. The free movement regime in French-speaking West Africa is a case in point. In the next chapter, we will discuss how these forces of integration and disintegration crystallised into the structural fragmentation that represents Africa's challenge to development.

CHAPTER THREE

AFRICAN BOUNDARIES AND ECONOMIC RELATIONS AFTER INDEPENDENCE

3.1 INTRODUCTION

The preceding chapter demonstrated how the European partition of Africa ignored the dynamic and fluid character of pre-colonial boundaries and the cultural landscape of the continent in favour of arbitrary and artificial boundary lines. It also showed that such arbitrary lines divided erstwhile homogenous communities or "concentric ecumenes", placing them under different colonial administrations whose divergent policies produced disequilibria that were exploited or resisted by people living around the borderlands.

In this chapter, we shall look at the legal context for the transformation of the colonial boundaries into nation-state boundaries in post-colonial Africa. Today all of the African continent is free from colonial rule. The dawn of independence from the late 1950's and 60's saw the emergence of a series of sovereign nation-states on the continent. Each of them gained the status of a politically independent country.

Relative to its landmass, Africa thus became the most politically divided of the continents, with over 50 independent countries. Many of them like Mali, Sudan, Niger and Chad are large and small at the same time: large in area; small

in population and total income. Some like Rwanda, The Gambia and Swaziland have populations of less than five million. Knud Svendsen calls them "micro-states".

Independence radically changed the legal character of the boundaries. The old colonial territories became sovereign states enjoying the full attributes of territorial sovereignty and sovereign equality. The boundaries thereby became divisions of nation-state sovereignties on the European, Westphalian model.

In economic terms, the boundaries became a new and deeper division of economic space and so became stronger obstacles to the existing flows of trade and economic intercourse. Even the established flows of cattle, fish and food products, generally termed traditional trade, were to be suppressed by protectionist national economic policies.

The further disruption of inter-territorial trade after independence created grave problems for some countries. Senegal for example had served as the administrative and industrial nerve centre of French West Africa only to find herself suddenly cut off from the free access to her former markets after independence.

Furthermore, in political and legal terms, independence created new nations and new formal status on all Africans as citizens of one state or another, as circumscribed by the new international boundaries. The rules of international law relating to nationality or citizenship allow a state to treat its own people differently from foreigners. In Africa, such new concepts affected the long-standing patterns of labour migration and intra-regional trade.

Thus, the colonially constructed nation-state remains the single most important heritage of imperialism in Africa. The zealous attachment to newly acquired notions of state sovereignty impel post-colonial states to rigidly enforce their boundaries as limits of state jurisdiction. This has generally imperilled economic co-operation in the post-independence era as national policies emphasise territorial inclusiveness and mutual isolation by central governments of neighbouring states. Diplomatic intercourse is recognised as the sole channel of communication between the states. Unofficial relations or transactions across the borders are subject to strict controls by the relevant authorities.

This chapter will examine the legal basis upon which the boundaries which separate African countries were created and the political and legal framework which sustains them in post-colonial Africa. The chapter will also undertake a functional analysis of how these boundaries have actually worked in the real world; that is to say how effective they have been as lines of division or exclusion.

3.2 MODERN INTERNATIONAL BOUNDARIES IN AFRICA

3.2.1 THE CREATION OF COLONIAL BOUNDARIES

In international law, modern African states are successors to the colonial entities created by the European partition. Legally therefore, they must trace the root of title to their territory to the European acquisition of Africa.

As Malcolm Shaw[1] had shown, the whole episode of the scramble for Africa was cloaked with the aura of legality. The reason for this was that colonial territorial acquisition played an important role in the process of maintaining Europe's uneasy balance of power in the early 19th century. Therefore, particular care seemed to have been taken in preserving legal form and conforming with the principles of international negotiation and treaty-making of that era.

Thus, it is of more than historic value to briefly examine here, the main modes of acquisition used by Europeans with regard to African territories. These ranged from protectorate agreements to treaties of cession with local rulers. The boundaries, on their part, were defined in treaties with other European powers. These sets of treaties or agreements remain the legal instruments for the delimitation of a majority of African international boundaries.

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1. Shaw, M.N. (1986): Title to Territory in Africa *op.cit.*, PP.29-30.

Two main legal questions are raised with respect to the status and validity of colonial agreements for the European acquisition of territory. The first is whether African territories were capable of acquisition by occupation, conquest or otherwise as the Europeans purported to do. In international law, the issue is whether or not African territories were *terra nullius*?[2]

The issue has been subject of much controversy in view of the fact that most of such African territories were inhabited by people with recognisable political and social organisation. The possibility of acquisition by occupation of territory possessed by organised peoples was discounted by many of the founding fathers of international law, notably Vitoria, Soto, La Casas, Ayala, Gentilis, Selden and Grotius. Other early jurists like Vattel argued that the land of such peoples could only be acquired by occupation if such land was in excess of the needs of the indigenous population.

A later approach, fostered by 19th century positivism, propounded the view that the organised peoples of non-European lands had no sovereign rights or title, and were only factually but not legally in occupation of their territory. This meant that such territory could be acquired as *terra nullius*. This view was supported by Westlake, Oppenheim and Jennings.[3]

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2. *Ibid.*, P. 31.
3. *Ibid.*, P.32.

This approach was criticised by Ambassador Bedjaoui of Algeria in the WESTERN SAHARA CASE[4] as constituting:

> the basis for all the imperialisms and all the phenomena of oppression in the history of civilisation. It was a device which involved the 'thingification' of numerous peoples since it divorced them from the process of territorial sovereignty.

The positivist position is also insupportable theoretically because it involves a misapplication and deliberate perversion of the pure concept of *terra nullius* in international law which was limited to uninhabited areas like polar regions, deserts or new islands.

Lastly and more importantly, it should be pointed out that a perusal of sate practice of that period reveals that Africa was not regarded as *terra nullius*. Territory was mostly acquired by means of agreements or treaties with local rulers. In the WESTERN SAHARA CASE, the International Court of Justice dismissed the notion of Africa as *terra nullius* and gave more weight to the protectorate or cession agreements. The court elevated them from mere 'trinket' or 'glass-bead' agreements to documents of legal significance and central character in the acquisition of sovereignty over colonial territory. According to Judge Dillard, the establishment of protectorates based upon agreements negated

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4. (1975) I.C.J. Rep. 68 at 78.

the possibility of a *terra nullius* situation because one cannot protect a *terra nullius*.[5]

The second legal question often raised in relation to protectorate or cession agreements is their validity in view of the lack of contractual capacity on the part of the non-European parties. Did the territories have international legal personality to conclude treaties? Did the rulers have the understanding to make binding commitments on their people?

Again, these are open questions on which modern opinion leans in favour of recognising legal capacity of non-European entities of that era to execute international transactions. At any rate, there has been little doubt that they possessed title to their land which they could validly alienate. So far as the local rulers were concerned, the only known rule was that they must have appreciated the nature of the transaction involved, although such agreements were not to be rendered invalid only because they were secured non-voluntarily.

Thus on the whole, it is safe to say that most African colonial entities were created by a series of cession treaties or protectorate agreements with local rulers. These entities in turn emerged as independent nation-states. Indeed since independence, only few boundary adjustments have been made. Although the

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5. *Ibid.*, at P.134.

spectre of border disputes still persists, the map of Africa has remained very much as settled by the colonial powers in the 19th century.

Basically the official policy on boundaries enunciated by the Organisation of African Unity in 1964 has been one of maintaining the *status quo* as at the time of independence. This has been equated to the Latin American policy of *uti possidetis juris*[6] by which the ex-Spanish colonies inherited their boundaries without modification. These policies are also said to be in accord with the doctrines of continuity, stability and finality of boundaries at customary international law which are presently reflected in the Vienna Conventions on State Succession and Treaties.[7]

We shall first consider the general international law relating to state boundaries before looking at the jurisprudence on African boundaries.

3.2.2 STATE BOUNDARIES IN INTERNATIONAL LAW

By definition, the concept of a state at international law assumes the existence of a permanent population on a defined territory, in addition to a government and capacity to enter into relations with other states. Article 1 of the

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6. Cairo Resolution, 1964 in Touval, S.(1967): International Organisations, Vol.21, P.102.
7. See FRONTIER DISPUTE BETWEEN BURKINA FASO AND MALI, (1986) ICJ Rep. 554.

Montevideo Convention on the Rights and Duties of States, 1933[8] lists a defined territory as a qualification of a state as a person of international law. The Convention reflects the general requirements of statehood at international law.

Within this doctrinal mould, a state is an international person irrespective of composition or size. The dominant criterion of statehood is that of territorial effectiveness which is underlaid by the concepts of sovereignty, independence and equality. Since title to territory is a fundamental prerequisite for statehood, the question arises as to when and how African countries acquired the title to their own post-independence territories. At traditional international law, until a new state was created, it would be incompetent to hold legal title. This, according to Shaw demonstrated a gap in legal theory for which the classical modes of acquisition of territory such as cession, occupation, conquest or accretion were unhelpful "since they are predicated upon activity by a particular subject of international law and in any case fail to explain the factual circumstances involved."[9]

The major legal theory that has been applied to solve the problem of title to territory in post-colonial Africa is the doctrine of state succession which some writers refer to as quasi-cession or quasi-prescription. These doctrines rest upon

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8. See TEMPLE OF PREAH VIHEAR (MERITS) 1962 I.C.J. Rep.61 HELSINKI FINAL ACT, 1975 (14 I.L.M. 1292); CONVENTION ON THE LAW OF TREATIES 1969 (ART. 62); CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES, 1978.

9. Shaw, M.N., Op.Cit., P.168.

the proposition that in non-self-governing territories, sovereignty vests in the administering power which then transfers title to the people or representatives of the emerging state.

In contemporary international law, the doctrine of succession is treated as an aspect of the wider principle of continuity of boundaries. Many of the fundamental principles of international law are predicated upon the concept of the territorial exclusivity of the state which is the major attribute of the Westphalian system of international relations.[10] From a Westphalian point of view, international law came to rest on the exclusive authority of the state within a given territorial framework. It is the state's boundaries that define that framework. Hence we shall first look at the legal nature of international boundaries.

(a) EVOLUTION AND LEGAL NATURE OF STATE BOUNDARIES

As we have said earlier, the notion of strict linear boundaries demarcating human communities first evolved in Europe under the Treaties of Westphalia, 1648. Before then, political and social life revolved around individual and tribal allegiance to a sovereign and to the church. And it took several centuries for the concept of the nation-state to mature as reflected in the Wilsonian settlement of 1919 after the first World War that produced 27 nation-states in Europe, with

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10. See 1970 Declaration on Principles of International Law.

more to come later. Indeed nation-states have continued to rise disappear and re-emerge in all parts of the world including Europe.

It seems therefore that even in Europe, the nation-state as we know it today is a relatively recent form of political and international organisation. It achieved its highest acceptability and reification in the 19th century when the concept was also exported to other parts of the world, including Africa. When the colonies emerged from colonialism, they adopted the nation-state concept along with the associated rules relating to state boundaries.[11]

The notion of a boundary is closely connected with the legal concepts of territory and territorial sovereignty. The very basis of the Westphalian international legal order is the concept of sovereign territorial states. In the ISLAND OF PALMAS CASE, Max Huber captured this in the following words:

> Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called national frontiers as recognised by international law or by outward signs of delimitation that are undisputed or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by

11. Allan, J.A. (1990) in Boschorner, S. & Ors (Ed.); Sovereignty Territoriality and International Boundaries in South, Asia, South West Asia and the Mediterranean Basin, (London: School of Oriental and African Studies) 12.

acts of recognition of states within fixed boundaries.[12]

This means that the international law rules concerning state boundaries cannot be perceived in isolation of the rules grounding the acquisition of title to territory or those grounding territorial sovereignty.[13]

Adami therefore defines state boundary to mean "that line which marks the limits of the region within which the state can exercise its own sovereign rights".[14] This is to say that boundaries mark the limitation of state sovereignties. They demarcate state jurisdictions and thus profoundly influence the regime, nationality and culture of the inhabitants of the area.[15] This makes the notion and existence of boundaries to be closely allied with the concept of territorial integrity.

Boundaries constitute the limits of the exercise of sovereignty although the actions relating to the establishment of boundaries are themselves acts of sovereignty by the states concerned. The protection of the inviolability of boundaries is therefore a matter of great importance in the international system, and is linked to the principle of territorial integrity.

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12. The Island of Palmas (Miangas) Arbitration 1928, in Briggs, H.W. (1952) The Law of Nations, PP.239-247 at P.239.

13. O. Cukwurah: (1994) "State Boundaries and International Law" (1994) Paper presented at the Nigerian Society of International Law Silver Jubilee Anniversary Conference at NIIA, Lagos, (Typescript, P.4).

14. Adami (1919): National Frontiers in Relation to International Law, Translated by Lt. Col. T.T. Behrens, London, P.3.

15. Shaw, M.: *op.cit.*, P.221.

of territorial integrity and inviolability of frontiers. Although a violation of a frontier may often also involve a violation of the territorial integrity of a state, the conceptual difference lies in the fact that not every border violation constitutes a violation of territorial integrity.

The fundamental difference between territory and frontier is that the former expresses the physical basis of the state and manifests its identity within the international community whereas the latter only marks the extent of that physical expression of the state. The inviolability of frontiers is no more than a concretisation of the concept of territorial integrity and is thus only one aspect of that broader concept.

For clarity of discussion it would also be necessary to define some of the terms or words used in connection with boundaries in international law. From existing literature, it is apparent that the terminologies - boundary, frontier and border - have at times been used interchangeably. And the dictionary meaning of each does not clearly bring out any distinctions.[16]

Whatever may be the strict etymological similarity between the terms, it is desirable and convenient for the purposes of this work to assign distinct

16. Ajomo, A. (1989): in Asiwaju & Adeniyi (ed.): Borderlands in Africa (Unilag Press), P.37.

meanings to them. For practical purposes, the term boundary is best used to describe the imaginary or physical dividing line which defines and delineates an area or territory. The term frontier on the other hand represents the boundary zone at which inter-state functions are applied. Borders or borderlands have been defined as "those zones lying on both sides of a given binational boundary which enjoy functional interaction with one another as well as with each of the sovereign states or nations in contact. They are zones in which the cultures, politics and economic arrangements of the inter-related nation states interpenetrate and mingle."[17]

It is clear from the above that while boundaries are linear features which are the legally prescribed or agreed separation of jurisdiction between one state or political unit and another; frontiers and borders represent the zones of actual contact or separation in the political, geographical or economic sense.

These definitions immediately bring to question the key function or characteristic of an international boundary. The old viewpoint as espoused by Sir Thomas Holdich[18] stresses the defensive and military conception of boundaries just like territory. Today however, modern thinking on peaceful relations between states rejects the purely security function of boundaries.

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17. *Ibid.*, P.38.

18. Holdich: (1916) Political Frontiers and Boundary Making p.46 Cited in Shaw, M. *op.cit.*

Professor Lyde who articulates this position argues that state boundaries should be seen as bridges of contact rather than as barriers between neighbouring states. Accordingly, states are enjoined nowadays to refrain from acts, conduct or policies that would impede trans-border interaction and co-operation.[19]

As we noted before, the notion of a strict, linear boundary is a relatively modern conception. The development of nation-states in the European Post-Westphalian era made it necessary to have defined boundaries. But exact boundaries only came about when map-making and geographic techniques were sufficiently advanced to facilitate clear delimitation and demarcation.

Pre-colonial Africa, as we stressed in the last chapter knew frontiers or zones rather than strict linear boundaries. Colonial boundaries on the other hand were in many cases originally established on basically geometric lines radiating from the coasts into the interior, generally paralleling European power relationships in the 19th century. As a result most of such boundaries were irrelevant to the historical or cultural patterns of African development. Colonial boundary-making neither delimited the outcome of traditional, historical processes nor took account of ethnic factors or cultural patterns.

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19. Cukwurah (1994), *op.cit.*, 11.4-5.

These factors make the domestic and international environment of African boundary and territorial conflicts most volatile. Radical change in the boundary regime could have widespread and unpredictable consequences. Thus, despite their inherent instability and apparent injustices, African states have adopted their colonial boundary as the framework for the continent's geopolitical distribution of state territory. It is necessary therefore, for the purpose of this work, to examine the legal context in which the boundaries have been accepted and preserved in post-colonial Africa.

3.3 THE LEGAL TITLE TO AFRICAN BOUNDARIES

The vast majority of African boundaries were laid down by European treaties. This means that the delimitation of inter-colonial boundaries between European powers between late 19th century and early 20th century was usually done by agreement. Ian Brownlie[20] reproduces 232 of such agreements defining the alignment and general provenance of African boundaries. Some of these are variously described as Conventions, Arrangements, Protocols, Proce's Verbal, Accords, Exchange of Notes, or Memorandum.

The colonial partition of Africa after the Berlin Conference of 1884 took various forms. One of the first and widely used formats were agreements defining spheres of influence. An example of this was the convention between Great

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20. Brownlie (1979): African Boundaries - A Legal and Diplomatic Encyclopaedia, London, C. Hurst, Royal Institute of International Affairs, PP.xiv-xxxvii.

Britain and France for the Delimitation of their Respective Possessions to the West of the Niger, and of their Respective Possessions and Spheres of Influence to the East of that River, signed at Paris on June 14, 1898.

Such arrangements had an element of provisionality. So the question had always arisen as to whether they amounted to a definitive boundary delimitation or not. Although Hall remarked that the term sphere of influence had no definite legal meaning[21], in practice if the parties to the agreement took firm control of the areas reserved, the delimitation would both in law and in fact attain the status of a boundary description. At the end therefore, spheres of influence delimitations evolved into demarcated alignments in much the same way as other divisions described in treaties or otherwise were confirmed by later arrangements.

For the purpose of this work therefore, the term treaty will be used to cover any such boundary agreement in writing, however labelled. In this sense, treaties no doubt play a prominent role in the legal pathology of African boundaries. Nonetheless the role of treaties must be qualified in a number of ways.

First a treaty may be flawed in some way. For example a line described in a treaty may be based upon error. An illustrative instance is the Anglo-German

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21. Hall (1926) International Law, 8th Ed.,) P.154.

agreement of 1895 which placed the boundary of the Nigeria-Cameroon territories on the right bank of Rio del Rey river. As it turned out, the Rio de Rey was not a river but a large estuary fed by several streams emptying into the ocean. The effort to relocate this boundary line in subsequent treaties has not been able to clarify the position satisfactorily and so to date Nigeria and Cameroon are unable to resolve the correct boundary alignment in the area.

Secondly a treaty may not come into force if one or both sides refuse to ratify it. In such a case the outcome cannot depend simply or at all upon the conclusion of a written agreement.

Thirdly, a good proportion of African boundaries represent internal administrative divisions within a given colonial entity. Examples are the states which were former units of French West Africa and French Equatorial Africa. In such cases, the evidence of the location of boundaries can be found mostly in French colonial legislation or administrative practice.

These qualifications to the use of treaties suggests that the absence of a treaty does not always mean that no boundary exists. Indeed many boundaries, according to Judge Bebler in INDO?AKISTAN WESTERN BOUNDARY (RANN OF KUTCH) case,[22] have usually emerged by custom.

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22. 50 ILR 2, 466.

> They (have) become gradually well determined by mutual acquiescence and/or recognition by the neighbours concerned--- Mutual acquiescence and mutual recognition are therefore the most general origin of existing international boundaries. Very many of them still nowadays have no other foundation for their validity.

Notwithstanding these observations, in Africa, the vast majority of boundaries were not laid down as a result of prescription over a period of time but by treaties. The validity and determination of such boundaries therefore depends on the status in law of the particular treaties delimiting such boundaries.

This raises two important questions. The first is whether or not the demise of colonialism and the achievement of self determination do result in a fundamental change in circumstances which terminates the relevant boundary treaties or enables a party or a successor to a party to the treaty to terminate it? The second question is whether or not by virtue of the dominant 'clean-slate' principle governing new states and state succession to the treaties of its predecessor, boundary treaties should lapse upon independence?

These questions can only be answered by a brief analysis of the international law doctrines of *Rebus sic stantibus* and state succession. We shall consider the two quickly before examining Africa's regional approach to its inherited boundaries.

3.3.1 THE CLAUSULA REBUS SIC STANTIBUS DOCTRINE

This rule states that a party to a treaty may unilaterally invoke the fact that there has been a fundamental change of circumstances from those which existed at the time the treaty was concluded as a ground for terminating the treaty, or for withdrawing from it. Put in another way, it is said there is always an implied term or clause in the treaty to the effect that the treaty obligations subsist only so long as the essential circumstances remain unchanged.[23]

Whereas international and municipal tribunals accept the rule in principle or at least view it with some sympathy, it remains most controversial. The major problem of the doctrine is that it could reduce the concept of *Pacta Sunt Servanda* to a mere form of words.[24]

The International Law Commission in its 1966 Report rejected the theory of an implied term and preferred to base the doctrine on grounds of equity and justice. The final outcome is now reflected in Article 62 of the Vienna Convention on the Law of Treaties, 1969.

The relevant paragraph (2) of that article stipulates that:

"A fundamental change of circumstances shall not be invoked as

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23. Starke, J.G. (1977) An Introduction to International Law, (London: Butterworths, 8th Ed.,) P.504.
24. Shaw, M. (1986), *op cit.*, P.230.

a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary---".

This means the *rebus sic stantibus* rule does not apply to boundary treaties. In effect therefore, a change of sovereignty arising from decolonisation is not a valid ground for terminating or withdrawing from a colonial boundary agreement. This position has been strongly supported by those who endorse the *status quo* as inevitable and as a more sensible alternative to the anarchy which a revision of colonial boundaries in Africa and elsewhere will generate.

The salient point in this context is that the provisions of the Vienna Convention, 1969 have not removed the exclusion of the *rebus sic stantibus* rule from "treaties establishing territorial status".

The International Law Commission further noted that self-determination, as envisaged in the UN Charter and other international legal instruments establishing the right of peoples to self-determination, is not to be a ground for rejecting colonial boundary treaties. In the commission's view, that right is an independent principle which should not be treated as an application of the *rebus sic stantibus* rule in the context of the law of treaties. The real justification for the legal rules here lies in the fact that it would open the door to infinite and uncontrollable territorial claims if revision of 19th century territorial arrangements

were to be permitted on the grounds of the post-1945 principle of self-determination.

At international law this would also be ignoring the doctrine of inter-temporal law, or rule of contemporaneity. By virtue of that doctrine, a treaty has to be interpreted according to the rules of international law prevailing at the time of its conclusion.[25]

These arguments emphasise the clear preference of international law for continuity and stability in the regime of international boundaries. Jennings pointedly stated that:

> The bias of existing law is toward stability, the *status quo*, and the present effective possession; the tendency of the International Court is to let sleeping dogs lie.[26]

This position is restated in a number of cases. It is also reflected in the law relating to state succession which we shall now examine quickly in response to the second question posed above.

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25. See THE GRISBADARNA case (1909) Norway/Sweden NORTH ATLANTIC COAST FISHERIES ARBITRATION (1910).

26. Jennings (1963): The Acquisition of Territory in International Law, P.70. See also the TEMPLE OF PREAH VIHEAR case (ICJ) Reports 1962, P.6 at P.34.

3.3.2 **STATE SUCCESSION**

The Vienna Convention on Succession of States in Respect of Treaties, 1978 declared in Article 16 that:-

> "--a newly independent state is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty applied to the territory to which the succession of states relates".

This provision, according to O'Connell marked the victory of the 'clean-slate theory' as against the view that 'succession rather than non-succession should be the rule'.[27] Apparently this principle would have permitted new states, upon gaining independence, to denounce treaties establishing boundaries and legitimately renounce their former borders and claim new territories. This could be further justified on the basis of the principle of self-determination of peoples.

However, Article 11 of the 1978 convention, reflecting the weight of juristic opinion and state practice, stipulates that:-

> "A succession of states does not as such affect -
>
> (a) a boundary established by a treaty, or

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27. O'Connell: (1965) 'Independence and Problems of State Succession' in O'Brien (Ed.): The New Nations in International Law and Diplomacy at PP.7, 21 and 25.

(b) obligations and rights established by a treaty

and relating to the regime of a boundary".

The underlying premises of this provision are similar to the rule propounded under Article 62(2) of the Vienna Convention on the Law of Treaties, 1969 to the effect that boundary treaties are *sui generis* and cannot be affected by a fundamental change of circumstances nor even a succession of states. Again, the policy emphasises that stability and continuity of boundaries is an essential condition of international life as recognised by the settled principle of respect for the territorial integrity of states.

In law, the process by which a boundary treaty survives a succession of states is explained on two grounds. The first is that the provisions of a boundary treaty become transmuted into a territorial settlement subsisting in its own right. Lester notes that upon ratification, the boundary agreement is deemed to be executed and thereafter operates as a conveyance so that the successor state succeeds " not to the treaty but to the frontiers of its territory as it does to other facts of its new international life".[28]

The second explanation is founded on the principle of *nemo dat quod non habet*. This suggests that a predecessor state can only transfer to a successor state

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28. Lester (1963) 'State Succession to Treaties in the Commonwealth' 12 ICLQ 475 at P.492.

the territorial extent of its own competence, no more, no less. In essence, the emergent state can only succeed to the existing and delimited territorial dimensions of the predecessor state.[29]

Professor Cukwurah submits that so far as succession of states in respect of boundary treaties is concerned, the truth of the matter is that

> "new states cannot be seen to blow hot and cold, to approbate and reprobate at the same time, by turning round to reject or denounce colonial boundaries which in effect form an integral part of their international personality as sovereign and independent states. It is more in consonance with the reality of the political situation for new states to acknowledge the colonial boundaries for what they are".[30]

This view reflects the general attitude of post-colonial African States. Apart from Morocco, Somalia and Togo, few states embarked on outright irredentist policies. Where boundaries have been redrawn, as in the case of Ethiopia and Eritrea, this was achieved on the battlefield rather than by a legal revision of colonial territorial apportionments on the basis of historical claims.

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29. Shaw (1986), Loc.Cit., P.235.

30. Cukwurah (1994), Loc.Cit, PP.19-20.

It seems remarkable therefore, as Professor Ian Brownlie said, that a political map of Africa in 1914 was not very different from such a map in 1977. Neither would it significantly differ today.

In the next part of the chapter, we shall attempt to explain the basis for the persistence of colonially-created boundaries in post-independence and the problems which by their very nature and character they have given rise to.

3.4 PROBLEMS OF STATE BOUNDARIES IN AFRICAN ECONOMIC RELATIONS

As noted above, the main principle deducible from post-colonial attitudes to African boundaries is that boundaries inherited from the colonial period are to be retained *faute de mieux*. This attitude has been explained on the basis of two main factors.

First, the nationalist movements which fought for independence adopted the parcels of colonial administration as the territorial units for the struggle for self-determination. Basil Davidson put it thus:

> They accepted the aim of building nation-states on the British model (or, later on the French) because, as it seemed to them and as they were strongly advised, there could exist no other useful objective--- Along with the nation-state as necessary aim and achievement, the legacy of the

> partition was transferred practically intact, partly because it seemed impossible to reject any significant part of that legacy, and partly as one is bound to think in retrospect, because there was no sufficient understanding of what the legacy implied. There were political thinkers, true enough, who understood that the colonial partition had inserted the continent into a framework of purely artificial and often positively harmful frontiers --- But they were few, and their voices feeble in the resounding chorus of anti-colonial agitation that was now heard on every side.[31]

The second explanation for the acceptance of the colonial territorial divisions as units of post-independence nation-states in Africa rests on the doctrines of customary international law which seek to achieve continuity and the related concepts of territorial integrity. We have already examined the legal ramifications of this regime.

It remains to point out that acceptance of the legacy of the colonial partition has also meant acceptance of the political and economic practices of colonialism in its institutional dimensions. For the purpose of this work, the heritage of the nation-state and its territorial framework has generally created problems of managing Africa's extensive international boundaries, particularly with controlling cross-border movement and trade.

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31. Davidson, B.(1992): The Blackman's Burden - The Curse of the Nation State in Africa (Ibadan Spectrum) pp-174-175.

Typically central governments on opposite sides of international boundaries institute measures to regulate movement and interchange to suit each other's national interests. The needs and desires of border inhabitants are of secondary importance, especially when issues of national security or economic well being are involved. This often leads to conflict between the central government and frontier residents.

Specifically it creates a tension between the formal or official level of relations between the neighbouring states and the informal or unofficial intercourse that border inhabitants routinely engage in. The tension is increased where coherent culture areas or human communities have been bisected by the international boundary line, such that communal feelings and group consciousness based on cultural or kinship ties remain strong. We have seen that this is the case in virtually all of Africa's inter-state boundaries.

This thesis draws attention to a humanistic concern for border inhabitants in official state policy relating to boundary maintenance. Therefore it is the informal level of relations across the boundaries that provides the theoretical framework for this work. It attempts to make a case for achieving some harmony between the official and non-official levels of relations across international boundaries in Africa. This means reconciling the interests of border residents who must interact across the boundaries with those of the nation-states who exercise control over the borders.

In formulating a policy framework capable of reconciling these conflicting interests, one vital point must be kept in view. This is the fact that many existing studies and reports establish that partitioned communities and other border inhabitants across Africa's boundaries generally tend to ignore the boundaries as diving lines in their normal activities. They carry on socio-economic intercourse across borders more or less as in pre-colonial times. Studies of cross-border trade and movement of people show that these activities are on a considerable scale. Many countries are infact alarmed but impotent at the scale of extra-legal commerce and migrations.

For purposes of illustrating the permeability of inter-state boundaries, we shall briefly look at the evidence of transborder trade which many states characterise and attempt to suppress as illicit, but which is infact the inevitable result of the articiciality of the boundaries.

3.4.1 INFORMAL TRANSBORDER TRADE IN AFRICA

In an apt introduction to the Report on the Impact of Transborder Trade in the Informal Sector (1991),[32] the Economic Commission for Africa observed that:

> African countries inherited political rather than historical boundaries from the former colonial powers. In many cases, these

32. E/ECA/TRADE/90/25 of December 1990 presented to the 11th Session of the Conference of African Ministers of Trade 15-19 April, 1991 at Addis Ababa, Ethiopia, P.1.

> boundaries cut across ethnic groups, cultures, traditions - style of living, languages and systems. However this artificial division has not prevented some of the African people who live alongside those borders continuing or developing various kinds of relations despite the existence of such new political boundaries. Thus the need to--- study--- the significance of unrecorded transborder trade and economic relations between African countries in the post-independence era.

The Report further affirmed that inter-African trade existed long before the advent of colonialism. Most of such trade was informal with no documentation or approvals for export or import required; no customs charges or other government restrictions on external trade. As this thesis has demonstrated, pre-colonial regional trade was finally disoriented or stultified by the imposition of tariff and non-tariff barriers during the period of colonial rule.

Notwithstanding these restrictions, neither during the colonial nor the post-colonial periods, have governments succeeded in eliminating trade across borders. Several reasons have been responsible for the persistence of the phenomenon. The most immediate and intractable is the economic and social interlock between partitioned groups on opposite sides of most international boundaries.

Professor Asiwaju[33] has demonstrated in the context of the Nigeria-Benin border how the ethnic coherence and interlink between the Yoruba, Aja and Borgu sub-groups through whom the boundaries were drawn has continued to militate against the border's barrier functions.

Yagba[34] and Hinjari[35] show that the common bonds of language, religion and history across the Nigeria-Niger borders make trans-border intercourse imperative, ranging from inter-marriages to social events like naming, burial or turbanning ceremonies. Kyari Tijanni[36] and Barkindo[37] have documented such cross-border linkages across the Nigeria Cameroon boundaries.

The foregoing are true of other known African border ethnographic situations in which the communities are connected by cultural, social and economic networks. Hence the Report of the Economic Commission for Africa on the Impact of Transborder Trade, earlier referred to, came to the conclusion that common ethnic loyalties or cultural affinities between people on opposite

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33. Asiwaju, A.I.(1989): "Problem Solving Along African Borders: The Nigeria-Benin case since 1889" in Martinez, O.J. (ed.): Across Boundaries: Transborder Interaction in Comparative Perspective (El paso: University of Texas), PP.168-171.

34. Yagba, T.A.T. (1993): "Legal Problems of International Boundaries in Africa: The case of the Nigeria-Niger Borders" in Asiwaju, A.I. & Barkindo, B.M. (ed.): The Nigeria-Niger Transborder Co-operation (Lagos: Malthouse Press, P.458 at 462-464.

35. Hinjari, W.L. (1993): The Impact of an International Boundary on the Political, Social and Economic Relations of Border Communities: A Case Study of Kano/Katsina States of Nigeria and Niger Republic in Asiwaju & Barkindo, Ibid., P.152 at 156-162.

36. Tijanni, K (1993): "planning for the Border Areas of Borno State" in Asiwaju A.I. (ed): Development of Border Regions (Lagos: Joe Talalu), p.110.

37. Barkindo, B.M. (1993): "The Neglected Border Areas of Gongola State" in Asiwaju Ibid, p.89.

sides of international boundaries in Africa provide a convenient shade for smuggling and other forms of unrecorded border trade.[38] A more recent report indicated that smuggling alone accounts for almost two thirds of intra-regional or inter-state trade in the West African sub-region.[39]

Yet smuggling is only one out of several other forms of unrecorded trade across international boundaries. Other forms of illegal border trade may consist in the falsification or forgery of trade documents; under or over-valuation of goods for the purpose of evading customs duties, outright theft or traffic in stolen goods.

This does not however imply that all border trade is illegal. For example the kind of exchanges that take place at traditional, periodic markets located near border villages which are attended by populations on both sides of neighbouring countries cannot be categorised as overtly illegal. Nonetheless most of unrecorded border trade is considered by central governments as illegal, with smuggling being the most problematic form of illegal or unrecorded trade.

For clarity and impact, we shall briefly look at smuggling as a form of illegal trade that presents the stiffest challenge for border management in Africa. We shall then examine other forms of border trade and why they are inevitable.

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38. E/ECA/TRADE/90/20, *op.cit.*, P.6 para. 14.

39. Federal Radio Corporation of Nigeria: Network News Analysis, October 27, 1993.

3.4.2 SMUGGLING

Smuggling is generally defined as the use of illegal channels for the movement of goods across national boundaries and/or the illegal traffic in currencies.[40]

Historically, smuggling has been the direct result of the imposition and enforcement of strict linear boundaries, dating from the colonial era. This was because the boundaries led to the development on both sides of such boundaries of two distinct market conditions. The variety of the goods and the difference in prices as one crossed from one side to the other made transborder trade a real temptation. The Economic Commission found that the profit motive accounted for the expansion in smuggling over the years. Smuggling enables traders to widen their profit margin by avoiding custom duties.

There are several other factors that also encourage and sustain smuggling across frontiers. The first is the attitude of African governments on opposite sides of international boundaries. They tend to be in-ward looking and therefore direct much effort at patrolling and enforcing their boundaries. These efforts are however undermined by the fact that they simultaneously establish rival rather than complementary market patterns and transport systems designed to divert

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40. Report on the Impact of Unrecorded Transborder Trade in the Informal Sector, *op. cit.*, P.2, Para. 5.

trade from one side to the other.[41] Collins' account of groundnut smuggling across the Nigeria-Niger border[42] provides an example of general application.

The second factor is the relative weakness of official boundary control machinery. Local businessmen generally have more intimate knowledge of the terrain. They know the countless footpaths or creeks (in coastal areas) much better. Officials also find it difficult to patrol the difficult terrain. There is also the factor of collusion between customsmen and businessmen which the National Institute of Policy and Strategic Studies (NIPPS) in its commissioned studies on Nigeria's International Borders found to be a major factor across all of Nigeria's borders which contributes to the flourishing of smuggling business.[43]

Furthermore, the security forces are generally ill-equipped, inefficient and are so frequently transferred that they never get to match the mastery of the terrain which the smugglers display. As a result, many countries cannot effectively police their rather extensive boundaries.

The third and indeed the most important of the factors that encourage smuggling is the existence of tariff and other trade barriers such as restrictions

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41. Report, *Ibid.*, P.6.

42. Collins, J.D.(1976): "The Clandestine Movement of Groundnuts across the Niger-Nigeria Boundary". Vol x.2 Canadian Journal of Africa Studies, pp. 259-76.

43. NIPSS; 1988: Studies on Nigeria's International Borders: Vol.5 (ed. Imobighe, T.A., Fakulujo, I.A. and Fagbemi, S.E.) Kuru: NIPSS, at P.9.

or bans on import or export of certain goods. Smugglers seize on the porosity of the borders to meet demand for banned or restricted items. This is often sustained by established consumption habits which create demand for imported goods. In addition, the existence of different monetary systems and currencies in the border areas also contributes to smuggling.

Finally, the sheer proximity of border settlements to each other leads some frontier inhabitants to 'take to professional smuggling as a popular occupation'[44].

3.4.3 UNRECORDED BORDER TRADE

An earlier study by the Economic Commission for Africa carried out on Unrecorded Trade Flows within ECOWAS in 1979[45] found that the geography of African countries, with the arbitrary way in which their borders cut across ethnic groups is largely responsible for their inability to mount meaningful control over "free commercial fraternisation between families and cultural groups divided by the arbitrary frontiers drawn by former colonial powers."[46]

The report gave the striking example of the Aflao on the Ghana/Togo border. In the same town, inhabitants with dwellings on one side of the frontier street belong to Ghana. Those on the other side of the same street are administered as Togolese nationals. The people on both sides of that street,

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44. Report on Unrecorded Trade Flows within ECOWAS: Economic Commission for Africa, E/CN.14/WP.1/115 of 28/8/1979, at P.3.

45. *Ibid.*

46. *Ibid.*, at PP.8-9.

commonly known as Kwadjoviakope, are of the same ethnic origin, have common traditions and speak the same language. Sometimes members of the same family are on different sides and therefore belong to two different countries. Both sides have access to a common Atlantic waterfront. Under such circumstances, the Report said, it would be impossible to mount meaningful controls against commercial intercourse between the two groups, however determined the two governments may be.[47]

Other factors which also foster border trade were identified in the same Report. The first was the fact of proximity.The fact that border inhabitants in adjacent countries live close to each other to permit physical access by one group to the other in itself promotes border trade. Such exchanges are not only incalculable but also uncontrollable. This is because inhabitants from both sides usually attend and buy from each other at border markets on either side as part of normal social, commercial or religious human interaction.

Added to this factor of proximity is the fact that border settlements are normally located far away from the capitals of their countries and have easier access to items sold on one side of the border and not the other than from industries or other sources of supply within their own country. Furthermore until recently, border areas tended to be generally neglected and to be seen mostly as

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47. 1979 Report, Ibid.

vulnerable security zones. This promoted a sense of political, economic and social marginality that accentuates the dependence of border inhabitants on each other.

Smuggling also contributes a great deal to promoting border trade. Smugglers frequently choose to sell their wares at border towns so as to minimise costs of transportation into the hinterland. Consequently towns and villages located near boundaries occasionally enjoy cheaper prices and 'regular supplies' of certain commodities which may be scarce or costlier in the capital or other larger cities.[48] A good example is that of cars on the Nigeria-Benin and Nigeria-Niger borders and the large market in second-hand clothes across the Nigeria-Benin and Nigeria-Cameroon boundaries.

These factors make it difficult to determine the exact extent of unrecorded border trade or its net impact. What is clear however is that it distorts national trade statistics, especially the trade balance and balance of payments accounts. This renders data for national economic policy unreliable.

In addition, unrecorded trade generates price distortions which undermine the accuracy of import and export estimates. It also leads to net loss of government revenue in terms of unpaid customs duties, loss of foreign exchange and currency leakage through trafficking. Lastly, unrecorded trade affects

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48. *Ibid.*, P.15, para. 73 (iii)

industrial development policies and other socio-political programmes which government may seek to promote within its territory.

Against this background, many governments are compelled to take stern measures to deal with unrecorded trade in general and smuggling in particular. However one inherent obstacle to the effectiveness of whatever measures are put in place is the very nature of the boundaries which makes them porous and permeable. Other militating factors include conspiracy and collaboration between traders spread across different countries and the persistence of the unofficial or 'black market' rates of currency exchange which facilitate such practices.

The overall scenario is that whereas the level of registered inter-state trade in Africa is very low, something like 5% or less of Africa's total trade,[49] unrecorded trade takes place on a considerable scale. Much of it takes place at national boundaries, and is difficult to suppress through administrative or security measures. Similarly, bilateral efforts involving customs co-operation, joint patrols, price liberalisation or fiscal alleviation have not been effective in combating the phenomena of smuggling and border trade.

It is submitted here that bilateralism cannot provide a sustainable framework for addressing a continental phenomenon. Individual or bilateral

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49. ECA Report on Unrecorded Transborder Trade in the Informal Sector, 1991; at P.107, para. 36.

measures for preventing or detecting and punishing smugglers are no answer. As is clear from the two studies conducted by the Economic Commission for Africa, so long as the colonial balkanisation of Africa is preserved on the basis of the classical doctrines of international law, unrecorded trade will remain an important component of inter-state trade in Africa.

What is needed, in the perspective of this thesis, is a legal framework which would recognise these trade flows as inevitable and try to capture them through a multilateral arrangement which would diminish the traditional function of state boundaries as lines of division and exclusion.

As in other regions of the world, notably Europe and North America, economic planners in Africa have come to accept regional economic integration as a viable multilateral arrangement with a potential to achieve the above objectives.

The series of economic integration efforts in Africa since independence have always had as a central objective the re-channelisation of unrecorded trade on the basis of a free trade or common market arrangement. Apart from a large number of sub-regional economic groupings pursuing this goal, African countries signed in 1991, a Treaty Establishing an African Economic Community.[50]

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50. 1991 International Legal Materials, Vol.XXX, No.5.

In the next chapter, we shall attempt to situate the idea of an African Economic Community in its proper historical and contemporary context and then subsequently assess its possible contribution to redressing the territorial irrationalities of the colonial partition which have impeded Africa's economic growth since independence.

CHAPTER FOUR

HISTORY AND LEGAL FRAMEWORK OF ECONOMIC INTERGRATION IN AFRICA

4.1 INTRODUCTION

We have seen in the preceding chapters that the colonial partition left Africa with a division of over fifty nation-states separated by artificial and arbitrary boundaries. The small size of many of these countries became one of the impediments to rapid economic development. To this was added the conceptual apparatus of traditional international law which accorded each nation-state the juridical status of a distinct sovereign entity with exclusive competence within its territory as delimited by its international boundaries.

It is clear from the overwhelming evidence of the scale and intractability of transborder trade in the pre-colonial, colonial and post-colonial periods that existing boundaries only distort Africa's economic space to the advantage of smugglers and traders who exploit the divisions. The nation-states and national economies, on the other hand, are net losers. So much human and material resources are deployed to enforcing boundaries and yet so much is lost through them.

In a study carried out by the United Nations in 1969,[1] the Committee for Development Planning noted that African countries must take steps towards fostering closer economic co-operation and integration if they were to confront the constraints to their economic development arising from the colonial heritage.

On their part, African leaders have long recognised the need for closer regional ties as a way of overcoming the geo-political configuration of divisions and fragmentation left behind in Africa by colonialism.[2] There has been wide unanimity about the benefits of African unity as exemplified in the formation of the Organisation of African Unity in 1963. There has been similar consensus on the need for economic integration as a promising vehicle for enhancing economic and social development, accelerating balanced and self-reliant growth and improving the quality of life for the peoples of the continent.

These feelings are manifested in the proliferation of economic groupings across the continent. Some commentators say they number over one hundred with about forty of them in West Africa alone.[3] But the experience of most of these groupings has been rather disappointing. Many are dead or dying. Even those which have been actively in existence for two or more decades like the Economic

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1. United Nations: Economic Co-operation and Integration in Africa - Three Case Studies, New York, 1969 (ST/ECN/09).

2. Ezenwe, U.:(1984) (Ibadan: West Books Publishers) p.12 ECOWAS and the Economic Integration of West Africa.

3. Dede, B. (1993): Keynote Address, in Ajomo & Adewale: African Economic Community Treaty - Issues, Problems and Prospects (Lagos: NIALS,) p.xxxii at xxxiv-xxxv.

Community of West African States and the Preferential Trade Area, now part of the Southern Africa Development Community, have achieved very little in concrete terms.

The signing of the African Economic Community Treaty[4] at Abuja on June 3, 1991 represented the culmination of many years of planning for an Africa-wide economic community. It was founded on the desire to overcome the problems which have militated against the successful operation of sub-regional groupings. The East African Economic Community (1967), and the Maghreb Permanent Consultative Committee (1964) which were some of the earliest attempts have since become defunct. Efforts are on to revive the former while the latter has been replaced by the Maghreb Arab Union. In Central and West Africa, rival groupings co-exist with neither the wider nor smaller ones making much progress in terms of addressing the problems highlighted above.

The perspective which this thesis seeks to emphasise is that the lack of progress on the part of these groupings is largely traceable to the fact that the legal framework within which they have operated was not designed to radically alter the nature and functions of the colonial boundaries which constitute the major obstacles to free trade and economic intercourse on the continent. Put differently, this is to say that so long as African States, in assertion of territorial

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4. 30 I.L.M. 1060 (1991).

In the two immediate decades after independence African States had been more concerned with the integration of their colonially-constructed territorial units into nation-states. This generally entailed the strengthening of boundaries and strict separation of the peoples of each state from those of others. Attachment to notions of newly acquired sovereignty was therefore largely responsible for either the collapse or sluggishness of efforts at integration. The most dramatic of these was the collapse of the East African Economic Community in 1977 due to disagreements between Kenyan and Ugandan leaders.

These disintegrative forces have proved to be counter-productive. African states acting individually have lost the capacity to confront their economic problems. The result has been a sharp economic decline in most African countries since the mid-1980s. In particular, Sub-Saharan Africa has been through more than a decade of falling per capita incomes, increasing poverty and accelerating ecological degradation.[5]

For many years, economic integration has been prescribed as a viable development initiative that would help to address Africa's deepening economic crisis. The United Nations Committee for Economic Development observed in its 1969 report that:

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5. See IMF; 1987: Sub-Saharan Africa: From Crisis to Sustainable Growth: World Bank Report, 1989; African Alternative Framework to Structural Adjustment Programmes for Social - Economic Recovery and Transformation (AAFSAP) ECA/E/CM/5/6/Rev.3; World Economic Outlook: A Survey by the Staff of the International Monetary Fund, April 1987.

"The creation of unified multinational markets would make possible faster expansion and greater economic diversification of the African economy and particularly of its industry. It would enhance productive efficiency by permitting increased specialization and the operation of industries on a more economic scale. Further it would help in overcoming barriers to development appearing in foreign trade".[6]

Since the 1960s, economic integration of Africa has been a central theme in the agenda of both the United Nations Economic Commission for Africa and the Organisation of African Unity. In October 1966, the Economic Commission for Africa organised a series of sub-regional meetings aimed at promoting viable economic groupings on the continent. That effort was directly responsible for the signing of the Articles of Association for a proposed Economic Community of West Africa at Accra, Ghana in April/May, 1967. It was out of this association that the present Economic Community of West African States (ECOWAS/CEDEAO), which is the only grouping encompassing French and English speaking West Africa, later emerged.[7]

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6. Op. Cit. Footnote 1 at p.iii.

7. Sohn, L.B. (ed.): (1971) Basic Documents of African Regional Organisations, Vol.3 (New York: Oceana.), p.987.

The Economic Commission for Africa also tried to promote a broader Economic Community of Eastern Africa after the collapse of the East African Economic Community comprising only Kenya, Tanzania and Uganda (1967-1977). The broader union as conceived by the Commission would have included among others Burundi, Ethiopia, Malawi, Madagascar and Somalia.[8]

This is not however to attribute the origins of economic co-operation arrangements in Africa entirely to the Economic Commission for Africa. During the colonial era, the administering powers set up a large number of inter-territorial institutions and common services in their areas of common jurisdiction. The French, for example, ran their African colonies as federations. Both in French West Africa and French Equatorial Africa, there were close political and economic ties between the colonies as well as between them and France.

In British West Africa, there were common services such as the West African Court of Appeal, Central Bank, Airways and Research Institutes. In East Africa, the British made an early attempt at economic co-operation by the establishment of a Customs Union between Kenya and Uganda in 1917. This was joined by Tanganyika, now part of Tanzania, in 1927.[9] The Union grew from its original aim of common customs administration to cover areas like company and

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8. See Sohn, L.B.: Ibid.

9. Okigbo, P.N.C.(1967): Africa and the Common Market (London: Longman,) Chapter 7, Passim.

personal income tax, communications and transport network, notably rail and air transportation.

In 1948, the East African High Commission was established to supervise the common services in addition to carrying on the responsibilities of the Conference of East African Governors instituted in 1926. The Commission itself was replaced by the East African Common Services Organisation in 1961 and on 6 June, 1967, a Treaty for East African Co-operation was signed in Kampala, Uganda to set up an East African Common Market and Economic Community. These arrangements represented the first major effort in both the colonial and immediate post-colonial periods to establish elaborate structures for economic integration in Africa. In other regions of the continent also, similar efforts were initiated. For example, just before independence, a number of French territories signed the Convention for the Establishment of the Council of the Entente at Abidjan on 29 May, 1959. Another Convention creating the French West African Customs Union (CEAO) was signed in Paris on 9 June 1959 and followed by another at Abidjan on 3 June, 1966.[10]

Like the less elaborate inter-territorial arrangements however, all these integrative processes were directed and co-ordinated by the colonial power. Once that bond of a common metropolitan driving force was severed at independence,

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10. See also Treaty Establishing the African and Malagasy Organisation for Economic Co-operation, signed by Brazaville group, at Tananarive, Madagascar, 125 ep.1961.

most of the arrangements either disintegrated or became severely weakened. The East African Community, for example, collapsed in 1977.

The major force behind these centrifugal or disintegrative tendencies was the heritage of the nation-state and the classical doctrines of state sovereignty which African countries adopted at their independence. These notions entailed emphasis on national unity or internal integration, autonomy and self-sufficiency by individual countries. Independence brought in its wake intensive rivalries as well as excessive political and economic nationalism, rather than encouraging more cohesion and co-operation to overcome the fragmentation of the colonial partition. These tendencies were exacerbated in many African countries by the emergence of military regimes which precipitated further national centralisation to the detriment of regional unity.

These tendencies however, did not completely eclipse the Pan-Africanists' dream of continental unity. Shortly after independence, the new nation-states embarked upon efforts to form an association of African countries. There emerged three main groups pursuing the same goal from different ideological projections. The first was the Casablanca bloc, which had a socialist leaning and stronger Pan-African commitment. Their vision, as articulated by President Kwame Nkrumah of Ghana was for a united Africa under a single government.

The second group was the Brazaville bloc which sought only to assert an African identity through Sedar Senghol of Senegal's philosophy of Negritude. The last was the Monrovia group made up largely of English speaking moderates, led by Nigeria's Sir Abubakar Tafawa Balewa.

Despite these fundamental differences of vision the overriding need for some form of continental union led the three groups, under the auspices of Emperor Haile Selasie of Ethiopia, to adopt a compromise Charter establishing the Organisation of African Unity in May, 1963.[11]

The Organisation's Charter, born out of compromise fell far short of the dream of a united Africa. However the Charter enshrined unification of Africa as one of its underlying objectives.[12] Hence, since its inception, the Organisation has sought to strengthen African solidarity as well as economic co-operation between African States. The first practical demonstration of this was the establishment of the African Development Bank by agreement signed at Khartoum, Sudan on 4 August, 1963.

From the 1970s, the Organisation became increasingly concerned with economic issues. Economic matters were always high on the agenda at several

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11. Tordoff, W. (1984): Government and Politics in Africa (London/Hampshire: Macmillan,) Pp.239-243.
12. Article II(1) (a), OAU Charter, 1963.

annual summit conferences. At the 1973 Summit in Addis Ababa, the Assembly of Heads of State and Government adopted an Economic Charter for Africa's Second post-independence Decade. It stressed the need for economic independence and inter-African co-operation as the main basis for lasting unity.

In 1976 at Port Louis, Mauritius, the establishment of an economic co-ordinating committee covering the entire continent was approved. At the same meeting, a proposal for the formation of an African Common Market was referred to the Economic Commission for Africa.

In April, 1980, an African Economic Summit was held in Nigeria which adopted the **Lagos Plan of Action** designed to create an African Common Market by the year 2000. The plan was to be realised largely through regional economic groupings.[13]

At its 1985 Summit, the Assembly of Heads of State and Government approved The Priority Programme for Africa's Economic Recovery as part of the implementation of the Lagos Plan of Action.

The Treaty Establishing the African Economic Community (AEC) signed at the 1991 Summit of the Organisation of African Unity at Abuja, Nigeria

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13. OAU, 1981: Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa (Lagos, April, 1981).

(hereinafter called the Abuja Treaty) was therefore only "the culmination of the efforts being made to organise the continent's economic future on a rational basis".[14]

The Abuja Treaty itself has only just received the ratifications and accessions required to bring it into force[15]. However, many of the Protocols that are required to give it real force and live are yet to be worked out. Nonetheless, the provisions of the Treaty clearly illuminate the path that the Community's evolution will follow. Article 6 of the Treaty for example makes it clear that the first stage of the treaty's implementation will be devoted to strengthening of existing regional economic communities and in establishing them in those regions where they do not exist.

As noted earlier, the record of attempts at regional economic integration since the 1960s has been a litany of failures. This makes it necessary to examine the problems which have militated against the achievement of the objectives of economic integration in order to assess whether or not, the existing regional communities are in a position to play the role of prime movers in the emergence of the African Economic Community. Thereafter we shall consider the key features of the African Economic Community as outlined in the Abuja Treaty and

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14. ADB, 1992: Role of the African Development Bank in the Treaty Establishing the Pan African Economic Community (Abidjan, Task Force Report, 1992).

15 By December, 1997, the Treaty had been ratified by 45 countries thus bringing it into effect. The first Heads of State's Meeting of the AEC was held in Harare, Zimbabwe in 1997.

also assess the extent to which it can address the constraints to integration arising from the legal character of Africa's international boundaries.

4.3 INTEGRATION EXPERIENCES IN AFRICA

The initial promise and economic growth which followed the attainment of independence by African countries had virtually evaporated by the close of the 1970s. The high expectations of raising living standards and national wealth have been unfulfilled, resulting in deteriorating conditions of living for the general population. An International Monetary Fund Survey in 1987[16] reported that the decline of per capita Gross Domestic Product continued uninterruptedly in Africa since 1981. It concluded that:

> In many countries, the economic slow-down and the fiscal retrenchment required by the adjustment in the first half of the 1980s tend to depress government expenditures on health services, water supply and sanitation, public housing, education and other services. In many countries, this contributed to lower nutrition standards, less accessible health care and declining

16. IMF: World Economic Outlook: A Survey by the Staff of IMF (April, 1987).

educational opportunities for the low-income population.[17]

The full picture of despair and destitution in Africa today appears even more grim. Famine, desertification, civil wars and natural disasters have combined with ineffective, corrupt and decadent governments to erode living standards to sub-human levels. This severe crisis has awakened some Africans to the need to reassess their strategies for development.

Measures such as economic integration which have the potential for overcoming Africa's internal fragmentation are considered as necessary in the bid to arrest the ever-worsening crisis. Hence, integration arrangements have been on a constant rise in both number and focus after the initial hysteria of independence.

Within West Africa alone, there were over 35 inter-governmental organisations for promoting one form of economic co-operation or another by 1979.[18] As at today, there are about 40 of such arrangements. One of the latest was formed in January 1994 by some Franco-phone West African States in the aftermath of the devaluation of the CFA Francs. It is known as the West African Economic and Monetary Union (UEMOA). This adds to the complex 'groupings-

17. Ibid., at P.66.

18. Renninger, J.P.(1979): Multinational Co-operation for Development in West Africa (New York: Pergamon,) 25.

within-groupings' problem in West Africa and other regions where larger and smaller integration groupings co-exist.

For the purpose of this work however, we shall only briefly look at the wider and potentially more inclusive regional economic projects which are likely to become the building blocks of the African Economic Community as envisaged by the Abuja Treaty. However the Economic Community of West African States (ECOWAS) will be reserved for consideration as a case study in Chapter Six.

4.3.1 ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES (CEEAC)

The Treaty establishing this community was signed in Libreville, Gabon in 1983 by ten member states including Cameroon, Congo, Chad, the Central African Republic and Gabon. Others were Equatorial Guinea, Sao Tome and Principe, Rwanda, Burundi and Zaire. Some of its members like Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon are also members of the smaller organisation known as the Central African Customs and Economic Union (UDEAC).[19] This very much replicates the West African situation.

What is even more complex in this region is the fact that three members, namely Rwanda, Burundi and Zaire also belong to the Economic Community of

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19. Onwuka, R.I.: "Free Movement of Persons, Goods and Services and the Right of Establishment" in Ajomo & Adewale, (ed.)., Op. Cit., P.190.

the Great Lake Countries (CPGL). Furthermore, Rwanda has again signed the Treaty establishing a common market and economic community for Eastern and Southern Africa.[20]

The main objective of the Central African Community is the gradual formation of an economic union, by creating a preferential trade area. This is scheduled to be accomplished within three phases of twelve years each. In the first phase, the organisation concentrated attention on the development of transport and promotion of co-operation in the areas of agriculture, industry and energy.

Several protocols and instruments aimed at strengthening inter-state trade have been adopted. In 1988, a clearing house to promote trade was set up. However, numerous difficulties have been encountered on the path to achieving these objectives. First is the lack of enthusiasm on the part of member states. The political will and commitment necessary to carry through the process are demonstrably lacking. There is a perceptible reluctance to surrender even a

20. Done at Kampala, Uganda: 5 November, 1993 33 International Legal Materials 1067 (1994).

modicum of state sovereignty and member states continue to concentrate on narrow national and political interests.

These attitudes go along with insular boundary management regimes which necessarily create physical, technical and fiscal barriers to free movement of goods, services capital and labour. Coupled with the paucity of transport infrastructure which hinders efficient inter-state movement of primary products by formal channels, the level of official intra-community economic intercourse is seriously impaired.

Another important issue relates to the overlapping web of micro-regional organisations. In the words of Professor Onwuka, this phenomenon "complicates, sophisticates and more importantly multilateralises dependent production in Africa. Smallness and poverty of the member states of the micro-organisations have contributed to the vulnerability of the integration schemes."[21]

These and other factors underlie the slow process of integration in Central Africa. The real challenge for the community is how to promote free movement of persons, goods and services across inter-state boundaries in order to encourage cross-border investment and economic intercourse.

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21. Onwuka, R.I. Op. Cit., P.193.

4.3.2 REFERENTIAL TRADE AREA OF EASTERN AND SOUTHERN AFRICA (PTA)

The origins of this association are traced to the Lusaka Declaration of 1977 although it formally took off in 1980.[22]

The seventeen member states are drawn from the two contiguous regions and include Angola, Burundi, Comoros, Djibouti, Ethiopia, Kenya, Lesotho and Malawi. Others are Mauritius, Mozambique, Rwanda, Somalia and Swaziland. Other members include Tanzania, Uganda, Zambia and Zimbabwe.

Like the Central African Organisation, many of the Member States notably Zambia, Zimbabwe, Lesotho and Mozambique also belong to the Southern Africa Development Community (SADC). As noted earlier, Rwanda and Burundi belong to two other communities as well.

The Preferential Trade Area was mainly designed to liberalise trade and encourage economic co-operation among member states. Some successes recorded include the introduction of Travellers' cheques in PTA currency units (UAPTA) which are in wide use and the establishment of a clearing house for centralising the registration and control of local currency transactions. In 1991, it was

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22. Report of the African Development Bank Task Force, Op.Cit., note 14, paras. 22 to 24.

estimated that 73 per cent of inter-state transactions in the region were routed through the clearing house, and 59% of them were done in local currency.

Nonetheless the organisation has remained unable to achieve the goals of establishing a common monetary system and complementarity in agricultural and industrial production. Again, even though a number of protocols and agreements relating to preferences and increased trade among member states have been adopted, the obstacles to mobility of labour, goods and services remain formidable because of inflexible boundary management regimes. Like in the other African integration schemes, the treaties do not recognise the need to address the obstrusive role of inter-state boundaries in the process of free trade or economic union.

The Preferential Trade Area is to be replaced by the Common Market for Eastern and Southern Africa established under the Treaty of Kampala, 1993. The Treaty seeks to create a common market and ultimately an Economic Community straddling across the two regions, which would take over the functions of the Preferential Trade Area.[23]

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23. 33 I.L.M. (1994) at 1077. Articles 177 and 188, COMERSA Treaty, 1993.

4.3.3 SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC)

This community started as the Southern Africa Development Co-ordination Conference (SADCC) following the Lusaka Declaration of 1980. By 1990, it had ten members namely Angola, Botswana, Lesotho, Malawi, Mozambique and Namibia. Others were Swaziland, Tanzania, Zambia and Zimbabwe.

On 1st August, 1992 at the Summit Conference of the Organisation held in Harare, Zimbabwe the members signed the agreement for the formation of the Southern Africa Development Community to replace the co-ordination conference. Post-apartheid South Africa has joined the SADC.

This has sharply changed the picture in the region and consequently the mission of integration projects. The Development Coordination Conference (SADCC) for example had primarily been conceived to reduce the dependence of frontline states on apartheid South Africa.

The overlap between the Southern Africa Development Community and the Common Market for Eastern and Southern Africa is well anticipated in the Treaty of Kampala, 1993. Article 180 of the Treaty clearly states that Member States may be members of other regional or sub-regional organisations with other members states or third countries. It is for the Secretary-General of the Common Market to work out relations between it and such organisations. Taking this cue,

the East Africans have also initiated efforts to revive the East African Community with enlarged membership. A joint Secretariat of the Community took off in January, 1996 with Kenya, Uganda and Tanzania providing the leadership to rebuild a firm sub-regional organisation.

For the purpose of this work, it is important to point out here that the Treaty of Kampala, 1993 is a very sophisticated legal instrument for economic integration in Africa. In the first place, the Treaty makes contribution towards the establishment, progress and realisation of the objectives of the African Economic Community a paramount aim of COMERSA. Article 178 specifically declares that the

> "final objective of the common market is to contribute to the implementation of the provisions of the Treaty Establishing the African Economic Community."

The Article further acknowledges that COMERSA would become an "organic entity" of the African Economic Community, whenever it takes off.

Another notable thing about this Treaty is that it makes provisions regarding harmonisation or approximation of laws to the extent required for the

proper functioning of the Common Market.[24] It also attempts to confer the power to make binding decisions on community institutions which represents a crucial concession of state sovereignty that is necessary for pushing the process of integration forward. Suffice it to only say here that the Treaty seemed to have been guided by African experiences of failure with respect to integration as against the relative progress made in other regions of the world. In a number of places, it copies the models of the European Community that have accelerated the process of European integration. We shall make references to this Treaty in subsequent chapters.

4.3.4 MAGHREB ARAB UNION (MAU)

As we saw earlier, the Maghreb Permanent Consultative Committee was set up in 1965 to formulate strategy for Maghreb co-operation and integration. Under its auspices, various bilateral and multilateral agreements were concluded in sectors such as trade, industrial and agricultural production, legal, scientific and technical co-operation. It also provided a platform for elaboration of rules relating to movement and settlement of persons and for relations with the European Community. However the dispute over Western Sahara proved a major obstacle to the development of these arrangements.

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24. Treaty of Kampala, 1993; Article 4 (6)(b).

In 1989, the process was almost started afresh with the adoption of a Treaty Establishing the Maghreb Arab Union (MAU) whose objective was the establishment of a Maghreb Common Market.[25] By 1991, the Union had established all its main institutions and organs such as the Conference of Heads of State, the Council of Ministers, Parliament, Court of Justice, the Committee on Investment and a host of sectoral committees.

A customs union, with uniform tariffs, took off fully in 1995 along with harmonisation and co-ordination measures to achieve other objectives. Nonetheless, like other integration projects in Africa, the Maghreb Union is also plagued by the incessant bickerings among member states. This is evident from the very composition of the Union. Presently only Algeria, Libya, Mauritania and Tunisia are members. Egypt, Morroco and Sudan are not members and indeed the latter has opted to join the Common Market for Eastern and Southern Africa (COMERSA). Clearly therefore, if this union is to cover all of Northern Africa as the Abuja Treaty, 1991 envisages, it must be more embracing and the Member States must display the political will to co-operate for development.

The foregoing discussion shows that Africa's past and present economic integration experiences have not been a story of much success. This then raises two questions. First, why should Africa embark on an ambitious process of

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25. Report of the ADB Task Force (1992), P.9.

continental economic integration when past efforts at sub-regional or even bilateral levels have been mostly failures? Secondly, why should a vast continent of over fifty countries with different political and social systems undertake such a daunting process at all?[26]

The answer to these questions probably lies in the force of circumstances which have compelled Africa to look inward for solutions to its deteriorating economic and political situation. The dismal economic picture painted earlier in the chapter has been further compounded by the drying up of government-to-government aid as a form of economic development assistance. Furthermore, Africa has not benefitted much from the flows of foreign direct investment in the 1980' and 90's. On the otherhand, the existing low stock of foreign investment and loans have precipitated the capital flight that is responsible for Africa's huge debt burden. The transnational corporations have also complicated Africa's technological and economic under-development. In the circumstances, economic integration, more than any other economic strategy, is now seen as the way out of Africa's fragmentation and backwardness as it would enable the pooling together of human and material resources.

Ambassador Brownson Dede clearly restated the incontrovertible facts which make integration inevitable as follows:-

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26. Dede, B., Op. Cit., at p.xxxvi.

> Africa has the largest number of the world's mini-states and the world's poorest states. Nine African countries have a population of under 1 million; 35 countries have a population of under 10 million; 29 African countries are among the 42 countries in the world which the United Nations have designated as least developed countries (LDCs). History teaches us that in the last 150 years, only very large national units with adequate resource base, climatic diversity and large population, and therefore, a large market, are capable of achieving a self-reliant and self-sustaining growth and development.[27]

Africans have probably been re-awakened to the challenge of charting a common destiny predicated upon collective wisdom and collective strength.[28]

The second reason which may have reinforced the desire for institutionalised Pan-African economic co-operation is the relatively successful

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27. Ibid., at p.xxxvi.
28. Ibid., at p.xxxiii.

experience of economic integration in other regions of the world notably in Europe, North America, South East Asia, Latin America and the Pacific Regions. Realising that even the powerful and wealthy nations of Europe, North America and South East Asia recognise the wisdom of collective activity and of increased strength and prosperity through integration has become a strong stimulant for African countries to seek closer economic links.

The desire of African countries to accelerate the process of economic integration was concretised in the Treaty Establishing the African Economic Community, 1991.[29] In the ensuing parts of this chapter, we shall examine the legal framework designed under the Treaty for achieving the objective of economic union.

4.4 FRAMEWORK AND STRUCTURE OF THE AFRICAN ECONOMIC COMMUNITY

The Treaty Establishing the African Economic Community signed at Abuja in 1991 was drafted and adopted under the auspices of the Organisation of African Unity. Conceptually therefore the Community is designed as an organisation within the framework of the OAU. Articles 1(c) and 98(i) of the Abuja Treaty expressly declare that the Community shall constitute an integral part of the OAU. The Treaty and all Protocols annexed thereto are also deemed

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29. 30 I.L.M. (1991).

to constitute an integral part of the OAU Charter.[30] Furthermore, the working languages of the community are to be the same as those of the OAU.[31]

Even more crucial is the fact that both organisations closely share the same institutions or decision-making structures. The Assembly of Heads of State and Government is the highest policy-making body for both organisations. The same applies to the Council of Ministers, the Economic and Social Commission as well as General Secretariat. We shall briefly explore this interface before raising some questions on what the relationship signifies in international law.

4.4.1 STRUCTURE OF THE COMMUNITY AND RELATIONSHIP WITH THE ORGANISATION OF AFRICAN UNITY

As we saw earlier, the Organisation of African Unity was born out of compromise in May, 1963 as an international regional organisation for African countries that had gained independence from colonial rule. Today, all of Africa is free from colonial rule and the apartheid regime in South Africa has collapsed. The organisation now has 53 Member States.

Apart from the proposed Pan-African Parliament and the Court of Justice, all the other organs of the Organisation of African Unity are the same as those of the African Economic Community. These include the Assembly of Heads of

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30. Ibid., Article 99.
31. Ibid., Article 97.

State and Government; the Council of Ministers and the Economic and Social Commission. Others are the General Secretariat and the Specialised Technical Committees. We shall briefly consider these organs as reflected in the Abuja Treaty bearing in mind that they are merely a reproduction from the OAU Charter.

Article 8(1) of the Abuja Treaty establishes the Assembly of Heads of State and Government of the Organisation of African Unity as the supreme organ of the community. It consists of the Heads of State and Government of the OAU Member-States. Its broad function is to implement the objectives of the community.[32] In addition to its specific powers as enshrined in Article 8(3), the Assembly is generally empowered to "take any action under the Treaty to attain the objectives of the Treaty."

It is however submitted that these words do not confer a general law-making power on the Assembly to enable it to fulfil its mission. The power to take action or decisions is limited to decisions necessary for the implementation of the community's objectives.[33] The decisions of the Assembly, by which it acts, are to be made by consensus or a two-thirds majority.[34] Such decisions are to be binding on all Member States, community institutions as well as the regional

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32. Article 8(2), Abuja Treaty, 1991.

33. Cf: The position of the Council under the EC, infra.

34. Article 10, Abuja Treaty, 1991.

economic communities. The language of Article 10(3) suggests that decisions of the Assembly would be directly binding and applicable, with the effect of legislation, and any breach may be referred to the Court of Justice.[35]

The fact that the community is to share the same Assembly with the OAU may give rise to several problems. First, it is not clear whether the OAU Chairman will also chair Community meetings? Second, will there be one meeting or two separate meetings? If it will be the same OAU meeting of three to four days that will also deal with community issues, will there be enough time to deal with an OAU as well as economic integration agenda? Femi Badejo argues that while a three or four day meeting of Heads of State and Government may be in order to pay lip-service to political principles, it cannot be adequate to consider policy recommendations for actualising African economic integration.[36]

Another problem is that the unwieldy nature of the Assembly and its composition makes it ill-suited to provide proper policy guidance for the community. It would have been better, given the large number of "sovereigns" on the continent, to provide for a smaller policy making body either on the model of the Security Council in the United Nations or the Council of the European Communities. It is hereby submitted that this function cannot even be properly

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35. Ibid., Article 10(2) and 8(3)(iv).

36. Badejo, F.: "The Political Implications of the African Economic Community" in Ajomo & Adewale (ed.), Op. Cit., p.68.

accomplished through the Council of Ministers as presently constituted under Article 11 of the Abuja Treaty.

It seems that the provisions of the Abuja Treaty on this point merely reflect the "ludicrous hanging on to a receding sovereignty and probably the dominant elitist culture that persists in Africa without much attenuation by democratic ethos."[37]

The second organ of the Community is the Council of Ministers which by virtue of Article 11(1) of the Abuja Treaty is to be the Council of Ministers of the OAU. The main function of the council is to ensure the functioning and development of the Community. The Council is mandated to make recommendations to the Assembly on any action aimed at attaining the objectives of the Community; to guide subordinate organs of the community and exercise any powers granted to it by the Treaty or delegated to it by the Assembly. The council is also empowered to "request the Court of Justice to give an advisory opinion on any legal matter, if necessary."[38]

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37. Ibid., P.72.

38. Article 11(3), Abuja Treaty, 1991.

The council is to act by way of regulations. Such regulations are to become binding on Member-States, subordinate community institutions and regional economic communities, once approved by the Assembly. However if the council issues a regulation in exercise of powers granted to it by the Assembly, the latter's approval is dispensed with.[39]

On the whole therefore the Council is subordinate to the Assembly but has supervisory powers over all other institutions. But again, the linkage to the OAU leaves some open questions. One is as to the composition of the council. Though the Abuja Treaty is silent on this, the OAU Charter reveals that the council is made up of Ministers of Foreign Affairs of its member states.

This is unsatisfactory because given the state-centric orientation of diplomatic or political appointees in such positions, they are likely to dissipate the council's efforts by arguing narrow national viewpoints and defending national interests or territorial sovereignty. This has been the experience with OAU. Hence it is suggested that the council should be reconstituted with state's representatives who are knowledgeable in integration matters or at least who are in charge of a department of government with responsibility for economic planning in general or integration in particular. It is also suggested that the council should have been made the highest policy making organ of the community

39. Ibid., Article 13.

with representatives who can meet more frequently than the twice a year stipulated in the Treaty.

The third main organ of the community is the Economic and Social Commission. This organ, like the Assembly and the Council, is also the same as that of the OAU established in accordance with Article 20 of its Charter. The Abuja Treaty provides that the Commission shall consist of Ministers of Economic Development of each Member State who may be assisted by other Ministers, if necessary.[40]

It is further provided that the administrative heads of regional economic communities "shall" participate in the deliberations of the Commission and its subsidiary organs. Heads of other organisations may also be invited as observers. The modalities for such levels of participation is to be spelt out in a Protocol on Relations between the Community and African Regional and Sub-Regional Organisations as well as third states.[41]

The main function of the commission is to make recommendations to the Assembly, through the council, with respect to the co-ordination and harmonisation of the activities of the regional economic communities, and the preparation of programmes, policies and strategies for co-operation in the fields

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40. Ibid. Article 16(a).
41. Ibid., Article 15(4).

of social and economic development among African countries and between Africa and the international community. The Commission is also empowered to make any other recommendations and undertake any other assignment which may be entrusted to it by the Assembly or the Council.[42]

The Commission is required to meet only once a year in ordinary session but an extra-ordinary session may be convened either *suo motu* on the initiative of the Commission, or at the request of the Assembly and the Council.[43]

The oddity in the relationship between the Commission and Council is apparent. Both of these organs consist of Ministers representing Member States. It is therefore anomalous that Ministers of Economic Development will have to act at the level of the Commission through the Council comprising of Ministers of Foreign Affairs. This is even more curious because in the matter of economic integration, the Minister of Economic Development more than that for Foreign Affairs is better placed to advise his home government and also effectively participate in Community decision-making.

It is submitted that this structure creates a confusing web of structural and bureaucratic interface which is apt to lead to procrastination and lethargy. It ought

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42. Ibid., Article 16.
43. Ibid., Article 17.

to be eliminated by elevating Ministers of Economic Development to compose the council while the commission should consist of a small number of executives, competent and independent, appointed by the Community. They should lead and run the community's bureaucracy on a full time basis. This would mean that Ministers for Foreign Affairs would cease to play a central role in Community decision-making. If necessary, they may advise their governments through the Assembly.

The Commission needs to be made up of seasoned, full time bureaucrats of the Community who will give its affairs their singleminded commitment and play a pro-active advisory role in moulding the Community. Anything short of this will render it an unnecessary duplicate to the Council or even a mere talk shop with no useful role in the bloated institutional structure of the Community.

The fourth organ of the Community is to be the Pan-African parliament. Established by Article 14 of the Abuja Treaty, its main purpose is to involve African peoples, through their representatives, in the development and integration of the continent. According to Ibrahim Gambari, the provision for a Pan-African Parliament elected on the basis of continental universal suffrage derives from the example of the European Community.[44]

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44. Gambari, I.: "The Political Implications of the African Economic Community" in Ajomo & Adewale, (ed.), Op.Cit., 60 at 62.

The composition, functions, powers and organisation of the Pan-African Parliament are to be defined in a protocol to be adopted later. It is envisaged that the Parliament will be in place in the final stage of the implementation of the Treaty.[45]

The fifth and potentially one of the most important institutions of the Community is the Court of Justice whose main function will be to ensure adherence to law in the interpretation and application of the Treaty and deciding on disputes submitted to it thereunder.[46] The jurisdiction of the Court may be invoked by either a Member State or by the Assembly in matters involving any infringement of the Treaty or a decision of the Assembly or regulation issued by the Council. Action may also be initiated on grounds of lack of competence or abuse of powers by any community institution.[47]

Furthermore, the Assembly or Council may apply to the Court for an advisory opinion on any legal matter. The Assembly also has additional power to grant further jurisdiction to the court.

As presently stated, the Court of Justice, from a jurisdictional point of view, is pre-eminently an international court. Only international legal persons, namely states and community organs can bring action before it. Nonetheless there

45. Abuja Treaty, 1991; Article 6.
46. Ibid., Article 18.
47. Ibid., Article 18(3).

namely states and community organs can bring action before it. Nonetheless there is no doubt that the court may also have to decide on disputes arising from acts or decisions of community institutions. In this context, it may sometimes act like a constitutional court interpreting the community's constitutive instruments. Lastly, it may on occasion have to adjudicate between the community and its staff. In such cases, it will take on the character of an administrative court.

What is clear from the foregoing however is that individuals or other legal entities have no legal standing to bring action before the Court. In this respect, it differs materially from the European Court of Justice which entertains applications by natural and legal persons from the Member States including actions against their home governments.[48] This same rule has also been incorporated in the Treaty Establishing the Common Market for Eastern and Southern Africa, 1993.[49]

This vital lacuna needs to be filled once the Treaty comes into force by a decision of the Assembly extending the Court's jurisdiction to disputes between private citizens or organisations in two or more member states which may involve reference to or interpretation of an Article of the Abuja Treaty. Otherwise, the only alternative would be that of espousal of claims by home states on behalf of

48. Treaty of Rome (1957), Article 113.

49. Kampala Treaty, 1993; Article 23, Chapter Five.

their citizens under the unsatisfactory regime of the principles of state responsibility at general international law.

The sixth organ of the Community is the General Secretariat. Article 21(1) of the Abuja Treaty provides that the Secretariat of the Community is to be the General Secretariat of the OAU. By extension, the Secretary-General of the OAU would ipso facto be the Secretary-General of the Community. He is to be supported by the necessary staff.[50]

The Secretary-General is empowered to direct the activities of the Secretariat and to be the Community's legal representative. He has responsibility for implementing decisions or regulations as well as preparing and servicing all meetings. The Secretariat is also responsible for preparing and implementing the budget, carrying out studies with a view to achieving the objectives of the Community and making proposals for enhancing the functioning and harmonious development of the Community.[51]

In effect, the Secretary-General is the Chief Executive of the community. He heads its bureaucracy and he and all community staff owe their allegiance to it alone. They must neither seek nor accept instructions from any authority other

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50. Abuja Treaty, 1991; Article 21(2).

51. Ibid., Articles 22 and 23.

than the Community.[52]

These strong injunctions seem to ignore the virtual affinity between the community and the OAU's bureaucracy. In effect, the staff may be required to serve two masters under a common boss. The foreseeable difficulty in doing so is that the relationship between the two organisations is far from clear. The Abuja Treaty has not answered the underlying question as to which of the two encompasses the other.

On the whole, the undue attachment between the Community and the OAU is likely to present obstacles to the integration process. Institutions that have not proved very effective in implementing the objects and decisions of the OAU cannot be expected to perform any more credibly in relation to the more ambitious and complex task of continental economic integration.

The last organ of the Community, like the Organisation of African Unity, is made up of seven specialised Technical Committees. Their functions are of course not exactly the same as those of the OAU. Section 25 of the Abuja Treaty establishes seven committees while also empowering the Assembly to establish other committees as deemed appropriate. The Committees established under the Treaty are:-

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52. *Ibid.*, Article 24.

(a) Committee on Rural Economy and Food;

(b) Committee on Financial and Monetary Affairs;

(c) Committee on Trade, Customs and Immigration;

(d) Committee on Industry, Science and Technology, Energy, Natural Resources and Environment;

(e) Committee on Transport, Communications and Tourism;

(f) Committee on Health, Labour and Social Affairs;

(g) Committee on Education, Culture and Human Resources.

Each of these committees is to comprise a representative from each Member State who may be assisted by advisers. Every committee is responsible for preparing community projects and programmes within its area of competence for submission to the Commission. It is also to ensure the supervision, follow-up and evaluation of the implementation of decisions of the Community in their various areas of competence.

It would seem that the committees are the institutions of the community most directly involved in the sectoral integration envisaged under the Treaty. But it is difficult to define their relationship with the Secretariat which is the community's principal executive organ. Furthermore, the fact that the Committees are to pass proposals through the Commission which itself can only recommend to Council and ultimately to the Assembly is likely to make them less effective

than the Treaty suggests.

It is hereby suggested that it would have made for greater efficiency and economy if all the functions of the General Secretariat and Specialised Committees were vested in an independent commission. Each Commissioner would then head a department on the relevant subject matter and pass recommendations to the Council, constituted as suggested above. In this way the Commission would have had power to hire and fire Community staff; coordinate and implement the integration process with the assistance of experts, the Secretariat and Committees established by it and generally to give more direction to the community's existence.

As it is, the Community is organised more along the lines of international political organisations like the Organisation of American States and the Organisation of African Unity.Its present structure is dominated by state representation. The Assembly, the Council, the Commission and the Specialised Committees consist of representatives from all Member States. The same may also be the case for the Parliament when the Protocol is drawn up. This, not only makes these organs unwieldy but is apt to lead to inertia and politicisation of economic decision-making. National interests would naturally predominate deliberations in such institutions. As Plischke[53] rightly noted:

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53. Plischke, E.: (ed.) (1964); Systems of Integrating the International Community (Princeton: D. Van Norstrad Co. Inc.) p.67.

> The desire for coalescence of the international community is largely reflected in the interests of the nation-states. Nationalistic egocentrism, provincialism and individualism tend to influence human behaviour more forcefully than do cosmopolitanism or globalism.

The tendency therefore is for international organisations to take the character of multipartite diplomatic fora and thereby become instrumentalities for implementing power politics rather than alternatives to it. Such arrangements, in Plischke's view can only provide a framework for inter-state integration rather than a true international integration which is what the African Economic Community should be aiming at achieving.

On the whole, it is submitted that the concentration of the Abuja Treaty on structures based upon member state representation is evidence that African countries are still strongly tied to the ideological rigidities of the traditional nation-state system. It is doubtful if such structures can rally the muscle to implement the objectives and mandate of integration in a continent fragmented into numerous nation-states and divided along strong linguistic, legal and racial lines. To make this point clearer, we shall briefly set out the objectives and principles outlined in the Abuja Treaty, 1991.

4.4.2 PRINCIPLES AND OBJECTIVES OF THE COMMUNITY

The Abuja Treaty, 1991 clearly enunciates the principles and objectives of the African Economic Community. Article 3 lays down eight principles which are to guide the Community in the pursuit of its objectives. The first four of them are the equality and inter-dependence of member-states; solidarity and collective self-reliance, inter-state co-operation; harmonisation of policies and integration of programmes; and the promotion of harmonious development of economic activities among member states.

The fifth principle is the observance of the legal system of the community. This is a significant principle for the purpose of this study not only because it provides a basis for the expected emergence of community law but also suggests the overriding character of such law vis-a-vis national law. Within the EEC, the European Court of Justice has categorised such law to be *sui generis*, that is to say, it is neither part of the corpus of international law nor municipal law.

The sixth principle requires the peaceful settlement of disputes among Member States, active cooperation between neighbouring countries and promotion of a peaceful environment as a prerequisite for economic development. The seventh principle relates to the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on

Human and Peoples Rights (1981).[54] The last principle is that of accountability, economic justice and popular participation in development.

Compared to the OAU, the principles underlying the community are better framed to achieve the objective of African unity which the OAU set for itself more than thirty years ago. Despite the reference to the principles of the OAU and those governing international relations in its preamble, the Abuja Treaty is "significantly different in letter and spirit from the eggregeriously aggressive and clumsy tone of the OAU's principles, which one commentator notes look more like a difficult peace treaty after a war of independence among African states, rather than a treaty for realising African unity."[55]

A few examples will illustrate this change of language and the corresponding change of intent and spirit which ought to accompany it. Instead of the" sovereign equality of all Member States" stipulated in Article III(1) of the OAU Charter, the Abuja Treaty has "equality and inter-dependence of Member States".[56] In place of the absolute rule of "non-interference in the internal affairs of states", the Community's principle is that of "solidarity and collective self-reliance". Similarly for the principle of "respect for the sovereignty and territorial integrity of each state and its inalienable right to independent existence" there is

54. Eze, O.: "Human Rights in the context of African Integration" in Ajomo & Adewale (ed.): *op.cit.*, P.282.
55. Ogan, C.A.: Discussant in Ajomo & Adewale (ed.), *op.cit.*, Pp.52-53.
56. Abuja Treaty, 1991, Article 3(a).

the principle of "inter-state co-operation, harmonisation of policies, and integration of programmes".

The understanding and brotherliness exhibited in the Abuja Treaty contrasts so sharply with the bellicosity of the OAU Charter that Mr. Ogan suggests that "nothing less than a confederation seems to result from (the) agreement."[57] This no doubt is an over-optimistic view but it is significant that the Treaty displays a grudging willingness on the part of African countries to concede some of their sovereignty in order to accelerate the process of economic integration.

On the basis of these principles, the Community is to achieve the following objectives:[58]

(a) to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an indigenous and self-sustaining development;

(b) to establish on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to enhance a self-reliant

57. *Ogan, C.A., op.cit.*, P.53.

58. Abuja Treaty, 1991; Article 4(1).

development;

(c) to promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to progress, development and the economic integration of the continent; and

(d) to co-ordinate and harmonise policies among existing and future economic communities in order to foster the gradual establishment of the Community.

These objectives indicate that the Abuja Treaty is designed to establish the Community by means of a theoretical approach combining sectoral integration in a number of priority areas (particularly trade, agriculture, industry and energy, transport and communications as well as currency and finance) and integration through the market system in the traditional stages of free trade area, customs union and common market.[59]

It is partly in recognition of this phased implementation of the Community and also partly having regard to the numerous difficulties that the process may confront that the Abuja Treaty has provided a programmatic framework for its establishment spanning over a period of thirty four years. The Treaty further

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59. See Report of ADB Task Force, 1992, *op.cit.*, Pp.13-14.

allows for a margin of six years to accommodate any delays.

Article 6(1) of the Abuja Treaty provides for a gradual establishment of the Community over a transitional period of thirty four years divided into six stages of varying duration. As mentioned earlier, the first stage of five years is to be devoted to strengthening existing regional economic communities. Where they do not presently exist, new ones are to be put in place in order to nurture them into building blocks for the Community. We have seen that this process has already been at work in Eastern and Southern Africa even before the Treaty's entry into force.

The second stage will cover the next eight years during which each regional economic community will stabilise tariff and non-tariff barriers, customs duties and internal taxes with a view to eliminating all trade barriers between Member States and harmonising customs duties in relation to states outside the Community.

The third stage, planned for 10 years, envisages the emergence of a free trade area across the continent through the stabilisation of the steps taken in the second stage. This would also cover the adoption of a common external tariff and the creation of a customs union. The customs union would then be concretised in the two years comprising the fourth stage of implementation.

The fifth stage of four years is for establishing the African Common Market. It is anticipated that the infrastructure for such a market will be laid in the twenty-

five year period of the first four stages. The Common Market will involve common policies in the areas of agriculture, transport and communications, industry, energy and scientific research. It will also involve harmonisation of monetary, financial and fiscal policies as well as the entrenchment of the principle of free movement of persons, goods and capital, and the rights of residence and establishment.

The sixth and final stage of five years is to be used to consolidate and strengthen the African Common Market. At this stage, all sectors including the economic, political, social and cultural would become integrated. There will he a single internal market and a Pan-African Economic and Monetary Union. There will be one African Central Bank and a single currency for the whole continent. It is also in this last stage that the structure for a Pan-African Parliament will be put in place. By the end of these stages, all structures necessary for the effective functioning of the community are to be consolidated.

This transitional arrangement closely resembles that under the Treaty of Rome, 1957 which established the European Community. Article 8 of that Treaty stipulated for a transitional framework of three stages spanning twelve to fifteen years each. Although the periodisation differs materially, it is perhaps correct to say that the European Community set the pace for the Abuja Treaty.[60] The

60. Akinterinwa, B.: Discussant, in Ajomo & Adewale (ed.), *op. cit.*, P.101.

question however is whether or not with its legacy of divisions, underdeveloped economies and fragile polities, Africa can accomplish Europe's feat of consummating a viable economic union within the time set in the Treaty or even the cumulative transitional period of forty years?

The answer to this question depends largely on the scope of integration envisaged under the Treaty and in some part on the effectiveness of community institutions, which itself derives from the legal status of the organisation itself. In the last part of this chapter, we therefore explore the legal status and scope of the African Economic Community as established under the Abuja Treaty.

4.5 LEGAL STATUS AND SCOPE OF THE COMMUNITY

The close relationship between the Community and the Organisation of African Unity has raised a number of questions on the legal status of the former. Is it a separate organisation or is it subsumed under the OAU? Does it enjoy legal personality at international law? Does it have supra national powers and functions or is it merely an inter-state or inter-governmental association?

To answer these questions it would be necessary to examine the Community's constituent instrument, its juridical competence as well as powers and purposes. On its relationship with the OAU, we have earlier seen that the Community shares all its key organs with the OAU - from the Assembly to the

Secretariat. But the Treaty leaves many issues hanging. For example, does membership of one automatically carry that of the other? Does withdrawal from one imply withdrawal from the other as well? Given their structural unity, does one encompass the other?

Other scholars also raise more questions. Ambassador Oshodi suggests that the level of integration expected would swallow up the OAU and even diminish the individual sovereign identities of member states. He then asked whether this would create a new political entity which would also be a sovereign? He further questioned what will happen to the existing sovereignties, if the answer to the first question is in the affirmative?[61]

In the view of the present writer, these questions implicitly over-romanticise the prospects and ultimate status of the Community. The structure of the Community leaves no room for speculation as to whether it envisages a federation or even a confederation. The status of the African Community is no more than that of a typical inter-governmental co-operation arrangement. The latter is evidently based on an inter-state or inter-governmental approach.

The basic feature of this model is that the international (or more accurately inter-state) organisation only provides a structure through which the participating

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61. Oshodi, A.O.: "The Legal Framework of the African Economic Community" in Ajomo & Adewale (ed.), *Ibid.*, p.38.

states espouse common goals and policies in keeping with their national interests. Thus member-states ascribe some authority and responsibilities, but not sovereignty, to the organisation.[62] Indications of this model under the Abuja Treaty include the pre-eminence of the Assembly of Heads of State and Government in decision-making, the principle of national representation in the various organs, and the rule of consensus. It is hoped that this primacy accorded to the state sovereignty principle will not become an obstacle to the integration process when it takes off.

It seems to be an encouraging signal that the inter-governmental or inter-state approach is somewhat diluted by the supra national character of community law. In cases of conflict with domestic laws, the former would prevail. Also the direct applicability of community decisions and regulations duly made in the Member States is evidence that supranationalism is somewhat recognised under the Abuja Treaty.

On the whole, it is only necessary here to re-state that "the subordination or at least abridgement of aspects of national sovereignty is a pre-condition for the success of the Community."[63] This is not to suggest that the Community must be a sovereign or a super-state. It only implies that unless the Member

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62. Plischke, E. (ed.) *op. cit.*, P.5.

63. Gambari, I. in Ajomo & Adewale, (ed.)., *op.cit.*, p.64.

States display the political will to concede some measure of their untrammelled sovereignty to the Community, integration cannot effectively take off at all, let alone proceed.

In terms of international law, this means that the Community itself must have international legal personality with clearly defined powers and competencies to undertake the integration project. We shall briefly examine both the legal personality and legal capacity of the African Economic Community by a quick look at the Treaty establishing it.

At classical international law, only states were deemed to possess international legal personality. However following the emergence of numerous non-governmental international associations in the 19th century, the dominant statist conception of international affairs began to change. The growth of private international unions like the International Committee of the Red Cross (1863) and the International Law Association (1873) was soon followed by a series of public international associations such as the International Telegraphic Union (1865) and the Universal Postal Union (1874). The 20th Century soon saw the creation of comprehensive, global organisations like the League of Nations and the United Nations. According to Plischke, these two organisations represented the most

"dramatic and epicentral typification of international organisations with a transcending significance."[64]

The United Nations by its constitutive Charter was empowered to perform functions relating to international peace and security which on orthodox doctrine could only be done by States. Similarly a large number of regional or multi-lateral organisations have been created whose competencies impinge on the traditional sovereignty or domestic jurisdiction of states. These state-like functions of international organisations served to challenge and ultimately to alter the theory and structure of international law, especially on the subjects of the law.

Thus international organisations have come to be attributed with legal personality. The problem however lies in the absence of clearly defined criteria for attaining such personality. The preponderance of juristic opinion and state practice now recognises that once Member States confer duties and powers on organs of an organisation, its legal personality becomes a necessary inference from those functions and rights it enjoys. Legal personality is regarded as indispensable for the achievement of the organisation's purposes.[65] This method of determining the personality of international organisations is classified as the

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64. Plischke, E. (Ed.), *op. cit.*, P.10.

65. See REPARATIONS FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS Case ICJ Rep. (1949) 174.

objective approach.[66]

The second approach, categorised as inductive, looks at the organisation's constitution only. Any inference of a collective intention on the part of Member States to make it a separate legal entity is only drawn from the rights and duties conferred on the organisation under its constitution.

Professor Ian Brownlie on the basis of the decision of the International Court of Justice in the REPARATIONS Case identifies three main criteria of legal personality at international law. The first is that the organisation must be a permanent association of states or other subjects of international law, with lawful objects and equipped with independent organs. The second criterion is that there must be a distinction, in terms of legal powers and purposes, between the organisation and its Member States. Finally, it is necessary that the organisation must exercise legal powers on the international plane and not merely within the national systems of one or more states.[67]

Even though the Treaty establishing the African Economic Community does not explicitly state so, and inspite of its heavy dependence or linkage to the Organisation of African Unity, it is submitted here that the Community is an

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66. Ajomo, M.A.: "International Legal Status of the African Economic Community" in Ajomo & Adewale (ed.), *op.cit.*,P.45.

67. Brownlie, I.(1979): Principles of Public International Law (London: Oxford Press) p. 679.

international legal personality. This is a logical inference from its capacity and powers which are conferred to enable it achieve its objectives.

The rights and duties exercisable by the Community are defined by the scope of integration envisaged under the Abuja Treaty, in particular the modalities for harmonising the economies of Member States. The ultimate objective of the Community is to create a single community market to be serviced by a single production area.

Article 4(2) of the Treaty stipulates the main means by which the objectives of the Community are to be achieved. Among these are the liberalisation of trade through the abolition, among member states, of trade barriers, including non-tariff barriers, in order to create a free trade area and the relaxation or eventual abolition of quantitative and administrative restrictions. Others are the gradual evolution of a common trade policy and removal of obstacles to the free movement of persons, goods, services and capital; and the right of residence and establishment.

Of all these means for the achievement of integration, it is the last, hereinafter referred to as the free movement regime, that has the greatest potential for overcoming the constraints to integration which arise from the character of international boundaries in Africa. We shall therefore focus on it in the next Chapter.

CHAPTER FIVE

INTEGRATION LAWS AND INTERNATIONAL BOUNDARIES: AFRICAN AND NON-AFRICAN REGIMES FOR FREE MOVEMENT

5.1 INTRODUCTION

We have seen in the preceding chapter that the African Economic Community as proposed under the Abuja Treaty, 1991 is an international organisation enjoying rights and duties as a legal person at international law. It is these rights and duties that define the scope of the community and its juridical competence. Of particular importance in this regard are the Treaty provisions which stipulate the modalities for harmonising the economies of Member States.

Harmonisation of economies on the African continent is the major objective of the community. It is clear from Article 4 of the Abuja Treaty that the task of the Community is not merely to create a free trade area. The ultimate aim is to build a single community market out of the numerous existing national markets, and also to evolve a single production area. Thus, member states are required to co-operate with each other in a number of functional areas like food and agriculture; industry, science and technology; energy, natural resources and environment as well as transport and communication infrastructure etc. Other areas of co-

operation envisaged extend to social, political, financial and monetary matters.[1]

The Treaty also carefully enumerates the major means by which the Community would achieve these tasks. The most important of these are the provisions dealing with harmonisation of African economies by the regime of free movement of goods, persons, capital and services as well as the rights of residence and establishment.[2] For the purpose of this thesis, it is this principle (hereinafter called the free movement regime) that is our main concern. The reason is that restrictions on factor mobility, including labour movement have been the direct consequence of the imposition of 'international' boundaries by arbitrary colonial partition of Africa's pre-colonial trade and political landscape. Hence in the perspective of this work, the major focus of integration law must be to eliminate or reduce the barriers to trade and other intercourse across boundaries arising from strict boundary maintenance policies and the diverse legal systems that exist in Africa.

Today, the African continent exhibits a pluralistic legal heritage that perpetuates the divisions of colonialism more firmly than the geo-

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1. Abuja Treaty, 1991; Article 4.
2. *Ibid.* (Article 4(2).

political boundaries established by the European powers. Four main legal systems cut across the length and breadth of the continent - the common law of Anglo-Saxon origins, the Civil law of continental Europe, Islamic Law and customary laws. Each country now has its own legal traditions; its own system of legal thought, its method of law-making and its own processes and philosophies of judicial interpretation or determination of disputes.[3]

It is submitted that harmonisation of policies for economic integration needs to go together with legal harmonisation or integration of laws that can support the physical and technical infrastructure for regional exchange of goods, services, labour and capital. This chapter will therefore examine these two major instruments of integration, namely free movement and harmonisation of laws, which are desiderata for overcoming the constraints to economic co-operation associated with Africa's territorial fragmentation. We shall first examine them in the light of the provisions of the Abuja Treaty, and then compare the approach to developments in other regions of the world pursuing economic integration. Particular reference will be made to examples from the European Community.

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3. Ndulo, M.(1996): "The Promotion of Inter-African Trade and the Harmonisation off Laws in the African Economic Community: Prospects and Problems" in Ajomo, M.A. & Adewale, B. (ed.): (Lagos, NIALS,) P. 110.

5.2 THE FREE MOVEMENT REGIME UNDER THE ABUJA TREATY

5.2.1 FREE MOVEMENT OF GOODS AND SERVICES

Article 29 of the Abuja Treaty, 1991 provides that:

Member states of each regional economic community agree to progressively establish among them during a transitional period as specified in Article 6 of this Treaty, a Customs Union involving:

(a) the elimination among Member States of each Community, of customs duties and charges having equivalent effect, quota restrictions or prohibitions and administrative trade barriers;

(b) the adoption, by Member States, of a common external customs tariff.

The purpose of this provision is both to create a free trade area as well as a customs union among Member States. These are to be achieved through the regional economic communities in the second stage of the implementation of the Community. Article 30(1) requires that during this stage, member states of each regional economic community shall refrain from establishing new customs duties and other charges having equivalent effect and from increasing those that apply in their mutual trade. At the

third stage, they are required to progressively reduce and finally eliminate, at the level of each regional economic community, customs duties and other charges.[4] In addition, the communities are to establish common external customs tariff applicable to goods imported from third states. Any differences in this regard between the regional communities are to be eliminated in the fourth stage of the Treaty's implementation.

From the perspective of international economic law, one significant provision of the Treaty is that member states are required to accord one another, in relation to inter-community trade, the most-favoured-nation treatment. This means that any privilege or favour granted by one Member State to another shall equally apply to other member states. Specifically the Treaty declares that in no case shall tariff concessions granted to a third state in pursuance of an agreement with a member state be more favourable than those applicable in pursuance of the Abuja Treaty.[5]

Finally Articles 39 and 40 wrap up the trade liberalisation regime by enjoining member states to take all necessary measures to harmonise and standardise customs regulations and procedures and to simplify and

4. Abuja Treaty, 1991 Article 30(2).

5. *Ibid.*, Article 37.

harmonise their trade documents in line with a protocol on customs co-operation to be adopted and annexed to the Treaty.

Although this protocol is yet to be prepared, it is important to stress that the free trade arrangements reflected in the Treaty itself are a clear recognition that the incongruities perpetrated by the existing fragmentation of the continent into small, unviable and territorially limited national markets underlie much of Africa's present under-development. It is suggested that the proposed protocol will have to put in place the appropriate regulatory framework to overcome the barriers to intra-regional trade introduced in the colonial period and perpetuated by the international law governing state boundaries and state sovereignty as we saw in Chapter 3.

5.2.2 FREE MOVEMENT OF PERSONS AND RIGHTS OF RESIDENCE AND ESTABLISHMENT

Chapter 6 of the Abuja Treaty which deals with this subject contains only one Article, that is Article 44. It stipulates that the Member States agree to adopt individually or at bilateral or regional levels, the necessary measures for ensuring the free movement of persons and capital and the rights of residence and establishment of their nationals within the community. This provision, on the face of it, imposes only a broad obligation whose specifics are to be worked out by the Member States.

It is submitted that the drafters of the Abuja Treaty should have used the experiences of the West African and Southern African integration schemes to elucidate more clearly the key measures for institutionalising freedom of movement at a continental level. Given the low score of existing integration schemes in Africa on this subject, it would have been preferable if the Treaty undertook more detailed treatment of the matter.

It is submitted that unless the free movement principle is fully implemented, integration cannot realise its ultimate objectives. In the view of this writer, the two key measures that have accelerated the pace of integration elsewhere have been the provision of a supporting framework for transborder co-operation and harmonisation of laws. None of these measures is mentioned in the Abuja Treaty. This suggests that the Treaty hopes to achieve free movement by means of inter-state co-operation. While this approach may be practicable, it seems to lack the level of multilateral uniformity needed to address the continent-wide phenomenon of arbitrary boundaries in Africa.

The provisions of the Abuja Treaty on this issue are in pari materia with the original provisions of the Lagos Treaty establishing the Economic Community of West African States, 1975.[7] These provisions were

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7. ECOWAS Treaty, 1975; Article 2(2).

Economic Community, now called the European Community, virtually every European country now wants to join.[9]

For all its economic power, the United States of America gave legislative approval to the establishment of the North American Free Trade Area which became effective on 1 January, 1994. Essentially this represented an extension of the Canada - United States Free Trade Agreement which came into force on 1 January, 1989. By covering Mexico, the North American arrangement created the largest free trade zone in history with 8.2 million square miles of landmass, 364 million consumers and 7 trillion dollars of economic activity.[10] Prospects of South American countries joining this grouping have also been expressed.[11]

In Asia, the Association of South East Asian Nations (ASEAN) was established in 1967 consisting of Brunei, Indonesia, Malaysia, the Phillipines, Singapore and Thailand. At the Bali Summit of 1976, they signed the Jakarta Declaration of ASEAN Concord. In 1991 they agreed to create a free trade area by the year 2008, and to step up talks towards "a higher plane of political and economic co-operation" in the face of

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9. See Agreement Creating a New European Economic Area between the EEC and European Free Trade Association; 22 October, 1991.

10. 31 I.L.M. (1992), 289-456; 32 I.L.M. (1993), 605-799.

11. Dede, B. in Ajomo & Adewale, (ed.), *op. cit.*, p. xxxvii.

large economic groupings forming elsewhere and to forge better ties with Indochina.[12] These principles were restated in the Singapore Declaration of 1992 and in the **Framework Agreement on Enhancing ASEAN Economic Co-operation.**[13] By its composition this grouping will also create a market of 320 million consumers similar to the European Community.

Even in developing regions, with economic conditions similar to those in Africa, efforts to forge viable economic groupings have been stepped up. In South America, for example, the Latin American Free Trade Association (LAFTA) established under the Montevideo Treaty, 1960 was renamed and expanded into the Latin American Integration Association (LAIA or ALADI) in 1981 to accelerate the process of economic integration in the region. This group was rivalled for many years by the Andean Pact union but both have now been overtaken by the more successful organisation named MERCOSUR.

Formed in 1991, the Southern Cone Common Market (Mercosur) consists of Argentina, Brazil, Paraguay and Uruguay. Its free trade area took off on 1 January, 1995. Bolivia and Venezuela are in the process of

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12. 1992 Commonwealth Law Bulletin Vol. 18, No. 1, January 1992, p.295.
13. (1993) C.L.B. Vol. 19, No.1, January 1993, Pp. 308-312.

joining the group.[14] The volume of intra-regional trade in the area has ballooned from 4 billion dollars a year to 14.4 billion dollars since the creation of Mercosur. This level of progress has demonstrated that integration schemes among developing countries are useful, plausible and workable.

For the purpose of this discussion however, we shall only examine the Treaties setting up the two major economic groupings in Europe today. These are the European Community and the Commonwealth of Independent States Economic Union. Only a brief discussion of the latter will be done here as it is relatively young and does not have an established track record that can be assessed.

The main point of interest with respect to the Commonwealth's Economic Union is the explicit free movement regime established under the Treaty. The Treaty on Economic Union was done at Moscow, Russia on 24 September, 1993 as a follow up to the Charter of the Commonwealth of Independent States signed on 22 January, 1993.[15]

The Commonwealth of Independent States itself was formed by former republics of the defunct Union of Soviet Socialist Republics on 8

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14. *Time Magazine*, August 26, 1996 at Pp.26-27.
15. 34 I.L.M. 1298 (1995).

December, 1991 on the basis of the Minsk Agreement by Belarus, Russia and Ukraine. It was later expanded by the Alma-Ata Declaration and Protocol of 21 December, 1991. This enlarged the Commonwealth to eleven republics (excluding Georgia and the Baltic States - Estonia, Latvia and Lithuania).

Originally, the Commonwealth was merely a part of the 'divorce process' among the successor states of the USSR until the adoption of the Commonwealth Charter defining the future of the association. The Charter had a range of commitments from co-ordination of foreign and defence policies to free movement of goods, capital and labour between Member States.

This was reinforced by the Treaty on Economic Union adopted and signed by Russia, Belarus, Armenia, Moldova, Kazakstan, Kyrgzstan, Uzbekistan, Tajikistan and Azerbaijan. Ukraine and Turkeministan became associate members while Georgia fully joined in October 1993.

Unlike the European Community Treaty, the Commonwealth's Economic Union Treaty is not self-executing. It only provides legal principles for the step-by-step formation of a common economic space based on market principles through the establishment of a free trade area;

a common market of goods, services, capital and labour, a payments and customs union and a monetary union.

Article 7 of the Treaty on Economic Union mandates the member states to create the necessary legal, economic and organisational conditions for free movement of capital and the work force. More specifically, Article 19 decrees visa-free movement throughout the territory of the economic union.[16]

These two provisions emphasize the central role assigned to the free movement principle in the evolution of an economic union. Given the strong historical links between peoples of the old Soviet union, it is significant that the successor states have not allowed unbridled attachment to their newly acquired sovereignties to obstruct routine human interaction in an erstwhile contiguous political and economic space. This approach very much commends itself to Africa with centuries-old traditions of free movement for trade and social intercourse among the continent's pre-colonial people.

However it is in the European Community that this principle has been best developed and hence we shall discuss in some detail, the

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16. *Ibid.*, at p. 1299.

evolution of the community and its free movement regime from inception to date

5.3.2 FREE MOVEMENT UNDER THE EUROPEAN COMMUNITY

The European Community was set up under the Treaty of Rome, of 25 March, 1957. The Treaty came into force on 1 January, 1958 creating the European Economic Community as one of a group of three communities. The other two were the European Coal and Steel Community and the European Atomic Energy Community (ECSC and EURATOM). The Community took off originally with only six members namely Belgium, France, Federal Republic of Germany (then West Germany), Italy, Luxembourg and The Netherlands. Denmark, Ireland and the United Kingdom joined in 1973, followed by Greece in 1981 and Portugal and Spain in 1986.

By the time the Single European Act for creating the Single European Market came into force on 1 July, 1987 many other countries including Switzerland, Sweden, Finland and Norway were seeking to join that community. East Germany, by virtue of re-unification with West Germany became a part of the Community. A number of East European nations, notably Poland, Romania, and even Russia, are seeking varying levels of relationship with the European Community.

Furthermore, a number of non-European countries and regions have negotiated different levels of association with the Union. An example of this is the European Community - African, Caribbean and Pacific countries (EC-ACP) Association based on the Yaounde/Lome Conventions of 1973, 1975, 1980, 1985 and 1990. The latter (1975-1990) are better known as Lome I to IV. The conventions presently involve the community and over sixty states in the African, Caribbean and Pacific regions with the aim of promoting trade and joint socio-economic development. In reality however, it would seem that the Association merely creates a large market outside Europe for European goods.

The most singular achievement of the European Community has been the establishment of a single integrated market without internal frontiers in which free movement of goods, services, persons and capital is assured. This was achieved by means of a careful legislative programme, outlined in the Single European Act adopted in 1986, for removing all obstacles to free movement, of persons, goods, services or capital; including physical, technical and fiscal barriers to free movement.[17]

The last legal instrument by which this has been implemented is

17. Brealey, M. & Quigley, C. (1989): Completing the Internal Market of the European Community 1992 Handbook (London: Graham & Totman,) p. vii.

the Treaty on European Union, otherwise called the Maastricht Treaty, which was signed on February 1, 1992. The stated objective of the Treaty is to take the process of European integration initiated by formation of the European communities in 1957 to a new stage in the process of creating an ever closer union between the peoples of Europe.[18]

The Treaty has redefined the scope of the union to be the creation of an economic and social area free from internal frontiers; the establishment of economic and monetary union and the implementation of a common foreign and security policy and ultimately a defence policy as well. Other objectives include the introduction of a common union citizenship and co-operation in justice and home affairs.

This means that while the new union is legally founded on the scope of the three existing European communities, it is supplemented by two new forms of co-operation introduced by the Maastricht Treaty, namely the common foreign and security policy and co-operation in justice and home affairs.[19]

For our purpose however, the most significant features of the

18. Maastricht Treaty, 1992; Art. A. para.2.
19. *Ibid.*, Article B & J and Article B & K.

revised European Treaties are the elimination of internal frontiers and the introduction of common union citizenship.

So far as union citizenship is concerned, Article 8 of the Single European Act confers the status on nationals of each Member State. The status carries with it, the right to move and reside freely throughout union territory.[20] Union citizens are also entitled to vote and stand as candidates at municipal elections and in elections to the European parliament within the Member State of residence.[21] The effect of the latter is to free electoral rights from the insular principle of nationality. Another significant attribute of union citizenship is that it entitles citizens to enjoy the subsidiary diplomatic and consular protection of any Member State.[22] Lastly, the treaty also contains provisions for a common policy on visas.[23]

The creation of an internal market was the main focus of the reforms brought about by the Single European Act. Thus Article 8A of the revised Treaty mandated the European Community to "adopt measures with the aim of progressively establishing the internal market over a

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20. See Article 8(a) of the Europeans Community Treaty as revised in the Single European Act.
21. *Ibid.*, Article 8(b).
22. *Ibid.*, Article 8(c).
23. Article 100c, Revised European Community Treaty, Article K.1, No.2 of the Maastricht Treaty.

period expiring on 31 December 1992---" It then defined the internal market as comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

What this means is that the European internal market is based on the four freedoms laid down in the original Treaty of Rome, 1957.[24] But the Single European Act also adds three new elements to the scope of the freedoms - first it introduces policies on economic and social cohesion as a means for achieving the internal market. Secondly, the limited meaning of persons as implemented under the original Treaty has now been extended. The 1957 Treaty restricted the term to natural persons in terms of workers (Articles 48-51) or people seeking to establish themselves or provide services (Articles 52-59). The concept now encompasses workers and economic actors as well as the more general aspect of the free movement of people, as addressed by the Adonnino Committee on a People's Europe.[25] Lastly, the definition of the internal market in terms of 'an area' connotes something wider than a purely economic unit.

Furthermore, Article 8A of the revised Treaty explicitly mentions

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24. Treaty of Rome, 1957; Article 3(c).

25. Mead, P.(1989): Introduction to The European Community; The Single Market (New York/London: Oceana Publications).

the necessity for the removal of "internal frontiers." While it may be said that this necessity was implicit in much of the legislation under the original Treaty, the removal as opposed to the reduction of barriers is the paramount aim of the internal market. The means of achieving the removal of barriers include, under Articles 100A and 100B, harmonisation of Member States' laws.

In practical terms, the essential aim of the internal market is the removal of internal frontiers between the Member States to create the economic conditions for a single European market. The most direct consequence of this is the removal of customs posts and immigration controls at the internal borders. These represent the most important physical barriers to intra-community trade. Their removal however would have repercussions for the collection of taxes and excise duties and the legitimate exercise of public policy and security controls by Member States in matters such as control of illicit trade in drugs, terrorism and illegal migration.[26]

As far as the fiscal issues are concerned, the effort has been to achieve approximation in the rates of taxes and to set up a clearing house system for reimbursement between states of taxes on imported and

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26. See Political Declaration By the Governments of the Member-States on the Free Movement of Persons, 1986 attached to the Single European Act.

exported goods. With respect to control of individuals, the main concern has been with removing the systematic checking of individuals when crossing an internal border. This implies that Member States who wish to conduct identity or security checks have to do so in the context of their internal security policy rather than at inter-state borders. Secondly it requires that checks should be strengthened at the external entry points to the community.

The last category of barriers to the internal market are technical in nature, including veterinary and health checks and controls as well as technical standards for goods being moved across internal frontiers. In this regard, effort has been made in harmonisation of the respective standards across the community and for imports from third states. Another aspect relates to the transfer of these controls to the places of departure with the issue of common certificates.

In conclusion, it is apposite to briefly state the case made by the European Commission for the removal of physical, fiscal and technical barriers to free movement of persons, goods, services and capital that:

> The reason for getting rid entirely of physical and other controls between Member States is not one of theology or

> appearance, but the hard practical fact that the maintenance of any internal frontier controls will perpetuate the costs and disadvantages of a divided market; the more the need for such control diminishes short of total elimination - the more disproportionate become the costs, expenses and disadvantages of maintaining the frontiers and a divided market.[27]

As this thesis has emphasised throughout, the above rationale is no less true for Africa. Unless internal frontiers are converted from barriers to bridges of human intercourse, they will remain stiff impediments to integration. The problem as we shall see with respect to the Economic Community of West African States has been that African countries hardly want to concede some measure of their sovereignty. One consequence of this is the perpetuation of strict boundary enforcement rules and apparatuses. For example, it has been reported that at some point, between Lagos in Nigeria and Porto Novo on the Beninoise side, there were over twenty checkpoints: from customs to immigration to police to produce inspectors, etc.

Apart from the fact that frontier posts are the most visible

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27. White Paper from the Commission to the European Council: Completing the Internal Market Com(85) Brussels 14 June 1985, para. 12.

examples of the continued fragmentation within the community, they also cause frontier delays which impede trade flows and add unacceptable administrative costs which are ultimately paid by the consumer. Similarly barriers created by different national product regulations and standards have a double-edged effect; they not only add extra costs; but they also distort production patterns; increase unit costs; discourage business co-operation, and fundamentally frustrate the creation of a common market for industrial products.

Until such barriers are removed, manufacturers will perforce have to focus on national rather than continental or regional markets and will be unable to benefit from the economies of scale which a truly unified internal market offers. This has been one major reason for the failure of the trade liberalisation scheme of the Economic Community of West African States.

For Europe, the benefits of a single internal market have been manifest. Intra-community trade has risen substantially to over 60 per cent of Member States total exports. Industrial production has, on average, been up by more than 20 per cent compared to 1984. The Gross Domestic Product (GDP) has been raised by 4.5 per cent with millions of new jobs and over 6 per cent drop in consumer prices. The aggregate government

budget balance has improved by about 2.2 percentage points of GDP as government revenues have risen and procurement costs have dropped with the opening of public procurement to wider competition.[28]

On the contrary, Africa has been badly hit by the implementation of the European single market as Europe now looks more inward. European investors find the market of 320 million people now more attractive and investors from other developed countries are also looking more to Europe with her more developed infrastructure and stable political and economic climate.

Africa's narrow national markets cannot compete for investment with the expanding and dynamic regional market created in Europe and hence Africa's response must be to accelerate efforts towards greater integration. In so doing, there are a number of important lessons to be learnt from the European experience. One important factor in the European integration has been the political will and commitment of Member States who have consented to give up some measure of their sovereignty in order for the common market to take firm root. Infact in both the revised Treaty and the Maastricht Treaty, decision-making

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28. Afolabi, R.: " The Impact of the EEC, Lome Conventions and Other Non-African Groupings on the AEC" in Ajomo & Adewale (ed.). op.cit., p.77 at 79; Cechinni, P.(1988). The European Challenge 1992 (London: Gower,) 1988 Passim.

structures have been strengthened in order to reinvigorate community institutions to take effective action which is binding on Member States in order to achieve the cherished European union.[29]

A good example of display of political will by European countries in favour of integration is provided by the judgement of the German Federal Constitutional Court on the Maastricht Treaty delivered on 12 October, 1993.

In that case, the Federal German Council had amended the Basic Law (Grundgesetzes) of 21 December 1992 and passed a Law of 28 December 1992 for ratifying the Treaty of European Union. By those amendments, the German Republic undertook that it "may, by law, with the approval of the Federal Council, assign sovereign rights". It also reaffirmed the Republic's duty to co-operate in the development of the European Union and incorporated provisions on community citizenship into the German Basic Law.

The ratification of the treaty and the amendments were challenged by some members of parliament on the grounds that they constituted a violation of their fundamental rights to democratically legitimate representation in the Federal Parliament and to participate in the exercise

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29. See Part Five, Revised EC Treaty.

of state power as the Maastricht Treaty assigned substantial powers of the Federal Parliament to institutions of the European Community.

The Court held that the willingness to be bound within a community under international law and within the close legal alliance of an inter-governmental community is appropriate for a democratic state. It also noted that the fact that sovereign powers are granted to an alliance means that the exercise of such powers is no longer dependent upon the will of a single member state. To regard this as a violation of democracy would be to assume a concept of democracy which would render any democratic state unable to become part of an integrated inter-governmental community unless the principle of unanimity were adopted.

In the final analysis, the court held that the principle of democracy should not prevent "Germany from becoming a member of an inter-governmental community which is organised on a supra-national basis."[30]

This decision represents a strong political and judicial bulwark for supra-nationality of European institutions. This is a big impetus for European integration which has been catalysed by a body of community jurisprudence and a common legal framework for harmonisation of

30. Wegan, G. & Kuner, C.: "Germany: Federal Constitutional Court Decision concerning the Maastricht Treaty" 33 I.L.M. 388 (1994) at 418-419.

policies.

This takes us to the second major element that is a prerequisite for the evolution of a common market structure, namely the harmonisation of laws. It is widely accepted that economic integration needs a legal framework to foster and support it. Thus from inception, the European Community emphasised approximation of laws as an essential means for achieving the tasks of the Community. We shall briefly examine the scope and application of this power of the Community.

5.3.3 LEGAL HARMONISATION IN THE EUROPEAN COMMUNITY

Article 3(h) of the Rome Treaty of 1957 as revised in the Single European Act lists as an activity of the Community for the promotion of its objectives:

> "the approximation of the laws of Member States to the extent required for the proper functioning of the common market."

This provision was informed by the realisation of the drafters of the Rome Treaty that quite apart from indirect tax variations and other restrictive practices which could hinder the smooth functioning of the common market, other obstacles could also impede or distort the free flow

of trade between Member States. The most important of these were technical regulations and fiscal legislation, patents and trademark laws. Hence Article 100 of the Treaty fortified the power of the community to issue directives for the harmonisation of legislative and administrative rules in the Member States that affect the establishment or functioning of the common market. Article 100A makes similar provisions with respect to the internal market.

The foregoing provisions have been used to harmonise customs legislation in areas in which uniform and directly applicable European law does not seem necessary. They have also been extensively used to harmonise non-tariff obstacles to interstate trade, especially laws dealing with public health or safety, within the framework of environmental and consumer protection safeguards. Other areas of implementation of these provisions have been public bids and fiscal legislation with particular emphasis on turnover or other indirect taxes.[31]

Lastly, the European Community has gone further to create an enabling legal environment for the development of co-operation between business organisations in order to strengthen the industrial and commercial fabric of the internal market. A number of Directives and Regulations

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31. Smit, H. & Herzog, P.E. (1981): The Law of the European Economic Community - A commentary on the EEC Treaty (New York: Matthew Bender), 1981), Vol.3, P.3, 518-544.

have been issued by the Council and the Commission dealing with company accounts, disclosure of information, groups of companies and single-member (or one-man) companies. Other efforts to adopt the statute of the European Company and to create a new type of association known as the " European Economic Interest Grouping" that will be governed by uniform community legislation are meant to provide more attractive instruments for the industrial co-operation needed in a unified Internal Market.

Measures for approximating national company and industrial property laws are designed both to improve the legal relationship and co-operation between enterprises and to achieve convergence in the areas of patents, trademarks and copyright.[32]

In Africa, as we noted in Chapter One, economic planners rarely reckon with the need to devise an appropriate legal framework to support economic structures. This has been very much the case in most of Africa's economic integration projects. Most of the existing regional integration groupings were designed with little regard for the need to put in place legal infrastructure to support the expected harmonisation of economic policies. In the next part of the Chapter, we examine Africa's plural legal

32. Belford, J. (ed.)(1990): The European Community: The Single Market (New York, London, Rome, Oceana) Commission white paper, *op. cit.*, note 26, p.133-149.

heritage, the impact of such diversity on interstate trade and economic integration and what needs to be done.

5.4. LEGAL INTEGRATION IN AFRICA

5.4.1 RATIONALE

From the composition of all the regional economic communities and the African Economic Community itself, there are several legal systems operating side by side within or across the Member States. These include the Common Law applied in former British Colonies; the Civil law traditions in Latin Africa consisting of countries that were under French, Portuguese, Belgian, German or Italian hegemony. In many countries, notably in North Africa, Islamic Law retains strong influence. And in a number of other African countries, like Nigeria and Ghana, Islamic and customary laws co-exist alongside the legal traditions and structures inherited from the colonial powers. This legal pluralism generates both internal and external conflicts of laws.

The major drawback of this legal diversity is that it creates unnecessary bottlenecks to social and economic intercourse across states contrary to the integration ideal. The application of different legal systems in neighbouring countries in Africa creates legal frontiers which are much

more significant and problematic than the artificial and illogical boundary lines fixed by colonial partition.[33] The reason is that the juridical concept of territorial sovereignty is closely tied up with international boundaries. This means that the legal system of each country and its enforcement machinery must be limited to its own territory.

Given the complexities of legal pluralism across the African continent, the real significance of inter-state boundaries is that they define the territorial limits of application of different legal systems. This leads to confrontation between the systems being applied on opposite sides of inter-state borders, thereby hampering co-operation in the enforcement of fiscal, criminal and immigration laws. In turn, this creates jurisdictional cracks in the enforcement and judicial structures which are exploited for extra-legal or illegal transborder activities by border residents and even criminals.

This thesis argues that the juxtaposition of dualistic or pluralistic legal systems creates conflicts and dichotomies which impede inter-state or intra-regional commerce. Hence the need for an accelerated harmonisation of laws that would facilitate the achievements of the aims

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33. Yagba, T.A.T. (1993): "Legal Problems of International Boundaries in Africa: The Case of the Nigerian-Niger Borders" in Asiwaju, A.I. and Barkindo, B.M. (ed.): The Nigeria-Niger Transborder Co-operation (Lagos: Malthouse), 458 at 467.

of regional integration.

5.4.2 HARMONISATION OF LAWS UNDER THE ABUJA TREATY

The question that comes to mind is whether the treaties establishing the various economic communities in Africa have recognised and provided for this necessary activity for realising their aim of attaining freedom of movement for persons, goods, services and capital, among other objectives?

It seems clear, on the face of it, that the Abuja Treaty establishing the African Economic Community does not expressly reflect the need to harmonise or integrate laws that would provide a uniform framework for intra-regional economic activities. Neither integration nor harmonisation of laws is listed as an objective or task of the community. Furthermore the Treaty does not have any provisions for a legal committee among the Technical Committees established under Article 25. This means that there is no organ specially charged with furthering co-operation in the progressive unification of laws under the Treaty. This may be taken to suggest that Africa hopes to achieve continental economic integration on the basis of the existing diverse legal systems.

However it is suggested here that some provisions of the Abuja Treaty may be employed to establish measures for harmonisation of laws. The first is Article 4(2) which contains an omnibus provision authorising the community to undertake any other activity the Member States might decide to jointly undertake with a view to achieving its objectives. This is a general power designed to supplement the fifteen stated modalities for achieving the community's objectives.

Secondly, Article 8(3) of the Treaty empowers the Assembly of Heads of State and Government to "take any action under the Treaty to attain the objectives of the Community". This again is a broad provision on the basis of which the Assembly may initiate or direct action on legal harmonisation or delegate the power to the Council to make the necessary regulations.

Thirdly, Article 103 which makes provisions for amendment of the Treaty, may be used to grant an express and stronger mandate for legal harmonisation. This of course, may be a difficult or dilatory process because of the requirements for ratification by two thirds of the Member States.

Lastly it is submitted that the jurisdiction of the African Court of

Justice may also be used to enhance the integration of laws and adoption of uniform legal standard. In the EEC, for example, the proactive role of the *European Court* in the interpretation of the *EEC Treaty* has given birth to a sui generis set of legal rules which now exist independently of both international law and national laws. By affirming the direct applicability of community law and its supremacy over national laws, the European Court has greatly advanced the achievement of a European Common Market. When established, the African Court will have to adopt a similar facilitative posture.

Looking beyond the Treaty, unification or harmonisation of laws in Africa has long been formally recognised as vital to integration by all Member States. At the All Africa Law Ministers Conference, the Abuja Plan of Action was adopted on 29 November 1989 which articulated a strong consensus on the matter. This can provide a basis for action by the Assembly of Heads of State and Government through the African Economic Community. Indeed the Ministers pointedly resolved that true regional co-operation could only be effected when appropriate international legal infrastructure have been agreed upon and put in place.[34]

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34. Federal Ministry of Justice, "Integration of Africa through Law (Lagos, 1990) Law Review Series, Vol.7, p. viii.

This is especially true with regard to the promotion of inter-state and intra-regional business. The harmonisation of business laws and commercial practices is a vital ingredient of regional integration. Indeed Professor Muna Ndulo, a leading expert in international trade law, has noted that no meaningful economic integration can be achieved within the framework of the existing legal diversity in Africa.[35]

Three main reasons make the harmonisation of trade laws an immediate priority for regional economic communities in Africa. One is the diversity of national laws and the complexity of the rules of private international law for determining which system of law applies to a particular transaction. Even where the choice of law is based on the choice of the parties, it would have to contend with limitations imposed by individual countries. A choice of law clause is not always a practical solution to the problems presented in intra-regional trade because many contracts fail to specify which law applies. This may be either on account of an impasse over this delicate question or that it was simply overlooked in the need for speed in concluding such contracts.

According to Professor Ndulo:

> In these cases, a buyer or seller will not be able to

35. Ndulo, M.: "The Promotion off Intra-African Trade and the Harmonisation of Laws in the African Economic Community: Prospects and Problems" in Ajomo & Adewale (ed.) *op. cit.*, p. 110.

> determine which law will apply until he or she completes a detailed conflicts of law analysis to determine which law has the closest relationship to the transaction. When this analysis suggests that the law of a given country, other than his or her own, may apply, the buyer or seller must then go through the difficult process of researching the law of the other country to determine his or her rights and obligations. This is made more difficult in Africa because access to another country's legal materials is often very difficult. Harmonisation of commercial laws and practices would ensure that whether the litigation is in state X or in state Y, the courts seized of the matter will apply to the same governing law.[36]

The second reason which makes harmonisation of commercial laws imperative is that a number of issues that arise in intra-regional trade do not present themselves in domestic commercial transactions. For example, the parties involved in a transaction may have had no contact with each other. In a contract of sale, for instance, this may mean that the seller is not familiar with the financial standing of the buyer; and that the latter has had no opportunity of inspecting the goods before purchase or delivery

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36. Ndulo, M.: *Ibid.*, at Pp. 112-113.

etc. Furthermore the delivery of goods in intra-regional trade usually involves carriage of goods by air, rail, road or sea over several national boundaries as well as insurance and payment arrangements covering more than one country.

The last reason is that in many African jurisdictions, there are no well developed legal rules governing some aspects of commercial transactions. Progress towards harmonisation needs to be made in some major areas such as sale of goods, the law relating to the supply and erection of plant and machinery in other countries, the law relating to bills of exchange, bankers' commercial letters of credit and guarantees; investment protection; service marks and franchising. Other important subjects of harmonisation would include licensing of technology, distribution agreements, contracts of agency, bankruptcy, secured credit transactions, mergers and acquisitions and the law of commercial arbitration. All these laws are critical in facilitating trade and, if they are not harmonised, will tend to impede intra-regional trade.[37]

It is submitted in conclusion that the present situation in Africa where parties to intra-regional transactions cannot be certain which law will apply tends to discourage intra-regional trade. The absence of a

37. *Ibid.*, at p. 113.

regional mercantile legal system or uniform rules makes the outcome of litigation unpredictable. Hence the need to make harmonisation of laws an urgent task of the African Economic Community. This makes it necessary to briefly discuss the techniques that can be used to achieve this objective.

5.4.3 TECHNIQUES FOR HARMONISATION OF COMMUNITY TRADE LAWS

A variety of methods have been tried in advancing the unification or uniformity of laws in other jurisdictions. Three of these are important for our purpose. The first is the introduction of normative rules devised and elaborated within the framework of a treaty. This usually involves the adoption of a convention to be implemented by Community Members. An example of this is the European Convention on Mutual Recognition of Companies and Legal Persons which was drawn up under Article 220 of the Treaty of Rome, 1957.[38]

The second method is the formulation of model laws to serve as guides for local adaptation and uniform laws to be incorporated by states into their domestic legislation. The advantage of this approach is that it permits substantial uniformity without requiring as a treaty normally does, exact equivalency. Its disadvantage however is that sometimes the uniformity worked out so meticulously may be lost in the national

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38. EEC Bull. Supp. 2/69; Also see Morse, G.K.: 1972 *Journal of Business Law* 195.

implementation process.[39] A good example of this is the model law on International Commercial Arbitration prepared by the UN Commission on International Trade Law.[40]

The third method consists in the standardisation of commercial customs and practices based on the usages of the commercial community. This could either involve the formulation of recommended standard practices or the extraction of minimum common rules from national laws for the evolution of regional standards. An instance of this is the Uniform Customs and Practice for Documentary Credits prepared by the International Chamber of Commerce.

All these methods are complementary in furthering regional unification of trade laws.

The examples cited illustrate that the African Economic Community can draw on a number of precedents in the work of international organisations involved in unification of international trade law. The leading body in this field is the United Nations Commission on International Trade Law established by the General Assembly of the

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39. Ndulo, M.: *op. cit.*, p. 114.

40. Known for short as UNCITRAL.

United Nations in 1966.[41] In exercise of its mandate to undertake "the progressive harmonisation and unification of the law of international trade", the Commission has elaborated several conventions and model laws. Examples include the New York Convention on the Limitation Period in the International Sale of Goods, 1974; the Vienna Convention on Contracts for the International Sale of Goods, 1980 and the Vienna Convention on Liability of Operators of Transport Terminals in International Trade, 1991. In the field of arbitration, it has developed the UNCITRAL Arbitral Rules, 1976; the UNCITRAL Conciliation Rules and the Model Law on International Commercial Arbitration.

Other United Nations agencies involved in related fields of international trade are the UN Conference on Trade and Development (UNCTAD), the UN Industrial Development Organisation (UNIDO) and the various UN Regional Economic Commissions.

In addition several other international institutions have also done some work in the field of harmonisation of law such as the World Intellectual Property Organisation (WIPO); the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference

41. G.A. Resol. 2205 (XXI) 1966.

on Private International Law.[42] The existence of these precedents notwithstanding, the harmonisation process in the African Economic Community will itself require effective action by the relevant institutions of the Community. Therefore it is suggested that a committee with specific responsibility for legal matters in general be established with a clear mandate to initiate action on legal harmonisation within the Community. Hence it is further suggested that the Assembly of Heads of States and Government should at the earliest possible opportunity, establish or restructure the Community's committees to create a legal committee in accordance with Article 25.

When set up, the Committee should be charged with responsibility for undertaking studies and preparing recommendations on problems relating to harmonisation of Community trade law; preparation of trade conventions and uniform codes; promotion of the codification and acceptance of regional trade terms, customs and practices, and the uniform interpretation and application of regional trade laws. The committee could also be concerned with the promotion of training and research in the field of integration law, in particular at African Universities and research institutions. Comparative legal research will encourage co-operation among African scholars in the search for solutions to the complex

42. Ndulo, M.: *op. cit.*, pp. 117-120.

problems of integration and generate flow of knowledge, analysis and suggestions that will accelerate the process.

In conclusion it is necessary to point out that in the new treaties being adopted to resuscitate old or existing regional economic communities, clearer framework for legal harmonisation are being explicitly included.

For example, Article 3 of the Revised Treaty of the West African Economic Community,[43] makes harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities in legal matters one of the objectives and means for establishing the economic union in West Africa.[44] This is supplemented by measures for the establishment of an enabling legal environment in Article 3(2)(j).

Similarly Article 3 of the Treaty establishing the Common Market for Eastern and Southern Africa[45] makes co-operation of member states in the creation of an enabling environment for foreign cross-border and domestic investment a central objective. Member states also expressly undertake to "harmonise or approximate their laws to the extent required for the proper

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43. ECOWAS Revised Treaty, Done at Cotonou, Benin Republic on 24 July 1993.

44. See Article 3(2)(a); ECOWAS Revised Treaty, *Ibid.*

45. Done at Kangala, Uganda on 5.11.1993 33 I.L.M. 1067 (1994).

functioning of the Common Market." [46] Article 15(1)(b) also makes provisions for a committee on Legal Affairs.

These provisions illustrate that legal harmonisation is gaining acceptance as a crucial dynamic of integration. What is left is concrete action to bring this about. In the next chapter, we explore the obstacles to achieving the economic and legal harmonisation that would accelerate the process of integration as a whole in Africa, having regard to the experiences of the Economic Community of West African States [ECOWAS].

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46. COMERSA Treaty, *Ibid.* Article 4(6)(b).

CHAPTER SIX

PROBLEMS OF INTEGRATION IN AFRICA

A CASE STUDY OF ECOWAS

6.1 INTRODUCTION

In Chapter four, we had examined the performance of existing or former economic integration arrangements in the various sub-regions of Africa. These included the Economic Community of Central African States; the Maghreb Arab Union; the Preferential Trade Area of Eastern and Southern Africa and the Southern African Development Community. Discussion of the Economic Community of West African States was however reserved for special consideration in this Chapter.

The justification for this was that ECOWAS is to date the most visible and ambitious regional integration project in Africa which should provide the experience from which to establish or consolidate other regional economic communities as envisaged under the Abuja Treaty. The second reason is that ECOWAS has achieved very little despite nearly twenty years of existence and frenetic diplomatic activity. Hence the ECOWAS project should offer useful lessons in identifying and tackling the problems which militate against economic integration in Africa.

Many of the problems which we identified in Chapter four from our discussion of some other African economic integration projects are equally applicable to ECOWAS. Notable among these are the lack of enthusiasm on the part of Member-States, lack of the necessary political will and commitment; and the overlap of intra-regional organisations.

With specific reference to ECOWAS, the catalogue of identified obstacles to regional integration is long and debilitating. These include lack of motivation and commitment arising partly from the vestiges of economic nationalism and partly from unbridled attachment to national sovereignty; fear and suspicion arising from traditional rivalries and differences in linguistic and historical background, political systems and ideologies, legal and administrative systems etc and the non-implementation of acts and decisions of the Community. Other obstacles arise from the endemic threats to political stability and regional security, inadequate funding; the non-rationalisation of existing integration arrangements and the hostile international economic environment.[1]

The main focus of this chapter will be to identify, on the basis of the ECOWAS integration experience, the major problems and challenges that are likely to confront Africa's continental experiment with economic

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1. Bundu, A.: "Sub-Regional Organisation and the Promotion of African Economic Integration! The Case of ECOWAS" in Ajomo & Adewale (Ed.)! *op. cit.*, P.338 at 347-352.

integration. Emphasis will only be laid on the legal dimensions of these obstacles. Consequently this chapter will examine the impact of the traditional legal doctrine of state sovereignty as practiced in post-colonial Africa as well as the legal and institutional barriers to economic integration which arise from the existing geo-political set-up. Although the discussion will be situated within the general framework of classical international law, the examples and situations to be used will be derived mainly from the ECOWAS experience.

For the aforegoing reasons, it would be imperative to put in perspective the creation, growth and present position of ECOWAS as a sub-regional integration project and as a regional economic community for the purposes of the implementation of the AEC. In the first part of this chapter therefore, we shall look at the genesis of ECOWAS, with emphasis on its diplomatic history culminating in the signing of the Lagos Treaty on 28 May, 1975.

6.2 DIPLOMATIC HISTORY OF ECOWAS

As we saw in Chapter four, inter-state co-operation or common services during the colonial period were limited within the territories of particular colonial powers. French and British West Africa created inter-territorial links and institutions within the respective spheres of French or

British rule only. This policy of colonial territorial inclusiveness was accompanied by the creation of inward looking economies with the system of infrastructure and law designed to divide and fragment homogenous communities.

By the transmutation of colonial territories into nation-states whose major objective since independence has been nation-building, even the fragile inter-state arrangements left behind by the colonial powers further disintegrated. The economic nationalism of the first post-independence decade left its marks on most African countries, not so eager to part with any measure of their hard won sovereignty.

Nonetheless as Dr. Abbas Bundu[2] rightly noted, it is impressive that West Africa can be counted among the regions of the world with an established tradition of regional co-operation.[3] As earlier stated, there are more than forty (40) inter-governmental organisations now existing in West Africa.

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2. Bundu, A.(1993): "ECOWAS and the future of Regional Integration in West Africa", Paper Presented at IDRC-ECOWAS International Conference on West African Integration; Dakar, Senegal).

3. *Ibid.*, Typescript, P.4.

A number of these organisations were set up by some West African countries to regulate utilisation of the river or lake basins common to them. First is the River Niger Commission created by Agreement of November 1964 at Niamey, Niger which encompasses Cote D'Ivoire, Guinea, Benin, Burkina Faso, Niger and Nigeria. The second one is the Lake Chad Basin Commission established by a Convention signed at N'Djamena, Tchad on 22 May 1964. It comprises Cameroon, Tchad, Nigeria and Niger.

The third organisation of riparian states is the Organisation Des Etats Riveraine du Senegal created by Statute signed by Senegal, Mauritania, Mali and Guinea on 24 March, 1968 at Labe, Guinea. The last and most important of these multi-lateral organisations is the Mano River Union established in 1973. Its members include Sierra Leone, Liberia and Guinea. It is a customs Union of the same level as the 6-member Communaute Economique de L'Afrique de L'Ouest (CEAO). The latter is made up of Burkina Faso, Cote D'Ivoire, Mali, Mauritania, Niger and Senegal. It was set up in 1972 as the Franco-phone rebuff to proposals for an all-embracing West African Economic Community. It took over from the Union Douaniere des Etats de L'Afrique de L'Ouest (UDEAO) formed on July 3, 1966 with the same membership except for Benin which refused to join the CEAO. The major achievement of these

groupings has been the institutionalisation of free movement for nationals. Neither passports nor Visas are required for movement within member states.

Another group of organisations are language based. The French speaking countries established a Union Monetaire Ouest Africaine (UMOA) in May, 1962 which dealt with their common currency, the CFA Franc and maintained their external reserves with the French Treasury. As noted in Chapter 4, in the aftermath of the devaluation of the CFA Franc in 1993, some Franco-phone states again rallied round to fortify and expand this union under the new name of UEMOA.[4]

However it was only in 1975 when the definitive text of the agreement establishing the West African Clearing House was signed in Lagos on 14 May, 1975 that the birth of a truly West African regional organisation was witnessed. This was soon followed by the signing of the Treaty Establishing the Economic Community of West African States embracing French, English and Portuguese speaking states in the region on 28 May, 1975.

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4. Union Economique et Monetaire de L'Afrique Occidentale (West African Economic and Monetary Union).

Against the background of the misgivings and cleavages precipitated by the colonial heritage, these were notable achievements involving intricate diplomatic negotiations and strong intervention of the United Nations through the Economic Commission for Africa. The birth of ECOWAS came after a decade of action and inaction. It took West African Countries ten years from the passing of the ECA Resolutions 142 (VIII) and 145 (VII) of 1965 to form ECOWAS. Some of the pains of birth continue to traumatise the organisation. Hence it is necessary to go into some detail on the subject of its genesis.

The period 1965 to 1972 was characterised by hesitation, vacillation and politicking despite all the institutional support the ECA gave to the integration idea in West Africa.[5] In its effort to encourage the building of viable economic groupings in each of the four regions of Africa, the ECA sponsored a meeting on the West African subregion which was held in Niamey, Niger in October, 1966. It was attended by fourteen West African States and this brought together, for the first time French and English speaking states on the subject of economic integration.

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5. Ezenwe, U. (1984): ECOWAS and the economic integration of West Africa. (Ibadan: West Books) P.126.

This was followed by another meeting between 27 April and 4 May, 1967 in Accra, Ghana still under the auspices of the ECA.[6]

At the end of the meeting, a document named "Articles of Association" was signed by Benin, Ghana, Cote D'Ivoire, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, Burkina Faso and later The Gambia. However, at the first Interim Council of Ministers meeting held in Dakar, Senegal from November 21 to 24, 1967 the UDEAO states disagreed with suggestions that they should remove trade barriers to grant non-UDEAO states the same treatment as exports from the European common market, among other issues. As usual, they preferred to look to France rather than Africa for inspiration regarding economic association. For these reasons, their lack of enthusiasm for an all embracing economic community became a major obstacle on the process of integration.

This led to the convening of another Conference of West African Heads of State and Government at Monrovia, Liberia from 23 to 34 April, 1968. The meeting adopted a Protocol establishing a West African regional group, which incorporated the Articles of Association signed in Accra on 4 May 1967. The Protocol also defined the framework of the

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6. Onwuka, R.I.(1981): Development and Integration in Africa: The Case of ECOWAS (Ile-Ife: Unife Press), P.60.

new grouping and a programme of action. However the absence of some French - speaking States - Cote D'Ivoire, Benin, Togo and Niger as well as Sierra-Leone made the conference far from a total success.

In 1972, series of meetings were initiated by President Eyadema of Togo and General Yakubu Gowon of Nigeria. These meetings were a consolidation of years of close cooperation and friendship between Togo's first President Slyvanus Olympio and Nigeria's Prime Minister, Sir Abubakar Tafawa Balewa in the immediate post-independence years before the coups that swept them away.

In April, 1972, the Heads of State of Nigeria and Togo decided to revive the languishing idea of West African Economic Co-operation and spearheaded the ultimately successful campaign to bring together Franco-phone and Anglo-phone states despite the strong divide between them. After preparing a joint proposal on the structure and scope of a possible West African Economic Community, they convened a meeting in Lome, Togo between 10 and 15 December 1973 to debate the Nigeria-Togo scheme for action. It was attended by fifteen states with Guinea-Bissau as the new addition. The governments agreed on necessary institutions and the general framework for co-operation. The two pioneering states were

then requested to prepare a draft treaty with the assistance of the ECA.[7]

Although the draft was readily prepared a number of developments and fresh apprehensions on the part of some states led to series of postponements of the Ministerial meeting which was to examine the work of the experts. It was only on account of Nigeria's strong diplomatic effort that Liberia eventually hosted the meeting in January, 1975. At that meeting held in Monrovia, the draft treaty establishing ECOWAS was adopted and submitted to the Heads of State Conference in Lagos on 28 May 1975. The Treaty was signed on that date by eleven Heads of State and four plenipotentiaries representing fifteen West African Countries.[8]

In the Communique after the meeting, the signatories affirmed their determination to make ECOWAS "a pragmatic, dynamic, and effective institution which will take into account the realities prevailing in the Member-States".

By 23 June, 1975 seven member states had already ratified the Treaty and thus brought it into effect. These states were Liberia, Nigeria, Togo, Ghana, Upper Volta (Burkina Faso), Ivory Coast (Cote D'Ivoire)

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7. *Ibid.*, p. 71.
8. *Ibid.*, Pp. 72-75.

and Guinea. Today, ECOWAS is made up of sixteen countries including Benin, Cape Verde, The Gambia, and Guinea Bissau in addition to those earlier mentioned. Others are Mali, Mauritania, Senegal and Sierra Leone.

6.3. AIMS AND OBJECTIVES OF ECOWAS

Article 2(1) of the 1975 Treaty establishing the Economic Community of West African States stipulated that the main aspiration of the community was:

> --- to promote co-operation and development in all fields of economic activity particularly in all fields of industry, transport, telecommunications, energy, agriculture, natural sciences, commerce, monetary and financial questions and in social and cultural matters for the purpose of raising the standard of living of its peoples, of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to progress and development of the African continent.

In their instrumental detail, the principal objectives of the ECOWAS have been significantly reformulated in the Revised ECOWAS

Treaty.[9] It states that the main objective of ECOWAS in the field of economic integration would be "to promote cooperation and integration, leading to the establishment of an economic union in West Africa".[10]

The achievement of an economic union in this context covers both a common market and a monetary union. But the Revised Treaty further specifies other ingredients of the integration process. The first of these is the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, human resources, education, information, culture, science, technology, services, health, tourism and legal matters.[11]

The second ingredient is the harmonisation and co-ordination of policies for the protection of the environment while the third relates to the establishment of joint production enterprises.

The fourth major activity of the community is to ensure the establishment of a common market through the liberalisation of trade by

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9. Adopted at the 16th Ordinary Session of the Authority of Heads of State and Government in July, 1993, in Cotonou, Benin Republic.

10. Revised ECOWAS Treaty, 1993; Article 3(1).

11. *Ibid.*, Article 3(2)(a).

abolition of customs duties and non-tariff barriers in order to establish a free trade area at the community level. Trade liberalisation would also involve the removal of obstacles to the free movement of persons, goods, services and capital and to the right of residence and establishment; the adoption of a common external tariff and a common trade policy vis a vis third countries.[12]

The fifth ingredient of the ECOWAS integration programme envisages the establishment of an economic union through the adoption of common policies in the economic, financial, social and cultural sectors; and the creation of a monetary union.[13]

Sixthly, the Revised Treaty stipulates for the promotion of joint ventures by private sector enterprises and other economic operators, particularly through the adoption of a regional agreement on cross-border investments. Allied to this is the adoption of measures for the integration of private sectors, especially by creating the enabling environment to promote small and medium scale enterprises.[14]

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12. Revised Treaty, Ibid., Article 3(2)(d).
13. *Ibid.*, Article 3(2)(e).
14. *Ibid.*, Article 3(2)(f).

Furthermore integration would also consist in the harmonisation of national investment codes leading to the adoption of a single community investment code and the harmonisation of standards and measures.[15]

Other measures for achieving the community's objective will include the promotion of balanced development of the region with particular attention to the special problems of each Member State especially the landlocked and small island states. Another measure will be the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, businessmen and women, workers and trade unions.[16]

Finally the Revised Treaty suggests that member states should adopt a community population policy which will balance demographic factors with socio-economic development; establish a fund for cooperation, compensation and development, and generally undertake any other joint activity whose object is the attainment of community objectives.[17]

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15. *Ibid.*, Article 3(2)(h-i).
16. *Ibid.*, Article 3(2)(j-k).
17. *Ibid.*, Article 3(2)(l-n).

Three points are important from the long list of activities designed to achieve the objectives of ECOWAS. The first is that the Revised Treaty unlike the 1975 Treaty of Lagos gives equal attention to all the economic sectors and activities, including the service sector and "legal matters". These should ensure that not only market integration but also production, physical and legal integration is achieved. To this end, the objective, scope and guidelines for integration activities in each area are clearly set out in the Revised Treaty, with provision in some cases for further details in a protocol.

The second point is the emphasis given to private sector participation in the integration process. The private sector is to be encouraged to participate actively in the community decision-making process and is assigned a bigger role in the implementation of community programmes. The ECOWAS Protocol on Community Enterprises[18] is expected to be revised to reflect the greater reliance on the private sector. It is also proposed that a community investment code which will stimulate private sector involvement in cross-border investments should be adopted.

The last point to stress is that the Revised Treaty elaborates more fully on measures to be adopted in the social and cultural sectors covered in the 1975 Treaty. Furthermore it also covers important areas of

18. Protocol A./P.1/11/84 dated 23 November, 1984.

cooperation, such as science and technology, information and defence which did not feature in the 1975 Treaty. These areas which were only included in the Community Work Programme are now provided for in the Revised Treaty. For example the democratic aspirations contained in the Abuja Declaration of Political Principles[19] form part of the general undertakings by Member States regarding the promotion and consolidation of a democratic system of governance in each Member State.

This then takes us to the underlying principles and general undertakings as recast under the Revised Treaty. These are strikingly similar to those reflected in the Abuja Treaty of 1991 establishing the African Economic Community.[20] The first is equality and inter-dependence of Member States. The second is solidarity and collective self-reliance. The third principle is that of inter-state cooperation, harmonisation of policies and integration of programmes.[21] All these seem to be directly inspired by the Abuja Treaty. Other principles which are similarly inspired include the peaceful settlement of disputes among Member States, active cooperation between neighbouring countries and promotion of a peaceful environment as a pre-requisite for economic

19. Adopted in Abuja on 6 July, 1991.

20. Treaty of Abuja, 1991; Article 4.

21. Revised ECOWAS Treaty, Op.Cit., Article 4(a)-(c).

development.[22]

Another cognate principle is that of the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights. Lastly there are the principles of accountability, economic and social justice and popular participation in development as well as recognition and observance of the rules and principles of the community.[23] The importance of this latter principle will be examined later in the light of the new provisions regarding the Community Court of Justice and Community Law under the Revised Treaty.

For now, it is necessary to stress that the Revised Treaty also enunciates certain principles which seem to have been uniquely informed by ECOWAS' own experience over the nearly twenty years of its existence. The first is the re-affirmation of the principle of non-aggression between Member States.[24] This implicitly reflects the morbid fear of external intervention in internal affairs which underlined the OAU's Charter. The second principle enjoins the maintenance of regional peace, stability and security through the promotion and strengthening of good

22. *Ibid.*, Article 4(e)-(f). cf. Abuja Treaty, Article.
23. *Ibid.*, Article 4(g)-(j).
24. *Ibid.*, Article 4(c)(d).

neighbourliness.[25]

The other principle earlier referred to is the promotion and consolidation of a democratic system of governance in each Member State as envisaged by the Abuja Declaration of Political Principles, 1991.[26] By that declaration, the Authority of Heads of States and Government committed the Community and its Member States to the observance of democratic ideals and the promotion of the democratisation process in the sub-region. These provisions cumulatively constitute a modest but vital beginning in political co-operation. The establishment of liberal democracy throughout the region would provide the essential nexus between enduring peace and stability on the one hand and sound development on the other. It is anticipated that the Revised Treaty will also encourage the entrenchment of democracy in West Africa and also promote grass-roots involvement and popular participation in the regional integration process.[27] ECOWAS' intervention in the Liberian crisis through the deployment of ECOMOG[28] leading to the restoration of peace and democracy and its efforts to dislodge the military junta in Siera Leone

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25. *Ibid.*, Article 4(c).

26. Adopted at Abuja, Nigeria on 6 July, 1991.

27. Bundu, A. (1993): 1992-93 Report of ECOWAS Executive Secretary, West Africa Magazine, 19-25 July, 1993 No. 3956, P. 1250 at 1255-1256.

28. ECOWAS Community of West African States' Monitoring Group (ECOMOG) went into Liberia to stop the Fratricidal, factional fighting in the country's civil war, in 1990. By 1997, a democratically elected civil government was inaugurated under the auspices of ECOMOG's successful mission.

demonstrate the community's commitment to these principles.

The last unique ECOWAS principle emphasises the equitable and just distribution of costs and benefits of economic co-operation and integration. This is perhaps a silent reminder that some delicate balancing between the stronger and weaker partners will need to be maintained for integration to have meaning and relevance for all the participating members.

On the whole, these principles as reformulated under the Revised Treaty achieve the twin objective of revitalising the ECOWAS integration project itself as well as realigning its mission with that of the African Economic Community (AEC). This is even better illustrated in the General Undertakings now incorporated in Article 5 of the Revised Treaty.

The first of these is that Member States undertake to create favourable conditions for the attainment of the objectives of the community, and particularly to take all necessary measures to harmonise their strategies and policies, and to refrain from any action that may hinder the attainment of the said objectives.[29]

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29. Revised Treaty, Op.Cit., Article 5(1).

Secondly, each member state is to take all necessary measures, in accordance with its constitutional procedures, to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the Treaty.[30]

Thirdly all member states undertake to honour their obligations under the Treaty and to abide by the decisions and regulations of the community.[31]

These undertakings are in pari materia with those under the AEC Treaty. They seem clearly to have been inspired by the latter. Since the regional economic communities are the building blocks or pillars in the construction of the African Economic Community, the need to endow them with similar powers to ensure their effectiveness and viability cannot be under-estimated. Both at the level of the AEC and of ECOWAS, the movement seems to be one in favour of supranationality of community law and its institutions. This point will now be examined more broadly below in the context of the organs of ECOWAS.

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30. *Ibid.*, Article 5(2).

31. *Ibid.*, Article 5(3).

6.4 THE ORGANS OF THE COMMUNITY

The Lagos Treaty of 1975 established five institutions for the running of ECOWAS. These were the Authority of Heads of State and Government; the Council of Ministers; the Executive Secretariat; the Tribunal of the Community; and the Technical and Specialised Commissions.[32] To these, the Revised Treaty has added the Community Parliament and the Economic and Social Council. It has also changed the name of the Tribunal to the Community Court of Justice.[33]

Under the 1975 Treaty, the Authority of Heads of State and Government was the principal governing organ responsible for the general direction and control of the community's executive functions. Its decisions were binding on all the community's institutions. Apparently however such decisions were not binding on the Member States unless they were ratified or adopted by internal legislative processes. As it turned out, this became a source of great weakness as most decisions and protocols made by the Authority were never implemented by local legislations in most member states.

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32. See Treaty of the Economic Community of West African States, Lagos, May 1975 (hereinafter called the 1975 Treaty); Article 4.

33. Revised ECOWAS Treaty, 1993; Article 6.

The absence of binding effect of the decisions of the Authority on Member States meant that they could not have direct and immediate applicability within national jurisdictions. This was a very different position from the provisions of Article 198 of the Treaty of Rome, 1957, setting up the European Economic Community. That Article provided as follows:

> "In order to carry out their task and in accordance with the provisions of this Treaty, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or give opinions.
>
> A regulation shall apply generally. It shall be binding in its entirety and take direct effect in each Member State. A directive shall be binding, as to the result to be achieved, on each Member State to which it is directed, while leaving to national authorities the choice of form and method. A decision shall be binding in its entirety upon those to whom it is directed".

On its face it would seem curious that even though these EEC Treaty provisions predated the ECOWAS Treaty of 1975, it was not considered necessary to draw inspiration from them. Again it would seem

that this was indicative of the preference for the interstate or intergovernmental approach to integration which accords primacy to the national sovereignty of individual Member States. Ab initio therefore the key institutions of ECOWAS were incapable of satisfying the supranational aspirations assigned to them.

It is largely for this reason and also drawing from the AEC's spirit that there has been an effort to shift towards the concept of supranationalism in the Revised ECOWAS Treaty. Under the new provisions, the Authority of Heads of State and Government is to be "the supreme institution of the community" responsible for the general direction and control of the community. It is within its competence to take all measures to ensure the community's progressive development and the realisation of its objectives.[34]

Article 7(3) of the Revised Treaty further defines the functions of the Authority. The first is to determine the general policy and major guidelines of the community; give directives; as well as harmonise and coordinate the economic, scientific, technical, cultural and social policies of Member States. The second function is to oversee the functioning of the community institutions and follow-up implementation of community

34. Revised ECOWAS Treaty, Op.Cit., Article 7(1)&(2).

objectives.

Thirdly, the Authority is empowered to prepare and adopt its Rules of Procedures and to appoint the Executive Secretary in accordance with the provisions of Article 17 of the Treaty. The Authority may also appoint, on the recommendation of the council, the External Auditors.

Furthermore the Authority has power to delegate to the Council, where necessary, the authority to take decisions as are stipulated in Article 9 and generally to exercise any other powers conferred on it under the Treaty.

Finally the Authority has power to refer any matter to the Community Court of Justice if it confirms that a Member State or institution of the community has failed to honour any of its obligations or an institution of the community has acted beyond the limits of its authority or has abused the powers conferred on it by the provisions of the Treaty, or by a decision of the Authority or a regulation of the Council. It may also request the Community Court of Justice, as and when necessary, to give advisory opinion on any legal questions.

When the Revised Treaty is implemented, these new provisions will mark an important step in the effort of building the regional integration process in West Africa. This is important because the new powers of the Authority of Heads of State and Government will be complemented by equally significant changes in the competencies of the other institutions of ECOWAS, especially the Council and Court of Justice.

Article 9 of the Revised Treaty empowers the Assembly to act by decisions. Such decisions may be adopted, depending on the subject-matter under consideration by unanimity, consensus, or by a two-thirds majority of the Member States. Such decisions are to be binding on the Member States and institutions of the community and will come into automatic effect sixty days after publication in the official Journal of the Community.[35]

Similarly the Council of Ministers is empowered to act by regulations which are binding on institutions under it and will become binding on Member States upon approval of the Assembly.[36]

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35. Revised ECOWAS Treaty, 1993; Article 9(4-6).

36. *Ibid.*, Article 12(1-3).

The Community Parliament established under Article 13(1) of the Revised Treaty is to be constituted under a Protocol relating thereto which would be worked out later and be attached to the Treaty. Similarly the Economic and Social Council which has been established to play an advisory role will be elaborated in a Protocol.[37]

The Court of Justice and the Arbitration Tribunal are also established and empowered to make binding decisions. Their status, composition, powers and procedure will be outlined in a subsequent protocol.[38]

Lastly, the Executive Secretariat, the Fund for Co-operation, Compensation and Development and the Technical Commissions, which are existing institutions have been reinforced. In particular, the Technical Commissions have been reconstituted to deal with specific sectors for integration or co-operation of Member States. Importantly, there are now Commissions on Political, Judicial and Legal Affairs, Regional Security and Immigration.[39]

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37. *Ibid.*, Article 14.

38. *Ibid.*, Articles 15 and 16.

39. Revised ECOWAS Treaty, Articles 17, 19, 21 and 22.

These provisions represent a renewed commitment to accelerating the process of regional integration in West Africa. The underlying spirit is that community institutions should have the necessary competence to implement measures that can lead to the creation of the economic union envisaged under the Revised Treaty. This should help to overcome the institutional shackles associated with decision-making under the original Treaty of 1975, especially the need to implement community measures by domestic legislation. This had led to delays and procrastination in the implementation of community programmes.

The direct applicability of community decisions and regulations upon approval of the Authority of Heads of State and Government coupled with the binding effect of decisions of the Court of Justice confer some supranational powers on community institutions.

However, this only addresses one major obstacle to West African integration, namely the non-implementation of community decisions in a formal legal sense. There is evidence to show that even when protocols have been adopted and ratified, the practical implementation thereof within individual Member-States leaves much to be desired. A good example of this, which is relevant to this work, is the protocol on Free Movement of

Persons, Right of Residence and Establishment adopted on 29 May, 1979.[40] The Protocol was quickly ratified and came into force on 20 May, 1980.

To day, two of its major phases have been implemented. The first dealt with the right of entry and abolition of visas. This was put into effect between 1980 and 1985. The second phase relating to the right of residence was implemented between 1985 and 1990.[41] The last phase covering the right of establishment was scheduled for implementation between 1990 and 1995.[42]

Inspite of the fact that all Member States ratified these instruments as well as the protocol on community citizenship,[43] obstacles to free movement and right of residence have persisted. Citizens of Member States continue to be refused entry or subjected to border checks and immigration controls. Expulsions and border closures remain a frequent occurrence. To date the use of the ECOWAS Travel Certificate and Brown Card for regional insurance of vehicles are only a partial success. In some countries, including Nigeria, the process of issuance, removal and

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40. Protocol A/P 1/5/79 Done at Dakar, Senegal on 29 May 1979

41. Supplementary Protocol on Implementation of the Second Phase, A/SP.1/7/86 done on 1 July 1986 with a deadline of 4 June 1990.

42. See Preamble to the Supplementary Protocol on the implementation of the Third Phase, A/SP.2/5/90 done on 29 May, 1990.

43. Protocol A/P.3/5/82

endorsement of the travel document or carnet de voyage can sometimes be as tedious as that of a national passport or visa. Similarly very little progress has been made on the regional trade liberalisation scheme.[44]

All these imply that the physical, technical and fiscal barriers to intra-regional trade are still very much in place. The Revised ECOWAS Treaty itself recognises this fact by stipulating for "the total elimination of all obstacles to the free movement of people, goods, capital and services and the right of entry, residence and establishment" as a means of completing the economic union.[45]

The same problems of implementation have hampered the achievement of a customs union as envisaged by the original Treaty. Efforts to harmonise and standardise customs regulations and procedures in order to facilitate the movement of goods and services across frontiers have not yielded much results. Internal legislations and administrative practices still discriminate against the same or like products from other Member States. Numerous major and minor restrictions have not been removed. Internal taxes and fiscal charges still vary and thereby distort the free flow of goods and services.

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44. Adopted by the Authority's Decision A/DEC.1/9/83 of 20 May, 1983 and launched on 1 January, 1990.

45. Revised Treaty, 1993; Article 55.

It was the failure of the original Treaty to achieve the objectives of integration for the benefit of the peoples of the region that necessitated revision thereof. It is therefore necessary to briefly identify the major obstacles that have constrained the ECOWAS integration efforts in order to draw lessons which can assist in the future implementation of economic integration schemes in Africa as a whole.

6.5 OBSTACLES TO ECOWAS INTEGRATION

We had identified lack of political will as a major factor undermining the commitment of Member States in most integration experiments in Africa. The same reason has been responsible for the sluggish pace of integration under the Economic Community of West African States. Despite over twenty years of frenetic diplomatic activity, concrete results have fallen far short of expectations.

For the purpose of this thesis, the main failure, which is also traceable to the lack of political will, is the perpetuation of internal divisions on the basis of existing international boundaries. These frontiers continue to obstruct the free flow of men and materials that economic integration is designed to assure. In effect, both inter-state and intra-regional trade cannot be increased significantly as traders continue to by-pass official entry points, customs and immigration controls instituted by

states at their frontiers.

In the West African sub-region, as we saw earlier, there has been very little increase in intra-regional trade at the official level. Unofficial or unregistered trade continues to account for more than two-thirds of commercial intercourse between the states in the sub-region. The tardy implementation of the free movement regime has not been of much avail in this regard. On the contrary, deteriorating economic conditions across the sub-region seem to have pushed Member States into looking more inward, leading to discriminatory internal economic and immigration policies that further undermine the free movement principle.

A number of other factors have also been responsible for the palpable lack of speed and enthusiasm in implementing economic integration in West Africa. These include the absence of a development and integration culture, which should make national development planning to be premised on regional considerations and have the regional market as the point of reference. Regional insecurity arising from armed conflicts within and across Member States; and the existence of a bloated public bureaucracy which treats regional integration as peripheral to the national

economic agenda[46] are also strong obstacles.

The singular issue underlying these obstacles, according to Jeggan Senghor, is that national political elites attach more importance to the preservation of national sovereignty recently acquired at the end of the colonial epoch.[47] This often leads them to direct political and financial resources to national integration than to regional integration. Administrative structures and policies are also designed to promote national interests, rather than regional aspirations.

This factor raises a number of questions touching on the institutional framework of African integration. How can regional institutions be made less dependent on national policies? What measures can be taken to secure steady financial support for regional integration? How can national institutional arrangements for managing the economy be made to reflect the priority to be accorded to regional integration?

These difficulties are exacerbated by the prevailing notions of general international law. Traditionally, as we saw earlier, the doctrine of

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46. Bundu, A. (1993): "ECOWAS and the future of Integration" in Ajomo & Adewale (ed.), *op. cit.*, 344; West Africa Magazine; Report of ECOWAS Executive Secretary, 1992-93, (No. 3956) p.1255.

47. Senghor, J.C. (1990): "Theoretical Foundations for Regional Integration in Africa (Nairobi: African Academy of Sciences) Chapitre 2.

state sovereignty gives each state exclusive legal competence within its territory. The law sanctions violations of sovereignty, whether territorial or otherwise. The dominant rule is one in favour of non-interference in domestic affairs. A state also has exclusive sovereignty over its natural resources and is free to determine its economic and political policies.[48]

Today, there is a growing recognition that these traditional principles are incompatible with the emerging international law of development. According to Garcia-Amador[49], the two corollary principles of the new regime of international economic law are the right to development and the duty to co-operate for development.

These imply that states seeking development and development assistance through the international system must undertake co-operation measures at bilateral, multilateral or regional levels. This necessarily entails a less dogmatic assertion of individual state sovereignties. As the world becomes increasingly inter-dependent leading to the evolution of what some people call the global village, it is ever more necessary that a number of subjects previously regarded as being within the exclusive

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48. UN General Assembly Resol. 1281 (XXIX) of 12 December, 1974 - Charter of Economic Rights and Duties of States.

49. Garcia-Amador, F.V. (1990): The Emerging International Law of Development (New York, London, Rome: Oceana Publications), Pp.35-36. See also UN General Assembly Declaration on the Right to Development, 4 December 1986 (Resol. 41/128), Articles 1 and 2.

domestic domain will be opened up to international action. The internationalisation of human rights and environmental protection are examples.[50]

For the purpose of this work, it is submitted that for a region that seeks development through co-operation, it is to be expected that classical notions of state sovereignty will have to be radically reassessed. As we saw earlier in Chapter three, strong claims of national sovereignty on the basis of classical international law are incompatible with the co-operative framework required for regional economic integration. The main conflict which arises is between the existing legal regime of inter-state boundaries and the imperatives of intra-regional intercourse.

In looking at the obstacles to integration in West Africa, it is submitted that the most pervasive problem has been the perpetuation of the territorial status quo of fragmentation inherited by African States at independence. The irrationalities and discontinuities of the existing structure and the legal regime upon which they rest inhibit the free movement of goods, people and factors of production.

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50. Falk; Human Rights and State Sovereignty (1981) cited in Kingibe, B.G.: Hon. Minister of Foreign Affairs' Keynote address at the Silver Jubilee Conference of the Nigerian Society of International Law, 1994.

As we have said earlier, the major obstacle to development in Africa has been the division of the continent into a large number of micro-states cloistered behind series of commercial, linguistic, cultural, political and legal barriers of all sorts. Hence transborder co-operation in planning and execution of development projects is a necessary condition for sustainable and self reliant growth in all forms. The imperative therefore is to remove or at least reduce barriers between countries in order to facilitate the exchange of ideas and technology, increase specialisation and attain economies of scale and thereby achieve higher levels of international competitiveness.

The real challenge for African integration is how to overcome the factors of fragmentation such as the forces of negative nationalism, the attachment to sovereignty and the consequent strict boundary enforcement policies. It is clear from our discussion of the free movement regime in Africa in general and West Africa in particular that the pace of integration at the inter-state or official level has been rather sluggish. As a result, internal frontiers remain formidable obstacles to free movement as a result of the physical, technical and fiscal barriers that persist.

On the contrary, cross-border relations at the unofficial or grassroots level remain strong. Informal trade is on the rise. Social

intercourse across international boundaries continues in spite of official boundary enforcement efforts. The extensive trading links, such as the trans-saharan networks, which existed in pre-colonial Africa have survived both the era of European colonial partition and present-day international boundaries and nationalist border-enforcement procedures. Furthermore, colonial partition and the ensuing nation-statist territorial framework of contemporary Africa have not suppressed the growth and spread of regional trading communities like the Hausa, Dioula, Yoruba, Mandinka and Mende diasporas in West Africa. The Ibos own shops across all of West and Central Africa. Similarly, occupational groups such as the Cattle Fulani of West and Central Africa have not been restrained by the divisions from grazing across the African Savanna. Fishermen in West African coastal waters notably the Fante of Ghana, the Ogu of Benin and the Ijaw, Itsekhiri, Efik and Ibibio of Nigeria continue to freely cover the entire Gulf of Guinea coastline inspite of so-called maritime boundaries.[51] Clearly therefore, the sluggish pace of economic integration ignores Africa's age-old traditions of long-distance, regional trade and the regional exploitation of transboundary resources. It is hoped that the renewed enthusiasm for regional integration expressed in the revision of the 1975 Treaty of Lagos establishing the Economic Community of West African States and the adoption of the Abuja Treaty for the

51. Imobighe, T.A., Fakulujo, I.A & Fagbemi, S.E (NIPSS Studies on Nigeria's International Borders: Vol. 5: The Coastal Border (NIPSS, 1988) pp. 30-32.

1. The existence of no less than twenty-five tribal and language groups straddling the boundaries across Nigeria and her immediate neighbours, namely the Republic of Benin, Niger Republic, Chad and Cameroun with Hausa, Adarawa, Tazarawa, Shuwa, Kanembu and Fulani tribal groups along the Niger, Chad and Cameroun borders.

2. The existence of various resources commonly exploited without regard to the existing boundaries like water, fisheries, fire-wood, food and oil.

3. The migration of large numbers of refugees from Mali, Niger, Burkina Faso, Mauritania and Chad following severe drought in the Sahel region and failure of agricultural products. The Niger and Chad boundary corridors remain prone to perennial environmental hazards, such as desert encroachment, locust and other pest invasion, whose control requires joint action and sustained mutual consultation.

4. The tremendous amount of two-way, illegal trade or smuggling between Nigerians and their neighbours, partly owing to the porous nature of such boundaries. Examples, include the Sokoto-Birnin-koni, Katsina-Maradi, Katsina-Garoua, Kano-Magaria and

Damasak-Diffa corridors on the Nigeria-Niger boundary.

5. That pastoral nomads to the North migrate northwards as the rains move north and south again as the dry season approaches and have been doing this for several hundred years which makes pasturage and alien herdsmen vital issues of transfrontier co-operation in the West Africa sub-region.

6. That transborder minerals constitute a source of major conflict between Nigeria and her neighbours, especially the occurrence of petroleum, limestone and other minerals.

In his presentation on the Eastern Border of Nigeria at the National Workshop on the Development of Border Regions, former Military Governor of the then Gongola State, Wing Commander Isa Mohammed identified the following factors relating to border relations across the Nigeria-Cameroon boundary:[53]

(1) The extensiveness of the boundary which passes through a mountainous region makes it porous with only a few customs and immigration officials to man the areas. This encourages the opening of illegal routes and

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53. Mohammed, I. (1992): "Problems and Prospects of Developing the Eastern Border: The Case of Border Communities of Gongola State" in Asiwaju, A.I. (ed.): Development of Border Regions (Lagos: Joe Talalu) 222 at 226-9.

increased crime rate and harassment especially cattle-rustling.

(2) The problem of determining who is a Nigerian among the border communities as the border inhabitants speak the same languages and dress alike.

(3) The border areas share similar socio-economic, cultural as well as physical characteristics. Pastoralists who live in border communities move their animals without regard to boundaries and this makes control of animal diseases like rinderpest and trypanosomiasis a transborder issue.

(4) Three rivers, the Donga, Katsina-Ala and Benue are shared by the two countries.

(5) A lot of transborder trade is carried on by the border communities. These activities are neither recorded nor formalised.

The Governor interjected his presentation with recommendations for co-operation between the two countries in dealing with transborder animal diseases, natural disasters and transport. He concluded that "development of border regions cannot be done in isolation from other areas. It requires integrated planning by

all countries concerned."[54]

These characteristics and policy prescriptions are true of all boundary sectors in Africa. The key point is that transborder relations arising from these impulses make some form of collaboration, consultation and joint action imperative in dealing with border regions. Professors Barkindo[55], Kyari Tijani[56] and Hinjari[57] in sectoral studies of the boundaries across Northern Nigeria argue that planning for the development of border areas must be based on a clear appreciation of the needs of the border people, especially their socio-economic conditions.

Border studies have clearly established that border communities are generally neglected and marginalised by central governments of their states. Consequently they experience the same problems of deprivation and underdevelopment on both sides.

Thus as Stoddard[58] states, in today's world, the problems of one side are also the problems of the other side. Hence he proposed a "Doctrine of Mutual Necessity" by which both sides recognise the existing integration, put aside nationalistic impediments and tackle issues in a binational or multilateral

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54. *Ibid.*, at P.229.

55. Barkindo, B.M.: "The Neglected Border Areas of Gongola State: A plea for Accelerated Development" in Aswaju, (ed.), *op.cit.*, p.89.

56. Tijani, K.: "Planning for the Border Areas of Borno State", Ibid., p.110.

57. Hinjari, W.L. "Border Communities and the Development Imperative: A case study of Kano/Katsina States' Border Communities", *Ibid.*, p.121.

58. Quoted in Martinez, O.J. (ed.): Across Boundaries-Transborder Interaction in Comparative Perspective (Texas: CIABS, 1986), p.5.

framework. Gustavo del Castillo[59] is likewise critical of policymakers who fail to see border problem-solving as a bilateral matter. This makes it necessary for us to examine the scope and legal framework for co-operation in the management of African boundaries. The structures for transborder co-operation will be discussed in the Nigerian context but these are broadly applicable to the rest of the continent.

59. *Ibid.*

CHAPTER SEVEN

BORDER POLICIES AND TRANSBORDER CO-OPERATION

7.1 INTRODUCTION

The preceding chapter has shown that the most persistent obstacle to regional integration in Africa in general and West Africa in particular is the existence of physical, technical and fiscal barriers arising from conflicting border management policies. We have also seen that these barriers to economic intercourse are reinforced by Africa's plural legal heritage and the legal parallelism it creates. These problems are products of Africa's colonial legacy of nation-states created on the basis of the international legal concept of state sovereignty.

In Africa, the story of exclusive boundaries as a basic requirement of the modern state system began with the imposition of colonial boundaries. Nothing more than the chances which characterised the colonial boundary negotiations has determined the varied status of Africans as Kenyan, Tanzanian, Angolan, Tunisian, Algerian, Nigerian or Nigerien. To bring the point nearer home, the Hausa or Fulani in the north, the Kanuri in the north-east; the Mandara, the Chamba or Efik to the eastern border have become Nigerians or Nigerienes, Chadians or

Cameroonians more by accident of history than anything else. These patterns of historical and cultural interlink were a feature of inter-group relations in pre-colonial Africa. The difficulties in maintaining an exclusive border regime in situations of this kind of ethnic or linguistic interlink and geographic contiguity have been demonstrated very graphically in episodes like the deportation of Alhaji Abdurahman Shugaba. Alhaji Shugaba, a Nigerian Kanuri of Borno State origin had obvious ancestral and kinship ties with Chad which were used for his politically motivated deportation in 1980. In reality the fact that Nigeria shares its Kanuri population with Chad makes it near impossible to determine the nationality of any Kanuri. The Nigerian situation is a window on the rest of Africa, and would therefore be stressed in this chapter.

7.2 PERSPECTIVES ON BORDER POLICIES

7.2.1 NIGERIAN PERSPECTIVES

The most striking feature of Nigerian borderlands is that in all sectors, the local communities on opposite sides are like a set of siamese twins with relation to geography, culture, language, history, politics and economy.[1] This internal coherence has given rise to easily observed pattern of relationship whereby the inhabitants interract more with one another across the obviously artificial

1. Asiwaju, A.I. & Ademiyi, P.O. (ed.) (1989): Borderlands in Africa (Lagos: Unilag Press) passim, esp. Asiwaju: Borderlands - Policy Implications p. 63 at 67.

boundary than they do with other groups in other parts of the nation-state in which they are officially located. A number of examples have been documented across all sectors of Nigeria's international boundaries.

Across the Nigeria-Cameroon border, for example Professor Barkindo shows that some villages like Vizik and Kamale in the Michika Local Government Area and Muckhta and Bagira in the Mubi Local Government Area of present Adamawa State in Nigeria attend medical establishments in Cameroon like Tur dispensary; the health centre at Mogodi or the Mokolo, Burha and Dibya General Hospitals which are nearer than Nigerian facilities at Madagali, Garta or Mijulu. Similarly some Cameroun border inhabitants also cross over to Nigeria where this is more convenient. There is evidence of large attendance by Cameroonians at Ganye, Gembu and Mubi General Hospitals as well as Kojoli and Jada dispensaries.[2]

In the Benue-Cameroun sector, it has been reported that "a number of Nigerian villages in the Turan and Ikyurav-Ya districts of Kwande Local Government Area now seem lost to Cameroun because of

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2. Barkindo, B.M.: "The Neglected Border Areas of Gongola State: A Plea for Accelerated Development" in Asiwaju, A.I. (ed.): Development of Border Regions (Lagos: National Boundary Commission, 1993), 89.

Cameroun's better facilities at this border".[3] Furthermore, it has been noted that the people in the border regions either belong to the same ethnic groupings or operate, by and large, the same or identical social institutions. These range from birth, marriage, age-set to burial ceremonies and rites. Ekpeyong cites the instance of the Tiv who "still look with anticipation at the time when they will cross over to Cameroun to worship at Swem, while the Betcheve in the Cross River look forward every year to the inginita ceremonies in the Metengi hunting groups in the Camerouns where the Priest resides."[4]

On the Nigeria-Niger borders, it has been said that:

> Economic links have combined with the great bond of a common religion and the use of Hausa as a lingua franca to nullify the effects of the boundaries imposed by the Europeans---[5]

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3. Nigeria/Cameroun Border: Benue State Sector in Asiwaju (ed.); Development of Border Regions, Ibid., 231 at 234.

4. Ekpeyong, J.: "Prospects and Constraints for Cameroun-Nigeria Socio-Economic Co-operation along with Eastern Border" in Asiwaju, ed., Ibid., 74 at 82.

5. Anene, J.C. (1970): The International Boundaries of Nigeria: 1885 - 1960 - The Framework of an Emerging African Nation (London: Longmans & Green) at p.233.

The Emirs of Katsina and Daura whose emirates were divided into Nigeria and Niger by the colonial partition, in a joint paper presented to the Transborder Co-operation Workshop held at Kano in 1989 stated clearly:

> Despite almost a century of International Protocol, national flags and the use of French and English languages as official languages in both Niger and Nigeria, the people are still the same--- it is the people, more than anything else that matter. The tribal groups - Hausa, Fulani, Tuaregs, Kanuri and Zaberma - still bear the same identities in both religion and languages, as their forefathers did. The international borders were no more than the ditch-RAMI--- same families live astride the borders. Our people share the same farmlands, and our livestock move freely across the borders, we share the same water points, markets and even clinics. You need to understand our farming methods and climatic conditions of our environment to appreciate all this. If, in desert conditions, you have to travel long distances to reach (a) water point, your thoughts would be on the water first, and not on territorial claims.[6]

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6. Usman, M.K. and Bashar, M.: "The Nigeria-Niger Transborder Co-operation" in Asiwaju & Barkindo (ed.)(1989): The Nigeria-Niger Transborder Co-operation (Lagos: Malthouse) p. 108.

These pronounced levels of interaction exist across all of Nigerian and African borders. They loudly make the point that border communities did not constitute decisive considerations for the definition or demarcation of the borders in their neighbourhood during the colonial partition. Indeed most local communities were known to have resisted the new boundaries to the extent of their functions as dividing lines, sometimes by protest migrations, tax evasions or extra-legal social and economic intercourse.

Since independence however, there has not been a significant policy innovation to attenuate the negative functioning of the colonially imposed boundaries. This has done much to perpetuate in many borderlands, a tradition of negative attitude to the border itself. The boundary-maintenance policy of the central or national government is inherently opposed to the border-free interests of the local communities. This is the major feature of border regimes all over Africa, namely the conflict between official or state-centred boundary policy aimed at strengthening national frontiers and the existing economic and cultural interpenetration which dictates cross-border collaboration. Simply put the nationalistic perception of the boundary as a barrier for protecting states and their nationals is incompatible with the transnational orientation of borderland communities. National governments, instead of treating integration in border areas as inevitable, regard it as a threat to national security. They also ignore the overlapping of myriads of problems across the border as well as the existence of

transboundary resources and environmental hazards.

The second major characteristic of Nigerian and *a fortiori*, African border areas is their relative under-development in relation to the core areas. As peripheral regions of the State, the borderlands are among the most neglected areas. Modern communication and transportation networks peter out as one approaches a nation's frontier zones in most localities. Basic amenities like schools and hospitals, electricity, water, housing schemes or industries are lacking. Little wonder then that in the border regions are to be found some of the most primitive cultures like the nudic Koma in the Nigeria-Cameroun north east boundary sector and the Ohori-Ije in the Nigerian-Benin south west.[7]

As has been observed, what border communities get most of the time is the rough side of state power. This is manifested in the operation of coercive state apparatuses, especially the para-military border-enforcement agencies, whose conduct generally tends to generate negative attitudes to the existence of the boundaries and towards the government enforcing them. All these have the effect of alienating rather than integrating border communities.[8]

Furthermore, Nigerian borderlands are not only disadvantaged in relation

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7. Asiwaju, A.I. in Asiwaju, (ed.)(1993): Development of Border Regions, *op. cit.* p.xvii.
8. *Ibid.*

to the core areas of the nation, but even more critically in reference to the adjacent borderlands of limitrophe countries. Considering that all these neighbouring countries are less materially endowed than Nigeria, it reinforces the point that borderlands are neglected in national development planning and the interests of border inhabitants are not central to border policy. The social and economic depression and neglect compel border residents to depend on each other for survival or simply to move over to where the conditions are more suitable.

Paradoxically, even nationalistic self-interest dictates that the marginalisation of border regions from the national development process must end. Apart from integrating them into the mainstream of the national economy, it should also enhance national security goals and the objective of civil and political stability within the national space.[9]

Hence it is appropriate that Nigeria's National Boundary Commission has initiated efforts to promote a conscious policy of border development involving the Federal, State and Local Governments.[10] There has been a rapid expansion of social amenities at border towns and villages with the dual objective of attracting Nigerians to their home state and stemming the tendency to identify with neighbouring countries at the expense of Nigeria in order to have access to

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9. *Ibid.*, p. xxi.

10. Proceedings of the Nigerian National Planning Conference on Development of Border Regions, Durbar Hotel, Lagos 10-12 August, 1989.

facilities provided by such countries. Although, the implementation of this policy has not dramatically improved the situation across most border regions, a few areas like the Bakassi Peninsula, have seen remarkable development, as considerable public and private resources have been deployed in providing essential amenities and establishing effective Nigerian presence.

It is however submitted that these unilateral policies cannot adequately address even the basic problems of border administration. Illegal entrants, smuggling, inter-territorial crimes or banditry like cattle and car theft, control of pests, animal diseases, desertification and tax enforcement remain critical administrative problems that at the least require collaboration or joint action by Nigeria and her neighbours.[11] Indeed direct participants in efforts to deal with such problems have noted that "no meaningful solution could be found to these problems unless there is active co-operation by both sides".[12]

It is therefore necessary to briefly examine the measures which Nigeria and her African sister-states have adopted to facilitate closer co-operation. In general, states have evolved different ways of handling transborder relations and transboundary resources. In all cases, they have accepted the challenge of co-operation which makes it imperative for sovereign states in today's world, to look

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11. Mohammed, O.A. (Col.): "Problems of Local Administration and the Imperative of Transborder Co-operation: The Experience of Borno State" in Asiwaju & Barkindo, ed., *op. cit.*, 291 at 292-3.

12. *Ibid.*, p. 293.

beyond the orthodox dictates of national sovereignty to appreciate the facts of geography and history which have thrust them together as neighbours. This is especially the case when their border populations share common bonds of language, culture and tradition nurtured by continuous and functional interaction. These links require that African States have to evolve effective strategies for transborder co-operation transcending the artificial barriers imposed by colonialism. Thus, there is an increasing tendency to establish frontier regimes outside the formal framework of inter-state diplomacy which are designed to concentrate more directly on border regions and border inhabitants.

To use the case of Nigeria and Niger, which is also largely the same for other neighbouring states, transfrontier co-operation has been approached by a combination of three major instruments.

The first involves the establishment of formal bilateral institutions to promote transborder co-operation. This is usually done through the setting up of Joint Commissions for Co-operation. An example is the Nigeria-Niger Joint Commission established by a Convention signed on 3 March, 1971 in Niamey, Niger where it is also headquartered.

A number of agreements and projects have been concluded between Nigeria and Niger under the auspices of the Commission. The generation and

distribution of hydro-electric power from the River Niger which passes through both countries is the most outstanding example of the neighbourly relations that the Joint Commission has helped to nurture. Roads and bridges linking the two states have also been executed. There has also been co-operation in joint security patrols and police action against the traffic in stolen cars and contraband goods.

However there is one major drawback of this approach namely that such commissions are largely made up of central government representatives acting with a limited diplomatic mandate. Furthermore, decision-making is often hampered by cumbersome treaty-making procedures. They are therefore not so appropriate for managing transborder interaction between local inhabitants on opposite sides of the boundaries.

In order to provide a more congenial framework for grassroots interaction, the second approach to transfrontier policy has involved the limited delegation of the central government's external relations jurisdiction to subordinate tiers of government. In the case of Nigeria, limited power is given to 'gateway' states to initiate transborder relations with departments (equivalent of states) on the Niger side.

The Nigeria-Niger Joint Commission has promoted this approach by drafting the agreements for the establishment of local bilateral committees for co-

operation in the border areas which try to involve border administrations more directly in managing international boundaries.

This initiative resulted in the adoption of draft agreements creating eight local bilateral committees between Nigeria and Niger as follows: Dosso-Sokoto; Tahoua-Sokoto; Maradi-Sokoto; Maradi-Katsina; Zinder-Katsina; Zinder-Kano; Zinder-Borno and Diffa-Borno. The Committees were to be made up of representatives of border departments (in the case of Niger) and of border states (in the case of Nigeria).[13]

The function of these committees is to encourage and promote co-operation "in all fields, notably in the fields of economics, transport, health, education, culture, movement of persons and goods and maintenance of law and order". Their objective is to promote co-operation, mutual understanding, peace and well being of the populations of the border areas.[14] The Committees are empowered to develop and encourage trade exchanges in border areas in conformity with national laws and applicable treaties and to assist Customs and Police in the control of movement of goods and persons through legally approved routes as well as inter-territorial crimes. Other functions include co-operation in the implementation of public and animal health programmes; desertification and

13. *Draft Agreement*, Annex II, Articles I and III.

14. *Ibid.*, Article V.

control of enemies of crops; sporting, cultural and youth activities as well as to encourage the establishment of small workshops, industry, primary and secondary schools, dispensaries and markets etc.[15]

On the whole, this bilateral initiative is a commendable effort towards converting African boundaries from barriers to bridges of human contact. It has opened up useful channels of communication between neighbouring authorities who are likely to better appreciate the circumstances of their border communities than the central governments. However the arrangements are unduly tied to central government fiat. Very often, its approval of decisions is mandatory. Secondly there is very little scope for participation of local residents. Local governments and traditional authorities should have been more directly involved.

Be that as it may, Nigeria's commitment to promoting transborder co-operation with its neighbours and evolving new boundary policies has been further demonstrated at a second level by the establishment of a National Boundary Commission[16] that has already organised trans-border co-operation workshops with neighbouring countries like Benin (1988), Niger (1989), Cameroon (1992) and Equatorial Guinea (1994). These workshops were aimed at developing a model for trans-border relations which other states in Africa could

15. Ibid., Articles VIII to XV.

16. Established by Decree No.38 of 1987, now Cap. 238, Laws of the Federation, 1990.

adopt in the management of their international boundaries. Some other countries also followed Nigeria's example by setting up national boundary commissions to deal with border issues. These include Benin and Equatorial Guinea to mention two of Nigeria's immediate neighbours.

Prior to this, Nigeria had proposed the establishment by the Organisation of African Unity of a Boundaries Commission at the 37th Ordinary Session of the Council of Ministers held at Nairobi, Kenya.[17] Although the proposal has not seen the light of day, it did articulate the need to address border problems associated with international boundaries on the continent at both the bilateral and multilateral level.

7.2.2 AFRICAN PERSPECTIVES

The major approach to the management of African boundaries has been through the avenue of regional or sub-regional groupings. These are designed to foster various levels of co-operation and thereby attenuate the rigidities of African boundary maintenance policies. In the West African sub-region, some of these forms of co-operation are the Lake Chad Basin Commission, the Niger River Commission and the Economic Community of West African States. French-speaking West Africa has had the most elaborate free movement arrangement which enables citizens of sister Francophone states to move in and out of other

17. CM/1119 (xxxvii) Add. 1 held 15-21 June, 1981.

states with little or no formality. At the wider level, there is also the Organisation of African Unity which was partly "inspired by a common determination to promote understanding among our peoples and co-operation among our states in response to the aspirations of our peoples for brotherhood and solidarity in a large unity transcending ethnic and national differences."[18] These principles have clearly been overshadowed by Africa's pledge to respect the frontiers existing at independence on the ground that "the borders of African States on the day of their independence constitute a tangible reality."[19]

The singular weakness of this approach to boundary management is that it focuses on the central governments and their dominant nationalistic perspective to inter-state border issues. Trans-border intercourse is basically treated as a subject within the exclusive domain of the central government with very little involvement of borderlands inhabitants and local authorities. This is the general policy of all African states. Thus the overall approach has been essentially bilateral and piecemeal in character. It is hereby suggested that the evolution of a comprehensive, multilateral framework for dealing with Africa's boundaries is the minimum that is required to cope with what is in reality a continental phenomenon.

In this connection, it needs to be restated that regional integration in

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18. Corvenka, Z. (1968): The Organisation of African Unity and its Charter (London: Longman, 1968) p.69.

19. 1964 OAU Declaration on the Intangibility of Frontiers.

Africa is specifically designed to eliminate obstacles to free movement and free trade which are directly linked to the exclusive and negative functions of state boundaries. In the face of efforts to integrate Africa's economies as a way out of Africa's economic quagmire, what is needed is a boundary framework that will transform the present structure of Africa of the nation-state into a new Africa of the region and of the people. For this purpose, developments in other regions of the world provide helpful precedents.

7.2.3 EUROPEAN PERSPECTIVES

The region where continental regional union seems to have made steady progress is in Western Europe. The foundations of economic integration were firmly laid in 1957 and to date, the Single European Market inaugurated in January, 1993 has literally 'defunctionalised' or 'devalued' the internal frontiers established after World War II. There are increasing calls for the withering away of boundaries and of overcoming the nation-states. The nation-state model of political organisation has lost much of its moral fascination in Europe and is subject to manifold ideological attacks. Continental unity has become the more widely shared value or political ideology. The sociological spread and moral intensity of this ideology has precipitated the gradual decay of the nation-state in the region where it was first invented and first matured. It would seem that European Unionism has overtaken and grossly weakened state-nationalism as the

paramount social philosophy and moral force of the 19th century.[20]

In Europe, regional unity at the inter-state level has grown hand in hand with local co-operation at the community level. The two tendencies seek to create a "Europe of the peoples", not of the Nation-States. The emphasis on economic integration and the establishment of institutionalized communication and cooperation between local communities across state boundaries became the two main instruments for socio-cultural and political integration. Whereas the European Communities took on economic integration, the latter became the special province of the Council of Europe.

It was under the auspices of the Council of Europe that the representatives of local communities met and organized themselves as Council of European Local and Regional Authorities to exchange views, compare problems and think out common solutions. Their deliberations quickly established that people located in the borderlands were worse hit by European divisions and eagerly desired integration.

The potential of frontier regions as a special force toward continental integration was accelerated by the growth of private and cross-border organisations set up to deal with borderland problems.

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20. Strassoldo, R.: *op. cit.*, Note 4 at p. 391.

The first locally initiated effort to address such problems in the neighbouring border areas of Alsace (France), South Baden (Germany) and the border cantons of Switzerland led to the creation of Regio Basiliensis in 1963. This trinational body received the endorsement of the respective national governments. It undertook the function of assessing the needs of the border area, collecting data and drawing up transportation and environmental plans. The emergence of this body brought to the fore the need for coordinated and institutionalised approaches to the solution of European transboundary issues.

By 1970, three associations of municipalities in the German-Netherlands frontier established the Euregio. This was a unique body having a binational parliamentary council and a secretariat. It was devoted to evolving a comprehensive approach to border development in place of the traditional piecemeal efforts.[21] In this way borderland communities in Europe gradually attempted to make boundaries more permeable for the common good of border residents on both sides. The European approach merits the attention of other regions of the world like Africa where greater trans-boundary co-operation and interchange is desirable. Allowing for appropriate modifications to suit local conditions, it is possible to adopt the legal arrangements formulated in the European context to redress the irrationalities of artificial and arbitrary boundaries. It is for this purpose that we shall now examine in some detail, the

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21. Martinez, O.J.: *op. cit.*, Note 7, P.3.

European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, 1980.

7.3 LESSONS OF TRANSFRONTIER CO-OPERATION IN EUROPE

The legal instrument which provided for a multilateral framework of transfrontier cooperation in Europe was the European Outline Convention on Transfrontier Co-operation Between Territorial Communities or Authorities. The Outline Convention as it is known for short, was drawn up within the Council of Europe by the Committee on Cooperation in Municipal and Regional Matters and adopted by the Committee of Ministers responsible for Local Government. It was opened for signature on 21 May, 1980. The outline convention came into force on 22 December, 1981 after the required four ratifications.

Of the 21 member states of the Council of Europe, more than half have ratified or signed the Outline Convention. The purpose of the Convention is to "outline the general, legal and common bases on which bilateral cooperation would be founded in the framework of the national sovereignty of each country. This co-operation should be adapted to the specific conditions of each country and region."[22]

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22. Proceedings of the 1st Conference of European Ministers responsible for Local Government Paris; 20-21 November, 1975.

As stated in its preamble, the convention aims at promoting transfrontier cooperation as far as possible and contributing to the economic and social progress of frontier regions. In the first place, the convention seeks to fill a legal gap by offering forms of transfrontier co-operation particularly suited to the needs of territorial communities and capable of providing an additional legal basis for any agreement which such authorities may conclude. Secondly, it furnishes states with various means of supervision and control for ensuring observance of the principle of state sovereignty wherever necessary.[23]

Because of the variety of situations and structures regarding local communities in Member States and the wide range of problems to be solved, the technique chosen for regulating the subject was that of an outline convention embodying the major relevant undertakings, to which are appended a series of model and outline agreements, statutes and contracts designed to meet the various cooperation needs. For the same reason, the convention is not intended to deal itself with all the problems concerned but frequently refers to the provisions of domestic legislation.[24]

The convention is designed to be of evolutive nature such that it may be perfected or expanded in the light of experience acquired in the course of its

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23. Council of Europe (1980): Explanatory Report on the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (Strasbourg), p. 8.

24. *Ibid.*

implementation. The graduated system of models and outlines appended to the convention do not form an integral part thereof and compliance there-with is not mandatory. They may be adapted to each specific case of transfrontier co-operation. Different forms may be used and further model and outline arrangements may be drawn up within the Council of Europe.[25]

The flexibility of the outline convention is specifically emphasised in Article 3(1) which stipulates that the model and outline agreements, statutes and contracts are intended "for guidance only and have no treaty value". The Article further provides that the provisions of the convention shall not prevent the contracting parties from having recourse, by common consent, to other forms of transfrontier co-operation. Similarly, "the provisions of this convention should not be interpreted as invalidating existing agreements on co-operation".[26]

The convention is also explicit as to the limits of its applicability. First, Article 1 reflects the fundamental principle that in the implementation of the convention, due regard shall be had to the constitutional rules of each party. Next, Article 3(4) supplements this rule in two respects. One is that the convention is not to affect the powers of the central government in general policy-making or the conduct of international relations. The effect is that the convention

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25. Outline Convention, 1980; Article 3(1), and 8.

26. *Ibid.*, Article 3(3).

does not confer an 'international' character on transfrontier relations. The second point is that the convention does not affect the rules of control and supervision to which territorial authorities and communities are subject under a state's domestic law except such state itself modifies the rules for purposes of enhancing transfrontier co-operation or otherwise. Any agreements or arrangements which are incompatible with the prescribed domestic standards would be null and void. Finally a state could still stipulate conditions to which transfrontier agreements would be subject under its domestic law by making a declaration in accordance with Article 2(2) at the time of signature or ratification.[27]

It is worth noting that even though the convention has no direct effect on domestic law, its aim is to persuade states to adopt a more favourable attitude towards transfrontier co-operation. States which have ratified the convention acknowledge the principle that territorial communities are entitled to co-operate across frontiers within certain limits. This principle was not recognised in the constitutions or legislation of most European countries especially those with highly centralised structures of government. In others it was expressly prohibited. The convention therefore fills a legal gap which existed in almost all states which have ratified it to take steps to encourage transfrontier co-operation and remove any remaining obstacles to it.[28]

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27. Council of Europe (1980): Explanatory Report, *op. cit.*, P.14-15.

28. Outline Convention, *op. cit.*, Articles 1 and 4.

The major achievement of the Outline Convention has been the balance it strikes between nation-states and local regions and authorities in the matter of transfrontier co-operation. While it leaves nation-states some room for manoeuvre, it leaves no doubt that local authorities and communities are free to use the legal forms which are best suited to their problems. Thus it is in keeping with the traditions of local autonomy characteristic of European states.[29]

The convention has been working satisfactorily, especially bolstered by the activities of the European Parliament and the European Community in general; the European conference of Local and Regional Authorities (CLRAE) and the European Conference of Frontier Regions. Other associations such as the Association of European Border Regions (AEBR) or (AGEG) and the Liaison Office for European Regional Organisations (BLORE) have also in various ways contributed to the growth of transfrontier cooperation.

Some scholars notably Professors Ayo Ajomo[30] and Anthony Asiwaju[31] have strongly urged for the adoption of the European Outline convention as a model for bilateral and multilateral transborder co-operation in Africa. Professor

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29. Partl, A. (1984): "The Institutional Development of Transfrontier Co-operation: Achievements and Prospects-Implementation of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities", paper presented at the 3rd European Conference of Frontier Regions: Borken, Germany 4-6 September, 1984 (Typescript, p. 7).

30. Ajomo, M.A. (1988): "The European Outline Convention on Transfrontier Co-operation between Territorial Authorities and Communities (1979) as Model for a Nigeria-Benin Agreement", Paper presented at the Nigeria-Benin Transborder Co-operation Workshop: ASCON, Badagry 8-14 May, 1988. (Typescript, PP. 14-15).

31. Asiwaju, A.I. in Asiwaju & Adeniyi (ed.)(1989): Borderlands in Africa, *op. cit.*, PP.76-77.

Asiwaju indeed makes a very strong case for preferring the pattern of developments in Western Europe as the model to be adopted on the ground that "the solutions provided are to problems that are similar to those encountered in Africa, including Nigeria".[32]

According to Professor Asiwaju:

> In both the European and African continents, borders arbitrarily split cultural and geographic entities and create sensitive management problems arising from conflicts between the boundary-maintenance policies of state and border-resisting tendencies of the local residents. The situation in most European border regions are very much like those of Africa where locality is internationalized. The similarities between African and European positions must ultimately be traced to the direct historical relationship between the two: borders in Africa are in very many and important respects extensions of the boundaries of former Metropolitan nation-states of Europe.

The lesson of the European experience, therefore, recommends itself to Africa, and the essence of that experience is in the steady realisation, since the end of the Second World War, of the need for active

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32. *Ibid.*, at P.81.

transboundary cooperation especially at the level of adjacent border jurisdictions. The new outlook limits or even overturns the hitherto exclusive use of diplomacy as the sole instrument for the management of relations between the sovereign nations.[33]

It would be useful in the context of these observations to distil the general principles deducible from the European experience and literature on border problems. The first is that all boundaries are artificial in the sense that they are human impositions on the continuous tissue of nature. This is as true of Europe as of Africa.

The second principle is that boundaries are an essential part of every system or community. This is because nothing can stand out unless it is somehow bounded and differentiated from its environment. Hence boundary-maintaining is a basic function of all systems from macromolecule to international communities.

The third principle is that most systems have two kinds of boundaries, spatial and functional. Spatial boundaries have ambiguous features: they divide and unite; bind the interior and link it with the exterior. They are barriers and junctions, walls and doors, organs of defence and of attack, etc. Frontier areas

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33. *Ibid.*, at P.81. cf. Cukwurah, A.O.: "European Outline Convention on Transfrontier Co-operation Between Territorial Authorities or Communities as a Model for Africa in general and Nigeria and Niger in Particular" in Asiwaju & Barkindo, eds., *op. cit.*

can be managed so as to maximise either of such functions. They can be militarised, as bulwarks against neighbours, or made into areas of peaceful interchange.

The fourth main principle deducible is that borderlands are usually different from the core or central areas of the state to which they belong and have greater commonalities with "sister" borderlands across the boundary. This arises from a great variety of factors. One of them is that boundaries often cut through homogenous culture areas. The second is their spatial or social distance from the core areas. A third is their economic dependence on border policy decisions made at the centre. Other factors include their economic integration and physical contiguity.

A fifth principle emphasised in the European approach to borderlands is that border people be not handicapped, in their daily lives, by their location. This is regarded as a dictate of the rule of spatial justice which requires that governments should reckon with the disadvantages and advantages of living in the borderlands so as to adopt appropriate policies to redress imbalances. In the last chapter, we shall summarise the main lessons and policy recommendations that ensue from our aforegoing discussion of African and European border policies.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1 FINDINGS AND CONCLUSIONS

Much of the work has tried to examine the legal framework within which regional integration has been conceived, designed and implemented in Africa and other regions of the world. In particular, it has compared African approaches to integration law with the legal instruments of the European Community. The thesis has found that African integration laws have in general, either not addressed or insufficiently provided for some important conditions for effective integration.

The first point is that they do not make specific provisions regarding state boundaries which represent legally and politically, strong obstacles to inter-African trade and socio-economic relations. At the moment, there are no regional legal principles regarding the management of African boundaries comparable to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities.[1]

Secondly, the AEC Treaty of 1991 has no provisions explicitly directing Member States or the institutions of the Community to undertake the harmonisation of commercial or other legal rules as a principal activity of the

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1. Strasbourg, 21 May 1980; see Chapter 7.

Community. There is no Committee on the subject even among the specialised technical committees. The same was true of the original ECOWAS Treaty of 1975. Given the colonial legacies of European laws which were imposed on indigenous communities that had their own systems of law, the thesis demonstrates that harmonisation of laws is an irreducible minimum condition for effective integration. The thesis therefore insists that economic integration is not purely an economic or political matter. It is also a legal matter, and a uniform framework for regional harmonisation should have been enshrined in all integration treaties.

Thirdly, African integration laws tend to ignore other similarly crucial factors and components of the integration process that would help to dynamise the process; defunctionalise state boundaries as dividing lines; overcome the theoretical and practical limitations imposed by the Westphalian international legal doctrine of national sovereignty, and push African States to embrace supra-nationalism. If regional integration is popularly embraced as a societal project involving other actors apart from governments whose political interests sometimes conflict with the fundamental objectives of regional integration, this will generate new social dynamics in favour of the project. Simply put, integration would have to involve the people directly to command legitimacy. The isolation of national social and political movements from regional institutions must be redressed. One hopes that the proposed regional Parliaments will be the starting point for

mobilisation of the generality of African people in support of integration.

Closely related to this is the need to create an institutional base for regional integration at the national level. This is because the effectiveness of any regional initiative depends on how it is accepted and implemented at the national level. The undue concentration in integration treaties on regional institutions ignores the interface between regional and national institutions in implementing economic integration.[2]

Professor Asiwaju summarised the origins of the problem as follows:

"One terrible effect of colonial partition on Africans has been the establishment of differential colonial educational systems and the introduction of official language barriers. These barriers have served to alienate Western-educated Africans culturally ..... One manifestation of this alienation was the colonisation and eventual nationalisation of African intellectual interests. Consequently, research, especially in the relevant fields of the humanities and the social sciences, which naturally should extend across states boundaries, is generally terminated near or at the border."[3]

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2. Bundu, A. (1992): "The Role of Research in Furthering the Integration Dynamic in ECOWAS", paper presented at NIIA Conference; February 27-28, 1992 (Typescript, p. 8.

3. Asiwaju, A.I. (1982): "Towards an Ethnohistory of African State Boundaries" in UNESCO. The Methodology of Contemporary African History (Paris), p. 96.

There is therefore the need to reappraise the focus of most subjects taught in our schools' curricula in terms of their instrumental value and relevance to the cause of integration in Africa. Most of Africa's post-independence scholarship has been focused on the decolonisation of African thought in furtherance of the cause of nation-building. Thus even where the themes of study obviously transcend the borders of the individual states, emphasis has tended to be placed on the national aspects or manifestations of the phenomenon; that is, as it is encountered within national territorial frameworks.

It must be stressed in this context that the borders between states of divergent colonial historical experiences such as the Anglophone-Francophone or the Francophone-Lusophone, which constitute nearly a third of African boundaries became especially "hardened" by differences in official languages and cultures.[4] A consequence of this is that results of researches, published or unpublished, are hardly known to scholars in neighbouring countries. Transborder and comparative research designs are more a matter of exception than the rule. Mechanisms for a systematic exchange of scientific information are also generally lacking. And like the researches themselves, the publishing industry in Africa is confined more or less to the national territorial frameworks. Their marketing arrangements relate individual African countries more to former European

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4. Asiwaju, A.I. (1992): "West Arican History: The Significance for the Consolidation of ECOWAS", paper presented at NIIA Seminar on Research Priorities and Integration in ECOWAS (Typescript), pp. 7-8.

metropolitan powers than to limitrophe countries within the sub-region. The general evidence leads to the conclusion that the process of fragmentation of African peoples into geopolitcally separate territories, which began with the simple acts of partition by European powers at the turn of the 19th century, was finally consummated at the turn of the 20th century by the establishment of nationalist states on the continent.

There is the need at this stage therefore to galvanise concerted intellectual support for the purpose and cause of economic integration in Africa. The research agenda must be one which seeks to address the factors of fragmentation on the continent. Such an agenda must be clearly an advocacy against the prevailing ethnocentric and state-centric scholarship and research designs.

On the whole, the following suggestions may be put forward as a way of reinforcing regional integration research in Africa:

(a) The establishment of research centres in Universities or other institutions to act as support bases for researchers working on regional integration in different countries.

(b) The creation of research networks to improve the co-ordination of individual and institutional research activities

and encourage collaboration.

(c) The creation of databases of researchers, research activities, and institutions working on regional integration as well as the development of documentation centres in individual countries.

(d) The creation of a multidisciplinary association of researchers working on regional integration issues, and in general the sponsorship of multidiciplinary research in universities and research institutes in different countries.

(e) The creation of an appropriate institutional framework to meet the imperatives of the multidisciplinary context of operation that can mobilise active researchers and provide research and documentation facilities in liaison with relevant governmental and private research centres within the regions.

Regional economic groupings everywhere today, dictate a compelling call for a new political mentality in favour of regional unity. The ideology of continental unity conflicts with state-nationalism as the paramount social

philosophy of the Westphalian international legal order. Transborder natural and cultural resources, for example, must be reconceptualised as factors of opportunity for international cooperation rather than conflict. Responsibility for execution of small binational projects must be conferred on agencies below the nation-states, preferably sub-national authorities along shared international boundaries.

The integration being sought at the continental level must begin with the integration of limitrophe economies. Transborder cooperation in planning and development between geographically contiguous member states within wider regional framework must be actively promoted as the key instruments for "defunctionalizing" boundaries.

This suggestion forms the core of the final legal solutions proposed in this thesis. The thesis concludes on the note that the key instruments for overcoming the limitations of state sovereignty and their negative impact on the integration process are two-fold. The first, just mentioned, is a legal framework for transfrontier cooperation which would virtually efface or devalue existing boundaries in Africa by providing the legal platform for border trade and inter-state intercourse. The point is that since most of the regions represent parts of a wider historical economic zone, national isolationism cannot resolve the pressures of the regional economy and border life which are at present manifested in

smuggling, illegal migration, etc.

The second instrument is the harmonisation of laws as a way of overcoming the territorial and jurisdictional complications of legal pluralism which reinforce the geopolitical functions of state boundaries. Uniform commercial laws and practices will enhance cross-border trade and investment. Harmonisation of laws will also remove the barriers to freedom of movement, the right of residence and the right of establishment which constitute the main pillars for the evolution of the African common market.

In policy terms, this thesis has placed special emphasis on the human factor in the European partition of Africa and the resultant boundary politics and legal regimes. It has suggested a significant re-direction that would allow integration to begin from down upwards in place of the current "trickle-down" nation-statist approach. We have argued that because of the tremendous cultural pulls across inter-state boundaries that divide homogenous communities, boundary policy should focus on frontier communities as a distinct policy goal, outside state-centric framework of international diplomatic relations.

The concentration of the work on projecting the human factor however does not suggest that state boundaries should be done away with. Instead it seeks to reconcile utilitarian nationalism with the realities of cultural and economic

relations across national boundaries which necessitate integration. The main purpose of all these proposals is simply to convert inter-state boundaries from their present hostility oriented functions as lines of exclusion, to more productive, more harmonious and, from the view point of traditional African history, more defensible roles as lines of mutual contact and inclusion. This, in substance would be the ultimate significance of African integration for the generality of its peoples.

It is in the best interest of Africa and Africans that the ideals of continental integration, unity and solidarity, which these efforts collectively represent, should be realised if the continent and her people are not to be further marginalised and impoverished in the new world economic and political order. Towards these ends, the thesis provides a sharp conspectus on the key elements of border policy in Africa in its last part.

8.2 RECOMMENDATIONS FOR A NEW BORDER POLICY IN AFRICA

In Africa, attempts to deal with borderlands on a regional scale have been at best sporadic and limited to national initiatives. The evolution of a comprehensive institutional framework for transborder co-operation has probably been constrained by rigid attitudes to boundaries and boundary-maintenance by the newly independent nation-states on the continent. The approach to boundaries has been dominated by a focus on conflicts arising from disputed boundary alignments between nation-states. The 1964 OAU Resolution on the Intangibility

of Frontiers addressed the issue from this conflict-avoidance perspective.

Apart from provisions in integration treaties which create free movement regimes, the official border enforcement structures do not reflect the needs and interests of borderland localities and border inhabitants. Thus as we have seen, integration treaties appear to leave the issue of border policies to individual states. No common policy on border management is stipulated except for the free movement regime whose practical import if faithfully implemented would be to defunctionalise the divisive character of inter-state boundaries. However it is suggested here that an explicit transborder co-operation framework needs to be developed as a supplement or instrumentality of the free movement principles. For this purpose it would have been desirable to include a commission on Transborder Co-operation either under the Charter of the Organisation of African Unity or the African Economic Community. It should have been constituted as a specialised, technical committee to evolve the necessary legal instruments for formalising transborder co-operation at the grassroots. Alternatively, this task could be assigned to a duly constituted Legal Committee.

In the Nigerian and African contexts, the framework for co-operation at local levels must go beyond the official central governments to the lowest tier of government (known as local government councils in Nigeria). It must extend to socio-cultural institutions like emirs, district heads and other traditional

authorities. It must also reflect shared religious connections, in order for example to tap the respect for religious leaders and community opinion moulders.

In terms of content, border policies should be directed to achieve a harmony between the interests of partitioned groups whose members have to cross the boundaries and the interests of the respective nation - states which exercise control over cross-border movements. Special governmental arrangements should be evolved at the local level to accommodate the idiosyncracies of the border societies. In this way, boundaries can be maintained and promoted as lines of mutual contact rather than of exclusion. The human cost incidental to the alternative, current policies of absolute boundary maintenance can be thus reduced.

In summary, the policy implication of the foregoing is that central governments must take into account the disadvantages and temptations of living in the borderlands and adopt special policies to redress the imbalances. This makes it necessary that local authorities and border inhabitants be empowered to carry on their lives by interacting and co-operating with people across the border, and even to enter into legal obligations and formal organisations with their counterparts across the border. Even at the purely theoretical level, it is inappropriate to treat neighbourhood relations between border communities as a subject of international relations.

Along with such policies at regional or multilateral levels, there is also need for countries to put in place conscious policies for the development of frontier regions which will end the marginalisation of border inhabitants from the national development process and thereby integrate them to their home-state societies without at the same time cutting them off from their neighbours across the borders. Balanced regional development will also help to reduce the distortions that promote extra-legal activities across international boundaries.

The African experience has been that cross-boundary movements and activities are an inevitable consequence of the existence of artificial boundaries. The sheer length of the land frontiers and the difficult terrain across the marine and mountainous sectors of many international boundaries make it difficult to effectively patrol them. In addition the identical cultural environments prevailing on either side of the boundaries provides a general cover under which clandestine intercourse takes place often to the detriment of national economies.

Furthermore, the disparity in the natural resource base and state of economic development between neighbouring states makes trans-border trade inevitable, because by their very nature border economies are market-driven. The artificiality of boundaries notwithstanding, governments on opposite sides often ignore the complementarity of their resource endowments and pursue rival economic policies which create strong incentives for cross-border supply of goods

available on one side and not the other. For example, in recent years, the smuggling of petroleum products, fertiliser and food items across Nigerian borders has escalated to such point that Nigeria has had to close its borders with Benin and other neighbouring countries from time to time.

These cross-border flows of goods and people are accentuated by pervasive government restrictions, especially security checkpoints, which give rise to a variety of forms of illegal income-generating methods such as bribery, corruption and black markets.

All these have made it imperative for countries to continue to pursue bilateral and regional arrangements to limit negative exploitation of the boundaries without having to build walls around them to keep off illegal cross-border intercourse. It is suggested that the policy of promoting transborder co-operation with neighbours must be pursued to its logical conclusion. Resort to strict boundary maintenance and policies which seek to separate border populations cannot do any good. It is submitted that Africa's arbitrary boundaries which bisect or even vivisect homogenous societies, lacerate communities and disrupt routine human intercourse must be humanised by policies which promote cross-border interaction.

Africa stands to gain nothing from perpetuating the existing fragmentation

and the legal, administrative and linguistic disparities it generates. Africa must do everything necessary to close the divisions and chart a common destiny for the continent.

Finally the cumulative findings of this work confirm that the daily lives of local communities in border areas often require interaction and cooperation with people across the border. This necessitates the granting of autonomous powers to local authorities to facilitate such intercourse and even allowing them to enter into legal obligations and formal organisations with their counterparts across the border. The Outline European Convention provides a useful framework within which relations between border people can be managed so as to maintain a sense of friendliness or neighbourliness and common humanity. In this way, borderlands can become veritable instruments of trans-national integration and pan-human solidarity.[5]

Economic integration, built on an integrated legal system and comprehensive framework for trans-border co-operation, and based on a democratic political and economic philosophy, is the only viable collective response to Africa's heritage of fragmentation and economic underdevelopment. In a new world order in which regionalism and globalism are rendering the old nation statist structures irrelevant, Africa must re-invent herself through appropriate responses to avoid further marginalisation in the next millineum.

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5. Strassoldo, R.: "Border Studies: The State of the Art in Europe" in Asiwaju & Adeniyi: *op. cit.*, Pp. 392-393.

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