

EXTRADITION AND ASYLUM IN INTERNATIONAL LAW REVISITED
THE DIKKO AFFAIR

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RESUME

After the overthrow of the government of Shehu Shagari in January 1984, a number of National Party of Nigeria (N.P.N.) chieftains fled Nigeria and sought freedom abroad. Among these was Umaru Dikko who was Transport Minister in the ousted regime. He went to London where an attempt was made to abduct him ostensibly to bring him back to Nigeria where the popular opinion was that he had engaged in a number of corrupt deals during his tenure of office.

In this article a number of international law issues have been examined in so far as they relate to the status of the fugitive ex-minister - the right of asylum, extradition, political offences and the consequences of the attempt to kidnap him from London i.e. the seizure of aircrafts by the British and Nigerian authorities at London and Lagos airports and the implications of this on the doctrine of sovereign immunity. Also because of the tenuous connection of the Nigerian High Commission in London with the Kidnap attempt, the law relating to diplomatic immunity has been examined.

The author concludes that the developed countries have a duty not to give sanctuary to national leaders of developing nations who loot their national treasuries when they are in power because such conduct is tantamount to abuse of trust.

INTRODUCTION

The Umaru Dikko affair has pushed to the forefront of international law and politics in Nigeria in recent times the complex issue of the "right" of an alien to seek asylum in a foreign country.¹ Umaru Dikko, the Minister of Transport in the ousted National Party of Nigeria (N.P.N.) Government of ex-President Shehu Shagari managed to escape from Nigeria after the 1 January, 1984 bloodless coup which brought into power Major-General Muhammed Buhari and his Supreme Military Council (S.M.C.).²

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1. Writing about the episode The Democrat - a weekly paper - wrote under the caption "U.K.'s Violation of International Law", The Democrat Vol. 1, No. 28 July 8, 1984 p.1.
2. See Africa No. 155; July 1984 p.10 for story of the escape.

Dikko was not the only N.P.N. chieftain who fled the country. Chief Adisa Akinloye, Chairman of the erstwhile N.P.N. and N.P.N. Senate leader Joseph Wayas are all now at large.

On 2 February, 1984 he had participated in the BBC programme Focus on Africa⁴ and talked about a plan to bring to an end the Military Government of Nigeria and to restore constitutional government in Nigeria. This is seen in Nigeria, a sizable proportion of whose population is Muslim, as declaration of Jihad. A spokesman of the S.M.C. also hinted at a plot hatched by Dikko to invade Nigeria from a neighbouring country.⁵

In the diplomatic wrangle which ensued following the foiling of the kidnap attempt, the British authorities detained the Nigerian Airways Cargo Plane at Stansted Airport which was to have carried Dikko to Nigeria; the Nigerian Government reacted promptly by detaining a British Caledonian aircraft at Murtala Airport scheduled to fly to London that night.⁶ And because of the tenuous connection of the Nigeria High Commission in London with the kidnap attempt, the British Government requested the Nigerian High Commission in Britain, to return to Nigeria and put pressure on the High Commission to waive its diplomatic immunity to enable the British authorities to conduct an investigation into the extent of the High Commission's involvement in the episode. The Nigerian Government responded by asking the British Government to recall its High Commissioner to Nigeria. The UK and Nigerian were on the brink of breaking off diplomatic relations with each other. Given the history of the political and economic link between the two countries, what was then unfolding was most unfortunate. Although common sense prevailed and an uneasy peace now subsists in the relation of the two countries the episode has revived again certain difficult

3. Ibid.

4. See Africa, op cit; also Daily Sketch, No. 5600, 3 Feb., 1984.

5. Daily Times No. 227905, 23 June, 1984; Daily Sketch No. 5721, 23 June, 1984.

6. See The Guardian, Vol. 2. No. 387, 8 July, 1984

7. On 12 February, 1984 at London's Old Bailey Criminal Court, four persons were convicted and sentenced to various prison terms for the attempted abduction of Dikko. They are three Israelis (Alexander Barak, Dr Arielev Shapiro and Felix Abitol) and a Nigeria diplomat, Mohammed Yusufu. Yusufu at the time of his arrest had not presented his letters of credence to the British Foreign Office as required by diplomatic protocol. For the full story, See West Africa, 18 February 1985 p. 296-7, 330; The Guardian Vol. 2 NO. 606, 13 February, 1985 p.1 and Daily Sketch, No. 5918, 13 February, 1985 p.1.

issues in international law and international relations such as (1) What is the content of asylum in international law? (2) How is political asylum different from diplomatic asylum; and (3) What are the perimeters of diplomatic immunity and the conditions for its waiver? We shall consider these issues seriatim.

I. RIGHT OF ASYLUM

The competence of states to extend protection to an alien who is the object of political persecution in his national state has long been recognised in international law.⁸ This phenomenon has been referred to as political asylum. It is an incident of sovereignty.

Each state determines for itself which aliens to admit and which to reject. International documents have proclaimed the right of persons to seek asylum as a fundamental human right. The Universal Declaration of Human Rights provides: 'Every one has the right to seek and enjoy in other countries asylum from persecution.'⁹

But prosecution genuinely arising from non-political crimes are excepted from the ambit of this right.¹⁰ Again the UN Declaration on Territorial Asylum provides:

Asylum granted by a state in the exercise of its sovereignty, to persons entitled to invoke Art 14 of the Universal Declaration of Human Rights including persons struggling against colonialism shall be respected by all other states.¹¹

Such persons as are entitled to this right are not to be rejected at the borders of states or expelled or forced to return once they have been admitted.¹²

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8. J.C. Starke, Introduction to International Law, (2nd ed. London 1967) p. 309; D.P.O. Connell, International Law, (London 1965) Vol. II) p. 809; B Sen, A Diplomat Handbook of International Law and Practice, (The Hague 1965) pp. 351-52; The Asylum Case, I C J Rep. (1950) p. 12 Oppenheim's International Law (The Hague, 1971) p. 205; Whiteman, Dig. I. L. (1970) p. 353 and Hackworth, Dig. I. L. (1941) p. 621.
 9. Art. 14(1) of the Universal Declaration of Human Rights, G.A. Res. 217 (III), Dec. 10, 1948, UN G.A.O.R. 3rd Sessions Res. A 810 p. 71.
 10. Id. Art. 14(2).
 11. Art. 1(1). G.A.O.R. 17th Session Annex, Item 16, U.N. Doc. A/5369 Par. 6, Dec. 14, 1967.
 12. Id. Art. 3.

Since it is within the unfettered discretion of each state to determine for itself who should be allowed into its territory, and who should be excluded, it is therefore doubtful if a political fugitive exist also a corresponding obligation. The question then is whether there is a concurrent obligation on the part of any state to admit into its territory a political refugee who exercises his right to seek asylum. The proper view it would seem appears to be that there is a concurrent obligation on the part of any state to admit into its territory a political refugee who exercises his right to seek asylum. The proper view it would seem appears to be that there is no such thing as the right of asylum. Much depends on the hospitality of the state in question and on considerations of political expedience and international comity. The British practice is summarized thus by Street:

When an alien's life or liberty is in danger or he has a well-founded fear of persecution of such a kind as to render life insupportable (e.g. denying him ration or employment cards) on account of his race, religion, nationality or political opinion, it is the practice of the British Government to allow him to stay in Britain. He may not come within the usual categories of admitted aliens, but nonetheless he may be allowed to stay. Obvious examples are sailors from behind the Iron Curtain who from time to time desert ships in British ports and seek refuge here. No such alien has a right of asylum, either by international law or English law. All that is meant is that the state will in practice allow such aliens to stay in Britain; other states have a similar practice. The Home Office makes the decisions and will first interview the alien, who will not be allowed to retain residence here under the guise of a claim for sanctuary.¹³

Street cites the case of Dr. Cort to illustrate the limits of the practice.¹⁴ Dr. Cort, an American national and qualified medical practitioner was employed by Birmingham University. Before his departure from the US he had been rejected for military service on account of his tubercular condition. In England, he was approached by the US authorities to report for a medical examination in connection with military service. Dr. Cort was convinced that the purpose behind the request for medical examination was to lure him into the US where he would be required or compelled to give evidence before the McCarthy Senate Committee on Un-American Activities. Dr Cort was at one time a member of the US Communist Party; his former colleagues had been subpoenaed to give evidence before the Committee and had their reputation disparaged by the Committee. Dr. Cort accordingly refused the American invitation. The British Government promptly refused to renew his visa and Dr. Cort would

13. Street Freedom, the Individual and the Law, (Penguin Books 1963) p. 263 emphasis added.

14. Ibid.

have to leave Britain. Pressure in Parliament to grant him asylum yielded no result, the Government arguing that Dr. Cort's refusal to go to the US amounted to evasion of military service, an act which by American jurisprudence was a ground to deprive him of his citizenship. Dr. Cort eventually emigrated to Czechslovakia.

A pre-condition for the sojourn of a political refugee in the country of refuge is that the refugee must not use the territory of the country of refuge as a spring-board for subversive activities against his home state. This is in accordance with the noninterference principle under both the UN and OAU Charters.¹⁵

Was Dikko's declaration of Jihad tantamount to preparation to subvert Nigeria? The Daily Times¹⁶ revealed plans by 'some Nigerian fugitives' to destabilise Nigeria, but Dikko was not directly linked to the plans.

II. THE FUGITIVE AND THE LAW OF EXTRADITION

That the political fugitive is regarded in international law as a very special person is evident in the rule that no such fugitive shall be extradited for an offence of a political nature. Most people flee the country of their birth on account of political persecution. Such people are not common criminals and must be left to live in peace where they choose to reside. The US position is stated in In Re Gonzales¹⁷ thus: 'Political offences are those offences which are incidental to and form a part of political disturbances.' The reason for the political offences exception in extradition treaties is, it has been said, to prevent a country's legal process from being used by a foreign regime as instrument of reprisal against its domestic political opponents.

In the UK confusion has raged and still continues to rage on the question of the proper definition of a political offence. It all began with the case Re Castioni¹⁸ where a native of the Swiss Canton of Ticino committed murder during an insurrection and escaped to England. It was held that the offence was of a political nature and he was thus not surrendered. It was laid down as a rule that to constitute an offence of a political nature, there must be two or more political parties in the state, each seeking to impose the government of their own choice on the other and the offence is committed by one side or other in pursuance of that objective.

15. See: Art. 2(4), 2(1) of the UN Charter and Art. 3 of the OAU Charter.

16. 23 June, 1984.

17. 217 Fed. Supp. 727.

18. (1891) 1 Q.B. 149.

But the fact that an accused perpetrated murder in a political disturbance does not by itself justify refusal to surrender him. Thus bomb outrages of an anarchist do not come within the ambit of the rule.¹⁹ Sometimes it is not clear what criteria the courts apply in determining whether an offence is of a political character.²⁰

A political crime is one committed in an attempt to substitute one government for another or one form of government for another.²¹

In *Re Castioni*²² the court applied the formula whether the crime was "incidental to and formed part of political disturbances."

In the US case of *Karodzole*²³ the US courts had to consider the request by the Government of Yugoslavia for the extradition of a Yugoslav national who was Minister of Interior in a Croatian cabinet formed in 1941 when the lawful government of Yugoslavia was in exile. It was alleged that Karodzole 'ordered numerous murders.' It was held that at the time of the alleged murder several political factions were struggling for power in Croatia and the applicant was also engaged in that struggle.²⁴

In the case of *Kolczynski*²⁵ seven members of a crew of a Polish trawler put the master and some members of the crew under restraint and sought political asylum on their arrival at Whitby,

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19. *Re Meunier* (1894) 2 Q.B. 415. See also *Ex parte Arton* (1896) 12 L.T.R. 132 and B.A. Wortley, 'Political Crime in English Law and International Law', (1971) 45 B.Y.B.I.L. 219.
 20. See *Ex Parte Kolczynski* (1955) 1 Q.B. 340; also Georges, 'The Notion of Political Offences and the Law of Extradition'. (1954) 31 B.I.Y.L. 430; Evans, 'Reflections upon Political Offences in international law', (1963) 47 A.J.I.L. 1; Amerasinghe, Case Note: 'The Schtracks Case: Defining Political Offences and Extradition' (1965) 28 M.L.R. 27; the *Schtracks* case is reported in (1963) 1 Q.B. 35.
 21. H. Lauterpacht 'Law of Nations and Punishment of War criminals'. (1954) 21 B.Y.I.L. 90.
 22. Note 18 supra.
 23. *U.S. Law Week*, June 26, 1957 p. 2030. See also J.E. Fawcett, 'Some Recent Applications of International Law by the United State'. (1958) 34 B.Y.I.L. 391.
 24. See the English test in *Re Castioni*, note 18 supra.
 25. Note 21 supra.

England. The Polish Government requested their extradition under a Polish - UK Extradition treaty. Their application for habeas corpus opinion in the interpretation of the expression 'political character'. In an apparent castigation of the inadequacy of the text suggested in the Castioni case the court said:

The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered. The present time is very different from 1891 when Castioni's case was decided. It was then no treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for a citizen in such places to take steps to leave. In this case the members of the crew of a small trawler engaged in fishing were under political supervision and they revolted by the only means open to them. They committed an offence of a political character, and if they were surrendered, there could be no doubt that while they would be tried for the particular offence mentioned they would be punished as for political crime.²⁶

It may be added that it is a misconception to suppose that the decision in Castioni was meant to be a rule of law exhaustive for all occasions. That there should be two or more political parties each vying with the other to impose the politics of its choice on the country is a principle inapplicable to a Communist country. Defection, namely, going to the West without permission of the political authorities might well be a punishable offence. Nor is the principle applicable in the new military dictatorships of Africa.

Cheng v. Governor of Pentonville Prison²⁷ is further illuminating on this discussion. Cheng appealed against his extradition to the US where he was convicted of attempted murder of the son of Chiang Kai-Shek. Cheng claimed that the offence, if any, was political in nature. Cheng was a Taiwanese and Executive Secretary of a movement dedicated to 'expose the corruption and oppressiveness of the Chiang Kai-Shek regime to the public'. The House of Lords held that an act was not 'an offence of a political character' unless the only purpose was to change the government of the state in which it was committed. Cheng's activities had not been directed against the US.

26. Note 18, supra p. 551.

27. (1973) T.L.R. 17.

It is now generally agreed that a military offence is not a political offence. In the Ghana Case of The State v. Schuman²⁸ the defendant, a German medical practitioner was alleged to have killed inmates of a lunatic asylum to make room for wounded soldiers; the Court of Appeal held that the offence was a war crime and therefore an extradition offence.

Just as the deportation of a citizen of the deporting state creates additional problems so also the extradition of a citizen. Typical of this problem is the claim by a citizen that he is not a 'person' within the meaning of an extradition treaty. In Charlton v. Kelly²⁹ the US. Supreme Court affirmed a judgement dismissing a habeas corpus application where a US citizen was to be extradited to Italy under a treaty providing for extradition of 'persons' charged with a crime. The applicant argued that under the law of Italy there was no obligation on Italy to surrender Italian nationals to the US on request by US to extradite such nationals. The court held that the treaty operated between nations and not between individuals and the claim was not one open to the applicant, an individual, and that the word 'persons' was wide enough to include citizens.

It was a different story in Valentine v. Neidecker³⁰ where the Franco-American Extradition Treaty of 6 January 1909 provided that 'neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention', the Supreme Court refused the request of the French Government for the surrender of the applicant, a national of the US. In a similar situation in UK where the extradition treaty between the the UK and Switzerland excepted nationals of the contracting parties from extradition under the treaty, Lord Cookburn expressed his regret that there should be such an escape for the benefit of English criminals.³¹

28. Dr Schuman had lived in Ghana since 1958. As long as the Nkrumah regime remained in control of the country, it was impossible for the German authorities to have him extradited. However, soon after the fall of the Nkrumah Government in 1966, proceedings were expedited and Dr Schuman was extradited: The State v. Schuman. Unreported. (1967) Current Cases (Ghana).

29. 229 US 447 (1913).

30. 229 US 5.

31. R v. Wilson (1877) 3 Q.B.D. 42 at p. 43 where he said 'This blot upon the law shall be removed, so as to prevent an Englishman from escaping with impunity.'

In Rex v. Gann³² the citizen of a third state, i.e., the US was extradited to the Netherlands whose treaty with the UK provided that citizens of the contracting parties should not be subject to extradition under the treaty.

In the Ghanaian case Republic v. Director of Prisons, Exparte Allote,³³ the applicant who was at all material time resident in the US obtained over two million dollars from US purchasers for the purchase for them of cocoa beans from Camara & Company, a company registered and doing business in Equatorial Guinea, but failed to make payment for the purchase when he took delivery of the cocoa beans and bolted away to Ghana, his fatherland. The applicant argued that there was no obligation to extradite a citizen. The Court of Appeal observed that there was no principle of constitutional or international law by which citizens are excepted from an agreement to surrender 'persons' where no such exception is made in the treaty itself. The Court said that extradition is based on the principle 'aut punire aut dedere' which means the offender must be punished by the state of refuge or surrendered to the state which can and will punish him. But since it was plain that the courts of Ghana had no power to invoke criminal sanctions against Ghanaians who had committed the offence of fraud by false pretence abroad, in respect of property in which the state of Ghana had no interest there was no alternative left but to surrender the offender to the jurisdiction where the offence was committed.³⁴

Extradition is distinguishable from deportation in the following ways:

1. extradition is based on treaty arrangement and thus has international law flavour;
2. extradition may affect every person generally whether a citizen or an alien except where the treaty expressly exempts citizens from extradition;
3. in deportation the deportee is led to the frontier of the deporting state and is left to go a free man; he is not handed over to any state under arrest. If the deportee is willing to leave voluntarily, he is allowed to go where he pleases. In extradition on the other hand, right from the time of his arrest, the defendant remains a 'captive' until he is handed to the appropriate agent of the requesting state.

32. (1982) 9 Q.B.D. 93.

33. (1973) 2 G.L.R. 480. See also The Government of Sierra Leone v. Major Jemu 1969 C.C. 47; Ex Parte Musa 1968 C.C. 108.

34. (1973) 2 G.L.R. 480 at p. 486.

III. THE MECHANICS OF EXTRADITION

Akin to deportation is the obligation in one state to surrender to another a fugitive criminal physically present in its territory to that other for prosecution and punishment on request from that other state. This is achieved through reciprocal treaty arrangement.³⁵ It is a cliché to assert that extradition is based on treaty. But the need for a treaty is based on the efficacy of the writ of habeas corpus which is the vigilant guardian of political and civil rights of individuals in a state.

The Nigerian Law is the Extradition Act.³⁶ The British situation is governed by the Extradition Acts 1870-1873, 1895, 1906, 1932, the Counterfeit Currency (Convention) Act, 1935 and the Theft Act, 1906. Section 2 of the 1870 Act provides:

When an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

Her Majesty may by the same or subsequent Order, limit the operation of the Order and restrict same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified, in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

35. Sir McNair cites the example of Britain applying for extradition of an alleged criminal who had fled to France in 1822 although at the time there was no extradition treaty between Britain and France. See his article entitled, 'Extradition and Extraterritorial Asylum' (1951) 28 B.Y.I.L. 172. Perhaps this was done through diplomatic channels which is perfectly in order. B.A. Wortley writes: 'When a state wishes to try an alleged criminal not in its custody or in its territory, it may ask for his rendition from the state of refuge through diplomatic channels or through the executive co-operation of that state. If there is a subsisting treaty provision for extradition then the requesting state may demand its right under the treaty' - Political Crime.....' in English Law and International Law, (1971) 43 B.Y.I.L. 228.

36. No. 87 of 1966.

Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer than the arrangement.³⁷

In the US 18 U.S.C. paragraph 3181-3195 is the applicable law. Paragraph 3181 states:

The Provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existengg of any treaty of extradition with such foreign government.³⁸

Section 26 of the English Act of 1870 describes a fugitive criminal as:

Any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or suspected of being in some part of Her Majesty's dominions; and the term "fugitive criminal of a foreign state" means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state.

A person shall be extradited only for an offence committed and which is covered by the provisions of the treaty - an extradition offence. The English definition for an extradition offence is a crime which if committed in England or within English jurisdiction would be one of the crimes described in the First Schedule to the Act which includes murder, rape, arson, forgery, stealing, etc. The US view of the law appears to be that the offence charged must be a crime in both the US and the requesting foreign state, although it it is not necessary to have it labelled the same.

The procedure which is followed in the rendition of a fugitive criminal is virtually the same in all advanced legal systems.³⁹ A request is made formally through the diplomatic channel, an order for the arrest of the criminal follows, the law enforcement officers issue a warrant for his arrest, he is then brought before the presiding magistrate, or "commissioner" in the US.

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37. As at 1969 there were fifty such orders made providing that the Extradition Acts 1870 - 1935 shall apply as between Britain and other parts of the Commonwealth and certain foreign countries Sec. Halsbury's Statutes of the England, 3rd ed. Vol. 13, 250.
38. See also Collins v. Loisel 258 U.S. 309.
39. For the British practice today see g. Reess 'Contemporary Practice' (1971) 2 The Cambrian Law Review 42. for the US Practice, see S.L. Gibson, 'Contemporary Practice of the United States Relating to International Law' (1969) 63 A.J.I.L. 799.

A hearing is in the nature of preliminary proceedings to determine if a prima facie case has been made against the criminal fugitive justifying his surrender by the asylum state to the requesting state.⁴⁰ There is a right of appeal by writ of Habeas Corpus.⁴¹

40. It has been held that extradition proceedings are not criminal nor is extradition punishment for crime; U.S. ex rel Oppenheim v Hecht 273 U.S. 769. In re Gonzalez 217 Fed. Supp. 727 it was said that whether the extradition request was made in good faith or whether the criminal charge is a cloak for political action by the requesting foreign state is not a matter on which in a court proceedings a judge may properly exercise a discretion, such matters being matters within the province of the political departments of the US Government. The Court held that all that is required is the establishment of probable cause that the accused is guilty which means that the case must be proved with a degree of sufficiency necessary to justify committal for trial beyond reasonable doubt, or that the evidence will be enough to convict the accused when tried in the courts of the requesting foreign state. See also Ex Parte Keine 55 U.S. 103; Fernandez v Phillips 268 U.S. 311.

Section 10 of the UK Extradition Act 1870 requires such evidence as 'justify the committal for trial of the prisoner if the crime' were committed by the accused in Britain. Nigerian and Ghanaian Laws are to the same effect.

41. The controversy in UK as to the nature and extent of the power of the court in a judicial review will be treated under the Fugitive Offenders Act of this paper. In the US it has been held consistently that the writ of Habeas Corpus may issue at the instance of the defendant to seek judicial review, but the only issues a court, may legitimately concern itself with are:
- (1) Whether the offence charged is within the treaty;
 - (2) Whether the court of first instance had jurisdiction; and
 - (3) Whether there was legal evidence before the court to support the committal.

Habeas Corpus it had been held does not afford a rehearing; D' Amicos Application 185 Fed Supp. 925, 286 Fed 2nd 320, 81 S. Ct. 1924, 363 US 963; Marino v US Marshall 379 US 872; US ex rel Harfield v Guay 300 US 678; Collier v Shipley 418 Fed 2nd 679 (1969) where the view was expressed that the due process clause guarantees accused right to hearing prior to foreign extradition although such hearing is in the nature of preliminary hearing and the right to hearing is satisfied by full Hebeas Corpus hearing.

IV. PROCEEDINGS UNDER THE FUGITIVE OFFENDERS ACT, 1967

Within the British Commonwealth there exists the practice of returning fugitive criminals accused or convicted of offences to their home states for punishment. The situation was formerly governed by the Fugitive Offenders Act 1881. It is now repealed and replaced by the Fugitive Offenders Act 1967. The rationale of the law is grounded in the "family" nature of the Commonwealth; it being one unit or union, there could be no protection for a criminal who fled from one part to another.⁴² Originally the purpose of the law was to enable the British Government to send back a British subject to a country he had left fleeing from justice. The purpose of the new 1967 Act is unmistakable in its terms. The preamble reads:

An Act to make fresh provision for the return from the UK to other Commonwealth countries and United Kingdom dependencies; to regulate the treatment of persons accused or convicted of offences in the UK who are returned from such countries and dependencies; to authorise the making of corresponding provisions for UK Dependencies including provisions for the return from such dependencies of persons accused or convicted in the Republic of Ireland; and for purposes connected with the matters aforesaid.

Here also as under extradition, a person accused or convicted of a crime of a political character is not a fit subject for surrender. Section 4(5) however declares:

The reference in this section to an offence of a political character does not include an offence against the life of the Head of the Commonwealth.

The procedure for the return of a fugitive criminal under the Act is similar to extradition procedure: a request to the Secretary of State for the return of the individual; an order for his arrest to the police, the issue of a warrant by the police, then the determination of his committal in a magistrate court. Here as in

42. Lord Reid said in Armah v The Government of Ghana (1966) All E.R. 177, p 183 'The Fugitive Offenders Act was in 1881 a domestic matter dealing generally with British subjects and enabling them to be sent from one jurisdiction to another within the British Empire, where there was then no Dominion Status. There could have been no question of political asylum in one part of Her Majesty's dominions for an offence committed in another part and no room for such provisions as S. 3(2) of the Extradition Act 1870'.

extradition proceedings, the fugitive offender has fifteen days to commence an appeal in the High Court by the writ of Habeas Corpus against his committal.⁴³

For a long time there had been doubt as to the nature and extent of the power of the High Court in these habeas Corpus proceedings to review the decision of a magistrate to commit a defendant to prison under (1) the Extradition Act 1870 and (2) the Fugitive Offenders Act 1881. Were they in the nature of appeal to reverse the magistrate's decision on a fact, or to alter a discretion lawfully exercised or an inquiry to determine whether there was jurisdiction to hear the matter? Or were they simply a question of law to determine the sufficiency of the evidence entitling committal of the accused by the magistrate?

Lord Reid in Ex Parte Schtracks⁴⁴ observed: 'The court on appeal to this House, can and must consider whether on the material before the magistrate he would have been entitled to commit the accused'.

Lord Russell said in Re Galway⁴⁵ that the review of a magistrate's decision is not an appeal but a determination of the question whether evidence was enough to give jurisdiction for the making of a committal order. In Re Castioni the court held:

Although the tests which the magistrate must apply under the Extradition Act 1870 and the Fugitive Offenders Act 1881 may not be the same the same principle must govern the power of the court to review or interfere with his decision whether or not there is evidence to support a particular decision is always a question of law. But it is not a question of jurisdiction.⁴⁶

There is also the problem of burden of proof. Here-in-lies the importance of the House of Lords decision in the Armah case.⁴⁷ In the language of the Fugitive Offenders Act 1881 the evidence must raise a 'strong or probably presumption of guilt.'⁴⁸ The Extradition Act 1870 however required such evidence as justify the committal for trial of the prisoner if the crime 'were committed by the

43. Section 8 (2) also the Nigerian case R v. Governor of Brixton Prison, Ex parte Enahoro [1963] 2 Q.B. 455.

44. (1962) All E.R. 529, p. 533.

45. (1896) 1 Q.B. 230, 236.

46. Note 18 supra, emphasis added.

47. See note 42 supra.

48. Section 5.

accused in England.⁴⁹ Obviously the two standards must be different, and one would appear to be higher than the other. But from the cases, the magistrates appeared to have been applying the same standard to both situations. Lord Reid said:

I think that confusion has arisen from an unwarranted assumption that the standard of evidence justifying committal must be the same under the Extradition Act, 1870 and the Fugitive Offenders Act 1881..... This, however, is a matter touching the liberty of the subject, which the law of England has always professed to guard jealously, and I find it a little surprising that the obvious difference between S.5 of the Fugitive Offenders Act 1881, and S. 10 of the Extradition Act 1870 should simply have been brushed aside.⁵⁰

The judges in the (Queens Bench) High Court before whom the case went on appeal in the first instance expressed reservations about the wisdom in applying the same standard of proof in extradition proceedings to proceedings under the Fugitive Offenders Act, Davies J. observed.

Applying the test thereby laid down, with hesitation I come to the conclusion that it is not possible to hold that the magistrate was not entitled to rule that a prima facie case had been made out on the evidence before him.⁵¹

His colleague Aitkinson, J also remarked:

But this court is bound by authority to treat those words 'strong or probably presumption' as meaning no more than a prima facie case, and on that basis with regret, I feel unable to say that the magistrate in his discretion could not decide as he did.⁵²

The last member of the panel, Lyell, J said:

I share to the full, the regret and hesitatin which have been expressed as to the necessity for finding that the evidence before the magistrate was sufficient to justify his order.⁵³

49. Section 10.

50. Note 42 supra p. 182.C

51. Re Kwesi Armah (1966) 2 All E.R. 1006.

52. Id. p. 1012.

53. Id. p. 1014, emphasis added.

But what was the evidence? A recital of the facts would perhaps help us to appreciate Lord Reid's concern. Following the overthrow of the Nkrumah Government in Ghana by the military, the Military (National Liberation Council) Government which took over the administration of the country set up a commission to inquire into allegations of misconduct in the performance of their duties of certain public servants among whom was appellant Kwesi Armah who was Minister of Trade in the government of President Nkrumah. He was in China together with President Nkrumah when the coup which toppled their government was staged. The appellant subsequently went to Britain where he apparently had considerable fortune and where he thought he might live in peace. The Commission was set up pursuant to the Corrupt Practices (Prevention) Act, 1964; Section 5 (2) provides that the findings of the commission were prima facie evidence of the facts found and it was then for an accused to show cause why he should not be convicted and sentenced.

The evidence before the Commission was that of a Lebanese trader, a Mr. Fattal who claimed that he gave the appellant bribe to induce appellant to grant him (Fattal) import licence. Needless to say that as an accomplice Mr Fattal's evidence needed corroboration. Apart from Mr. Fattal's evidence, there was only the evidence of appellant's Principal Secretary to the effect that the appellant ignored procedures for issuing licences and would personally see applicants. This, in sum was the evidence in the depositions which accompanied the Ghana Government's request for the return of the appellant under the Fugitive Offenders Act 1881. It must be remembered that the appellant was not in Ghana and was therefore not heard by the Commission. Was the piece of evidence 'a strong and probable presumption' of appellant's guilt?

Lord Reid opined that it could be assumed that under section 10 of the Extradition Act all that was required was prima facie evidence but that under section 5 of the Fugitive Offenders Act the onus of proof was much higher and that the test to be applied here was that the magistrate should weigh the whole evidence put before him and decide whether 'he - not a hypothetical jury - thinks it probable that the accused committed the offence; and probable does not mean a mere possibility.'⁵⁴

This, certainly is not a mouse of a decision. It is monumental decisionally and in its outcome.⁵⁵ It is monumental decisionally because it also changed the procedure in proceedings insti-

54. Note 42 p. 184.

55. Mr Kwasi Armah was at one time Ghana's High Commissioner to Britain during the C.P.P. era. He was acclaimed one of Britain's best dressed gentlemen, and no doubt had a great deal of political influence in Britain.

tuted under the Fugitive Offenders Act. For a long time the printed form of committal under the Fugitive Offenders Act stated that the accused was brought before the magistrate 'to show cause why he should not be returned' to the country where the alleged crime was committed and that the accused had been committed to prison 'for as much as no sufficient cause has been shown to the magistrate why he should not be returned.' In view of the requirement that the prosecution must prove the guilt of the accused on whom there is no onus to prove his innocence, the printed form, it was held ought to be changed. It 'completely reverses the onus and disregards the requirement that evidence must be produced on which the magistrate can act.'⁵⁶

Since Nigeria is a member of the Commonwealth of nations it must initiate proceedings under the fugitive offenders law.⁵⁷

V. WHAT WAS DIKKO'S CRIME?

At the height of the controversy, the British ambassador indicated that as far as he was aware the Nigerian Government had not made a request for the extradition of Dikko and that if it did, the British Government would consider it in the usual manner all such requests are considered. Why was such a request not made by the Nigerian Government? Since the basis of the request for extradition is that the fugitive had committed an extraditable offence, there was need for the Nigerian Government to assemble evidence sufficient to make a prima facie case. The belated attempt by the Nigerian Government to have Dikko extradited was revealed by West Africa, on 28 February, 1985. It was here disclosed that the request for extradition of the fugitive is based on a two count charge: namely (1) receiving 'corruptly' the sum of N450,000 from Felix Ayinotu 'on account of a favour shown to Messrs Harma Construction Nigeria Ltd., in securing the award of the N20.4m Abakaliki - Afikpo - Ohafia road reconstruction'; and (2) receiving 'corruptly' the sum of N4.52m 'on account of a favour shown to Euro-trade Nigeria Ltd., in securing the award of a contract for the clearing and distribution of about 300,00 bags of USA No. 2 long-grain parboiled rice to that company in the discharge of (his) official duties... as the chairman of the defunct Presidential Task Force on Rice responsible for the award of the said contract'.

56. Per Lord Reid. Armah v. Ghana. Note 42 at p. 188.

57. In Nigeria proceedings this respect are governed by the Fugitive Criminals Surrender Act, Cap. 73 (1916).

Be that as it may, the kidnap attempt served to politicise the issue thus taking it out of the realm of law. Legal process had been overtaken by events of a political nature and given the revolution of the international community at international terrorism, it did not require too much imagination for anyone to conclude that the kidnap effort has now made it more difficult for Nigerian to succeed in the belated effort to get Dikko extradited to Nigeria.

That Dikko might have committed a crime during his tenure of office as Minister of Transport is a plausible proposition.⁵⁸ It has been reported in the Tribune⁵⁸ and the National Concord⁵⁹ that he appeared in a London High Court on 12 October 1984 'for an alleged fraud in the US'. The fraud, the National Concord said was in connection with 'a six-million dollar rice deal'. Given the revelations at the numerous commissions set up by the F.M.C. to probe certain aspects of the operations of the Shagari administration⁶⁰ it can be asserted with some degree of certainty that criminal evidence may not be lacking against Dikko if he were probed.

What is the real nature of Britain's interest in giving Dikko protection in asylum? If Dikko as he is popularly acclaimed a billionaire, then it is submitted that the reason for protecting the fugitive is more economic than humanitarian. It seems that Britain has a duty not to protect fugitives who have looted the treasuries of their national governments.

To protect such people on the basis of human rights glosses over the argument that some people have been denied basic human rights food, shelter and clothing - in their own countries because a few entrusted with the governance of their nations stole all the money which should have been used for the provision of basic human needs and deposited same in foreign accounts. A journalist put it thus:

'Nigeria's loss is Britain's gain'.⁶¹ If Britain found no difficulty in returning Chief Anthony Enahoro in 1963 to face charges of treason following the unsuccessful coup attempt to overthrow the Balewa Government, then the explanation for Britain's dilemma now to send Dikko back must be found in the realm of economics rather than law. Obviously Chief Enahoro did not wield such economic power as Dikko now allegedly wields.

58. No. 0342, 14 Oct. 1984.

59. Vol. 5, No. 1462, 31 Oct. 1984.

60. See Africa, No. 155, July 1984, p. 11.

61. Africa, ibid.

VI. POLITICAL ASYLUM DISTINGUISHED FROM DIPLOMATIC ASYLUM

A very controversial area of the law of asylum is that which is subsumed under the title diplomatic asylum; this is the 'right' to grant asylum to nationals of a receiving state in the legations or consulates of the sending states. It is a type of extraterritorial asylum of which maritime asylum and asylum on board military aircraft are other examples.

Gilbert says:

The practice of extending protection, or 'asylum' within the walls of legations and consulates to refugees and unfortunates rests upon no satisfactory legal basis, but rather upon considerations of humanity. Though from time to time certain recognised doctrines of international law and certain doctrines of somewhat more doubtful recognition have been asserted in justification, it will be found that the so-called 'right of asylum' is no right at all, but only a privilege granted or claimed where its use seems necessary by reason of an unstable condition of society.⁶²

At stake are two conflicting claims: (1) that based on humanitarianism, and (2) that based on sovereignty.⁶³

Morgestern says:

A sovereign state enjoys the exclusive right to control and administer justice within its territory. Because the granting of shelter is often times accorded with a view to withholding an individual from that jurisdiction, such action cannot be regarded with favour, except in very exceptional circumstances.⁶⁴

62. B. Gilbert, 'The Practice of Asylum in Legations and Consulates in the United States' (1909) 3 A.J.I.L. 562.

63. See F. Morgestern, 'Extra-Territorial Asylum' (1948) 25 B.Y.I.L. 236.

64. Ibid.; See also, Whiteman, op. cit. Vol.7 p.354; Hudson, International Legislation Vol.4, Washington D.C. 1931) p.2413; Briggs: 'The Columbia Peruvian Asylum Case and Proof of Customary International Law' (1951) 45 A.J.I.L., 728. Moore, Dig. I.L. Vol.2 (1906) Hackworth, op. cit. Vol.2, p.621. The Asylum Case ICJ Rep. (1950) p.12; Przetacnik, 'Declaration on Territorial Asylum and International Law' (1966-67) 15-16 Indian Y.I.A. 236; Jessup, Note 'The Defence of Oppressed People' (1938) 32 A.J.I.L. Vol.32 (1938) p.166; The Schooner Exchange v. M'Faddon 7 Cranch. 116 (1812); Cheung v. The King (1939) C.A. p.160.

Diplomatic asylum is not in issue here and it is being indicated in passing because it can be confused for political asylum. The vulnerability of legations to terrorist operations has been vividly exemplified by the case of the American hostages in Teheran, Iran.⁶⁵

VII. DIPLOMATIC IMMUNITY AND ITS WAIVER

From antiquity nations have exchanged ambassadors as a natural consequence of international intercourse. For the effective performance of their functions, ambassadors have been accorded a bundle of rights, privileges and immunities. One such immunity is exception from local jurisdiction. This immunity from jurisdiction extends from the ambassadors person to his family, his residence and the legation.⁶⁶

Although the concept of extraterritoriality constitutes an unwarranted imposition of a limitation on the exercise of the sovereign power of the receiving state, it has been seen as the basis for the rule that a legation and the residence of a foreign ambassador are inviolable and immune from invasion from the government agencies of the receiving state.

That this view is a legal fiction cannot be doubted.⁶⁷ In the past ships used to be considered as 'floating territories' of the flag states. But the right of approach which reserved for man-of-wars on the high seas the power to inspect vessels⁶⁸ has whittled down considerably the importance of the concept. To-day it is generally recognised that the 'purpose of immunity is to enable representatives to fulfil their functions fully. In other matters, they should yield entire respect to the jurisdiction of the territorial government.'⁶⁹

65. See Case Concerning US Diplomatic and Consular Staff in Teheran, (1980) I.C.J. Rep. p. 1

66. Note 62 supra.

67. L. Preuss says, 'Extraterritoriality is at best a picturesque metaphor and at worst a misleading fiction even when it is applied to diplomatic missions.' 'Consular Immunity: the Kasenkina Case' (1949) 43 A.J.I.L. 51.

68. Art 22, UN Convention on the High Seas, 29 April 1958, 450 U.N.T.S. 82, 13 U.S.T. 2312.

69. Dig. I. L.; Vol. II op. cit. note 64, supra, p.623.

In Dickinson v. Delsolar⁷⁰ Lord Hewart, C J said:

'Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in thecourts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability but only exemption from local jurisdiction.'

The Vienna Convention on Diplomatic Relations⁷¹ supports the view of the English judge. Art 41(3) provides:

The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by another rules of general international law or by any special agreements in force between the sending and the receiving state.

The functions of a diplomatic mission consist inter alia in, representing the sending state in the receiving state, protecting in the receiving state, the interest of the sending state and of its nationals, negotiating with the Government of the receiving state and promoting friendly relations between the sending state and the receiving state,⁷² getting information for the sending state on the receiving state.

It must be noted however that the immunities accorded diplomats do not extend to consuls.

It is clear that the immunities are not a license for misconduct and that diplomats must carry themselves with the dignity befitting their status. A receiving state reserves the right to invade the privacy of an embassy for good cause - where for instance activities being carried out therein constitutes a affront to its sovereignty. Thus when the Soviet ambassador Panyushkir wrote to the American Secretary of state Lovett charging that the 'acts of the New York Police authorities violated, the extraterritori-

70. (1939)1 K.B. 376.

71. UN Doc. A/Con. 20/23. 18 April 1961, 500 U.N.T.S. 95.

72. Art 3(1).

73. US v Wong, 169 US 649, 42 L. Ed 890, 893 (1898); See also Commonwealth v Kosloff 5 S&R. 545 (1816) where the Russian Consul General in Philadelphia was indicated for rape and the plea of diplomatic immunity failed; Art. 5(3) of the Vienna Convention on Consular Relations, UN Doc. A/Con 25 23 April, 1963 and Art 41 of the Convention on Diplomatic Relations, UN Doc. A/Conf. 25/6.

ality of the building of the USSR Consulate in New York the need for the observance of which is derived from international custom and from the norms of international law', the US Government rejected in its reply - note the idea of 'the exercise within the United State of the police power of a foreign government.'⁷⁴

VIII. WAS THE NIGERIAN GOVERNMENT CONNECTED WITH THE ATTEMPTED ABDUCTION OF DIKKO?

It is said the crate bearing the body of Dikko was labelled:

"From: The Nigerian High Commission in London

To: The Minister for External Affairs in Lagos"

There was also the reported presence of a Nigerian diplomat - Yusufu.⁷⁵ The evidence at best is circumstantial and is not conclusive of the involvement of the Government of Nigeria in the affair. The label could be a forgery; if genuine it could have been stolen from legal custody. The presence of the diplomat can be explained away in many ways. What is freedom of movement if a man cannot go where he will and in London of all places? Of course the Nigerian High Commission in London promptly and vehemently denied any suggestion of its involvement in the affair and only a thorough investigation of the matter can reveal the extent of the involvement of the Nigerian High Commission in the matter. The question is: Was it necessary for the British Government to request waiver of diplomatic immunity, for its law enforcement agencies to carry out investigation into the matter? Although the premises of a foreign mission is inviolable and there is the obligation on the receiving state to protect it against intrusion and damage and to prevent 'any disturbance of the peace of the mission or impairment of its dignity', yet the agents of the receiving state may enter premises 'with the consent of the head of mission'.⁷⁶ This consent must be unequivocal since the act of entry by the agents of the receiving state is a serious derogation from diplomatic immunity. Needless to say consent obtained under duress or through the exertion of improper pressure is no consent and is void.⁷⁷

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74. Department of State Bulletin, Vol. 19 No. 478 (29 Aug. 1948) p. 253.
75. Sunday Punch Vol. 15 No. 583, 15 July 1984. pp. 8-9.
76. Art 22, Vienna Convention on Diplomatic Relations.
77. See this Writer's view on the question of Waiver of diplomatic immunity as expressed in the Daily Times, 12 July 1984.

IX. SOVEREIGN IMMUNITY AND THE DETENTION OF A NIGERIAN AIRWAYS
CARGO PLANE AT STANSTED AIRPORT

As indicated earlier an aspect of the diplomatic wrangle between London and Lagos was the detention of the British Caledonian airplane and a Nigerian Airways air craft on each side. Since British Caledonia is a private corporation there is no question about its juristic status. On the other hand it is possible to argue in respect of the Nigerian Airways plane that its detention was unlawful because it is state property. This argument is of course based on the doctrine of sovereign immunity according to which a sovereign's person, property and ambassadors are said to be outside the domestic jurisdiction of another sovereign state. This immunity which was thought at one time to be absolute⁷⁸ had been extended even to departments of a sovereign state.⁷⁹ Naturally a blanket application of the doctrine could work injustice in certain circumstances. Thus efforts were made in judicial pronouncements by the British courts to whittle down its harsh effects.⁸⁰

78. The British led the absolute principle with the common law: The Parliament Belge (1880) 5. P.D. 187; Mighell v The Sultan of Jahore (1894) 1.K.B. 149, The Cristina (1938) A.C. 485.

79. See Krajina v The Tass Agency (1949) 2 All E.R. 274.

80. Reference here is to Sir Robert Phillimore's dictum in The Charkieh (1875) L.R.A. & E 59; Lord Singleton's dissenting opinion in the Baccus case (1957) 1. Q.B. 438, 440; Lord Denning's view in Rahimtola v Nizam of Hyderabad. (1957) 3 W.L.R. 883 and Lord Jowitt's dictum in the Juan Yamael case (1955) A.C. 72 89 et seq. See also O. Jemiyo, 'The Law of State Immunity in Nigeria' in Proceedings of the 7th 9th Annual Conferences of the Nigerian Society of International Law (1975-1978) ed. Ajomo, Lagos (1982) p. 105.

The process of delimiting the perimeters of the doctrine resulted in the inauguration of the restrictive immunity principle according to which a differentiation has to be made between official acts - acts *jure imperii*, - and private acts - acts *jure gestionis* of a sovereign state.⁸¹ The continental European countries, notably Italy and Belgium which led the onslaught on the absolute immunity principle were joined by the US whose Secretary of State Jack B Tate stated in his famous letter, the Tate Letter,⁸¹ that the determination of the issue whether immunity from process of American courts should be granted on request by a foreign sovereign should be left to the judiciary rather than to the Department of State. This was given legal backing 24 years later by the promulgation of the Foreign Sovereigns Immunity Act 1976.⁸² The bend of judicial and international legal opinion today is that if a sovereign descends to the level of a trader he must be treated as any other trader in the market place. Trading was not traditionally a sovereign occupation, more so where the juristic personality of the department of the state engaged in commercial activity can be established as a separate⁸³ entity which has rights and obligations and can sue and be sued.⁸³

Nigerian Airways it would seem is among the category of so-called parastatals with distinct legal personality and thus clearly separate from the Government and a plea of sovereign or state immunity on its behalf must fail.

X. CAPITALISM

While it is patently clear that there are no easy solutions to some of the legal issues we have been investigating in this paper, their political and economic under-pinnings are manifestly clear; perhaps as Nick Fadugba put it: 'Britain had seriously misjudged the sense of outrage in Nigeria that a supposedly friendly country should give sanctuary to leading former politicians, such as Dikko, who are wanted in Nigeria on charges of economic mismanagement and corruption.'⁸⁴

The sense of justice (legal and political) of the people of the Third World has shifted from orthodox philosophic conceptions of law as an instrument of social equilibrium to that of law as an instrument for the promotion of a nation's vital economic inter-

81. Erlich et al. International Legal System, (New York: Foundation Press, University Case Book Series 1978) p. 105.

82. 90 Stat. 2891, 28 US C.A. Sec 1602-1606.

83. See the Trendtex case (1977) 2 W.L.R. 356.

84. Africa, op. cit. p. 20.

rests. As Jerry Rawlings the Ghanaian leader eloquently put it: 'influential voices in the West maintain stunning silence while politicians loot their national treasuries, but initiate and stridently sustain political propaganda based on charges of human rights violation to shield them when they flee and seek sanctuary in these countries at a time they should be facing criminal charges in their home countries.'⁸⁵

On 22 April 1985, both the Daily Times and Daily Sketch referring to the British Sunday Mail carried the story that Dikko has been refused political asylum by the British authorities. If this represents the state of affairs presently, one can only conclude that Britain appears to be exhibiting sensitivity by its decision not to grant political asylum to Dikko, for Third World political sentiment.

CONCLUSION

The Dikko case has not brought about any change in the law of asylum and extradition. If anything, it has brought forth vividly and in a very concrete manner the difference between political questions and purely legal issues. It has also demonstrated the hypocrisy inherent in the legal aphorism that before the law all are equal. Dikko was denied political asylum in the UK but has been granted residence status to enable him continue with his law studies; what he could not obtain through asylum, he has achieved indirectly by becoming a resident alien. The case also demonstrates that given the choice between national economic interests and the interests of other friendly nations, a nation is more likely than not to place its economic interest first.

85. Speech delivered at the closing session of summit meeting of four heads of ECOWAS States (Nigeria, Ghana, Benin and Togo) 15 Dec. 1984. See also A.C. Ajayi, 'Implications of Four Nation Summit', African Business Review (Jan/Feb. 1985) 24.