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UNEQUAL TREATIES (WITH SPECIAL REFERENCE TO THE AFRICAN EXPERIENCE IN UNEQUAL EXCHANGE AND CESSION OF LAND)

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INTRODUCTION

The Treaty making practice is a historical one. It became important with the emergence of capital and exchange relations. Initially it was employed as an instrument between/among city states to assist early merchants to further their mercantilist interests. With the development of productive forces it expanded to embrace all spheres of social-economic life.

Treaty making practice has hitherto been the most wide spread and important form of co-operation amongst nations/communities in various social-economic aspects. It has served as one of the mechanisms through which powerful states have extended their social, economic and political domination over weaker states. Treaties have therefore served as a media of mutual relationships amongst states. At the same time it has widely been employed as a passage to domination of some states by others.

In this paper we intend to survey and analyse the nature of Treaty practice between African Communities and later states, on the one hand, and developed Western States on the other, between the middle ages and the 1970's. We shall concentrate on commercial and land cession Treaties, although not exclusively. We intend to show, in this paper, how Africa has suffered and is still suffering a bitter experience through the media of exchange and cession of land Treaties.

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1. **THE TREND OF TREATY PRACTICE BETWEEN AFRICAN CHIEFDOMS AND EUROPEAN POWERS PRIOR TO THE BERLIN CONFERENCE, 1885.**

Early treaties and diplomatic relationships may be traced between African rulers and European merchants (as agents of European princely states) as far back as the 15th century. In these early treaties, the African rulers granted recognition to European merchants who penetrated into the continent of Africa. Trade privileges were extended to the merchants whereby payment of debts was regulated and the customs duties to be paid by the latter to the African Chiefs were laid down. These early treaties might have also contained stipulations concerning navigation guarantees for the security of merchants and their premises and the purchase of grains. Other stipulations dealt with harmonization of some basic social and political areas, e.g. cessation of hostilities, removal of navigation handicaps, religion, education etc. Diplomatic treaties on the basis of reciprocity were concluded between African chiefs and European agents as early as 1482.

However, although the issue of superiority or inferiority of civilization as between the Europeans and Africans in these early treaties did not arise, European Merchants extracted prodigious profits on the premises of "trade concessions" in trading activities in these African states. The former often violated peaceful concessions by plunder of the riches available in these kingdoms or chiefdoms. In this era of mercantile imperialism, the plunder of Africa was matched by that in the trade with Latin America and the East. Apparently, where trade treaties were negotiated, they were not concluded on the basis of reciprocity. For, the differences in the level of economic development of the Western States as compared to that of Africa, clearly reflect that the parties did not possess equal capacity to exercise their rights and assume obligations. The Westerners applied their cemented Law of Contract principles, such as "consideration need not be adequate", in the conclusion of these international agreements. It is common knowledge that gold and slaves were often exchanged for pieces of cloth, mirrors or pair of boots, or guns for land.

The losses which Africa sustained through unequal trade and plunder via the instrument of treaties, nourished the Western European states and prepared them for the Industrial revolution. We do not, however, assert that all the European states gained from the unequal treaties of the era of mercantile imperialism, but that whereas Africa's communities lost a lot of their riches from the unequal relationship Europe gained substantially from the same.

The bulk of the treaties concluded during the mercantilist era did not on their face abrogate the fundamental rules of treaty — making to the same degree as would be the case in the later periods. Nevertheless, the tendency had been that of stronger states employing treaty practice to dominate and exploit weaker communities. It is therefore wrong to assert that they were negotiated on a footing of equality just because there was no serious interference with the internal sovereignty of the African states. The absence of formal colonialism and the inclusion of clauses to create good diplomatic relations between the parties do not establish equality. We are aware that these treaties were employed to provide a safe foothold for the European merchants and a one way traffic
to extract substantial gain in the unequal exchange. It should therefore, be noted that
during the period preceding the Berlin conference treaties played a major role as a legal
instrument expressing the international relationships of the time. However, it is also
important to understand the basic reasons behind the development of these
relationships.

Capitalist units began to develop as early as the 18th century with the development of
commerce, industry and financial institutions in Western Europe. By the early 19th
century numerous capitalist units were freely competing at the levels of production and
distribution. It was this free competition which in turn necessitated the formation of
monopolies to inhibit competition. It was also this competition which paved the way for
scientific discoveries during the period from the 1860's to the 1890's. This process was
stimulated by capital investment in industry, cheapening of the means of production and
intensified labour. The same competition for surplus amongst the monopolies would
later change the picture of treaty practice as witnessed in the scramble for foreign
territories where investment was deemed to be more profitable. It was when the
monopolies realised that they could more profitably invest their capital beyond their
national boundaries that the question of foreign investment became a serious issue and
led to the scramble for Africa. This development was formalised in the Berlin
Conference which ended in February 1885.

Many of the African kingdoms or chiefdoms prior to the 19th century were sovereign
societies capable of entering into international contracts. It is therefore clear that they
had contracting capacity in international law, that they could offer guarantees for the
implementation of international obligations, and that even the minor chiefs' or kings'
title to their territory were never in doubt. However, in analysing the nature of
agreements signed during the 19th century, especially during its last two decades, it is
important to consider the limitations on the legal capacity of the rulers in the African
communities and whether the treaties with western states were signed voluntarily. One
must also observe the common form of the treaties concluded. In the first eight decades
of the 19th century, the treaty making practice was more or less the same as that of the
past few centuries, except that in contrast to the previous era it penetrated to the
landlocked communities in the heart of Africa.

Most of the treaties signed between African rulers and European states' agencies
prior to the Berlin conference did not involve the cession of land. They were basically
commercial. As exceptions, we learn of the 1823 treaty of cession of land between the
Gambia Region and England; the Treaty of Cession of 1840 between Great Britain and
Gombo; the 1807 treaty between two kings of Sierra Leone and the Royal Niger
Company; the British and Ethiopian treaty of 1849; the treaty of 1850 between Great
Britain and Demba Sonko, king of Barra; the treaty between Britain and the ruler of
Lagos in 1861; the 1865 treaty between Queen of Madagascar and the British; the 1840
treaty between the English East India Company (acting in Africa) and the Sultan of
Tujourali. Most of these treaties limited the African kings from entering into other
treaties injurious to the interest of the European powers concerned. Meanwhile some
powerful African communities sought relations with the European for example the
Mandebele and Mashona of Central Africa, the Zulu of Southern Africa and the
Treaties that decided their fate. The conference was responsible for the partition of Africa and it actually drew the political boundaries of the present African countries in the treaties between the powers.

After the Berlin conference, a serious encroachment on the continent of Africa was made both diplomatically through treaties and by military force. The encroachment was first made by commercial companies operating on the basis of charters given by their respective governments which allowed them to act in the international field i.e., to conclude treaties and acquire land for their sovereign states, and maintain military force under their governments. Guidance and protection e.g., The Royal Niger Company of 1886; the British East African Company of 1888; The British South Africa Company of 1889; The German South West African Company; the Portuguese Nyasaland Company; The International Congo Association of 1886; and The Italian East Africa Company. All of these companies became active in Africa after the 1884/5 Berlin Conference.

An observation of the Treaty practice between 1885 and 1945 reveals the concept of "protectorate" as a legal shield for "colonialism". Hundreds of treaties were concluded between African Chiefs and European companies in South, East, Central, West and North Africa immediately following the Berlin Conference. In these treaties the European companies applied certain standard forms of treaties drawn by them as approved under the Berlin Conference, containing the agreement which they wished to enforce. The standard form treaties contained guarantees for interpreting the text and of its free acceptance by both contracting parties. They also contained provisions wherein witnesses would declare that the chief had in the presence of the witnesses affixed his mark or signature by his free will and consent. This was then followed by a declaration that an interpreter fully versed in the language used in the text had faithfully explained the agreement to the chiefs. No doubt hundreds of treaties were signed according to these forms.

It would appear from the standard form used that in most cases an offer with stipulated conditions was made to the African Chiefs, that is, it was drawn by the European companies and offered to the African chiefs for acceptance. In this respect the provision for acceptance was irrelevant as the party who drew the instrument had pre-determined its terms. During the period when Africa was colonized, most of the African rulers and their people were illiterate. It therefore followed that the same agents who negotiated the treaties took the trouble to learn local languages so as to be able to communicate with the indigenous people. It would naturally follow from this practice that the interpreters' declaration, in whichever language it was made, raise a doubt as to whether it was bona fide. In any case, even if it was bona fide the African chiefs and whether it was bona fide. In any case, even if it was bona fide the African chiefs and their councillors were not given enough time to discuss the proposals in detail in order to unveil the present and future social, economic, and political consequences or implications of the treaty. And further, if in some instances they did discuss the terms of the treaty in detail, it was highly improbable that they would identify the policy behind the standard form treaties as determined under the Berlin Conference. It may therefore be suggested that most of the African Chiefs signed the treaties without actually understanding their future socio-economic implication, whether they solemnly swore to
their binding effect or not. The few who understood the argued implications were, of course, traitors.

Lugard reported that the treaty making process in Buganda adhered to the principle of *Pacta Sunt Servanda*. He argued that the treaties were well understood by both contracting parties, put in written form in both English and Local Language, and that the parties testified to their awareness of the binding nature of the treaties. We do not accept Lugard’s assertion. There is an apparent contradiction in the treaties themselves in that, whereas it was emphasized that the Europeans had not come to deprive the African chiefdoms of their land nor their internal political power, there were pledges by African chiefdoms not to enter into wars with other tribes without the sanction of the Europeans, nor to have intercourse with any stranger or foreigner except with the leave of the Europeans. Such terms clearly limited the sovereignty of the African chiefdoms involved, for, many African communities were subordinated to the will of the Europeans.

Among the treaties concluded during the era of colonialism the treaties of “protection” and “cession of land” were most common. For example: the 1890 treaty between the Sultan of Zanzibar and Great Britain; the 1895 treaty between Buganda and Great Britain, under which the King of Buganda undertook not to sign treaties with other European powers without the consent of Britain; The 1888 treaty between Lobengula and The British South African Company; The 1889 treaty between the Ottoman state and the British in which Egypt came under British control *de facto*; The 1890 treaty between British South African Company and the King of Gazaland; The 1893 treaty between Great Britain and Alafir of Oyo Ibadan; The 1894 treaty between the Royal Niger Company and the Sultan of Gandu and the 1896 treaty between Italy and Ethiopia which did away with the stipulations of the treaty of 1889 because of vital change of circumstances.

In these treaties the African rulers declared the cession of part or all their land to the European companies so as to be protected, honestly believing that they still held final rights to the land ceded. The German East African Company under Karl Peters, for example, concluded many treaties between 1884 and 1885 in the coast and Northern Highlands of Tanzania, and later in Ruanda and Burundi. Similarly, the British East African Company entered into treaties in Kenya and Uganda between 1885 - 1890. In a treaty signed between the German East African Company and the Sultan of Msvero in Tanzania on 29th November, 1884, it was agreed that Sultan Mangungo thereby ceded all the territory of Msvero belonging to him by inheritance or otherwise. A similar agreement was reached between the Sultan of Northern Msvero and the German company. A treaty was signed between the Sultan Mbuni of Mkondogwa in Usagara in Tanzania and the German Company to which the lady declared that she was dependent on the Sultan of Zanzibar. She however, ceded to the German company her whole territory with all civil and public rights for all time without any condition despite her incapacity to enter into an international obligation while tied to the Sultan of Zanzibar.

Other notable treaties include treaties between the International Association of Congo under the authority of king Leopold II of Belgium and the legitimate sovereign
chiefdoms in the Congo basin in 1885. The treaties made Congo a property of the King until 1908, when it passed over to the Belgian State. These treaties provided for cession of land.

It is doubtful that the African parties to the treaties noted really understood that they were surrendering their sovereignty. It is our opinion that the Sultan of Zanzibar, who adhered fully to the Berlin Conference resolutions, did not understand the consequences that would follow the Berlin Conference. Had he known that the result of the Berlin conference would be to strip him of economic and political hegemony over the East African chiefdoms he claimed to rule, including Zanzibar, and leave him only symbolic power, he would not have welcomed the European powers. Indeed, he could only have accepted such a result knowingly if he had been guilty of corruption for his individual benefit. The same must apply to the rulers of African chiefdoms suggesting that fraud must have been practiced on them. Situations did occur where a chief or king was placed in such a position that given the strength of his enemies, he had no choice but to seek external support. This would suggest that the local leaders underestimated the external powers with whom they formed alliance.

We have already observed that African rulers had no powers whatsoever to cede land to foreigners. It may be argued that the treaties of cession of land were void in international law for lack of capacity. The privy council in Amodu Tijani v. Secretary held that, “a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners”. This statement clearly shows how colonial courts stood in favour of void treaties.

A classic case which reflects the incapacity of African chiefs to cede land is that of Ol le Njogo and Others v. Attorney General. The facts are briefly that in 1908 an agreement between the colonial Government and a local chief and representatives of a certain Masai tribe agreed that sections of the tribe should be moved to a reserved. But it was agreed that no further transfer should be made. Nevertheless, a further agreement was made in 1911 between the government and representatives of the section of the tribe left undisturbed, to effect its movement. A legal action was brought by members of the tribe against the government on the basis, inter alia, that the representatives of the tribe who concluded an agreement with the British to cede a tribe’s land had no powers to bind the whole tribe in such agreements. The colonial court of appeal, wishing to arrive at a conclusion that would protect colonial interests, ruled that the agreements formed matured treaties and that the resettlement of the Masai in question was an Act of State. This challenge by the members of the tribe to the cession of land by their headmen underlines the incapacity of the heads of a kingdom or tribe to cede land to foreigners. It also suggests corrupt transaction between some leaders and foreigners in derogation of the powers their peoples had entrusted them with. Similarly, in the Meruland case a large number of members of the Meru tribe in Northern Tanzania were forced out of their land and their houses burnt down. When they challenged the act, the Act of State doctrine was advanced to defeat their case.

Likewise, in the case of Sobhuza II v. Miller and Others, a legal action by the Swazi...
King was defeated through the application of the so-called *Act of State doctrine*. Prior to the case in question some Swazi natives were dispossessed of their lands and their rights of use or occupation, contrary to a convention signed between Great Britain and the S.A. Republic. On appeal to the Judicial Committee against the decision of a lower court, it was held that *Orders in council were effective even if they were not within the powers recognized by the convention*. This is another example of the inability of the traditional African rulers to negotiate, and ensure strict adherence to the terms of treaties, on an equal footing with their European counterparts.

The wars of resistance against attempts by European powers to penetrate the internal sovereignty of various states in Africa during the late 19th century and during the first half of the 20th century,\(^{[29]}\) reflect two major facts. First, that some African rulers were forced to enter into agreements with the colonial agents which denied the former's "freedom of consent", a prerequisite of international agreements. And, second, where the rulers voluntarily signed agreements the majority did not understand the quality of the treaties they signed until they discovered too late that they had made a wrong move.

Moreover, the diplomatic stipulations introduced in various treaties, such as the treaties between Ethiopia and Italy of 1883 (Shoa), 1889 and 1896 (after the battle of Adawa) or the treaty between Britain and Madagascar in 1865 in which it was stated that the queen of Madagascar wished to receive a British agent at her capital and the British crown in like manner should receive at London an agent of the queen of Madagascar,\(^{[29]}\) indicate that the African rulers were aiming at protecting their sovereignty against adjacent rulers, as well as against European encroachment,\(^{[29]}\) and not to surrender their internal sovereignty.

The European powers used the unequal treaties to justify their acquisition and occupation of the African continent. However, the treaties signed during the colonial period, such as treaties establishing boundaries, treaties relating to international trade, space and rights over the seas, technical and administrative treaties, were such that the colonial governors remained bound in international law. Many boundary agreements were concluded between the colonial states prior to the Berlin Conference and some on the basis of the conference.\(^{[29]}\)

It cannot be argued that the colonial rule united numerous small groups into nations. Unity and civilization of a high order were possible before the coming of Europeans as is demonstrated by the federation of the Ashanti, the Mandelebele and Mashona kingdoms in Central Africa, the Zulu of South Africa and Benin in West Africa.\(^{[29]}\)

The treaties concluded between colonial governments include the *1921 - 1951 Belbase Treaties*, and the *1929 Nile Waters Agreements*. Under the Belbase treaties the British Government concluded agreements with the Belgium Government which granted the Belgians a lease in perpetuity of port sites in Tanganyika at rent of one franc per annum. These treaties were an abuse to the integrity of the people of Tanganyika in that the British Colonial Government was selling a property to which it never had title. In the Nile Agreement of 1929 Britain purported to accord Egypt priority in the use of the Nile River waters. No country under British administration could use the waters for any
purpose which would disturb their flow. This meant that any use which would reduce the quantity of the waters or their continuous flow to Egypt was required to seek prior approval of the Government of Egypt. The agreement was concluded when Tanganyika, Kenya, Uganda, and Sudan were under British rule. This treaty also reflects a total disregard of the rights of the indigenous people in the territories affected by the agreement. Both series of agreements were concerned with British economic interests. The African people who were the rightful owners of the lands in question were never invited to participate in determining international engagements which would substantially affect them in the future.

The treaty practice between European powers and African states from and, indeed, the Berlin Conference until the Second World War was highly unequal, and, indeed, more unequal than during the first two periods discussed. In this period requirements for international engagements such as capacity, equality and voluntariness were lacking in a majority of treaties. Moreover, most of the African states lacked the technical and diplomatic machinery to participate in international affairs on their own accord. For example, they lacked the expertise to study carefully the social, economic and political implications of the treaties concluded. Fraud and corruption was used to cheat or buy off some rulers. In any case, the Berlin Conference had already predetermined the colonization of Africa. The question of equality between the African states and the European powers was never considered. The treaty practice was thus used as a legal medium through which the European powers penetrated and undermined the economies of the African continent, in an attempt to combat the crises of the time in the capitalist system. The treaties concluded during the colonial period in question are therefore not capable of being regarded as treaties for the reasons given.

3. THE POST-1945 PERIOD TREATY PRACTICE

The treaty practice during the post-1945 period reflected both the problems that had beset the capitalist system during the inter-war years and its general decline after the Second World War. The years after 1918 witnessed a crisis in the economies of the European capitalist powers that led to further war. The economic crisis was marked by the collapse of the Gold standard, the main medium of convertibility or currencies, competitive devaluations and exchange controls which radically reduced international trade and necessitated a resort by most imperialist countries to prohibitions and tariff barriers, and closed markets in the colonies.

The Second World War damaged the economies of the original capitalist powers. United States emerged from the War as the most powerful capitalist state and forced the other capitalist powers to accept her “open door” system. Treaties played a major role in furthering the U.S. multilateral strategy. She used her economic superiority to compel the European powers to surrender political independence to their colonies, thus permitting her capitalist monopolies to compete freely in open markets. The U.S. was advocating a neo-colonial strategy where she would have a role to play. At the same time the successful socialist revolutions in the U.S.S.R., and later many parts of the world, posed a threat which called for the unification of the capitalist system.
The post-1945 period therefore saw a multiplication of multilateral and bilateral treaties in the areas of trade, finance, space and sea waters, many of which had a great impact on the history of Africa. As early as 27th December, 1945, 22 Western countries signed the Bretton Woods agreement, which established the World Bank and the International Monetary Fund, basically aimed at helping to reconstruct the wrecked capitalist economies. The establishment of another institution to be charged with a common mission, the International Trade Organization was attempted in March 1948, in a convention concluded between the capitalist powers meeting in Havana. The convention was never ratified, hence a General Agreement on Trade and Tariffs (the G.A.T.T.) was temporarily put into operation. This came into force on 30th October, 1947 and is still in operation. As a political institution the United Nations Organization was also established in 1945 charged with the function of ensuring peace amongst states.

A number of customary international principles have been enshrined in the treaties concluded immediately after the Second World War, for example, Most-Favoured Nation Treatment (Article I of the G.A.T.T.); Act of State Doctrine; State Succession. Such sacrosanct doctrines of the law of treaties as pacta sunt servanda; rebus sic stantibus and pacta tortiis nocent nec prosunct have been more and more expressed in international agreements. The African countries did not take part in the initial formation of the post-Second World War international institutions.

We have already shown that the operations of the colonial powers in the colonies were geared towards meeting particular economic interests in the metropole. The colonial governments did not ever represent the interests of the colonized people in the multilateral or bilateral arrangements of the post-1945 period. In any case, these multilateral arrangements were a new strategy aimed at recolonizing the third world countries (neo-colonialism) after they had regained their lost political independence.

Most of the colonized African states gained their political independence between 1945 and the 1960's, and were welcomed into the family of nations under the United Nations Organization. Upon assuming their municipal and international responsibilities, the new states found a number of bilateral and multilateral treaties and other contractual obligations entered into by their predecessors, the colonial governments. Many of these were meant to serve the colonial masters' interests, were burdensome, and if effected would frustrate the development process and compromise the international personality of the newly independent states.

After independence, a number of attempts were made, through the doctrine of succession, to assign to the newly independent African states rights and obligations that had been created by their predecessors. Most of the African states have clearly expressed the view that since the pre-independence treaties were concluded for the benefit of the colonial governments; they are at liberty to consider themselves not bound by them. For example, a Kenyan spokesman has said that,

..... a new state succeeds not to treaties but to the competence to conduct its international relations and consequently to enter into treaties with other countries.2
This view is accurate in that the African states did not take part in concluding the treaties nor did they participate in the international law-making process during the period that they were subjects of de facto colonial domination. They cannot, therefore, be obliged to perform the obligations therein stipulated since this would be in violation of the principle *pacta tertii nocent nec prosumt*, that is, that a party may not be bound by an agreement to which he was not a party. As N.S. Rembe aptly observed, *The fact that the African states were the object of that law... it cannot be said that they consented, more so when the law was enacted against their interests*.

Few African states have rejected the theory of succession altogether, but some have agreed to be bound by particular international agreements. They have expressed reservations concerning other treaties, analysing them before declaring whether they consider themselves bound or not. Many African states have decided to continue respecting acceptable international customary obligations and multilateral treaties while rejecting bilateral agreements. The West African states adopted the procedure of indicating to the United Nations' Secretary General the treaties they considered binding. Tanzania, Uganda, Malawi, Zambia and Kenya regarded bilateral treaties as binding for a fixed period (Tanzania and Uganda two years only after independence), after which time each treaty should be negotiated afresh. Multilateral treaties would continue on the basis of reciprocity while each was being reviewed. Former French African territories have not entered into formal devolution agreements with the ex-colonial state, but have continued to observe treaties specifically applied to them before they attained independence. The ex-Portuguese colonies have stated in their constitutions that only such treaties, agreements, and alliances to which Portugal had committed the territories and which may be prejudicial to the latter's interests or which infringe or diminish their sovereignty over land, sea or space are considered terminated. The rest would be reviewed and ratified accordingly.

All these declarations by African states reject the notion of automatic devolution of treaties, but at the same time recognise the devolution of certain treaties through customary international law.

After independence Tanganyika and Sudan declared the *Nile water Agreement* not binding upon them because it was incompatible with their status as sovereign states. Similarly, Tanganyika considered the *Belbase Treaties* as void on the ground that the rights of Britain over Tanganyika were of limited duration (since it held Tanganyika *under the mandate of League of Nations*) and thus could not bind her. Moreover, on the eve of independence, the government of Congo (now Zaire) postulated that the property of aliens was still safeguarded, but the state expressed its intention to end ownership of colonial origin such as was exemplified by putting the substance of the Congolese soil at the disposition of the Compagnie du Katanga, the C.S.K., the C.F.L. and C.N.K.I. Companies.

While many African countries in practice have not rejected the doctrine of succession, the traditional international law view that when a state gains independence it is born into the family of nations and thus becomes automatically bound by the existing law is absurd, in that the newly independent state did not take part in unfolding the international principles it meets after independence, whether based on customary or treaty law. Hence, even where a state declares itself bound by treaties concluded by its predecessors, it is entitled to apply the doctrine of "changed circumstances".*
At the eve of their political independence most new states found themselves in a dilemma. On the one hand, the productive forces were highly underdeveloped due to the colonial economic policy. Thus they needed financial resources to develop the long-ignored industrial sector, infrastructure and to diversify the agricultural sector. This means they have to maintain strong ties with the profit-oriented capital exporters—the international financial oligarchy, which would eventually turn them into neo-colonies. On the other hand, they are confronted with the forces of nationalism determined to build strong national economies and do away with poverty, disease, ignorance and decadence. A departure from colonial underdevelopment would therefore entail a radical break with the entrenched capitalist economies and face the danger of capitalist sabotage. Alternatively, a state could try to build “national capitalism” or “state capitalism” through local and imported capital which might never materialise. The economic, and thus military, instability of many third world countries and the fear of capitalist manoeuvres have forced many African states to depend heavily on the capital exporters. For example, most African countries are members of the G.A.T.T., I.M.F., and the World Bank, all of whose regulations reproduce many customary international principles. The same is true of bilateral agreements.

African countries have therefore maintained treaty relationships with the capital exporting countries in the areas of commerce, Military, Technology, Management consultancy, Infrastructure, Research Facilities, and to a limited extent in Agricultural development. Meanwhile the traditional bourgeois concept of international division of labour, the specialization of industrially developed countries in high technology industries and high quality goods production and a corresponding concentration of raw materials production in the third world, is still predominant. Africa will remain underdeveloped as long as it is attached to the Western economic system.

Most of the post-1945 period economic treaties between capital exporting countries and the less developed countries are based on unequal relationship. We maintain that the relationships are unequal because the agreements tend to favour the interests of the capital exporters and are injurious to the development of the less developed countries. It is noted for example that certain aspects of customary international law, like the Minimum Standard [MS], operate against the third world countries in their decolonization process. The Third World Countries are eager to control their own economies through the ownership of the major means of production. This process is compatible with the nationalization of foreign owned property, but against the requirements of the M.S. The Most Favoured Nation Principle on the other hand insists on giving equal treatment to contracting members of G.A.T.T., and giving no better treatment to other third parties irrespective of their weight in the development process of a member country. In many instances, the capital exporting countries have reacted sharply to nationalization measures taken by developing countries. Thus, the Nationalization of Suez Canal by Egypt in July 1956 was viewed by United Kingdom, France and United States as unlawful. Similarly, the nationalizations in Mexico in 1938, in Cuba in 1960, and Iran in 1957, met serious attacks from foreign investors despite the
fact that they were Legitimate acts of Sovereignty.

The United Nations Resolution on the Establishment of a New International Economic Order stated that,

In order to safeguard these resources each state is entitled to exercise effective control over them and their exploitation with means suitable to its own situation including the right to its nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the state.\(^3\)
The U.N. Resolution is in line with the O.A.U. resolution on permanent sovereignty of African countries over their natural resources.

Moreover, the *United Nations Trade Act of 1975* contains a list of measures that can be directed against the host state in the case of nationalizations which do not tend to protect the traditional law, or other legislative measures not hospitable to foreign investments.

Justice Harlan’s remark in his judgement in the *Sabatino case*,

Certain representative of the newly independent and underdeveloped countries have questioned whether rules of state responsibility towards aliens can bind nations that have not consented to them and *it is argued that traditionally articulated standards governing expropriation of property reflect imperialist interests and are inappropriate to the circumstances of the emergent states.*\(^3\)

(stress mine) should be highly commended.

The present trend of agreements in matters of technology and managerial skills is one sided. It involves agreements concerning management and consultancy, the importation or retaining of certain skills, knowledge, equipment, and facilities lacking in the importing country. These agreements often include provisions for services, administrative responsibilities, technology purchases, sales, training of local staff and so on. As a result, whether the venture employing foreign capital or technology is jointly owned or not, the foreign party eventually controls the running of the venture through its power of capital, technology and management, and reaps great profits while employing the natural resources of the host country.

Loans and grants often entail joint ventures or the importation of technology. These are in most cases tied with conditions. The conditions of the loan assistance or joint venture may prescribe the employment of the grant or loan and its fruits. They may prescribe that the products realised from the loan should sell within a limited geographical zone; that the recipient country must sell all or part of the products coming out of the imported technology to the owner of it (exclusive market rights); that the recipient party must obtain its requirements for the purpose of employing the loan such as machinery and technology (after the conclusion of the first agreement) from countries approved by the donor, thereby ensuring a continuing market for industrial products, intermediate parts and spare parts from the donor or its associated monopolies. Thus,

In a sample of 150 technology and licensing contracts studied by Vaitsos in diverse sectors in Bolivia, Columbia, Ecuador and Peru, more than two-thirds explicitly required the purchase of intermediates from the technology supplier or his supplier or affiliates.\(^3\)
Indeed the technological, licensing and capital-oriented contracts may not in themselves form treaties in the strict definition. Nevertheless, it is our view that we cannot distinguish loan and assistance agreements signed between the so-called international institutions and developing countries or their agents from agreements between the capitalist monopolies and the less developed countries or their agents. For, the sources of capital and technology in relation to the employment of the loans, grants and other assistance approved by the suppliers may involve intricate networks of contracts between the international institutions and monopolies which are the real source of capital.

The unequal nature of treaties and similar relationships concluded between capital importing countries (which category includes the African countries) and the capital exporting countries, is clearly indicated in the debt problem facing most of the developing countries. For example it is stated that, “The total external public indebtedness of 81 developing countries in Africa, East Asia, Middle East, South Asia, Southern Europe, and Western Hemisphere, for which I.B.R.D. provides estimates, rose from £21.6 billion in 1961 to over £79.2 billion in 1971, a more than three fold expansion. Preliminary estimates for 1972 placed the figure at about £88 billion”[3] This shows the worsening relationship between capital exporting countries and capital importing countries, or rather the developed countries and less developed countries.

In a historical account of the unequal relationship between the third world and the capitalist countries in international trade Samir Amin explains that, in 1939, the under-developed countries were able to purchase only 60% of the manufactured goods they had bought in 1870 — 1880. In gold terms, the value of the trade in basic products in 1936 — 1938 was 2.2 times as greater in 1876 — 1880; whereas that of manufacturers was 2.3 times as great. Parallel with this, the volume of trade in basic products had quadrupled while the corresponding figure of manufactured products had multiplied by only 2.5 to 3.0. This shows decline in trade for the underdeveloped countries since the gold price of exports had fallen by 45% while that of the exports of the industrial countries had fallen by only 21%.[2]

This tendency shows the actual domination of the less developed countries by capitalist countries through unequal economic relationships which may be traced back to the era of mercantilist imperialism.

CONCLUSION

The equality of states in international engagements is vital for the development of a just form of international society. Equality in international law is traditionally based on the concept of sovereignty. However, a modern view of equality of treaties should enshrine: the capacity of states or their agents to exercise their rights and obligations under the international engagement; the voluntary action of states; the equality of states or their agents, and international institutions to conclude international engagements. It must also embrace such other contractual prerequisites as the capability of the treaty to be realised on the basis of the existing social, economic and political situation of each
individual state. In other words *The parties must stand to gain or lose equally from the treaty.*

In our historical analysis of treaty making practice in the international community we have noted that since treaty practice made its first appearance in the history of man, it has been the most widespread and important form of co-existence amongst states. It is it has been the most widespread and important form of co-existence amongst states. It has also served as a major source of *international* law. Tracing the historical treaty relationship between states, one notes that from its inception treaty practice, and hence the international law of treaties, had favoured the powerful states at the expense of the young and weak states. Most of the pre-second world war treaties were tainted with inequalities such as lack of voluntary action, incapacity to contract, coercion, fraud, corruption, and pure exploitation and domination of the weak states in Africa, Asia and Latin America by the European powers. This kind of relationship still lingers, although of course a minority of treaties are mutual and founded on real equality.

Certainly the mechanism of treaty practice plays a great part in promoting international co-operation in bringing the human race closer together. Nevertheless, it has to a larger extent been employed to safeguard the interests of the developed states, especially the western capital exporters, in disregard of the interests of the Third World countries. It has been correctly noted that, International law developed by western powers before the 20th century served as a buttress for the colonization of African people. It connived at the subordination of African dignity to western economic interests. It was essentially racialist and therefore contrary to the basic norms of law applicable to all mankind. The so-called customary international law developed prior to the 20th century to suit the interests of the colonial powers. In most of the post-Second World War treaties provisions are made for the parties to abide by accepted international customary rules. It should, however, be noted that the post-1945 multilateral arrangement is basically aimed at submerging the third world countries in the capitalist system and promoting the imperialist interests in these countries. Many of the bilateral arrangements are also aimed at promoting the interests of the powerful states at the expense of the weak states.

It is common knowledge that when most colonized countries regained their political independence they found themselves confronted with many social, economic and political difficulties developed historically through the colonial policy of suppression, domination and exploitation. At the same time the agents of imperialism may be within or at the borders eager to make sure that the old trend is continued in a new form. No doubt, therefore, the new states find themselves compelled to enter into new treaties and other contractual agreements with the metropolitan states or the imperialists promoting international institutions, and sometimes to succeed to obligations concluded by their predecessors, treaties which favour the stronger parties, or which may in the long run be in conflict with long term national interests. These treaties or their related contractual obligations are basically unequal.

*Article One of the United Nations Charter provides that self-determination is important to develop friendly relations among nations based on respect for the principle*
of rights and self determination. General Assembly Resolution 3021 [s-VII] on a New International Economic Order entitles a state to exercise effective control over its natural resources. Nevertheless, the application of customary international law may not allow the operation of these two fundamental principles.

Thus far there is no independent rule of international law which entitles a state to rescind or terminate a treaty because it operates unequally against her, or because it was concluded as a result of economic pressure, or economic or political instability. The Vienna Convention on the law of treaties, invalidates treaties concluded by fraud (Article 49), corruption of a representative of a state (Article 50), and coercion of a state by the threat or use of force (Article 52). However, the convention is not exhaustive on the definition of coercion nor does it talk of aggression. It leaves aside the most common instrument of inequality which may be used in the present day, the conclusion of treaties and other contractual agreements where one party takes advantage of economic or political instability of the others. It also does not touch on the possibility of one state voluntarily entering into an international obligation ignorant of the future implications of the agreement due to a lack of experts to thoroughly study the engagement.

States which succumb to the operation of unequal treaties may apply the doctrine of rebus sic stantibus. However, the operation of this doctrine is limited and unsettled. The Draft Article on the law of Treaties formulated by the international law commission in 1966, explicitly limit the scope of this right to situations wherein the performance of a treaty may be opposed to the national interests of one of the parties or where the facts upon which the treaty was based have expired or substantially changed. In any case, the doctrine of rebus sic stantibus, as an exception to the doctrine of Pacta Sunt Servanda (the grundnorm of international law), is a reasonable doctrine which should be enforced in international law, especially where a country has undergone a revolution. Moreover, technological agreements need to be considered seriously under the two doctrines.

Since most developing countries are now rapidly changing (save that the same applies to developed countries), it is just and reasonable that treaties or other contractual relationships should recognize the right of a party to demand the revision or termination of the treaty where the circumstances anticipated by both parties are no longer tenable, or have become burdensome or unreasonable to the interests of one of the parties, or where the performance of the obligation by one of the parties will be detrimental to the existing socio-economic aspirations of that party or tend to be beneficial to one of the parties at the expense of the other(s) (i.e. exploitative). No party is prepared to enter into an engagement in which she stands to lose. These categories include all treaties whose performance derogates from the sovereignty of one of the signatories and thus covert treaties concluded by colonial governments before independence.

The lack of experienced personnel to scrutinize treaties covering various disciplines in the less developed countries may often lead to the conclusion of unequal contractual engagements between such states and the highly equipped developed countries. It is therefore important that where a state discovers that it is being exploited by an unequal engagement, be it a treaty or other contractual obligation, it should be entitled to seek
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revision or re-negotiation of the agreement with the other party or to terminate the whole agreement where revision will not prove equitable. Where this remedy is sought and there is disagreement between the parties, an equitable determination of the dispute may be provided by an international tribunal. Certainly unless some of the existing aspects of international law are re-examined the current gap between international law and socio-economic development will continue to favour the domination of the less developed and developing countries by the developed countries to such extent that violence may ultimately be the only solution.

The recent Zaire dealing involving a contract of cession of part of Eastern Zaire to a West German prospecting company (OTRAG) is in every aspect directly linked with the metropolitan powers’ manoeuvres to re-colonize the less developing countries. In this case, it is clear that although imperialism is to blame the rulers of Zaire were a sell-out of capitalist imperialism. The compradorial element reflected in this case is dangerous in the interest of African development. Even if it was entered into on the basis of sovereign equality, it is bound to be challenged by the people of Zaire, for, a unilateral act of one head of state or a given class may not bind the entire people.

It is clear that the protection offered against unequal treaties and other contractual relationships by international law is imperfect. A need exists for the less developed and developing countries to be provided with certain protections against unequal engagements. We fully support Fiore's assertion that,

...all treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation or which hinders the development of its industry, which prevents the exercise of any of its natural rights or which offend in any manner against the principles of absolute justice or the supreme law right.46

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FOOTNOTES


5. Ibid., pp. 30 — 31.

6. Ibid., Chapter VII p. 79.


12. It is our view that all treaties are to be considered as null and void which are concluded under economic or political pressure. The burden of proof here is on the party who stand on the losing side (on a preponderance of evidence)


15. Hertslet, op. cit., p. 137.


20. Other instances include; the treaty between the Mhavero of South West Africa and Captain Joseph Fredricks of Benthany in 1885, Captain Hermanus of the Rehoboths and Maherero the paramount Chief of the Hereros in 1885, treaties with South West African communities in which the chiefs ceded their land to the German South West African Company and vowed that would not sign or conclude any future agreement with any other power without the consent of Germany. (See, Alexandrowicz, C.H., Part II).

21. (1921) 2. A.C., p. 299.

22. (1914) A.C., p. 90.

23. For a full text of the case see Kirilo Japhet and Earle Seston *The Meru Land Case* (1967 Edn.) E.A.P.W.

24. (1926) A.C. 518.


28. For example; the Anglo French International in Egypt 1871-1882 in which the Suez Canal was administered under the treaty of constantinople in 1888, following the British acquisition of Egypt, the Anglo-Congolese Treaty of 1894 in which Leopold recognized the British sphere in the Upper Nile which had been laid down in the Anglo-German arrangement of 1890, The Anglo-French Agreements on Nile Basin of 1891, on East Africa 1889, and 1890 which delimited spheres of influence of both France and Britain. France kept-Central Sudan from Darfur in East to Lake Chad in West, but was excluded from the Nile Basin by Britain, thus removing the French Challenge in the Nile
Basin, the Anglo-French Agreement of 1862 on Zanzibar, The Anglo-German Agreement on East Africa of 1886 and 1890. The British implicitly accepted German claim to a protectorate over the coast fronting the sultanate, the Anglo-German Agreements on West Africa in 1893. The Anglo-Italian Agreements on East Africa in 1894 which merely delimited the British Italian claims along the Somali Coast, The Anglo-Portuguese Convention of 1890-1891; The Anglo-Portuguese treaty on the Congo in 1881. Elias, T.O., Africa and the Development of International Law, (1972 Edn.) Dobbs Ferry, New York, p. 484.

30. Nabudere, D.W., op. cit., Chapter IV.
33. Rembe, N.S. op. cit., p. 58.
37. U.N.O. General Resolution No. 3201 (S-VI), also quoted in Rembe, N.S. op. cit., pp. 66 — 68.
40. Mason, The World Bank Since Bretton Woods, (1973 Edn.) pp. 76 — 80. From its evolution the Bank has been mainly owned by the biggest capitalist powers. By mid-1971 for example North America and Europe cast 64 per cent total votes; Asia, Africa and Latin America 28 per cent only; Africa and Latin America 8.3 per cent only. Chapter 4. See also Nabudere D.W. The Political Economy of Imperialism, op. cit., pp. 150 — 151
41. Debt problems of developing countries: report by the UNCTAD Secretariat, United Nations Publications (Sales No. E/72/11/D/12 para. 16.
43. Rembe, N.S. op. cit., p. 52.
44. See for example, the Treaty between Tanzania and Swiss Government, concerning the encouragement and reciprocal protection of investments (1966).
45. For a deeper analysis of the doctrine, see; Sinclair, The Problem of unequal treaties op. cit., and Lissitz, Treaities and changed circumstances, 896 — 900.