

**SUPREME COURT OF NIGERIA**  
4th APRIL, 1997. SC. 238/1994  
**CORAM:- A. B. WALL, I. L. KUTIGI, M. E. OGUNDARE,**  
**U. MOHAMMED, A. I. IGUH, JJSC.**

JOSEPH IBIDAPO ..... APPELLANT  
AND  
LUFTHANSA AIRLINES ..... RESPONDENT

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**ACTIONS** - *Limitation of actions - Statute bar - Whether appellant's action is caught by the two year limitation period.*

**CONSTITUTIONAL LAW** - *Existing law s. 274(1) of the 1979 Constitution - 1953 Order that made the Warsaw Convention part of our existing law - Still subsists.*

**INTERNATIONAL LAW** - *Warsaw Convention - Whether Nigeria is a party to the Convention.*

**INTERNATIONAL LAW** - *Carriage by air Order 1953 - Made while Nigeria was a British Colony - Whether the Order is an existing and applicable law in Nigeria.*

**INTERNATIONAL LAW** - *Implied repeal - An important international Warsaw Convention - That Nigeria is still taking advantage of - Cannot be said to be impliedly repealed.*

**INTERNATIONAL LAW** - *Adherence - International agreements - That are not in conflict with our fundamental law - Shall continue to be enforced in Nigeria.*

**FACTS**

The plaintiff/appellant before the Lagos High Court, claimed against the defendant/appellant the sum of \$1,785 U.S. Dollars being cost of the plaintiff's lost IBM typewriter. The typewriter in issue was part of plaintiff's baggage in course of his travel from Lagos to Frankfurt Germany on board the defendant's airline which was not delivered by the defendant. The defendant relied on Article 29 (1) of the 1st Annex to the 1st schedule to the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 and moved the trial court to dismiss the action as being statute barred having been caught by

the 2 year limitation period.

The trial court granted the defendant's application and dismissed the action as prayed. Plaintiff's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising a single issue.

**ISSUE FOR DETERMINATION**

*"Whether the Convention for the Unification of certain Rules relating to International Carriage by Air (The Warsaw Convention) is applicable to Nigeria to bar the Appellant's claim and if not, whether the Court of Appeal was not wrong to dismiss the Appellant's appeal."*

**HELD** (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)  
**Whether Nigeria is a party to the Warsaw Convention**

1. The Carriage by Air {Parties to the Convention} Order, 1958, No. 1252 of 1958 made on 30th July, 1958, made by extension, Nigeria a Party to the Warsaw Convention. See Part 1 of the Schedule to the Carriage by Air [Parties to Convention] Order No. 1252 of 1958 (which was printed as amended, by Carriage by Air [Parties to Convention] (No. 2) Order-in-Council) 1958. (p. 748 G)

**Carriage by Air Order 1953**

2. The provision of the sub-section (*supra*) read together with the devolution agreements between the United Kingdom and the Government of the Federation of Nigeria, saved and made the 1953 Order as an existing and applicable Law in Nigeria on October 1, 1960. The 1963 Republican Constitution made similar saving provision in subsection 1 of Section 156 under the subtitle of "adaptation of existing law. (p. 749 C)

**Existing law s. 274(1) of the 1979 Constitution**

3. The 1979 Constitution [now as amended] is the one that is still in force. So from 1960 to date, all the received English Laws, Multi-lateral and bilateral agreements concluded and extended to Nigeria, unless expressly repealed or declared invalid by a court of law or tribunal established by law, remain in force subject to the provisions of s. 274(1) of the 1979 Constitution. The 1953 Order making the Warsaw Convention as part of the existing law still subsists, since it has neither been repealed nor declared invalid. (p. 749 H)

**International law - Implied repeal**

4. I have not been able to find any legislation that repealed the 1953 Order or any court decision that has declared it illegal, irrelevant or obsolete. An important international convention like the Warsaw convention cannot be said to be impliedly repealed when this country is still taking advantage of its

provisions and has not promulgated similar enactment to replace it. The convention is so important to this country both domestically and internationally to be avoided. A vacuum of such magnitude cannot be tolerated in our legal system. It is a notorious fact that all Air travelling tickets, whether domestic or international contain notices alluding to the provisions of the Warsaw Convention being referred to in this case as the 1953 Order. The 1953 Order can certainly be taken judicial notice of under section 74(1)(a) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990. (p. 750 H)

### **Adherence - International agreements**

5. Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found to be not over-ridden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both the multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law. (p. 751 C)

### **Limitation of actions**

6. The decisions of the lower courts declaring the action filed by the appellant as being caught up by article 29(1) of the Carriage by Air [Colonies protectorates and Territories] Order, 1953 to wit two-year limitation period from the date the cause of action arose as barring the appellant's action is hereby affirmed. (p. 751 E)

### **REPRESENTATION**

Olisa Agbakoba for the appellant

Chief Olusiji a Soetan for the Respondent

### **CASES REFERRED TO**

A. G. Canada v. A.G.A. Ontario (1937) AC 326

A.R.C.A. v. Fantaye (1986) 3 NWLR (pt. 32) 811 at 818

Osafire v. Odili (No. 1) (1990) 3 NWLR (Pt. 137) 130 at 161

Toriola v. Williams (1982) 7 SC 27 at 47

Raleigh Industries Nig Ltd v. Nwaiwu (1994) 4 NWLR (Pt. 341) 760 at 771 (CA)

Olu of Warri v. Kperegbeyi (1994) 4 NWLR (339) 416.

Attorney-General v. Lamplough (1878) 3 Ex. D. 214 at 229

Board of Customs and Excise v. Barau (1982) 10 S.C. 48 at 128 and 172

The Governor of Kaduna State v. Kagoma (1982) 6 S.C. 87 at 106  
Uwaifo v. A.G of Bendel State (1982) 7 S.C. 124 at 191

**STATUTES REFERRED TO**

Constitution of Nigeria 1979 s. 274  
Revised Edition (LFN) Decree 1990 s. 3 (1) & (2)  
Nigeria (Constitution) Order-in-Council 1960 s. 1(3) & (7)  
Evidence Act s. 74(1) (a)  
Carriage by air Act 1932 ss. 1, 2  
Carriage by Air (Colonies Protectorates & Trust Territories) Order 1953

**LEAD JUDGMENT BY WALLI JSC**

By a Writ of Summons filed in the Lagos High Court, the plaintiff Mr. Joseph Ibidapo claims against the defendant, Lufthansa Airlines as follows:-

*"The Plaintiff's claim is for:- negligence in the care and custody of plaintiff's baggage containing an IBM typewriter delivered to the defendant at Lagos for delivery in Frankfurt-Germany but which said baggage remains undelivered despite repeated demands. The plaintiff also claims in the alternative against the defendant as bailees for reward for nondelivery of their baggage and in the further alternative on contract. The plaintiff also claim damages for loss of use of his typewriter."*

Parties filed and exchanged pleadings in which issues were joined. The most relevant of the plaintiff's Statement of Claim are paragraphs 13 - 18 which I reproduce hereunder:-

*13. The defendant was at all material times under a duty as a bailee for reward to re-deliver the plaintiff's baggage and despite repeated demands the defendant, has failed to deliver the plaintiff's baggage in Germany or at all. The plaintiff will at the trial rely on the defendant's letters to establish non-delivery.*

**PARTICULARS OF BREACH OF DUTY AS BAILEES FOR REWARD**

*The defendant having possession of the plaintiff's typewriter as bailee for reward failed to exercise reasonable care while in custody of the plaintiff's baggage by failing to put same on board its flight to Germany.*

*14. Further and in the alternative, the defendant was under a contractual obligation to redeliver the plaintiff's baggage but has failed to do so despite repeated demands. (At the trial of this action the plaintiff shall refer to and rely on his passenger airticket and baggage tags for their full terms and effect.)*

**PARTICULARS OF BREACH OF CONTRACT**

*Securely by charging a rate and accepting the plaintiff's baggage for car-*

*riage and delivery the defendant undertook to safely and securely carry the plaintiff's baggage between Lagos and Frankfurt and to redeliver same on demand. Despite repeated demands by the plaintiff the defendant has failed to re-deliver the plaintiff's baggage.*

15. *The plaintiff will contend at the trial that the defendant was a common carrier of the plaintiff's baggage and the defendant is guilty of a breach of it's duty as such common carrier/*

PARTICULARS OF SPECIAL DAMAGE

1. *\$1,785 U.S. Dollars being cost of the typewriter purchased in the United States.*

2. *The equivalent prevailing cost of the IBM typewriter in Nigeria.*  
3. *In the alternative the plaintiff demands a replacement of his typewriter.*

PARTICULARS OF BREACH OF DUTY AS COMMON CARRIER

i. *The defendant accepted to carry for reward the plaintiff's baggage on it's Lagos flight bound for Frankfurt and to deliver on demand the aforesaid luggage.*

ii. *The defendant as aforesaid failed to deliver said Luggage in Frankfurt or at all.*

16. *Further and in the second alternative the plaintiff contend that the defendant was negligent in the care and custody of the plaintiff's Luggage which negligence resulted in the loss and or non-delivery/mis-delivery of the aforesaid luggage.*

17. *The plaintiff will contend at the trial that the defendant owed them a duty of care which duty was breached by the defendant by reason of non-delivery of the plaintiff's baggage.*

PARTICULARS OF NEGLIGENCE

i. *The defendant took possession of the plaintiff's baggage in Lagos for re-delivery in Frankfurt but failed to do same.*

ii. *The Defendant failed to supervise the loading process which resulted in the failure of the defendant to load plaintiff's baggage on the aircraft and to take adequate measures required of the defendant to ensure that the baggage was put on board.*

iii. *The defendant failed to exercise due diligence of those concerned in Air transport undertaking to ensure that the plaintiff's baggage was safely and securely stowed.*

iv. *The defendant failed to take measures to prevent the reasonably foreseeable act of stealing which deprived the plaintiff of his property.*

18. *By reason of the diverse matters aforesaid, the plaintiff has suffered loss and sustained damage.*

*And the plaintiff claims damages, interest and cost of this action."*

In paragraphs 7 and 8 of the Statement of Defence the Defendant pleaded thus:

7. *The Defendant will raise an issue that the Plaintiff's action was not brought within 2 years from 17th January, 1987 which was the date when the aircraft, unto which the said baggage allegedly, containing the typewriter was checked, arrived at its destination at Frankfurt, and accordingly the action is barred by virtue of Article 29(1) of the first Annex to the first Schedule to the Carriage by air (Colonies, Protectorates and Trust Territories) Order 1953.*

8. *Further or in the alternative, the Defendant will contend that by reason of the matters aforesaid, the Plaintiff's right to damages herein (if any, which is denied) has been extinguished by virtue of Article 29(1) of the First Annex to the First Schedule to the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953."*

By a motion filed in the High court, the defendant among other prayers D sought, prayed as follows:-

"3. *Setting down for hearing and disposing of the point of law raised in paragraphs 7 and 8 of the Statement of Defence filed in the above suit;*

4. *dismissing the above suit on the ground stated in the 1st schedule to this Motion on Notice.*

5. *In the alternative, dismissing the said action on the grounds set out in the 2nd Schedule to the Motion on Notice."*

For ease of reference and understanding of the issues involved in the Suit, I reproduce below the 1st and 2nd schedules annexed to the Motion F on Notice:

"1st Schedule

(1) *The contract, under which the alleged missing baggage was carried, being one for international carriage by air, is governed exclusively by the provision of the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 as adopted by and applied to Nigeria by the Carriage by air (Colonies, Protectorates and Trust Territories) Order 1953 (Public Notice No. 73 of 1953).*

(2) *Under the said Order, any action must be brought within 2 years reckoned from the date that the aircraft, on which the alleged missing baggage was carried, arrived at its destination.*

(3) *The aircraft which carried the Plaintiff and the alleged missing baggage arrived at its destination, Frankfurt, on 17th January, 1987, but the Plaintiff did not file this action until 21st March, 1989.*

2nd Schedule

*Even if all the facts pleaded in the Statement of Claim were admitted the Plaintiff will not be entitled to any damages as the action was not brought within 2 years reckoned from the date that the aircraft, on which the alleged missing baggage was carried, arrived at its destination in Frankfurt."*

The learned trial Judge after hearing learned counsel's arguments for and against the prayers referred to supra, concluded in his Ruling delivered on 20th December, 1991, as follows:-

*"From the foregoing, the condition precedent that an action should be brought by the plaintiff within two years of the arrival or scheduled arrival of the aircraft at the destination admits of no negotiation between the parties. The defendant/applicants are therefore right to say that this action was not filed within the two-year limitation. The action is therefore statute barred and is dismissed with costs assessed at N200.00."*

Aggrieved by the decision of Segun J, the learned trial judge, the plaintiff appealed to the Court of Appeal on one ground of Appeal from which the following 2 issues were raised in his brief:-

*"1. Whether the Carriage by Air (Colonies, Protectorates, and Trust Territories) Order 1953, which implemented the "Convention for the Unification of Certain rules relating to international Carriage by Air" ("The Warsaw Convention") within the former colony and protectorate of Nigeria, is still relevant to and/or still in force in the Federal Republic of Nigeria, such that it can be regarded as "existing law" within the meaning of Section 274 of the Constitution of the Federal Republic of Nigeria 1979 (as amended).*

*2. If it is found that the aforesaid carriage by air (Colonies, Protectorates and Trust Territories) Order 1953 is no longer relevant to and/or in force in the Federal Republic of Nigeria, whether the aforesaid "Warsaw Convention" can have the force of law in Nigeria in the absence of any other statute enacted by the legislature to implement its provisions within the Federal Republic of Nigeria."*

The defendant on his part formulated one issue in his brief which the learned President of the Court of Appeal rightly said was covered by Issue 2 in the plaintiff's brief.

After a thorough and painstaking consideration of these issues as argued in the briefs filed, the learned President of the Court of Appeal finally concluded as follows:-

*"I agree that the above issues are not in dispute in this appeal. So, with the concession made, and the issues raised in the appeal having been resolved against the appellant, I must come to the inevitable conclusion that*

*this appeal must fail. It is accordingly dismissed. The decision of the lower Court in hereby affirmed. The Respondent is entitled to costs assessed to N500.00."*

Aggrieved by the Court of Appeal decision, the plaintiff has further appealed to this court. Henceforth the plaintiff and the defendant will be referred to in this judgment as the appellant and the respondent respectively. B

In compliance with the Rules of this court the appellant and the respondent filed and exchanged briefs of argument.

In the brief filed by Mr. Agbakoba for the appellant, learned counsel formulated one issue for determination which reads:-

*"Whether the Convention for the Unification of certain Rules relating to International Carriage by Air (The Warsaw Convention) is applicable to Nigeria to bar the Appellant's claim and if not, whether the Court of Appeal was not wrong to dismiss the Appellant's appeal."* C

The respondent also raised two issues in his brief for determination by this court, to wit:- D

*(1) Whether the Imperial Order in Council known as the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 (hereinafter called 'the 1953 Order) automatically ceased to have the force of law in Nigeria on the coming into effect on 1st October 1960 of the Nigeria (Constitution) Order in Council 1960 and was not saved by section 3(1) of the said Order in Council.* E

*(2) If the answer to (1) is 'no', whether the 1953 Order has been repealed."*

The respondent's two issues are subsumed in the single issue formulated by the appellant and for the purpose of determining this appeal, I F shall adopt the appellant's issue.

The facts involved in this case are not seriously in dispute and are as follows:-

The appellant was a passenger on the respondent's passenger aircraft travelling to Frankfurt from Lagos on 16th January, 1982. He checked in G along with his IBM typewriter. On arrival at Frankfurt the next day, the typewriter was missing and he promptly lodged complaint with the respondent which promised to do every thing possible to locate the missing typewriter. When the effort proved abortive, the respondent informed the appellant and offered to pay 749 Deutsche Marks as compensation. The appellant refused H the offer made by the respondent and filed the present action against the latter for negligence, and claiming for damages, interest and cost of this action.

It was the contention of Mr. Agbakoba learned counsel for the appellant that the provisions of Sections 1 and 2 of the Carriage by Air Act 1932,

were extended to the colony and protectorate of Nigeria by the Order-in-council Order, 1953 and that on 1st October, 1960 when Nigeria became a sovereign state, the Carriage by Air (Colonies Protectorates & Trust Territories) Order 1953 became irrelevant and ceased to apply in Nigeria, having spent its purpose. Learned counsel emphasized his submission for its non-applicability by referring to the Revised Edition (Authorized Omissions) Order 1990 and the Revised Edition (Laws of the Federation of Nigeria) Act 1990 which omitted in Item 6 of Part 11 of Schedule 1 to the order, the Carriage by Air (Colonies Protectorates and Trust Territories) order 1953.

Learned Counsel referred to s. 3(2) of the Revised Edition (Laws of the Federation of Nigeria) Decree 1990 and said:-

*"Where however, as in the instant case, an enactment is omitted on the ground that it is" no longer relevant to Nigeria S. 3(2) of the Revised Edition (Etc) Act 1990 cannot preserve its force or validity beyond the moment its relevance ceased. The relevance of the Carriage by Air (Colonies Protectorates, and Trust Territories) Order, 1953, ceased with effect from October 1, 1960 when Nigeria relinquished its status as a colony, protectorate and trust territory."*

Learned counsel therefore urged this court to hold that the Order ceased to have any effect or validity in Nigeria as it was not saved or preserved by S. 274 of the 1979 Constitution, as an existing law.

On the Warsaw Convention, it was the submission of learned counsel that notwithstanding the declaration made by the government of Nigeria on attaining independence from the government of United Kingdom on conventions and Treaties, because of the dual nature of treaty making in Nigeria, all that the declaration could have achieved was a declaration of intent. He submitted that for the treaties and the conventions to have the effect and force of law in Nigeria legislative action was still required, and that there was no such legislative act similar to the executive declaration of 1960 to make the Warsaw Convention applicable in Nigeria. He forcefully contended that the Warsaw convention never applied to Nigeria in the first place and that all that applied was the Carriage by Air Act of the United Kingdom which applied by virtue of the 1953 Order-in-Council. It was also his contention that the fact that the Warsaw Convention is not included in a compilation of Treaties and international conventions in force in Nigeria by the Federal Ministry of Justice goes to strengthen his case that it is not applicable and therefore the appellant's action was not statute barred by Article 29(1) of the convention. He cited and relied on the following cases to buttress his submissions; A. G. Canada v. A.G. Ontario (1937) AC 326; The Parliament Belge (1879) 4 P.D. 129 and A.R.C. v. Abate Fantaye (1986) 3 NWLR (Pt. 32) 811 at 818. Learned

counsel summarized his arguments and submissions in his brief as follows:-

"(1) *The Carriage by air (Colonies, Protectorates, and Trust Territories) Order, 1953, was an imperial legislation enacted to implement the provisions of Carriage by Air Act of the United Kingdom and not the provisions of what is commonly referred to as the Warsaw Convention.*

(2) *The Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 is obsolescent and in its absence there is no other statute in Nigeria to implement the provisions of the Warsaw Convention.*

(3) *By virtue of the recognized duality between "treaty making" (as an executive function), and "treaty implementation" (as a legislative function), the Warsaw Convention never had force of law in Nigeria, notwithstanding that Nigeria, upon independence, declared itself bound by the obligations of the United kingdom for treaties extended to Nigeria.*

(4) *The Warsaw Convention was never extended to Nigeria. Rather it was the English Carriage by Air Act that was extended so that the declaration of 1960 would not apply in any event.*

(5) *The result is that the Warsaw Convention aforesaid, and particularly Article 29 thereof, cannot operate to affect the rights of the Appellant in the present case, and therefore cannot abridge the six year limitation period (provided under municipal law) within which the Plaintiff can institute a claim for loss of goods.*

(6) *Finally, we submit that for the reasons stated above, the Court of Appeal was wrong to regard the 1953 Order as existing law within the meaning of section 274 of the Constitution."*

He urged the court to allow the appeal and hold that the case is not statute barred and to remit the same to the High Court for determination on the merits.

In answer to submissions of learned counsel to appellant, learned counsel for the respondent submitted that the Warsaw Convention which formed the First Schedule to the 1953 Order though a treaty on its own did not require any further Act of the Federal Legislature to make it applicable to Nigeria from 1st October, 1960. Learned counsel argued that it was clear from the first Schedule to the Order that the convention shall have the force of law in Nigeria as extended to it by the Carriage by Air Act 1932. He referred to paragraph 7.2 at p.6 of the appellant's brief where he said learned counsel for the appellant expressed the same view. He submitted that the 1953 Order was, by virtue of S. 3(1) and (7) of the Nigeria Constitution Order-in-Council 1960 by which Nigeria became an independent state, made part of the existing laws. He argued that both the 1963 and 1979 Constitutions contained similar saving provisions of the existing laws. Learned counsel contended that, whether

viewed from the standpoint of the legislative history of the matter in the United Kingdom prior to 1st October 1960 or from the standpoint of the preservation in existence of the inherited legislation by Nigerian legislative and constitutional process, the 1953 Order remains in force to this day and must be deemed to be an Act of the National Assembly made under Item 3 of the B Exclusive legislative List contained in Cap. 64 of the Revised Edition of the Laws of the Federation of Nigeria 1990. He contended that the omission of the 1953 Order from the revised edition of the Laws of the Federation of Nigeria 1990, did not affect its enforcement and validity as an existing law since by virtue of s. 3(2) of the Revised Edition (Laws of the Federation) Act, 1990, the C 1953 Order was saved. It cannot also be implied to have been repealed. Learned counsel cited and relied on the following cases in support of his submissions - Osafire v. Odili (No. 1) (1990) 3 NWLR (pt. 137) 130 at 161; Ogunmade v. Fadayiro (1972) All NLR (New Edition) 670 at 678; Mobil Oil (Nigeria) Ltd. v. Federal Board of Inland Revenue (1977) 3 SC 53; Toriola v. Williams (1982) 7 SC D 27 at 47; Kanada v. Governor of Kaduna State (1986) 4 NWLR (Pt. 35) 361 at 364; Governor of Kaduna State v. Kagoma (1982) 6 SC 87 at 106; Kaleigh Industries (Nig) Ltd. v. Nwaiwu (1994) 4 NWLR (Pt. 341) 760 at 771 (CA); Uwaifo v. A.G Bendel State (1982) 7 SC 124 at 191 and Olu of warri v. Kperegbeyi (1994) 4 NWLR (339) 416. In addition, learned counsel referred to the following text books on interpretation of statutes: Craies on statute Law (7th Edition) and Odgers' Construction of Deeds and Statutes (5th edition).

He also like learned counsel for the appellant, summarized his submissions as follows:-

"(1) *The 1953 Order, as an Imperial Legislation, was in force in F dependent Nigeria and formed part of the law of the country.*

(2) *The "Warsaw Convention" is set out in a Schedule to the 1953 Order and being part of the enactment, was itself an existing law within the meaning of that expression in section 3 of the 1960 Order.*

(3) *The 1953 Order was an existing law preserved in operation by G section 3(1) of the 1960 Order and was transformed by the 1960 Order.*

(4) *The 1953 Order as transformed by the 1960 order was in turn existing law under section 274 of the Constitution of the Federal Republic, 1979, and has never been repealed by the competent Nigeria legislative authority.*

H (5) *The omission of the 1953 order, as transformed, from the Revised Edition (Laws of the Federation) 1990 does not derogate from the continued validity and effect of the Order."*

He urged this court to dismiss the appeal for want of merit. Learned Counsel submitted that the 1953 Order was, by virtue of s. 1 (3) and (7) of the Nigeria

(Constitution) Order-in-Council, 1960 by which Nigeria became an independent sovereign state made part of the existing laws. He argued that both the 1963 and 1979 Constitutions contained similar provisions to the 1960 Constitution which made the 1953 Order part of the existing laws.

There is no universal rule of state succession to treaties since the intention of High contracting parties must always be taken into account. Historically the former British Colonies had no international status and could not therefore enter into any treaty relations with foreign states. But by 1914 the dependent countries with dominion status i.e. Australia, Canada, New Zealand and South Africa, began concluding certain commercial and technical treaties when it became generally accepted that the British treaties did not automatically devolve on them. They could withdraw from certain commercial treaties. The practice gradually developed of consulting dependent territories in the negotiation of certain commercial and administrative treaties and of inserting colonial application clauses in treaties requiring local legislation by such dependent territories as a condition precedent to the application of such treaties by them. It then became the policy of the metropolitan government to secure by special agreement, the devolution upon its former territories of these rights and obligations arising from treaties and other international agreements contracted for or applied to them. A state could be deemed ipso facto a High contracting party on the ground of it formerly being part of a state that ratified or adhered to the treaty or convention.

By 1945, it has become the general policy of the imperial government to secure by special agreements with its former dependent territories, be they colonies or protectorates, the devolution upon them of these rights and obligations arising from treaties and other international agreements contracted for or applied to them. In the case of Nigeria, by exchange of letters between the United Kingdom and the government of Nigeria on October 1st, 1960, the Nigeria government confirmed and agreed that:-

1. *All obligations and responsibilities of the government of the United Kingdom which arise from any valid international instrument are from October 1st 1960 assumed by the Government of the Federation of Nigeria in so far as such instruments may be held to have application to or in respect of the Federation of Nigeria.*

2. *The rights and benefit heretofore enjoyed by the Government of the United Kingdom by virtue of the application of any such international instrument to or in respect of the Federation of Nigeria are from October 1st, 1960, enjoyed by the Government of Nigeria.*

The terms of other devolution agreements are broadly similar to the one supra and appear to have been accepted with equanimity by other inde-

pendent African States of the Commonwealth, thus guaranting the continuity of such multilateral and bilateral agreements by these successor states. It is also worth nothing that devolution or continued adherence is a form of state succession proper and retroactive from the date of independence of the dependent territory.

B The narrow issue for determination in this appeal is whether the Carriage by Air (Colonies, Protectorates and Trust Territories) order 1953, is still an existing law by virtue of which the Warsaw Convention is still applicable to Nigeria and binding on the parties to the transaction in this case.

Learned counsel for the appellant conceded that the United Kingdom had power to legislate for Nigeria when the latter formed part of its dependent territories. Learned counsel said thus in his brief of argument:

"As the treaty practice of the United Kingdom of Great Britain and Northern Ireland was based on the duality doctrine, the Warsaw Convention signed on October 12, 1929, did not have legal force within the United Kingdom until Parliament passed legislation to implement it. This was done by virtue of the Carriage by Air Act, 1932 [22 and 23 Geo 5 Cap 36], the long title of which reads: "An Act to give effect to a Convention for the Unification of Certain Rules Relating to International Carriage by Air .....". By this time, Nigeria then comprised a colony and protectorate under the authority of the United Kingdom of Great Britain and Northern Ireland ..... Accordingly the provisions of the Warsaw Convention did not have force of law within the colony and protectorate of Nigeria except through the mechanism of its former colonial master, the United Kingdom. The procedure adopted was to extend the provisions of Sections 1 and 2 of the Carriage by Air Act, 1932, to the colony protectorate of Nigeria by use of an Imperial Order-in-council, viz the 1953. Order. (See paragraph 2 of Preamble to the 1953 Order at Vol. xi Laws of the Federation 1958 page 618 and Sections 1 and 2 of the 1st Schedule thereto at p. 620)".

But his main contention is that from October, 1960 when Nigeria became a sovereign state, the 1953 Order ceased to have retroactive effect as there was no further legislation by Parliament to make it effective. He argued that as from October 1, 1960, if Nigeria was to succeed to the Warsaw Convention, it would do so in its capacity as a High Contracting Party. He added that he was supported in this view by the Revised Edition [Laws of the Federation of Nigeria] Act, 1990, particularly s. 3(1) of the Act; and that pursuant to the powers conferred upon the Attorney General of the Federation by the provision of sub-section (1) of Section 3 to the Act, the Attorney General Promulgated the Revised Edition (Authorized Omissions) Order, 1990; by virtue of which the Carriage by Air [Colonies Protectorates and Trust Territories] Order

1953, was omitted on ground that it was no longer relevant. It was his further, argument that s. 3(2) of the Revised Edition [ETC] Act, 1990 could not save the 1953 Order since it was omitted from the Schedule to the Revised Edition of the Laws on the ground that it is no longer relevant to Nigeria.

Dealing with this point and other arguments related to it, the learned President of the Court of appeal admirably and exhaustively dealt with it in his lead judgment wherein he said:-

"..... Once an enactment is extended to a Colony or Protectorate by an Order in council, such as the 1953 Order, that enactment to all intents and purposes becomes not only part and parcel of the law of the Colony, but also self-executing and requires no further legislative act to implement its provisions. In other words, that extended enactment made by Order in Council enjoys the same legitimacy and effect as if passed by Parliament. In the circumstances, I hold the view that as at 1st October, 1960, when Nigeria became independent, the 1953 Order remained an "existing law". It could only have ceased to be so, if it had been decreed out of existence by the Constitution of 1960 or repealed by the sovereign legislature. But that was not the case.

On the contrary, Section 3(1) of the Nigeria (Constitution) Order in Council 1960, protected and preserved existing laws as if they were made pursuant to the said Order. Furthermore, it must be noted in passing that section 18 of the Order-in-Council gave to the Parliament of the Federation of Nigeria the power to alter, with the consent of the Governors of the Region, any of its provisions or the 1st Schedule thereto. The first Schedule therein listed out the Orders in Council that have been revoked. The 1953 Order was not one of them.

The 1963 Constitution of the Federation, which repealed the Nigeria Independence Act 1960, and the Nigeria (Constitution) Order in Council 1960, however, still provided for and preserved all existing laws, viz "a rule of law or a provision of an act of Parliament, or of a law made by the Legislature of a Region, or of any other enactment or instrument whatsoever, in force immediately before the date of the Commencement of this Constitution ....."

Vide Section 156(1) of the 1963 Constitution. [Underlining supplied]

It has not been suggested that any of the Constitutions or an Act of the legislature or the Decrees of the Military has repealed the 1953 Order. If anything, Section 274 of the 1979 Constitution of the Federal republic of Nigeria, like the ones before it, preserved and protected all existing laws. Section 274 (4) (b) of the 1979 Constitution reads:-

"Existing law" means any law and includes any law or any enactment or instrument whatsoever which is in force immediately before the date when

*this section comes into force or which having been passed or made before that date comes into force after that date".*

*Earlier on in this judgment, I have tried to show that the mere omission of the 1953 Order from the Revised Edition of the Laws of the Federation does not amount to a repeal of that order or for that matter any omitted enactment.*

- B *The omission authorized to be made, cannot be equated with a repealing clause in an Act. For if the two were to give rise to the same result and effect, it would, in my view, have been unnecessary to have clause 3(2) in the revised Edition of the Act of 1990. Again as I did say before, I have not been shown any legislation expressly repealing the 1953 Order, and I am unable to imply any. I have already held that it is an existing law. So, I agree with the respondent's counsel that where a repeal is intended, it should expressly have been so stated."*

I entirely agree with this sound legal opinion expressed by Akanbi, the learned President of the Court of Appeal.

- D As I have said earlier in this judgment when reviewing the historical developments of the dependent territories to the succession of multilateral treaties extended to them by their colonial masters, particularly the African States, a state could be deemed ipso facto a High Contracting Party to a multilateral treaty extended to it by the legislation of its colonial master on the ground that it was formerly being part of the colonial master state which ratified or adhered to it in its capacity as a High Contracting party. In the case of Nigeria, this was achieved and concluded through exchange of letters between the United Kingdom and the Government of the Federation of Nigeria on October 1, 1960 wherein the two states agreed as follows:-

- F *1. All obligations and responsibilities of the government of the united Kingdom which arise from valid international instrument are from October 1, 1960 assumed by the Government of the Federation of Nigeria in so far as such instruments may be held to have application to or in respect of the Federation of Nigeria.*

- G *2. The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Nigeria are from October 1, 1960 enjoyed by the Government of Nigeria.*

- H **The Carriage by Air {Parties to the Convention} Order, 1958, No. 1252 of 1958 made on 30th July, 1958, made by extension, Nigeria a Party to the Warsaw Convention. See Part 1 of the Schedule to the Carriage by Air [Parties to Convention] Order No. 1252 of 1958 (which was printed as amended, by Carriage by Air) [Parties to Convention] (No. 2) Order-in-Council) 1958 (S. 1958) 2190.**

Although s. 2 of the 1960 Constitution described as the Nigeria [Constitution Order-in-Council, 1960, repealed the Constitution of the Federation of Nigeria set out in the Second Schedule to this Order, subsection (1) to section 3 of the Order provided as follows:-

*"The existing laws shall, notwithstanding the revocation of the Orders specified in the First Schedule to this Order have effect after the commencement of this Order as if they had been made in pursuance of this Order and shall be read and construed with such modifications adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this order."*

**The provision of the sub-section (supra) read together with the devolution C agreements between the United Kingdom and the Government of the Federation of Nigeria, saved and made the 1953 Order as an existing and applicable Law in Nigeria on October 1, 1960. The 1963 Republican Constitution made similar saving provision in subsection 1 of Section 156 under the subtitle of "adaptation of existing law" as follows:-**

*"156(1). All existing laws, that is to say, all laws which, whether being a rule of law or a provision of an act of Parliament or of a Law made by legislature of a Region or of any other enactment or instrument whatsoever, is in force immediately before the date of the commencement of this Constitution or has been passed or made before that date and comes into E force on or after that date, shall, until that law is altered by an authority having power to do so, have effect with such modifications [whether by way of addition, alteration or omission] as may be necessary to bring that law into conformity with this Constitution and the constitution of each Region."*

By 1979 Nigeria has a new Constitution providing for an Executive F President at the Federal level. Subsection (1) of s. 274 of the Constitution of the Federal Republic of Nigeria, 1979 contains the following provision to save the existing law

*"274. (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it G into conformity with this Constitution and shall be deemed to be*

*(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make and;*

*(b) a Law made by a House of Assembly to the extent that it is a law H with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws."*

**The 1979 Constitution [now as amended] is the one that is still in force. So from 1960 to date, all the received English Laws, Multi-lateral and bilateral**

agreements concluded and extended to Nigeria, unless expressly repealed or declared invalid by a court of law or tribunal established by law, remain in force subject to the provisions of s. 274(1) of the 1979 Constitution. The 1953 Order making the Warsaw Convention as part of the existing law still subsists, since it has neither been repealed nor declared invalid. I entirely agree with the learned President of the Court of Appeal in his statement of the legal position to wit:-

*"Clearly, the fact that Nigeria declared itself at independence to be bound by such Treaties, gives support to the contention that existing laws, until perhaps repealed by a legislative enactment, will remain in force even after independence. For there is no doubt that in making such a declaration, it must be present to the mind of the declarant, that Nigeria has a compelling duty (and in its own interest) to observe all international treaties and obligations, extended to it by the British Crown, until it is able to make its own legislations in such matters. Certainly, it will be invidious and a dangerous thing to do, for any government at independence to declare that it will not be bound by international treaties extended to it by law."*

Although s. 3(1) of revised Edition (Laws of the Federation of Nigeria) Act 1990 confers on the Attorney-General of the Federation power to specify by order, a schedule of enactments to be omitted from the revised Edition of the Laws of the Federation of Nigeria, 1990, for reasons that such enactments are:-

- (a) obsolescent; or
  - (b) of temporary nature; or
  - (c) under revision with a view to replacement; or
  - (d) of restricted or personal application;
- subsection (2) of the same section went on to save such omitted enactments by providing that:

*"3(2) Enactments, omitted in accordance with subsection (1) of this Section, shall have the same force and validity as if they had not been omitted in the revised edition."*

Although the 1953 Order was included as item No. 6 in Part 11 of the Schedule 1 to the revised editions of the Laws of the Federation of Nigeria as one of the Imperial Legislations described in the revised Edition [authorized Omission:] order, 1990 as obsolete the s. 3(2) of the Revised Edition [Laws of the Federation of Nigeria] Act, 1990 and from which the Attorney general of the Federation derived his power of promulgating the order, has saved the 1953 Order from being irrelevant or obsolete.

**I have not been able to find any legislation that repealed the 1953 Order or any court decision that has declared it illegal, irrelevant or obso-**

lete. An important international convention like the Warsaw convention cannot be said to be impliedly repealed when this country is still taking advantage of its provisions and has not promulgated similar enactment to replace it. The convention is so important to this country both domestically and internationally to be avoided. A vacuum of such magnitude cannot be tolerated in our legal system. It is a notorious fact that all Air travelling tickets, whether domestic or international contain notices alluding to the provisions of the Warsaw Convention being referred to in this case as the 1953 Order. The 1953 Order can certainly be taken judicial notice of under section 74(1)(a) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990. C

Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found to be not over-ridden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both the multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law. D E

The issue raised and canvassed by the appellant having been resolved against him, the appeal fails and is hereby dismissed.

The decisions of the lower courts declaring the action filed by the appellant as being caught up by article 29(1) of the Carriage by Air [Colonies protectorates and Territories] Order, 1953 to wit two - year limitation period from the date the cause of action arose as barring the appellant's action is hereby affirmed with N1,000.00 costs to the respondent. F

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**KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother Wali J.S.C. I agree with his reasoning and conclusion. The decisions of the lower courts are affirmed and the appeal is dismissed with N1,000.00 costs to the Defendant/Respondent. G

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**OGUNDARE JSC**

The simple question arising for determination in this appeal is whether the Convention for the Unification of Certain Rules Relating to International H

Carriage by Air (The Warsaw Convention) is applicable to Nigeria.

The facts are simple and undisputed. On 16th January 1987 the Plaintiff (who is appellant in this appeal) was a passenger on defendant's aircraft Flight LH 561 from Lagos to Frankfurt. The Plaintiff checked in a baggage containing an IBM typewriter which Plaintiff claimed he bought for B US \$1,785. On arrival at Frankfurt the baggage was missing. Plaintiff lodged a complaint with the Defendant. Efforts by the Defendant to locate the baggage failed and Defendant offered the Plaintiff a compensation of N1,280 for the loss of the baggage. The Plaintiff was unhappy about the offer made to him and communicated his displeasure to the Defendant. The Defendant C made no reply. On 21st March 1989, Plaintiff issued a writ in the High Court of Lagos State. By paragraphs 13 - 18 of his statement of claim he averred as follows:<sup>13</sup>

The Defendant filed a defence to the action in which he pleaded thus:

D       *"2. The Defendant admits that it carried the plaintiff and his baggage on its aircraft Flight LH 561 from Lagos on 16th January 1987 as alleged in paragraphs 4, 5 and 6 of the Statement of Claim and says that the said aircraft arrived at Frankfurt (Germany) on 17th January 1987.*

E       *3. Further to paragraph 2 hereof, the Defendant avers that the said carriage of the Plaintiff and his baggage was 'international carriage' within the meaning of the Carriage by air (Colonies, Protectorates and Trust Territories) Order 1953 (Public Notice No. 73 of 1953) which brought into force in Nigeria the Provisions of the Warsaw Convention for the unification of certain rules relating to international carriage by air 1929, and the Defendant will rely on the relevant provisions of the Convention as well as the uniform 'Conditions of Contract' printed in the flight tickets it issues to its passengers, and the applicable terms of the Conditions of Carriage (Passenger and Baggage) of deutsche Lufthansa for their full effect on all the matters pleaded in the Plaintiff's Statement of Claim.*

G       *4. Save as aforesaid, the Defendant denies each and every allegation of fact contained in the Statement of Claim and puts the Plaintiff to the strictest proof thereof.*

H       *5. The Defendant avers that the alleged loss of the Plaintiff's baggage (which is denied) was occasioned notwithstanding that the Defendant, its servants or agents took all necessary measures to avoid the same, or alternatively it was impossible for the Defendant, its servants or agents to take such measures to avoid the same.*

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<sup>13</sup> See p. 737 E for the paragraphs

6. *The defendant avers and will contend at the trial that even if the liability of the Defendant is established (which is denied) the liability is limited.*

7. *The defendant will raise an issue that the Plaintiff's action was not brought within 2 years from 17th January 1987 which was the date when the aircraft, unto which the said baggage allegedly containing the typewriter was checked, arrived at its destination at Frankfurt, and accordingly the action is barred by virtue of Article 29(1) of the First Annex to the First Schedule to the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953.*

8. *Further or in the alternative, the Defendant will contend that by reason of the matters aforesaid, the Plaintiff's right to damages herein (if any, which is denied) has been extinguished by virtue of Article 29(1) of the First Annex to the first Schedule of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953."*

By an application filed on 16th August 1989, the Defendant sought to have the action dismissed in limine for the reason pleaded in paragraphs 7 and 8 of the statement of defence.

The application came up for hearing and, in a ruling delivered on 20th December 1991, segun J. found:-

*"The plaintiff/respondent filed his Writ of summons two years and two months after the aircraft arrived at its destination in Frankfurt. The applicable law is the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953. This law introduces the Warsaw Convention for the unification of certain rules relating to international carriage by air (See volume 11 Laws of the Federation 1958 page 618). This Order is an existing law under Section 274 of the Constitution of the Federal Republic of Nigeria 1979.*

*By Articles 24 (1) and 29(1) of the Warsaw Convention (See Laws of the Federation 1958, Volume 11 pages 628 and 629), action should be instituted within two years. Article 29 provides:*

*(1) 'The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.'*

*As the Warsaw Convention fixes its own limitation period, the Limitation Law of Lagos State Cap. 70, Laws of Lagos State 1973 would not apply."* and adjudged:

*"From the foregoing, the condition precedent that an action should be brought by the plaintiff within the two years of the arrival or scheduled*

*arrival of the aircraft at the destination admits of no negotiation between the parties. The defendant/applicants are therefore right to say that this action was not filed within the two year limitation. The action is therefore statute-barred and is dismissed with costs assessed at N200.00."*

The Plaintiff was displeased with this decision and appealed to the B Court of Appeal contending that the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 (hereinafter is referred to as the 1953 Order) which applied the Warsaw Convention to British Colonies, including Nigeria, was no longer relevant to the Federal Republic of Nigeria on the latter attaining independent status on 1st October 1960 and by virtue of Schedule 1 Part C II of the Revised Edition (Authorized Omissions) Order 1990 made pursuant to Section 3 of the Revised Edition (Laws of the Federation of Nigeria) Decree No. 21 of 1990. The court of Appeal rejected this contention. In his lead judgment (with which the other Justices agreed) Akanbi, PCA said:

*"It appears to me that running right through the submissions of D appellant's counsel are certain persuasive misconception and/or assumptions as regards the powers of the United Kingdom Government to legislate for or extend its enactments to BRITISH Colonies and Protectorates. The basic assumption was that since the Warsaw Convention was made applicable to the Colony and Protectorate of Nigeria by a mere imperial Legislation that is the 1953 order, it ceased as noted before to have any legal E validity when Nigeria became an independent nation: for unlike Britain, there has not been and indeed there could not have been a Treaty implementation enactment to give the Convention an all time legal force.*

*I think I am right in saying that the competence of the British Parliam F liament to legislate for the overseas dependence of the Crown has never been in any serious doubt, Madzimbamuto v. Lardner - Burke (1969) 1 A.C. 645 at 722; (1968) 3 ALL ER 561 at 572. Similarly, there can be no doubt that in the case of conquered or ceded Colonies, Protectorates and Trust Territories, the Crown also has power to legislate by Order in council for G any of them. This power to legislate by Order in Council is established by the Foreign Jurisdiction Acts 1890 and 1913. See also Section 5 of the Colonial Laws validity Act 1865. What is more, it is correct to say that such Orders in Council when made under the Acts have effect as if enacted by the acts themselves."*

H After quoting a passage from Halsbury's Laws of England 4th Edition vol. 6 paragraph 1200, the learned President of the Court of Appeal went on to say:

*"It follows from the above in my view, that once an enactment is extended to a Colony or Protectorate by an Order in council, such as the 1953 Order, that enactment to all intents and purposes becomes not only*

*part and parcel of the law of the Colony, but also self-executing and requires no further legislative act to implement its provisions. In other words, the extended enactment made by order in Council enjoys the same legitimacy and effect as if passed by Parliament. In the circumstances, I hold the view that as at 1st October, 1960, when Nigeria became independent, the 1953 Order remained an 'existing law.' It could only have ceased to be so, if it had been decreed out of existence by the Constitution of 1960 or repealed by the sovereign legislature. But that was not the case.*

*On the contrary, Section 3(1) of the Nigeria (Constitution) Order in Council 1960, protected and preserved existing laws as if they were made pursuant to the said Order. Furthermore, it must be noted in passing that section 18 of the Order-in-Council gave to the Parliament of the Federation of Nigeria the power to alter, with the consent of the Governors of the Region, any of its provisions or the 1st Schedule thereto. The first Schedule therein listed out the Orders in Council that have been revoked. The 1953 Order was not one of them.*

*The 1963 Constitution of the Federation, which repealed the Nigeria Independence Act 1960, and the Nigeria (Constitution) Order in Council 1960, however, still provided for and preserved all existing laws, viz 'a rule of law or a provision of an Act of Parliament, or of a law made by the Legislature of a Region, or of any other enactment or instrument whatsoever, in force immediately before the date of the Commencement of this Constitution. ....' vide Section 156(1) of the 1963 Constitution.*

*It has not been suggested that any of the Constitutions or an Act of the legislature or the Decrees of the Military that repealed the 1953 Order. If anything, Section 274 of the 1979 constitution of the Federal Republic of Nigeria, like the ones before it, preserved and protected all existing laws." The learned President also held that the mere omission of the 1953 Order from the 1990 Revised Edition of the Laws of the Federation did not amount to a repeal of that Order or any other omitted enactment.*

On the question whether the 1953 Imperial Order-in-Council was spent, Akanbi P.C.A. observed:

*"But the argument has also been pressed that the continued existence of the 1953 Order is 'antithetical' to Nigeria's status as a subject of international law, and therefore with effect from 1st October 1960, the Order became 'spent' and no longer had the force of law. This appears to me to be one of those assumptions made by Appellant's counsel. But first let me state my understanding of the submission and it is that the newly acquired independence status of Nigeria automatically 'killed' or repealed the 1953 Order and so it became extinct. From a nationalistic point of view, the argu-*

ment sounds attractive and captivating, but the fact of our history as a former colony (which cannot be wished away) is that the British Crown had the competence, as stated before, to legislate for the Colony of Nigeria, and that was done in this case by an Imperial Order in Council, which extended the 1953 Order to Nigeria. If however, after independence the Order is found to be obnoxious, or incompatible with our new status, as an Independent sovereign nation, the appropriate thing to do, is to expressly repeal it by an Act of the sovereign legislature."

The learned President of the Court of Appeal concluded thus:

".....from the analysis and exposition I have made above, I am bound to hold that the 1953 Order which extended or applied the provisions of the Warsaw Convention to Nigeria is still a valid enactment; and has the force of law in this country."

The appeal to the court of Appeal was consequently dismissed. And the Plaintiff, still aggrieved, has now further appealed to this Court upon the following grounds of appeal:

"1. The learned Justices of the Court of appeal erred in law in deciding that the Carriage by Air (Colonies, Protectorate and Trust Territories) Order 1953 (The Warsaw Convention) is an existing Law within the meaning of section 274 of 1979 Constitution and therefore the Appellant's claim was barred by the limitation clause in the Convention.

PARTICULARS

(i) The Carriage by Air (Colonies, Protectorate and Trust Territories) Order 1953, not being an imperial statute of general application is inconsistent and wholly inapplicable to Nigeria, as a Sovereign State.

(ii) The sovereign state of Nigeria is not a High contracting party to the Warsaw Convention which the order of 1953 sought to implement in the then colony of Nigeria and the ratification and implementation of the convention by the imperial government of Great Britain and its extension to then colony of Nigeria could not at independence enure for the sovereign republic of Nigeria.

(iii) Nigeria, upon independence became subject of international law but has not ratified the Warsaw Convention, nor is it a High contracting party capable of implementing the convention.

2. The learned Justices of the Court of Appeal erred in law, when they held that the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 remains in force in Nigeria by virtue of section 3(1) of the Nigeria (Constitution) Order-in-Council 1960 which preserved pre-independence laws in the sovereign Nigeria, and that in absence of an express repeal, the 1953 order is an existing law within the meaning of section 274

of 1979 Constitution.

PARTICULARS

(i) Section 3(1) of Nigeria (Constitution) order-in-council 1960 could not protect and preserve a law which was no longer applicable and enforceable in Nigeria at independence.

(ii) Even if pre-independence laws and imperial statutes were preserved in the independent Nigeria, statutes such as the 1953 order, which extended the implementation of an international treaty ratified by great Britain to its colony in Nigeria cannot be enforced in sovereign Nigeria.

(iii) a law inconsistent and inapplicable within the Constitutional framework of Nigeria as a sovereign state is not an existing law whether or not the law was subject of express repeal or not."

Pursuant to the rules of this Court, the parties filed and exchanged their respective written briefs of argument. In the Appellant's Brief, Plaintiff sets out the following question as calling for determination in this appeal:

*"Whether the Convention for the Unification of certain Rules Relating to International Carriage by Air (The Warsaw Convention) is applicable to Nigeria to bar the Appellant's claim and if not, whether the Court of Appeal was not wrong to dismiss the Appellant's appeal."*

The Defendant, in its brief, split this lone question into 2, thus:

*"(1) whether the Imperial Order in Council known as the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953 (hereinafter called 'the 1953 Order') automatically ceased to have the force of law in Nigeria on the coming into effect on 1st October 1960 of the Nigeria (Constitution) Order in Council 1960 and was not saved by section 3(1) of the said Order in Council."*

*(2) If the answer to (1) is 'no', whether the 1953 Order has been repealed."*

I do not think there is much difference in the issues as formulated in the two briefs.

Both in their respective briefs and in oral arguments learned counsel for the parties have advanced in this Court the same legal argument proffered in the Court below.

The sum total of the submissions of Mr. Agbakoba, for the Plaintiff is not the Warsaw Convention is not an existing law in Nigeria because (i) there was no proper legislation ever enacted to domesticate it and make it applicable to Nigeria; (ii) the 1953 Imperial Order-in-Council did not domesticate the Convention and (ii) even if the 1953 Order is in force, it cannot be the basis for the application of the Convention to Nigeria as local legislation in that the 1953 Order merely implements the Carriage by Air Act 1932 of the United Kingdom

and not the Warsaw Convention which is an international treaty of High Contracting Parties excluding Nigeria. Learned counsel further submits that an international treaty is only enforceable in Nigeria after local legislation is passed to domesticate it. It is his argument that there has not been any legislation implementing the provisions of the Warsaw Convention in Nigeria.

B He relies heavily for his submissions on the omission of the 1953 Order-in-Council from the 1990 Revised Edition of the Laws of the Federation on the ground that it was "no longer relevant to Nigeria."

Chief Soetan, for the Defendant submits, both in his brief and in oral argument, that the 1953 Order-in-Council, as an Imperial legislation, was in force in dependent Nigeria and formed part of the laws of the country. He submits also that the Warsaw Convention is a Schedule to the 1953 Order and being part of the enactment, was itself an existing law within the meaning of that expression in section 3 of the Nigeria (Constitution) Order-in-Council, 1960. Learned counsel submits that the 1953 Order has never been repealed D by the Nigerian legislature and, therefore, is an existing law under section 274(1) of the constitution of the Federal Republic 1979. He argues that the omission of the 1953 Order from the Revised Edition of the 1990 Laws of the Federation does not derogate from the continued validity and effect of the Order.

E I have given careful consideration to the submissions of learned counsel for the parties. The answers to the various submissions of Mr. Agbakoba have been adequately given by Akambi PCA in the excerpts of his judgment I have set out earlier in this judgment, with which excerpts I am in full agreement. I do not think it is seriously contended in this appeal that the F British Crown could not legislate by order-in council for any colony, protectorate or trust territory under the Crown. The Foreign Jurisdiction Acts 1890 and 1913 and the Colonial Laws Validity Act 1865 gave this power to the Crown.

Now, pursuant to this power, the Crown, in 1953, promulgated The G Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953. Section 3 of the Order, extended the provisions of sections 1 and 2 of the Carriage by air Act 1932 of the United Kingdom (subject to adaptation and modifications set forth in the First Schedule to the Order) to the British Colonies, protectorates and trust territories listed in the Second Schedule. Nigeria H is one of such colonies, etc. The provisions of the Warsaw Convention are set out in the first annex to the First Schedule to the Order. True enough, because she saw not subject of international law at the time, Nigeria was not a High Contracting Party to the Convention. But by virtue of the Carriage by Air (Parties to Convention) Order 1958 (hereinafter referred to as the 1958

Order) made by the Crown, the United Kingdom of Great Britain and Northern Ireland was a High Contracting Party to the Convention, for and on behalf of a number of counties, including Nigeria, listed in part 1 of the Schedule to the Order. The effect of these two Orders was to make the Warsaw Convention applicable to Nigeria and to make that country, through its principal, the United Kingdom, a party to the Convention. By the 1953 Order sections 1 and 2 of the Carriage by air Act, 1932 of the United Kingdom became a part of the municipal law of Nigeria. Sections 1 to 3 of the Act provided:

*"1. Provisions of convention to have force of law:-*

*(1) As from such day as His Majesty may by Order in Council certify to be the day on which the Convention comes into force as regards the United Kingdom, the provisions thereof as set out in the First Schedule to this Act shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons and subject to the provisions of this section, have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage.*

*(2) His Majesty may by Order in council from time to time certify who are the High contracting Parties to the Convention, in respect of what territories they are respectively parties and to what extent they have availed themselves of the provisions of the Additional Protocol to the Convention, and any such order shall, except in so far as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified.*

*(3) Any reference in the said First Schedule to the territory of any High Contracting Party to the Convention shall be construed as a reference to the territories subject to his sovereignty, suzerainty, mandate or authority, in respect of which he is a party.*

*(4) Any liability imposed by Article seventeen of the said First Schedule on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect the death of that passenger either under any statute or at common law, and the provisions set out in the second Schedule to this Act shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced.*

*(5) Any sum in francs mentioned in Article twentytwo of the said First Schedule shall, for the purposes of any action against a carrier, be converted into sterling at the rate of exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the court."*

*(2) Provisions as to actions against High Contracting Parties who*

undertake carriage by air:

Every High Contracting Party to the Convention who has not availed himself of the provisions of the additional Protocol thereto shall, for the purposes of any action brought in a court in the United Kingdom in accordance with the provisions of Article twenty-eight of the said First Schedule to  
B enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that court, and accordingly rules of court may provide for the manner in which any such action is to be commenced and carried on; but nothing in this section shall authorize the issue of execution against the property of any High Contracting Party.

C 3. Application of this Act to colonies, protectorates, etc:- His Majesty may by Order in Council direct that the foregoing provisions of this Act shall extend, subject however to such exceptions, adaptations and modifications, if any, as may be specified in the Order, to all or any of the following territories, that is to say, the Isle of Man, any of the Channel Islands, any  
D colony and any territory which is under His Majesty's protection, or in respect of which a mandate from the League of Nations is being exercised by His Majesty's Government in the United Kingdom.:

The 1953 Order was made pursuant to section 3 above.

This was the position when Nigeria attained independent status on  
E 1st October 1960 and became, in her own right, a subject of international law. The Federal Government of Nigeria promptly made the following declaration:

"(i) all obligations and responsibilities of the government of the United Kingdom which arise from any valid international instruments shall henceforth, in so far as such instruments may be held to have application to  
F Nigeria, be assumed by the Government of the Federation;

(ii) the rights and benefits henceforth enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Nigeria shall henceforth be enjoyed by the Government of the Federation of Nigeria."

G See: United Nations Treaty Series 1961, Vol. 384 at pages 207 - 210. It is submitted by Mr. Agbakoba that this declaration, being an executive act was not sufficient to give to the Warsaw Convention (among treaties declared to be so binding) any force of law until the treaty was enacted into law by the Nigeria Parliament. With respect to learned counsel, this submission loses  
H sight of the fact that by the 1953 Order, the Convention was already part of the municipal law of Nigeria. The Government declaration was no more than a reaffirmation of the binding effect of treaties into which the United Kingdom entered on behalf of Nigeria. Had the declaration been a renunciation of such treaties, it would not affect the applicability of the 1953 Order, and therefore

the Warsaw Convention, until the Nigeria Parliament had repealed it. Section 3(7) of the Nigeria (Constitution) Order in Council 1960 defined "existing law" as meaning:

*"(7) for the purposes of this section 'existing law' mean all Ordinances, Laws, rules, regulations, orders and other instruments having the effect of law made of having effect as if they had been made in pursuance of the Orders in Council revoked by this Order and having effect as part of the law of the Colony and Protectorate of Nigeria or any part thereof immediately before the commencement of this Order."*

This would include the 1953 Order in its ambit. It has not been shown by the Plaintiff that the 1953 Order was at any time repealed before the coming into force of the 1979 constitution. The Order, therefore, forms part of the our existing laws as defined in section 274(1) of that Constitution.

Mr. Agbakoba also argues that as the 1953 Order was omitted from the 1990 Revised Edition of the Laws of the Federation on the ground that it is "no longer relevant to Nigeria," it has ceased to have effect in Nigeria. With respect to learned counsel I have no hesitation in rejecting this submission. Section 3 of the Revised Edition (Laws of the Federation of Nigeria) Decree No. 12 of 1990 provides:

*3.(1) The Attorney-General of the Federation may by order specify a Schedule of enactments which it shall not be necessary for the Committee to include in the revised edition upon the grounds that such enactments are-*

- (a) obsolescent; or*
- (b) of a temporary nature; or*
- (c) under revision with a view to replacement; or*
- (d) of restricted or personal application.*

*(2) Enactments, omitted in accordance with subsection (1) of this section, shall have the same force and validity as if they had not been omitted in the revised edition."*

Pursuant to subsection (1) of section 3, the Attorney-General of the Federation made the Revised Edition (Authorized Omissions) Order 1990, paragraph 1 of which provides:

*"1. It shall not be necessary for the Law Revision Committee to include in the Revised Edition of the Laws of the Federation of Nigeria the following, that is to say -*

*(a) all Imperial enactments or Statutes or subsidiary matters appertaining to them which are no longer relevant to Nigeria as contained in Parts I, II and III of Schedule 1 to this Order;*

*(b) all laws, enactment, Legislation and Subsidiary enactments or any part thereof, specified in Parts I and II of Schedule 2 of this Order."*

The 1953 order and the 1958 Order are items 6 and 7 in Part II of Schedule 1 to the Order. The fact that these two orders are listed in the Attorney-General's Order reinforces the view that they remain existing laws in Nigeria. I venture to say that the validity of paragraph 1(a) is questionable in that section 3(1) of Decree No. 21 of 1990 did not empower the Attorney-General to omit any enactments on the ground that such enactments are "no longer relevant to Nigeria". His power was limited to enactments that are obsolescent or of a temporary nature or under revision with a view to replacement or of restricted or personal application. Whatever view one holds, however, the Decree did not provide that the omission of any enactment meant its repeal. On the contrary, subsection (2) of section 3 of the Decree retains its validity. Thus, both the 1953 Order and the 1958 Order remain in force. That being so the Warsaw Convention remains applicable to Nigeria.

It is not in dispute that Plaintiff arrived Frankfurt on 17th January 1987. If he had any claim against the Defendant he must bring his action within two years of that date - see: article 29(1) of the Warsaw Convention, which provides:

*"(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."*

As Plaintiff did not commence his action until 21st of March 1989, well outside the two-year period laid down in Article 29(1), the two Courts below are right in holding that the Plaintiff's action is barred by the said Article.

It is for the above reasons and other reasons contained in the judgment of my learned brother Wali JSC., a preview of which I had before now, that I too dismiss this appeal and affirm the judgment of the Court below. I abide by the order for costs made by Wali JSC.

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### MOHAMMED JSC

I had a preview of the opinion of my learned brother, Wali, J.S.C., in the judgment just read, and I agree with him that this appeal has failed. I have had the privilege of reading the judgment in draft before now. I agree that the carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, through which the Warsaw Convention was made applicable to the Colony of Nigeria before Independence by an Act of the British Parliament is still applicable to this Country. No legislation had been promulgated expressly repealing the Warsaw Convention as an integral part of the law applicable in this country.

Article 29(1) of the Warsaw Convention provides as follows:-

*"(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the carriage stopped".*

Thus, by virtue of the provisions of Article 29(1) of the Warsaw Convention, reproduced above, the appellant, having failed to sue within two years of his arrival at Frankfurt had been caught up by the limitation provisions in the said convention. In the lead judgment of Wali, J.S.C., all these points have been adequately considered and I have nothing more to add.

I therefore dismiss the appeal and affirm the judgment of the Court below. I abide by the order for costs made in the lead judgment.

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### IGUHJSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Wali, J.S.C. and I agree entirely with the reasoning and conclusion therein.

The narrow issue in this appeal is whether the Imperial Order in Council, to wit, The Carriage by air (Colonies, Protectorates and Trust Territories) Order, 1953, hereinafter called "the 1953 Order", which laid down the rules of the "Warsaw Convention", regulating international carriage by air, applicable to Nigeria, is an existing law such as would govern the transaction of carriage by air between the Appellant and the Respondent in the present appeal.

In this regard, both parties are ad idem that the Warsaw Convention which is contained in the first schedule to the 1953 Order is a treaty law. Being part of the first schedule to the 1953 Order, it forms an integral part of the Order itself. This is so as a schedule in an Act of Parliament is as much an enactment as any other part of such an Act. See Attorney-General v. Lamplough (1878) 3 Ex. D. 214 at 229 and Board of Customs and Excise v. Alhaji Ibrahim Barau (1982) 10 S.C. 48 at 128 and 172

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The competence of the United Kingdom Parliament to legislate for overseas dependencies is not in doubt. Pursuant to the powers conferred by the Carriage by Air Act, 1932, the 1953 Imperial Order in Council was enacted, extending the provisions of that Act with necessary modifications to Nigeria. Consequently, the Warsaw Convention attained the full force of law in the then colony of Nigeria. Accordingly, the 1953 Order, as an Imperial legislation, was in force in and became applicable to dependent Nigeria and formed part of the law of the land. The Warsaw Convention, being a schedule to and part of the 1953 Order as aforesaid became part of the enactment and an existing law

within the meaning of that expression in section 3 of the Nigeria (Constitution) Order in council, 1960. I entirely agree with the court of Appeal, per the leading judgment of Akanbi. P.C.A. with which Ogebe and Ayoola, JJ.C.A. agreed when it observed -

*"It follows from the above, in my view, that once an enactment is extended to a Colony or Protectorate by an Order in Council, such as the 1953 Order, that enactment to all intents and purposes becomes not only part and parcel of the law of the Colony, but also self-executing and requires no further legislative set to implement its provisions. In other words, the extended enactment made by Order in Council enjoys the same legitimacy and effect as if passed by Parliament. In the circumstances, I hold the view that as at 1st October 1960, when Nigeria became independent, the 1953 Order remained an "existing law". It could only have ceased to be so, if it had been declared out of existence by the Constitution of 1960 or repealed by the sovereign legislature. But that was not the case.*

*On the contrary, Section 3(1) of the Nigeria (Constitution) Order in Council 1960, protected and preserved existing laws as if they were made pursuant to the said order. Furthermore, it must be noted in passing that section 18 of the Order-in-Council gave to the Parliament of the Federation of Nigeria the power to alter, with the consent of the Governors of the region, any of its provisions or the 1st Schedule thereto. The first Schedule therein listed out the Orders in council that have been revoked. The 1953 Order was not one of them."*

Learned counsel for the respondent, Chief O. A. Soetan, has submitted that the said 1953 Order on the coming into force of the Nigeria (Constitution) Order in Council 1960, hereinafter called the 1960 Order, had the effect in Nigeria as if it had been made pursuant to the said 1960 Order by virtue of Section 3(1) thereof. I accept this contention as well founded. The 1953 Order upon the attainment of independence in 1960 effectively became part of our laws as if it had been enacted pursuant to the Constitution of the Federation of Nigeria, 1960. In my view, this status of the 1953 Order as an "existing law" has remained unchanged till this day, notwithstanding the constitutional changes of 1963 and 1979. See Section 156(1) of the 1963 Constitution and 274 of the Constitution of the Federal Republic of Nigeria, 1979, both of which saved all existing laws of which the 1953 order was a part and has since remained unrepealed. The Order has remained in force to this day and must be deemed to be an Act of the National assembly made under item 3 of the Exclusive Legislative List. See Cap. 64, Revised Edition of the Laws of the Federation 1990.

Learned counsel for the appellant further submitted that the relevance

of the Carriage by Air (Colonies, Protectorates, and Trust Territories) Order 1953 ceased in Nigeria with effect from 1st October, 1960, when Nigeria relinquished its status as a colony, protectorate and trust territory. He argued that with effect from that date, the 1953 Order ceased to have force or validity within Nigeria's legal framework, and consequently failed to qualify as "existing law" within the meaning of section 274 of the 1979 Constitution, *afortiori* the Warsaw Convention. He referred to section 1 of the Revised Edition (Authorized Omissions) Order Vol. 1., Laws of the Federation of Nigeria, 1990 and pointed out that the 1953 Order is therein shown to be one of the imperial enactments authorized to be omitted from the Revised Edition of the Laws of the Federation on the ground that it was no longer relevant. C

With the greatest respect, although the 1953 Order was omitted from the Revised Edition of the Laws, I am in agreement with Mr. Soetan's submission that by virtue of section 3(2) of the revised Edition (Laws of the Federation) Act 1990, the enactment continued to have effect and retained its validity notwithstanding its omission from the Edition. This is because, the omission in question did not amount to a repeal of the legislation. D

Where it is intended to repeal a legislation this should be expressly so stated as the courts generally lean against implying the repeal of an existing legislation unless there exists clear proof to the contrary. See The Governor of Kaduna State and others v. Lawal Kagoma (1982) 6 S.C. 87 at 106. It is a cardinal principle of the law that statutes are not repealed by inference or implication but by direct provision of law. See Raleigh Industries Ltd. v. Nwaisu (1994) 4 N.W.L.R. (Part 341) 760 771. The court will not imply a repeal unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time. See Uwaifo v. Attorney-General of Bendel State (1982) 7 S.C. 124 at 191, Olu of Warri v. Kperegbeyi (1994) 4 N.W.L.R. (part 339) 416. E

In the present case, it is plain to me that the 1953 Order was at no time repealed, whether expressly or by necessary implication I therefore entertain no doubt that the omission of the Order from the Revised Edition (Laws of the Federation) 1990 does not derogate from its continued validity and effect. G

The conclusion I finally reach is that the Imperial order in Council known as the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, otherwise referred to as the 1953 Order, which laid down the rules of the Warsaw Convention regulating International Carriage by Air applicable to Nigeria did not cease to operate as an existing law on the coming into effect on the 1st October, 1960 of the Nigeria (Constitution) Order in Council 1960. The present action, having been filed more than two years when the cause of action arose, in contravention of Article 29 of the Warsaw Convention which H

formed the first schedule to the 1953 Order, is therefore statute-barred. In my view, the suit was rightly declared to be statute-barred by both the trial court and the court below. It was also properly dismissed.

It is for the above and the more elaborate reasons contained in the leading judgment of my learned brother, Wali, J.S.C. that I, too, dismiss this B appeal. I abide by the order for costs therein made.

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