THE LEGAL FRAMEWORK FOR COMBATING THE CRIME OF SMUGGLING UNDER THE NIGERIAN CUSTOMS AND EXCISE MANAGEMENT ACT

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CERTIFICATION

This is to certify that **OMALE, GODWIN MUSA**, a post graduate student in the Department of Commercial and Property Law and with Registration No. PG/Ph.D/04/37916 has satisfactorily completed this research work for the award of the degree of Doctor of Philosophy in Law of University of Nigeria.

This thesis is original and has not been submitted in part or in full for any other Diploma or Degree of this or other university.

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DEDICATION

I always dedicate whatever I do to the Almighty God. This Thesis is no exemption. I therefore, dedicate it to the ALMIGHTY GOD who is the Alpha and Omega.

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TABLE OF ABBREVIATIONS

AC	Appeal Cases
AG	Attorney General

A.P Moller	Anord Peter Moller
ABUP	Ahmadu Bello University Press
ACG	Assistant Comptroller General
AIR	All Indian Reports
All E.R	All English Reports
AML	Anti Money Laundering
ASYCUDA	Automated System for Customs Data
BOC & E	Board of Customs and Excise
BOOT	Build-Own-Operate and Transfer
BSA	Bank Secrecy Act
CAC	Customs Area Controller
CAMA	Companies and Allied Matters Act
CBMS	Coordinated Border Management Strategy
CBP	Customs and Border Protection
CBOE	California Board of Equalization
CC	Criminal Code
CCCF	Customs Community Consultative Forum
CCI	Clean Certificate of Inspection
CCVO	Combined Certificate of Value and Origin
CEMA	Customs and Excise Management Act
CET	Common External Tariff
CGC	Comptroller General of Customs
CIPB	Customs Immigration and Prisons Board
CMAA	Customs Mutual Assistance Agreement
COPAZ	Co-Prosperity Alliance Zone
CPA	Criminal Procedure Act
CPC	Criminal Procedure Code
CPC	Customs Processing Centre
CRF	Clean Report of Findings
CRI	Clean Report of Inspection
CSER	Corporate Service and Economic Relations

CSI	Container Security Initiative
CTOA	Container Terminal Operators Association
CTR	Currency Transaction Report
D.N	Demand Notice
DCG	Deputy Comptroller General
DI	Destination Inspection
DPR	Department of Petroleum Resources
DRC	Democratic Republic of Congo
DSC	Deputy Superintendent of Customs
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
ERLR	Eastern Region Law Report
ETLS	ECOWAS Trade Liberalization Scheme
F.R.C.R	Federal Revenue Court Reports
FAAN	Federal Airport Authority of Nigeria
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FHCR	Federal High Court Reports
FIRS	Federal Inland Revenue Service
FOB	Free on Board
FOU	Federal Operations Unit
GCEPS	Ghana Customs and Excise and Preventive Service
GDP	Gross Domestic Product
GLR	Ghana Law Reports
GNP	Gross National Product
HMCE	His Majesty Customs and Excise
ICE	Immigration and Customs Enforcement
ICIS	Integrated Container Inspection System
IDR	Import Duty Report

IGP	Inspector General of Police
IMF	International Monetary Fund
IMO	International Maritime Organization
IOM	International Organization for Migration
IPRIO	International Peace Research Institute, Oslo
JCC	Joint Committee on Commerce
JNBP	Joint National Border Patrol
KRA	Kenya Revenue Authority
L.L.R	Lagos Law Reports
L.T	Law Times Report
LDC	Least Developed Country
LRN	Law Reports of Nigeria
MAN	Manufacturers Association of Nigeria
MIBS	Manufacture in Bond Scheme
MLPA	Money Laundering Prohibition Act
MNI	Member National Institute
MOU	Memorandum of Understanding
N.R.N.L.R	Northern Region Nigeria Law Reports
NAGAFF	National Association of Government Approved Freight Forwarders
NAPTIP	National Agency for the Prohibition of Traffic in Persons and Other related Matters
NCMDLCA	National Council of Managing Directors of Licensed Customs Agents
NCS	Nigeria Customs Service
NCSB	Nigeria Customs Service Board
NDIC	Nigeria Deposit Insurance Corporation
NDLEA	National Drug Law Enforcement Agency
NEXIM	Nigerian Export-Import Bank
NICIS	Nigeria Integrated Customs Information System.
NIPSS	National Institute for Policy and Strategic Studies

NNSL	Nigerian National Shipping Line
NPA	Nigeria Ports Authority
NSDUH	National Survey on Drug Use and Health
NTA	Nigeria Television Authority
NUPENG	National Union of Petroleum and Natural Gas Workers Union
NUTGTWN	National Union of Textile, Garment and Tailoring Workers of Nigeria
PC	Penal Code
PCA	Post Clearance Audit
PENGASSAN	Petroleum and National Gas Senior Staff Association of Nigeria
PIDA	Professional Import Duty Administrators
PNDCL	Provisional National Defence Council Law
PSI	Pre-shipment Inspection
PTML	Ports and Terminals Multi-services Limited
PTO	Ports Terminal Operation Ltd.
Q.B	Queens Bench Division
RAR	Risk Assessment Report
RORO	Roll-On Roll-Off
RPM	Radiation Portal Monitors
SAP	Structural Adjustment Programme
SAIC	Science Application International Corporation
SAR	Suspicious Activity Report
SGD	Single Goods Declaration
SSA	Sub-Saharan Africa
TI	Temporary Importation
UK	United Kingdom
US	United States
USA	United States of America
UAC	United Africa Company

UCL	Uncleared Cargo List
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VACIS	Vehicle and Cargo Inspection System
VAT	Value Added Tax
WCO	World Customs Organisation
WEMOA	Franco-Phone West African Economic Group
WRN	Weekly Report of Nigeria
WTO	World Trade Organization

Other Abbreviations:

Ibid.	*Ibidem* (in the same work)
Infra	To be noted after
Op. cit.	*Opera citate* (in the word quoted)
Loc cit.	*Simply Cited*
Ort.	Others
P.	Page
Supra	Above referred to previously
v.	And *or* Against
viz.	That is to say or namely

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ABSTRACT

Smuggling involves the illegal importation or exportation of goods either to evade the correct payment of duty or to undermine government policy on existing prohibition regulations. The major effects of smuggling include huge revenue loss, money laundering, exposure of local industries to unfair competition with their foreign counterparts and insecurity of life and property. The principal legislation for combating smuggling in Nigeria is the Customs and Excise Management Act (CEMA) and the Nigeria Customs Service Board has the duty of controlling and managing the administration of CEMA. The main features of CEMA are the overlapping of offences, use of presumptions, the reversal of the burden of proof, forfeiture of goods and their means of conveyance, compounding of offences, the intriguing prescription of capital punishment for certain categories of smugglers and the limitation of time for the prosecution of offences under the Act. However, the provisions of CEMA, which was enacted since 1958, are largely outdated in terms of concept and punishment and are therefore, inadequate to cope with the sophistication of the new trend of smuggling in Nigeria. Unfortunately, an earlier CEMA Reforms Bill before the National Assembly merely seeks to subject the exercise of Presidential and Ministerial powers, over imports and exports to the approval of the National Assembly. Already the CEMA Reforms Bill now before the National Assembly seeks among others to grant autonomous status to Nigeria Customs Service, prohibits mandatory pre-shipment and post-shipment inspection and to prescribe tougher penalties and sanctions. The Reforms Bill also seeks to encourage the use of consultants and enhance better use of Information Technology. This thesis attempts to highlight the purport and application of CEMA in the light of constitutional developments and thereby expose the inadequacy of the current legislation. The thesis also takes a look at the factors that promote smuggling, examines the control measures and makes a case for a far-reaching appropriate legislative review that would enhance the fight against smuggling in its entire ramifications. The thesis is a product of literature review, comparative analysis of relevant judicial decisions and statutory provisions together with our experience on the job in this area of law.

THE LEGAL FRAMEWORK FOR COMBATING THE CRIME OF SMUGGLING UNDER THE NIGERIAN CUSTOMS AND EXCISE MANAGEMENT ACT

BY:

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The Customs and Excise Management Act (CEMA)[1] was enacted in 1958 under her majesty, Queen Elizabeth II when Sir James Wilson Robertson was the Governor-General and Commander-in-Chief of Nigeria. The Act was enacted to regulate the management and collection of customs and excise duties, and other purposes ancillary thereto, including prescription of penalties for any infringement of the laws.

The CEMA is the principal enactment for combating the crime of smuggling in Nigeria. It should be noted however that some other enactments[2] which govern on some aspect of the crime.

The federal agency of the government in-charge of the administration of the CEMA is the Nigeria Customs Service (NCS), which was formerly referred to as the Department of Customs and Excise. The NCS is regulated

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1 It was later published in Cap. 84, Laws of the Federation of Nigeria (LFN), 1990 and presently in C 45, LFN, 2004.

2 Sections 78, 79 and 87 Criminal Code (CC), Cap. 77 LFN 1990 (now C 38, LFN, 2004), sections 423,424 and 425 Penal Code (PC) (Northern States) Provisions Act, Cap. 345, Vol. XIX, 1990, LFN (now Vol. 13, Cap. P3, LFN, 2004); sections 3 (1)(p), 8 (b) (c), 11(a) and 41 National Drug Law Enforcement Agency Act (NDLEA) Cap. N 30 LFN, 2004 and sections 6(b) and 46 of the Economic and Financial Crimes Commission Act (EFCC), No. 1 of 2004 which repealed the EFCC Act, Cap. E1, LFN, 2004 that was made in 2002.

by CEMA.[3] This Act gives the officers of the NCS the authority to act, and any act not based on it is null and void. The law also prescribes punishment for any breach of its provisions. The Act is amplified by the various customs and excise regulations, which are published as legal notices and orders from time to time. The legal notices in fact seek to interpret the CEMA.

The Act provides for the establishment of a Board of Customs and Excise, which is established, by the Nigeria Customs Service Board Act.[4] The Board is responsible for the administration of the Customs and Excise Management Act.

This chapter is anchored on the fact that the need for a sense of history of any society cannot be over emphasized. The evolution of NCS will enable us fully grasp the dynamism of the agency in recent times, especially *vis-à-vis* its role in the implementation of the CEMA and the other enabling laws made from time to time.

The various kings and rulers of chiefdoms, empires and states of pre-colonial Nigeria took charge of customs matters in their various domains. In 1861, Lagos was annexed by the British and the United African Company (UAC) was established. This company dominated trade and commerce in the Delta areas initially, and before 1891 exercised customs control to ensure that traders not operating under their agencies paid taxes for the

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3 C 45, LFN, 2004.

4 No. 45 of 1992, now in Cap. N 100, LFN, 2004, hereinafter ñNCSB Actò.

services provided them. The UAC later metamorphosed into the Royal Niger Company.[5]

I.E.S Amdii[6] commenting on this further stated that what the Nigeria Customs is today is largely an extension of what the Royal Niger Company in the Mid 19th Century established and incrementally adapted by the Lugardian system.

The NCS is one of the oldest government departments in Nigeria. Its real origin dates back to 1862 when Thomas Tickel, British Vice Consul in Badagry was appointed as Collector of Customs for the new British Colony of Lagos.[7] However, by way of reform in 1891, the Department of Customs Niger Coast Protectorate was created with Mr. T. A. Wall as the Director General. In 1900 a new head, Mr. H. L. Searle was appointed and the designation changed to Collector of Customs and Post Master General. This changed again in 1922 when Mr. F. A. Clinch was appointed as Controller of Customs and Excise Federation of Nigeria. Then the Department was charged with the responsibility of collecting import and export duties and also providing postal services.

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5 I.E.S Amdii and U. Birai, ñThe Department of the Nigeria Customs and Excise: Preliminary Report and Commentò in Report of Senior Officers Seminar for 1990, Department of Customs and Excise, 1991; p. 10.

6 I.E.S Amdii, ñIntroductionò, in *100 Years of the Nigeria Customs and Excise*: 1891 ï 1991, I.E.S Amdii (ed.) (ABUP, Zaria, 1991), p. 1.

7 M. Omale, *Nigeria Customs Service Law and Practice* (Shomolu Lagos, Cinnamon Press International, 2000), p. 1.

In 1933, by virtue of the Excise Duties Ordinance No. 3, new duties were created for the Department, having relinquished its postal services duties.

As the departmentôs evolution continued[8], there was the need to create a para-military arm to curb the activities of smugglers. In view of this, the Customs Preventive Service was formed to police the nationôs borders.

Beginning from Mr. Wallôs era to date, thirty-three (33) officers have headed the Department including Mr. Ogunbemile and Mr. Effanga who acted briefly but were not confirmed. Out of these, nineteen (19) were expatriates. The very first Nigerian head to be appointed in 1964, was Mr. A. Diyan. So far, thirteen Nigerians have headed the Department, including the incumbent, Alhaji Abdullahi, Dikko Inde.

In 1992 as a result of government reform the Department of Customs and Excise was renamed the Nigeria Customs Service and its ranking was realigned with that of the Nigeria Police. It should be noted that for convenience wherever reference is made to the Department of Customs and Excise, such reference is to the Nigeria Customs Service. The reform also re-named the head of the Customs as the Comptroller General and this has continued to be the *status quo* until date. There appears to be an oversight in that the NCS is not created under the CEMA unlike the cases of the EFCC, the NDLEA and the Police.

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[8] For details see Appendix I.

The CEMA provides for the establishment of the Board of Custom and Excise without any reference to the creation of the NCS.[9]

Section 3 (1) of CEMA provides ñThe board referred to under this Act is the Board of Customs and Excise established by the Nigerian Customs Service Board Actò[10]

The EFCC Act, the NDLEA Act and the Police Act,[11] on the other hand provides as follows:

Section 1 (1) of the EFCC Act provides:

> There is established a body to be known as the Economic and Financial Crimes Commission (in this Act referred to as ñthe commissionò) which shall be constituted in accordance with and shall have such functions as are conferred on it by this Act.

Section 1 of the NDLEA Act provides: There is hereby established a body to be known as the National Drug Law Enforcement Agency (in this Act referred to as ñthe Agencyò).

Section 3 of the Police Act provides: There shall be established for Nigeria a police force to be known as the Nigeria Police force (in this Act referred to as ñthe forceò)

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9 Section 3 of the NCS bill, 2012 has now provided for the establishment of a body to be referred to as óThe Customs Serviceô.

10 Cap. N 100 LFN, 2004.

11 Cap. P 19 LFN, 2004.

Section 5 of the Police Act further provides:

> There shall be an Inspector-General of the Nigeria Police, such number of Deputy Inspector-General, Assistant Inspector-General as the Nigeria Police council considers appropriate, a commissioner for each state of the Federation and such ranks as may, from time to time, be appointed by the Nigeria Police Council.[12]

As pointed out by Ango,[13] human organizations often have to undergo transformations in the form of reorganizations. Such reforms and reorganizations are meant to achieve greater efficiency, transparency, accountability and effectiveness. The NCS is no exception to this assertion. The NCS as seen over the years have gone through many stages by way of reforms. The reforms in the NCS is aimed at achieving greater revenue collection, transparency and accountability on the part of officers and men, and promote efficient, effective, honest and reformed customs service in order to bring sanity to ports operations in all its ramifications.[14]

In 1970, by virtue of Decree No. 7 of 1970, additional members were appointed to represent other ministries like Economic Development and Reconstruction together with Trade and Industries on the Board of the Customs and Excise.

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[12] Section 14 of the NCS Bill, 2012 provides for the office of Comptroller-General and Deputy Comptrollers General. Section 15 further provides for appointment of other staff of the Customs Service.

[13] S.O.G Ango: *The Role of Nigeria Customs Service in the Realization of Vision 2010,* (Ibadan, Spectrum Books Limited, 1998) p. 3.

[14] See *Nigeria Customs Service, Monthly Order* Nos. 1 ï 5 (January ï May, 1996), p. 4.

The expansion was intended to broaden the scope of the decisions of the Board. When the CEMA of 1958 came into being, the chairman of the Board was also the Chief Executive of the Department of Customs and Excise. In 1975, the Murtala Mohammed regime abolished the position of the chairman and conferred all the powers of the Board on the Director of the Customs and Excise.[15] Alhaji S. A. Musa being the first Director undertook the task of reorganizing the Customs and Excise Department so as to assume its supposed international character and bring about better performance and image for the organization. To this end, the two parallel areas of the Service which were the revenue (technical) and the preventive (enforcement) were unified.

The unification led to the restructuring of the Department into five major directorates namely:

i) Revenue
ii) Enforcement
iii) Investigation
iv) Inspection
v) Economic Relations, Research and Planning

At this stage of the evolution, the Department of Customs and Excise has always been under the supervision of the Federal Ministry of Finance. In 1985, it was removed from that ministry and taken to the Federal Ministry of Internal Affairs. As a follow-up the Board of Customs and Excise was

[15] Decree No. 41 of August 28, 1975.

abolished in 1986 and the Customs, Immigration and Prisons Board (CIPB)[16] was established. This Board also absorbed the functions of the Federal Public Service Commission as regards appointment, promotion and disciplinary control over the officers of the Customs and Excise Department. The CIPB embarked on an extensive and intensive reorganization of the three services in pursuit of the objectives of the reforms.

In spite of the fact that most significant changes took place at this stage of the evolution, we submit however that the policy of transfer of service, which was introduced by the reforms, became a problem to the Department at a later stage.

The restructuring continued and the functions of the Department of Customs and Excise were decentralized to Zonal commands in order to quicken and smoothen decision-making process. Six zonal offices were created at Lagos, Kaduna, Bauchi, Minna, Owerri and Ibadan respectively. The then Minister of Internal Affairs, Col. John Shagaya while justifying the creation of the Zonal Offices stated thus:

> The main purpose of the reorganization which divided the whole country into Six-zones is to enhance the efficiency of the department by decentralizing authority for quick decision-making, this has resulted in greater efficiency and high level of performance by each Zone.[17]

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16 Decree No. 14 of January 11, 1986.

17 J. Shagaya, ñKeynote address by the Honorable Minister of Internal Affairs, to the participants in the 1989 Department of Customs and Excise Seminar, at the Concord Hotel Owerri, Imo State, 6 ï 10 November 1989ò in Report of Senior Officers Seminar for 1989 Abuja, Department of Customs and Excise, p. 7.

Under this arrangement Dr. Bello Mohammed became the Director.

In 1992, the Department was removed from the Federal Ministry of Internal Affairs back to the Federal Ministry of Finance. A new decree, the Nigeria Customs Service Board Decree No. 45 of June, 1992 was promulgated to establish the Nigeria Customs Service Board (NCSB). This decree vested in the new board the sole authority to administer and formulate general policy guidelines for the NCS.

The decree made the NCS an independent paramilitary service that it is today. As put by Ango[18], the Service is very grateful to the government, which saw the need to remove the Department of Customs and Excise from the civil service structure and restructure its grading and salary formats to bring it in line with the situation of things in the paramilitary organizations.

Today, the NCS is a full-fledged paramilitary organization geared towards operating with discipline and dispatch. In view of the 1992 decree[19], the administration of the NCS came under the control of a Comptroller-General assisted by Six Deputy Comptrollers-General who were in charge of the newly created six divisions as follows:

i) Customs
ii) Excise and industrial incentives
iii) Enforcement and Drugs

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18 S.O.G Ango, ñThe Customs and Excise in National Revenue Driveò, A lecture delivered to the participants of Senior Executive Course No. 18, NIPSS, Kuru March 12, 1996, p. 1.

19 Decree No. 45 June, 1992.

iv) Investigation and Inspection

v) Economic Relations, Research and Planning

vi) Finance, Administration and Technical Services.

Though the Comptroller-General exercises general control over management and administration of the service, he is however responsible to the Honourable Minister of Finance who is the Chairman of the Nigeria Customs Service Board.

It is submitted that the performance of the duties of the Comptroller-General under the control of Minister of Finance does not augur well for good administration, more so as the NCS is a paramilitary outfit, it ought to be taken out of ministerial control. This suggestion is without prejudice to the role of the Ministry of Finance, which is the formulation of polices on economic matters.

In regard to the six Deputy Comptrollers ï General who are in-charge of the six divisions, it is submitted that it will be more relevant to have just one Deputy Comptroller-General who shall be the second in command to the Comptroller-General. This will finally resolve the tussle that always exists among them as to who is superior. If this is achieved, the six divisions will be headed by Assistant Comptrollers General.

The above arrangement unfortunately was scuttled when the then Head of State, General Sani Abacha instituted a probe panel (Paul Tafa Panel, 1994) sacking all the management team of the NCS. S.O.G. Ango was

appointed as an administrator in 1994 and was later in 1997 made a sole administrator with wider powers thereby abolishing the NCSB.

The status quo was however restored with the appointment of Alhaji Aliyu Ahmed Mustapha as the Comptroller-General (C. G) in 1999. He held forth until he honourably retired from the Service in 2004. The same year via a presidential reform headed by the then Minister of State for Finance, Mrs. Nenadi E. Usman, Elder Jacob Gyang Buba was appointed as the Comptroller-General. This particular reform was lethal, claiming almost about seventy-five officers of the rank of comptroller who were retired to pave way for a new management team.

The new structure provided for only three main departments as follows:

i) Corporate Service and Economic Relations

ii) Enforcement, Investigation and Inspection

iii) Revenue.

The Departments as usual were headed by Deputy Comptrollers General.

Another interesting but unfortunate aspect of this reform was the reduction of the Zonal Offices from six to four. The Area commands were reduced to twenty-five. Under this arrangement some States were merged to form one area command. The activities of the NCS definitely were reduced to the lowest ebb. People wanting to do business in such states have to move longer distance before they can have access to a command of the NCS.

This restructuring, it is submitted, has done more evil than good. It not only offends a policy of the federal government that each federal agency should maintain offices in the State Capitals, but have led to serious politics of exclusion. This presupposes that as contended by the federal government reformists that some States are not viable to have Federal offices established there.

The 1999 Constitution[20] provides that Nigeria shall be a federation consisting of States and a Federal Capital Territory. The States so created are listed in the First schedule Part I to the Constitution. By necessary implication, there should be a rethink of this aspect of the reform that have deprived some States from having the presence of customs area commands.

A maritime paper[21] captured it succinctly when it stated that the presidency was set to clean up the customs. Like a recurring decimal, specifically on May, 27 2008, Gyang Buba had to bow out paving the way for a new Comptroller-General, Ahmed Hamman Bello. Characteristic of past reforms, two Deputy Comptrollers ï General (DCGôs) and six Assistant Comptrollers-General (ACGôs) were retired.

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[20] Constitution of the Federal Republic of Nigeria, Cap. C 23, LFN, 2004, as amended in Constitution of the Federal Republic of Nigeria, (first alteration) Act, No. 1, 2010 and Constitution of the Federal Republic of Nigeria (Second alteration) Acts No. 2, 2010, hereinafter, ñ1999 Constitution as amendedò section 2 (2) thereof.

[21] ñPresidency sets to Clean up the Customsò *Maritime International*, January/February, 2004, p. 19,

The Federal Government this time approved the re-structuring of the NCS into four departments following the acceptance of a recommendation of the World Customs Organisation (WCO) strategic plan to review the structure put in place by the presidential committee in 2004.

The departments are:

i) Corporate Support Services

ii) Strategic Research and Policy

iii) Tariff and Trade

iv) Enforcement, Investigation and Inspection.

In no time, specifically after six months, the tenure of Ahmed Hamman Bello came to an end having attained the statutory age of retirement.

The succession bid was fraught with controversies as to who should take over among the Deputy Comptrollers General. On January 15, via a presidential directive one of the Deputy Comptrollers General in the person of Dr. Emeje Benard Shaw Nwadialo was appointed as the Acting Comptroller General of Customs. He acted for about three months and was confirmed on March 23, 2009.

In less than one month, specifically on April 16, 2009 a presidential task force was set up to reform the Customs. It was the contention of the Honourable Minister of Finance that in the last decade, the federal government had made efforts to reform the Customs administration but

without much tangible result. The then administration therefore deemed it necessary to reposition the NCS to play its statutory role in a more effective and efficient manner consistent with the changing countryôs objectives and global demands.[22]

The presidential task force had the following terms of reference:

(i) To oversee, on behalf of the Nigeria Customs Service Board (NCSB), the implementation of an agreed action plan for the structural transformation of the NCS into an efficient, world class organization, involving an overhaul of governance, organizational and leadership structures, systems, processes and procedures;

(ii) To make appropriate recommendations to the NCSB in relation to leadership selection, capacity building, recruitment, promotion, discipline, retirement as well as dismissal of officers and men of the service in line with the Customs and Excise Management Act;

(iii) To assist in overseeing the implementation of reforms aimed at improving operational efficiency and effectiveness, focused on key aspects of customs operations, drawing on international best practices;

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[22] Remarks by the Honourable Minister of Finance ï Dr. Mansur Muhtar at the inauguration of the Presidential Task Force on the reform of the Nigeria Customs Service held at the Conference room of the Federal Ministry of Finance, Abuja, on Thursday April 16, 2009.

(iv) To liaise with relevant government agencies to pay particular attention to the implementation of reforms, aimed at speedy achievement of 48-hour cargo clearance in Nigeria ports; and

(v) To carry out other duties as may be assigned to it by the president, commander-in-chief, and/or the minister of finance.

From the terms of reference, the powers of the NCSB tend to have been taken over by the task force, as it is to oversee all the powers on its behalf. Though, the task force is to carry out other duties assigned to it by the President or Minister of Finance, it has by its operations whittled down the powers of the C.G. It was submitted that with the mandate given to the three-man task force, it was a deliberate attempt to whittle down the powers of the C.G.[23] The arrangement then, which we submit is unfortunate is for the C.G. to report to the task force made up of two Former Comptrollers-General of Customs. The arrangement lasted for two years and whether or not the objective of the task force was achieved, is yet to be seen as events that so far followed has necessitated the need for more reforms.

By August 6, 2009, the tenure of Nwadialo came to an end and Abudullahi Diko Inde was appointed. A new human resources department was created to be headed by a Deputy Comptroller-General. While the task force was still in place, on August 20, 2010, the Minister of Finance, Olusegun Aganga inaugurated a reconstituted presidential task force on the

[23] G. Umunnakwa; ñSidelining Nwadialoò, the *Source Magazine*, May 11, 2009, p. 40.

reform of the NCS. The minister acknowledged the earlier presidential task force which was set up with an elaborate terms of reference and came to the conclusion that its interim draft report showed no great cohesion and co-operation, hence the need for another one.

Like previous reforms, there have been no positive results; they have not yielded any positive results as the committees never submitted any recommendations that could have assisted the government to carry out the desired result. What the committee submitted was a status report and account of its activities. [24]

Suffice to at this point refer to some other jurisdictions and see what is obtainable. In the United Kingdom (UK), His Majesty Customs and Excise (HMCE) was, until April, 2005[25] a department of the British government in the U.K. It was responsible for the collection of Value Added Tax (VAT), customs duties, excise duties, and other indirect taxes such as Air Passenger Duty, climate change levy, insurance premium tax, landfill tax and aggregates levy. It was also responsible for managing the import and export of goods and services into the UK. HMCE investigators guarded the borders of the UK from smugglers. This was done in conjunction with the former water guards.[26] These functions however in

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[24] ñStatus Report and Account of Activitiesò being a statement made to the NCSB by Dr. Bello Mohammed Halliru, Chairman Presidential Task Force on Custom Service Reform on 24th August, 2010.

[25] The Commissioners for Revenue and Customs Act, 2005 combined the Inland Revenue and HMCE into a single government department HM Revenue and customs.

[26] This was as a result of a 1971 Amalgamation.

recent time have been transferred to the UK border agency of the Home office.[27]

In the United States of America (US), the origin of the Customs dates back to around 1789 when the first United States Congress passed and President George Washington signed the Tariff Act of July 4, 1789. The fifth Act of Congress established the United States Customs Service at its ports of entry. For nearly 125 years, the U.S. Customs was the primary source of funds for the entire government, and paid for the nationôs early growth and infrastructure.[28] In 2003[29] there was a reform creating the U.S Customs and Border Protection by combining employees from the U.S Department of Agriculture, the U.S. Immigration and Naturalization Service and the U.S Customs Service. The US Customs and Border Protection (CBP) was then headed by a commissioner.

In Ghana, the Customs and Excise and Preventive Service (CEPS) was established in 1839. Since then, it has performed several functions through the years as a civil service department until 1986 when it became an autonomous institution under the Provisional National Defence Council Law (PNDCL) 144 of 1986. At present CEPS operates under the CEPS management law, PNDCL 333, 1993.[30] It is headed by a commissioner and plays a key role in handling commercial activities at the sea and airports and

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27 ñLaunch of Britainôs New Unified Border Agencyò (htt://ukba..homeoffice.gov.uk) UK Border Agency 2008 ï 04-03 accessed on March 3, 2009.

28 ñHistory of the U.S customs serviceò (http://www.cbp.gov) accessed on March 3, 2009.

29 CBP became an official agency of the U.S. Department of Homeland Security on March, 2003.

borders by ensuring compliance with national and international laws governing trade.

The role of the Ghana customs is very interesting in that it has a three-fold mission: A fiscal mission of collecting revenue for the State; an economic mission of helping business to be more competitive and compiling foreign trade statistics; and a mission of protecting society which involves combating fraud, smuggling, terrorism and organized crime, counterfeiting, piracy, human and drug trafficking. CEPS also implements government policy in order to ensure compliance with national and international regulations in force regarding the environment.[31]

In the East African country of Kenya the position is that there is the Kenya Revenue Authority (KRA), which was established by an Act of Parliament[32] which became effective on July 1, 1995. The authority is charged with the responsibility of collecting revenue on behalf of the government of Kenya. A Board of Directors consisting of both public and private sector experts make policy to be implemented by KRA management. The chairman of the Board is appointed by the President of the Republic of Kenya. The chief executive of the authority is the commissioner general who is appointed by the minister of finance. The customs service is a department in the KRA and is headed by a commissioner. The commissioner shall be subject to the direction of the minister, be responsible for the

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30 ñHistory of Ghana Customsò (http://www.ghanacustoms.gov.gh) accessed on March 4, 2009.

31 *Ibid*.

control and management of the customs and the collection of, and accounting for, customs and excise revenue. The commissioner may authorize any officer to exercise any of the powers conferred by the Act upon the commissioner subject to such limitations as he think fit. The officer so appointed shall make and subscribe before a Magistrate or Commissioner for Oaths, a declaration in the form set out in the tenth schedule to the Act.[33]

The NCS Board is established by the NCSB Act[34]. Section 1 (1) of the Act provides:

> There is hereby established under the control of the Federal Ministry of Finance a board to be known as the Nigerian Customs Service Board (in this Act referred to as the Boardò), which shall be responsible for the administration of the Customs and Excise Management Act.

The Board consists of a chairman, who is the Minister of Finance, the Comptroller-General of Customs who is the deputy chairman, all the Deputy Comptrollers-General of Customs, a representative each from the Ministries of Finance, commerce, industry and transport, the legal adviser of the Customs, the chairman of the Federal Inland Revenue Service and then two other persons from the corporate sector. The Minister of Finance is to appoint the representatives from the ministries and the corporate sectors[35].

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32 Chapter 472, Laws of Kenya. KRA (http://www.revenue .go.ke) accessed on December 23, 2008.

33 Section 3 (1) (2) (3), Customs and Excise Act Cap. 472, Laws of Kenya, 1978.

34 Cap. N 100, LFN, 2004.

35 Section 2 (2) of the NCSB Act.

The board has as its secretary a serving officer, not below the rank of an assistant comptroller-general.[36]

The Board formulates the general policy guidelines for the NCS and exercises the powers hitherto exercised by the CIPB[37] The membership of the Board, it is submitted, is too large and this brings pressure on the Service which is responsible for their local tours, international study tours and conferences, vehicles and even mobile phones. Even disengaging members have to be paid severance package.

The part time sitting arrangement does not augur well for the Service. To this end, many decisions reached by the Customs management requiring confirmation by the Board has to wait until whenever the Board will sit. It is in view of this, we advocate a Customs Service Commission as in the case with the Police Service Commission where the members are serving on full time and are on ground to deal with issues as they come.

In section 4(3) of the NCSB Act, the Board has the power to effect a transfer of service from the civil service. Our submission here is that it must have been an oversight to import this particular provision from the former CIPB Act.[38] This is hinged on the fact that the provision was abused during the military era, which led to the bloating of the top echelon of the Service.

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36 Section 5, *ibid.*

37 CIPB Decree No. 14 of 1989.

38 *Ibid*.

In Ghana, the corresponding Board is the Revenue Agencies Government Board which has the heads of all the revenue agencies as members. Other members include a chairman, the governor of the Bank of Ghana, an executive secretary, a representative from the ministry of finance, and four other persons out of whom two must be women.[39]

The governing Board in Ghana unlike that of Nigeria made provisions for tenure. Section 5(1) of the Ghana Customs Act provides:

> Members of the board, other than the governor, Bank of Ghana, the commissioners, the executive secretary and the representative of the Ministry of Finance, shall hold office for a period of three years and are eligible for re-appointment except that a member shall not be on the Board for more than three terms in succession.

Section 5(2) stated that members may be paid the allowances determined by the minister.

1.2 Statement of the Problem

Kofo Olugbesan stated that the economic repercussion of smuggling and the inordinate perpetration of the act may necessarily have led to its criminalization.[40] Smuggling has also been held not only as an economic activity, but one possessing and manifesting terroristic dynamics.[41]

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[39] Section 4(1) (2) Customs, Excise Preventive Service (Management) Act, 1993. See also section 2 of the Revenue Agencies (Governing) Board Act 1998 (Act 558).

[40] K. Olugbesan, *Smuggling, The Crime, the Law*, (Lagos; Stevman Law Publications, 1993), p. 68.

[41] O. B. C Nwolise ñ*Smuggling as International Economic Terrorism*ò, a Commissioned paper presented at the Nigerian Customs Service Seminar, held at Ladi Kwali Conference Centre, Sheraton Hotel and Towers, Abuja, 15th to 19th Dec., 1997.

The broad role of the NCS is to enforce the customs and excise laws as contained in the CEMA.

Section 4(1) of CEMA empowers the NCS, subject to the general control of the minister to control, manage and administer the customs and excise laws, collect customs duties on imports and exports and collect excise duties on goods manufactured locally. The NCS is expected to account for these duties in such a manner as may be directed by the minister. As expressed by Ango,[42] the NCS is also responsible for the prevention of smuggling and the maintenance of social security through strict enforcement of import and export regulations affecting the health, social and economic life of Nigerians.

A former comptroller general of customs was quick to observe that: The main functions of the Department of Customs and Excise are to collect and account for import, export and excise revenues, and to prevent or arrest smuggling.[43]

The bulk of the *Revenue* need of the country is from oil and the Customs Service.

The NCS provides *social security* for the populace by implementing the various programmes of the government. The NCS ensures that

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42 S.O.G Ango *op. cit*. p. 16.

43 B H. Mohammed, ñIntroductory address by the Director, Department of Customs and Excise, on the occasion of the opening of the Customs and Excise Seminar, November 16, 1989 in *Report of Senior officers Seminar* for 1989, (Abuja, Dept. of Customs and Excise, 1989), p. 5.

contraband goods do not come into the country. It prevents illegal exportation of food items, which can cause scarcity and hunger.

There is also the *cultural and moral security* role of the NCS. The Service to this end prevents the exportation of the nationôs artifacts or other work of arts being stolen from the museums. In 1996, thirty-six objects were stolen from Oron and thirty-four from Ife museums alone.[44] The NCS prevents the importation of pornographic magazines and video materials so that the moral tone of the nation is not wrecked with particular reference to the youths and children.

The NCS in performing its duty engages in *public education and enlightenment* about the rules and regulations guiding imports and exports. This particularly concerns, importers, exporters, clearing agents, manufacturers and investors on exportable or importable goods. The essence is for all stakeholders to understand these rules and regulations, as well as the list of prohibited goods and tariffs on items as may be effected by government from time to time. The Customs Community Consultative Forum (CCCF) and in recent time the Customs Duty News Programme aired every Monday by 10.00 pm. by the Nigeria Television Authority (NTA) is performing this role greatly.

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[44] Mrs. Voilater Ekpo, ñIllicit Traffic in Cultural Propertiesò, A paper presented at the Celebration of the International Museum Day, 1997 in Calabar on May 21, 1997, reported in *The Guardian*, May 23, 1997, p. 20.

The NCS provides some administrative needs for some other Ministries and the Central Bank of Nigeria. This could be statistical data and information on movement of persons, goods, and currencies of various countries in and out of Nigeria.

The *Economic security* needs of the nation are further secured when the NCS effectively manned the borders. By waging war against smuggling, goods are not illegally exported or imported. This also helps to protect infant industries against dumping and undue external competition.

Other roles of the NCS include promotion of trade efficiency, trade facilitation through aviation, shipping industries, encouragement of foreign investors, input to general policy and policy implementation, inputs to fiscal polices and budget reforms and making business transaction with Nigeria easier.[45]

In the exercise of the above roles and as provided by the CEMA, any breach therein of the provisions can lead to setting the law in motion for possible prosecution.

Section 186 (a) of CEMA provides that the NCS Board may ï

> Without prejudice to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney-General of the Federation to institute, continue or discontinue criminal proceedings against any person in any court of law) and subject to such directions, whether general or special, as may be given by the Attorney General of the Federation, stay or compound any proceedings, for an offence or

[45] Ango, *op. cit,* pp. 22 ï 27.

> for the condemnation of anything forfeited under the customs and excise laws.

The practice by virtue of the provisions of section 181 (2) of the CEMA was that every magistrate in any part of Nigeria had jurisdiction for the summary trial of any offence under CEMA. It is however pertinent to note that by virtue of section 7 (1)(c) of the Federal High Court Act, [46] jurisdiction to try customs offences has been removed from the State High Courts and Magistrate Courts to the Federal High Court.[47]

Prosecution therefore, under this dispensation is done by the law officers sent from the Federal Ministry of Justice. Section 180 (1) (2) of CEMA however, permits any customs officer, provided he is a legal practitioner and with the consent of the Comptroller-General, to conduct criminal or other proceedings in respect of matters relating to the CEMA. A similar provision under the Police Act was amplified in the case of *FRN v. Osahon*,[48] when the same issue arose in the case of the right of police to prosecute. The proceedings shall be instituted within seven years of the date of the commission of the offence.[49]

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[46] Cap. F12 LFN, 2004, section 181 (2) of CEMA, 7(1) (c) of the Federal High Court Act and section 251 of 1999 Constitution as amended is fully examined in chapter 8.1 of this work in our discussion on Institution of proceedings under the CEMA.

[47] See also section 251 (1) (3), Constitution of the Federal Republic of Nigeria, 1999 which confers concurrent jurisdiction to Federal High Court in respect of criminal matters as opposed to section 251(1) which confers exclusive jurisdiction on civil matters to Federal High Court. See *Ehindero v. FRN & anor (2014) 10 NWLR 281.*

[48] (2006) WRN 1 See also Decree 14 of 1979 which made the same provision as to the right of an officer to prosecute.

The preventive and enforcement machineries provided under CEMA which was enacted since 1958 could no longer effectively tackle the challenges posed by smugglers who have devised new methods of perpetrating smuggling. These have given rise to serious consequences on the economy and security of Nigeria. This thesis has identified those problems and has recommended measures including administrative and legislative reforms to combat the rising wave of smuggling in Nigeria.

1.3 Research Questions

It is of importance to look at the scope of CEMA, as a background before raising the research questions.

The CEMA is an Act to regulate the management and collection of duties of customs and excise and for purposes ancillary thereto. The Act arose from the recommendations of a special committee set up by the Federal Ministry of Finance in 1958 to examine the Jabez-Smith draft customs and excise legislation.[50] It was then cited as the Customs and Excise Management Ordinance, 1958 and having effect throughout the Federation. It was later published in Cap. 84 LFN, 1990. Currently, the law is contained in CEMA Cap. C. 45 LFN 2004.

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[49] Section 176 (3) of CEMA.

The Act has a total of 13 parts, 195 sections and 3 schedules and 19 subsidiary legislation.[51]

Part I: **Preliminary**

This part has 2 sections. Section I is the short title while section 2, interprets some key words totaling about 53 words.

Part II This part deals with administration which runs from section 3 through 11 and covers areas like establishment, constitution and proceedings of the Board, powers and duties of the board, powers of the officers, hours of attendance and others. The Board referred to is the Board of Customs and Excise established by the Nigeria Customs Service Board Act. The constitution, proceedings, and functions of that Board are provided for under sections 2 and 3 of that Act. Section 4(3) of the Act empowers the Board if it thinks expedient that any vacancy in the staff of the Service should be filled by a person holding office in the civil service of the Federal or of the State, to notify the appropriate Civil Service Commission to that effect and thereafter the Board may, by arrangement with the

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50 See S. A. Musa, Proposals for the Reorganizations of the Board and Department of Customs and Excise, (Lagos, 1975) pp. 1 ï 10. Unpublished

51 The list of subsidiary legislation are Brewing Regulations, Drawback (customs) regulations, importation and exportation by air regulations, import and exportation by post regulations, Importation and Exportation by sea regulation, Small craft regulations, Tobacco (Manufacture) regulations, valuation (exportation duties regulations), Custom Ports order, customs (importation of positive cinematograph film order, small craft (customs licensing) regulations, General Excise regulations, Importation and Exportation by land and inland waters regulations, Customs and Excise (warehousing of goods, notice, Customs Airports (re-designation) order, Custom ports (designation) order, Customs and excise (ship chandlers) (licensing) Regulations and Customs and Excise Agents (licensing) Regulations.

Civil Service Commission concerned, cause such vacancy to be filled by way of secondment or transfers.

This sub-section is anchored on section 4 (1) which states that the powers, being exercised by the Customs, Immigration and Prisons Service Board to appoint, promote and exercise disciplinary control over Staff of the Service are vested in the new Board. The former Board had come under the cover of this provision to engage in the arbitrary and unscrupulous transfer of civil servants into an organisation that was supposed to be an independent paramilitary service as intended by the NCSB Decree No. 45 of 1992.

The importation of this provision into the present NCS Act, we submit, is unnecessary as it is capable of reintroducing the transfer of service syndrome.

Part III: This part which contains 69 sections (12 ï 80) deals with the importation, exportation and carriage, coastwise, customs ports, customs airports, customs stations and other related matters.

Part IV: This part deals with warehouses and government warehouses and run through 18 sections (81-98).

Part V: This part covers sections 99 to 109 and deals with manufacture of spirits and mentholated spirits.

Part VI: This covers sections 110 to 114 and deals with Beer.

Part VII: This deals with tobacco and covers sections 115 to 117.

Part VIII: Deals with other goods subject to excise duty as covered in sections 118 to 120 therein.

Part IX: Covers from sections 121 to 135 and deals with excise licenses general provisions, general provisions as to entry of premises and general provisions as to excise traders respectively.

Part X: Covers sections 136 to 143 and it deals with general provisions on duties and drawbacks.

Part XI: This deals with general powers, agents and general offences as indicated in the various sections from 144 to 166.

Part XII Deals with forfeiture and legal proceedings running through sections 167 to 190.

Part XIII: This is the final part and it contains from sections 191 to 195 dealing with miscellaneous provisions. Under this part, section 194 needs some consideration. It provides that:

> (1) The president may make regulations for the establishment of a Customs and Excise Preventive Service and the terms and conditions of service therein.
>
> (2) Members of the preventive service established in accordance with regulations made under sub-section (1) of this section may, by order in writing of the Board and under arrangements to be agreed between the Board and the Inspector-General of Police be seconded for training to the Nigeria Police Force.
>
> (3) During the period of any such secondment for training, a member of the preventive service shall for the purposes of discipline, rank and training in accordance with the Police Act and the Police Regulations, be deemed to hold the rank of a recruit in the Nigeria Police Force, or such other rank as may be agreed with the Inspector-General of Police and specified in the order of the Board, and subject to any necessary delegation by the Federal Civil Service Commission, shall be liable to be dealt with by a superior officer accordingly, save that any punishment of dismissal which may be imposed under such Act or

> regulations shall be subject to the approval of the Board and not the Inspector-General of Police or a Commissioner.
>
> (4) During the period of any such secondment for training, a member of the preventive service shall be entitled to the same exemptions in respect of any enactment relating to arms and ammunition as is applicable in respect of a recruit in the Nigeria Police Force (or in respect of such other rank as may be specified as aforesaid).

It is difficult to say what the section intended to achieve. This is in view of the fact that the preventive service referred to, has existed since as seen in the evolution of the NCS. Specifically, it was the reforms of Alhaji S. A. Musa under the Murtala Mohammed regime in 1975 that merged the preventive service with the revenue service thereby making it one unified customs and excise department. The reforms then provided for the two customs training colleges in Lagos and Kano and recruits into the customs stopped going to the Police College for training.

This particular section talking about another preventive service will amount to taking the hands of the clock backward and we hope that in the amendment we are proposing, it will not feature again.

The first schedule gives detail of the interpretation of value. This is to assist in curing any lacuna in the provisions of section 45 of CEMA regarding value. Section 45 of CEMA provides that:

> Where a duty of customs is chargeable on imported goods by reference to their value, their value shall be taken to be as laid down in the first schedule to the Act, and duty shall be paid on that value.

The second schedule provides for a form or warrant of distress, which shall be issued to any defaulting excise trader under section 134 of the CEMA. Section 134 of CEMA provides that:

> Where any excise duty remains unpaid after having been demanded under section 140 of the Act, the Board may authorize the levying of the distress.[52]

The third schedule makes detail provisions relating to forfeiture under section 167 of the Act as it relates to detention, seizure and condemnation of goods. Section 167 of the Act provides that:

> Any officer or police officer, or any other persons authorized in that behalf by the Board, may at any time seize or detain any thing liable to forfeiture under the customs and excise laws or which such officer, Police Officer or any other person has reasonable grounds to believe is liable to forfeiture thereunder.

It is important to, at this stage, mention three other important Acts dealing with some relevant issues.

i) The Customs and Excise Management (Disposal of Goods) Act[53] make provisions for the disposal of goods forfeited to the NCS and matters connected therewith. It contains 7 sections dealing with forfeiture of goods, power of sale, penalty for importation and reshipment of goods, supplementary provisions, interpretation, application and the short title.

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[52] Section 140 of CEMA provides for the time limit on payment of drawback.

[53] Cap. C 46, LFN, 2004.

ii) The Customs and Excise (special penal and other provisions) Act[54] makes provisions with respect to the disposal of goods forfeited under customs and excise law. The provisions run through 7 sections dealing with forfeited goods, unclaimed goods in government warehouse, smuggled goods, interpretation and the short title.

iii) The Customs Duties (dumped and subsidized goods) Act[55] authorizes the imposition of duties of customs where goods have been dumped or subsidized, and it made provision for matters connected therewith. It has 11 sections dealing on several matters, namely the short title, interpretation, cases where duties may be imposed, order imposing duties, relief in respect of anti-dumping duties, drawback, etc. of duties, power to require information from importers, ascertainment of export price, ascertainment of fair market price, construction of references to country of origin, etc. and confirmation of order by resolution of each house of National Assembly. Unlike the CEMA that has 19 subsidiary legislation, there is no subsidiary legislation for the other three aforementioned Acts.

The CEMA as stated was made to regulate the management and collection of duties of customs and excise, and for purposes ancillary thereto. In the management and collection of duties, several breaches of the enactment are likely to occur. The crux of this thesis is to examine the

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54 Cap. C, 47 LFN, 2004.

55 Cap. C, 48 LFN, 2004.

crime of smuggling which is one of the serious areas that may lead to the breaches of the CEMA.

Smuggling is old as man and has been defined in several ways. Ordinarily it is defined as the crime of taking, sending or bringing goods secretly and illegally into or out of a country.[56] Statutorily, it is defined as the act of illegal importation or exportation of goods into or out of a country without payment of duty payable therein and evasion of prohibitions and restrictions order without legal documents required for that purpose.[57]

From the customs definition, smuggling can be viewed from six headings namely:

i) False declaration and concealment
ii) Willful underpayment of customs duties,
iii) Trafficking in prohibited or restricted goods
iv) Use of unapproved routes and ports
v) Forging of customs documents
vi) Touting in customs goods and documents.

Another independent definition says, it is the taking of food from one country to another especially to avoid paying the necessary tax.[58]

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[56] Catherine Soarces, Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th edn. New York, Oxford University Press, 2004) p. 204. See also *Encarta Encyclopedia 2004*, which sees smuggling as carrying goods into a country secretly because they are illegal or in order to avoid paying duty on them.

[57] Sections 46, 47, 63 and 64, CEMA.

[58] U. M. Birai, ñDimensions of Smuggling and the Nigerian Customsò, in *100 Years of Nigeria Customs and Excise 1891 – 1991* I.E.S Amdii (ed.), (ABUP, Zaria, 1991), p. 222.

From the above definition, the common words used are importation and exportation. The avoidance of payment is also common. There is movement, concealment and evasion which in totality amount to the act of smuggling.

The CEMA in the light of above makes several provisions which if breached will amount to smuggling. It is the highlight of some of those provisions that we intend to bring out here.

Section 19 of the Act deals with the control of movement of uncleared goods. Any breach of the section will amount to smuggling. The section provides ï

> (i) The Board may, from time to time, give general or special directions as to the manner in which and the conditions under which goods chargeable with any duty which has not been paid, or drawback goods, or any other goods which have not been cleared, or any class or description of such goods, may be moved between any place in Nigeria and any other place thereon.

The breach of the section attracts a fine of ₦200.[59]

Section 43 of the Act deals with exported goods and goods delivered free of duty. It provides that:

> (i) Where by virtue of any provisions of the customs laws, any imported goods are exempted from duty as being intended or imported for a specified use or purpose, such goods shall not be used or dealt with in any way contrary to such use or purpose, except with the permission of the Board and after payment of the full duty, or such proportion thereof as the Board may direct, on goods of a like kind not intended or imported for such use or purpose.

[59] Section 19 (3), CEMA.

Any person who knowingly uses or deals with any goods in contravention of this shall be liable to a fine of six times the value of the goods.[60] Any breach here amounts to smuggling.

Section 46 deals with forfeiture of goods improperly imported. It provides that:

> (a) except as provided by or under this Act, any imported goods, being goods chargeable with duty of customs, are without payment of that duty landed or unloaded in Nigeria or removed from their place of importation or from any approved wharf, examination station, customs station or customs area, or.
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition; or
>
> (c) any goods, being goods chargeable with any duty or goods the importation of which is prohibited, are found, whether before or after the unloading thereof, to have been concealed in any manner on board any ship or air craft or in any vehicle; or
>
> (d) any goods are imported concealed in a container holding goods of a different description; or
>
> (e) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer; or
>
> (f) any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof.
>
> Those goods shall be forfeited.

Section 47 of the Act further provides imprisonment for the term of five years for any of the above improper importation. There is no option of fine under this provision. This, it is submitted is a reflection of the seriousness of the offence.

Sections 50 and 51 of the CEMA deal with entry outwards and export of certain goods respectively. Both sections seem to be talking about the

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[60] Section 43 (3), *ibid*

same thing, that is breach of some conditions for export, which will amount to smuggling. The interesting thing however is that if the breaches of the sections will amount to smuggling, punishment was prescribed for the breach of section 51, while none was prescribed for section 50. It is doubtful what the intention of the draftsman is here.

Section 50 provides:

> Before any goods are loaded into any ship or aircraft for exportation or as stores for use on a voyage or flight to an eventual destination outside Nigeria or are removed from any customs station for exportation, the exporter shall deliver to the proper officer an entry outwards of the goods in such form and manner and containing such particulars as the Board may direct.

Section 50 (ii):

> The Board may subject to such conditions as it may see fit, impose relax the requirements of this section in relation to any goods.

Section 51 (1) provides that:

> This section applies to:
>
> (a) Goods from warehouse,
>
> (b) Transit goods
>
> (c) Any other goods charged with any import duty which has not been paid.
>
> (d) Draw back goods;
>
> (e) Goods the exportations of which is prohibited except as provided under by virtue of any enactment

Section 51 (2) provides that:

> On or before the delivery of an entry outwards of any goods to which this section applies, the exporter shall, if so required by the Board, give security to its satisfaction, that the goods shall be exported to and discharged at the destination for which they are entered outward within such time as the Board may consider reasonable or, in the case of goods entered for use as stores, shall be so used, or that they shall be otherwise accounted for to the satisfaction of the Board.

Section 51 (3) of CEMA provides that:

> Except with the written permission of the Board, no person shall export, load for exportation or enter outward any goods to which this section applies in any ship of less than one hundred tons register. Any such goods exported, loaded or entered in contravention of this subsection shall be forfeited; and any person concerned in such exportation, loading or entering shall be liable to a fine of two hundred naira (₦200).

The thinking here is that since the two sections are similar, they ought to have carried the same punishment or at least even a lesser one for the breach of section 50. The absence of any form of sanction in section 50, we submit, is an oversight.

Sections 53 and 54 of CEMA offences on short loading of goods without giving due notice, and loading of shipstores without permission. The offences attract a fine of ₦100 and ₦40 respectively. This is yet another reason why we advocate for a reform of the CEMA as pointed out earlier.[61]

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[61] M. Omale, *op. cit*, p. 64.

Where the minister makes any regulations with respect to loading of goods for exportation, and the submission of a full list of all the cargo carried in the ship to the proper officer in the prescribed form, any breach of the above will lead to forfeiture and a fine of ₦200. [62]

Section 63 deals with forfeiture of goods improperly exported.

(a) except as provided by or under the Act, any goods chargeable with duty on exportation are exported without payment of that duty; or

(b) any goods are exported or loaded for exportation or as stores or are brought to any place in Nigeria for the purpose of being exported or loaded as stores and the exportation of such goods is or would be contrary to any prohibition; or

(c) except as provided by or under this Act, any goods are loaded into any ship or aircraft for exportation or as stores, or are removed from any customs station for exportation, before entry outwards thereof has been signed by the proper officer; or

(d) any goods being goods chargeable with any duty on exportation or goods the exportation of which is prohibited, are found after having been loaded for exportation to have been concealed in any manner on board any ship or aircraft or in any vehicles; or

(e) any goods are exported or brought to any place in Nigeria for exportation concealed in a container holding goods of a different description, or

(f) any goods are exported or brought to any place in Nigeria for exportation concealed or packed in any manner appearing to be intended to deceive an officer; or

(g) any goods entered outwards are found, whether before or after loading, not to correspond with the entry made thereof.

Those goods shall be forfeited.

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[62] See sections 57 (1) (2) and 58 (1), CEMA.

Section 64 of the Act further provides imprisonment for the term of five years for any of the above improper exportation. There is no option of fine under this provision. This is a reflection of the seriousness of the offence.

The CEMA extends the crime of smuggling to the post office too. That is, smuggling can be committed through the post office. To this end, section 79 (1) of the Act provides that subject to the provision of the Nigeria Postal Services Department Act, the provisions of the customs laws applies to postal articles and to goods contained therein as they apply to any other goods. By necessary implication, all the import and export rules in sections 46, 47, 63, and 64 become applicable to all importation and exportation by post.

In order to assist customs officers in the performance of their role, section 80 of the Act compels the Department of Posts and Telecommunications[63] to provide suitable accommodation for such officers for the proper discharge of their functions in the post office.

Failure to pay any customs and excise duty on demand when due, the defaulter shall subsequently pay, and in addition to the amount, be liable to a fine equal to twice the amount thereof or six hundred naira, whichever is the greater.[64] The question then is, the inadequacy of the punishment, as provided in the sections.

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63 Now Nigeria Postal Service.

64 *Section 160,* CEMA.

The crime of smuggling as contained in the CEMA extends also to any person who even though is not the owner but is concerned with the carrying of the item. Section 164 provides:

> (a) If any person knowingly and with intent to defraud the Federal government of any duty payable thereon, or to evade any prohibition with respect thereto, acquires possession of, or is in any way concerned in the carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or government warehouse, or which are chargeable with a duty which has not been paid or with respect to the importation, exportation or carriage coastwise of which any prohibition is for the time being in force; or
>
> (b) Is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition as aforesaid or of any provision of this Act applicable to those goods, he shall be liable to a fine six times the value of the goods or four hundred naira, whichever is the greater or to imprisonment for two years, or to both.

Another research question is the issue of the appropriateness of some sanctions imposed under CEMA. For example, section 165 provides among others for capital punishment for certain offences. Section 165 (1) provides that any person ï

> (a) who while concerned in the commission of any offence against the customs and excise laws, is armed with any offensive weapon; and
>
> (b) so armed found in Nigeria in possession of any goods liable to forfeiture under the customs laws; shall be liable to imprisonment for ten years.
>
> 2) If an offender under sub-section (1) of this section is armed with any firearms and with such firearms causes injury to an officer, he shall be sentenced to death.

An analysis of this section by Kofo Olugbesan[65] needs to be considered here. She stated that:

> Under sub-section (1) of the provision would have been very clear but for the use of ñandò immediately after paragraph (a) of sub-section (1). The question then is whether before a person can be said to have contravened the provision of section 165 (1) he, apart from being armed while concerned in the commission of the offence of smuggling should also be in possession of any goods liable to forfeiture. Put in another way. Are paragraphs (a) and (b) of section 165 (1) cumulative? The enquiry is apposite because if ó*or*ô has been used instead of ñ*and*ò there would have been no question as to the fact that the paragraphs are alternative ways of committing the offence. As it is however, it is submitted that, the two paragraphs are cumulative so that even if a person is so armed while concerned in the commission of smuggling, he should be shown to have possessed the smuggled goods before his culpability can be said to have been provedò.

We agree with the learned author to the extent that the provisions are cumulative. We however, disagree to the extent that she contended that the provision would have been clearer if ñ*or*ò was used instead of ñ*and*ò we submit that under the section, it is no offence if the offender is not armed. The offender may be liable under another section of CEMA or other law. It is again no offence under section 165 (1) (a) and (b); if the offender while armed with offensive weapons is not in possession of goods liable to forfeiture under the customs law. Accordingly, a person genuinely in possession of goods within the law, even if he is armed and commits an offence he may be charged with committing such offence under another law, but not under section 165(1).

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[65] K. Olugbesan, *Smuggling the Crime, the Law*, (Lagos Stevman Law Publications, 1993) pp. 118 ï 120.

All in all, neither section 165 (1) (a) nor section 165 (1) (b) is a complete provision on its own, the two must be read together to enable the commission of the offence as provided therein, which punishment is imprisonment for ten years; or sentence of death if the use of the firearms causes injury to an officers.[66]

The concern here is the reasonableness of the capital punishment as provided by section 165 (2) for just a case of causing injury which may not lead to death.

Another question here is that in case the injury to the officer results in death, can the customs proceed with a charge of murder against the smuggler? This is in view of the practice of the police who normally investigate and prosecute murder cases. Even though section 165 (2) did not cover where death results from the injury caused by a smuggler to an officer, it is desirable for customs to be able to prosecute where death occurs during the commission of customs offences. The customs in practice have always handed over such cases to the Police. We are however, contending that by virtue of this section 165 (2), if the offender is proven to be a smuggler then it means the customs can prosecute in the circumstance.

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[66] The NCS bill, 2012 in section 244 (2) provides that a person who threatens a customs officer with a weapon or threatens to physically strike a customs officer either by body or weapon, commits an offence and liable on conviction to a fine of ₦3,000,000 or a minimum mandatory imprisonment of two years or where bodily harm or bodily injury occurs under sections 245 (1) (2) punishment ranges from a fine of ₦5,000,000 and ₦10,000,000 with imprisonment of not exceeding five years and not less than ten years respectively.

This is further hinged on the fact that the CEMA has provided capital punishment for the offence. Another problem here is the fact that the penal code and criminal code made adequate corresponding provisions on issue of murder[67].

Olorunfemi[68] has argued that while it is true that death may result from such injury contemplated under section 165, it is also possible to argue that the express mention of injury under the section and the adequate corresponding provisions of the Criminal Code and Penal Code to cater for situations of this nature that result to death may lead one to the conclusion that section 165 (2) of CEMA is restricted to only when injury is caused to an officer by armed smugglers with firearms even though the relevant statutes on the point all prescribed the same capital punishment.

We disagree with the argument of the learned writer.[69] This is hinged on the fact that since section 165 (2) has provided for capital punishment and the crime arose out of a customs related offence, then there is no reason why the section cannot be applied if death occurs. Our position is further strengthened by the provisions of section 8 of CEMA, which confers some powers of the police on customs officers. It provides that:

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67 *Section 221*, Penal Code, *section 316*, Criminal Code

68 J. F. Olorunfemi, ñ*When Smuggling may Attract Death Sentence in Nigeria*ò (2009) UILJ Vol. 5, No. 1, p. 120.

69 *Ibid.*

> For the purpose of carrying out or enforcing the provisions of the Customs and Excise laws, the officers shall have the same powers, authorities and privileges as are given by law to police officers. [70]

The application and scope of section 165 (2) of CEMA was brought to the fore when 50 people were arrested for allegedly killing an officer.[71] The then Comptroller General of Customs, Alhaji Hamman Ahmed relying on section 8 of CEMA[72] indicated the determination of the NCS to apprehend the suspects, investigate their level of involvement and prosecute those indicted by the findings of the investigation.[73]. The Police however, took over the matter contending that it was a case of murder under section 316 of the Criminal Code.[74]

Under section 86 of the English Customs and Excise Management Act, 1979 which is similar to section 165(1) of CEMA the punishment prescribed for the same offence is a term of imprisonment not exceeding three years.

It provides that:

> Any person concerned in the movement, carriage or concealment of goods
>
> (1) contrary to or for the purpose of contravening any prohibition or restriction for the time being in force under or by virtue of any enactment with respect to the importation or exportation thereof; or

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70 This Provision is also contained in sections 5 of the Customs and Excise Act, Cap. 472, Laws of Kenya Revised Edition 2000 (1996).

71 See ñ50 Arrested for Killing Customs Officerò, *The Nation* on Sunday October 18, 2008, p. 11.

72 *Ibid*.

73 *Ibid.*

74 Cap. C 38, LFN, 2004. Section 245 (3) of the bill provides that where death to a customs officer occurs, the accused person shall be proceeded against as provided under the penal or the criminal code.

> (2) Without payment having been made of a security given for any duty payable thereon; who, while so concerned, is armed with offensive weapon or disguised in any way and any person so armed or disguised found in United Kingdom in possession of any goods liable to forfeiture under any provisions of the Customs and Excise Acts relating to imported goods or prohibited or restricted goods, is liable on conviction on indictment to imprisonment for a term not exceeding three years and may be arrested.

It is pertinent to note that there is no equivalent of section 165 (2) of CEMA relating to causing injury to an officer under the English and Kenya Customs and Excise Act.

Under the Kenya Act[75] for a similar offence under section 165 (1) of CEMA the punishment prescribed is a term of imprisonment not exceeding twenty years.

Also, while the CEMA did not define or stipulate what amounts to injury, section 180 (5) of the Kenyan Act defines violence thus:

> For the purpose of this section, ñviolenceò means harm to a person, or any criminal mischief, or the carrying or use of any dangerous or offensive weapon so that terror is likely to be caused to any person, or conduct as is likely to cause in any person a reasonable apprehension of criminal force, harm or mischief, to him or to his property.

The conclusion is that while section 165 of CEMA prescribes for capital punishment, the other jurisdictions[76] considered did not. This, as argued by Olorunfemi[77] may be condemned by many especially as in the situation under section 165 (2) of CEMA where death need not occur. In

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75 *Section 180 (1)*, Kenyan Act

76 English Customs and Excise Management Act, 1979, Customs and Excise Act, Cap. 472 Laws of Kenya, Revised edition 2000 (1996).

77 Olurufemi, loc.cit, at p. 130.

view of all the cloudy areas in section 165 of CEMA, we seriously advocate an amendment in line with international trend. [78]

Apart from the examination of offences and sanctions under CEMA the thesis also looks at the question of whether the existing administrative, preventive and enforcement machineries could cope with the growing wave of smuggling and its attendant results. Above all, this thesis also determines the impact of the Reforms Bill before the National Assembly on CEMA and the effective administration of NCS.

1.4 Literature Review

Some scholars and customs officers have attempted in the past to publish works on Nigeria Customs Service generally.[79] However, none of these works can be regarded as standard international text on Nigeria Customs

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[78] Abolition of Capital Punishment. The 2012 Reforms bill seeks to take care of the possible jurisdictional conflict between NCS and Police and limit capital punishment only to where the death of an officer results from the injury caused by an armed smuggler.

[79] The works include, S.O.G Ango, *The Role of Nigeria Customs Service in the Realisation of Vision 2010* (Ibadan: Spectrum Books Limited, 1998); S. A. Ajayi: *Perspective*: *The Nigeria Customs and Excise Department*, (Ikeja: Joe-Tolalu & Associates (Nig) Limited, 1990); M.F.O. Ikhilae, the *Re-Birth of Nigeria Customs Services*, (Lagos: Delink Ultimate Ventures, 2001); J. Alagbaoso, *Eyes Right Nigeria Customs Services on the Dais*, (Lagos: University of Lagos Press, 2006); I.E.S. Amadi, *100 years of the Nigeria Customs and Excise (1891 – 1991)*, (Zaria: Ahmadu Bello University Press, Ltd., 1991); E. O. Olarewaju, *An Introduction to Legal Procedures and Practice in Nigeria Customs Service*, (Lagos: Quadro Impressions Limited, 2001); M. Omale, *Nigeria Customs Service*: *Law & Practice*, (Port Harcourt: Royal Aspen Institute, 2000). K. Olugbesan, *Smuggling, The Crime the Law* (Lagos: Stevman Law Publications, 1993); and J. F. Oloruunfemi, ñWhen Smuggling may attract Death Sentence in Nigeriaò, [2009] U.I.L.J Vo. 5, No. 1, pp. 118 ï 131.

Service. For example, the works of Ango[80], Ajayi[81], Ikhilae[82], Alagbaoso[83], Amdii[84] lack any legal content.

Angoôs work is an examination of the roles of Nigeria Customs Service towards the mobilization of officers in order to promote revenue generation as alternative to crude oil revenue in the spirit of Vision 2010[85]; Ajayiôs book is a documentation of the history and activities of the then department of Customs and Excise aimed at highlighting the challenges of the Service with the aim of improving the welfare and conditions of service of officers[86]. Even though Ikhilaeôs[87] work also contains a brief historical analysis of Nigeria Customs Service, it focuses on management style and achievements of a former comptroller general of customs, Alhaji Ahmed Aliyu Mustapha from 1999 to 2001. In the same vein, Alagbaosoôs[88] book is essentially a documentation of the reforms introduced by Mustaphaôs successor, Elder, Jacob Gyang Buba who was comptroller general of customs from 2004 to 2008. Amdiiôs[89] book is a collection of commemorative essays to mark 100 years of the existence of Nigeria Customs and Excise, none of which contains any legal analysis of any sort.

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80 *Ibid*.
81 *Ibid*.
82 *Ibid*.
83 *Ibid*.
84 *Ibid*.
85 *Op. cit*.
86 *Op. cit*.
87 *Op. cit*.
88 *Op. cit*.
89 *Op. cit*.

Even though Olarewajuôs[90] book is entitled: ñAn Introduction to Legal Procedure and Practice in Nigeria Customs Serviceò, its contents reveal that only chapter one of the book contain a narration of elementary principles of law generally. It also contains a brief history of NCS from 1861 ï 2001, the procedure of arrest, compilation of case file, detention and seizure without an indepth analysis of the relevant laws. Just like Olarewaju, our earlier work[91] in this area even though introduces the readers into the main features of the provisions of CEMA, it lacks comparative analysis that would have assisted in the desired reforms of CEMA. The book at best serves as lecture notes for customs trainees.

Nevertheless, a fair attempt has been made in Olugbesanôs[92] work to discuss the nature of smuggling and its devastating effect on the economy and security of the nation using her background in Law and Sociology. The work of Olugbesan which is referred to extensively in this research is divided into two parts. Part I narrates the societal factors that motivate smugglers, points out the problems encountered by officers of the NCS in carrying out their duties and recommends possible solution to the identified problems. Part II of Olugbesanôs book is an analysis of some provisions of CEMA, Criminal Code and Penal Code with a view to pose some problems

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90 *Op. cit*.

91 M. Omale, *op. cit*.

92 *Op. cit*.

of interpretation which often make it difficult to ascertain the exact scope and effect of such provisions.[93]

Olorunfemiôs[94] work is an examination of the relevant provisions of CEMA, Criminal Code and Penal code with the aid of decided cases and comparative analysis of laws in foreign jurisdictions but it is limited to the scope and effect of capital punishment provided under section 165 of CEMA.[95]

This thesis is the first attempt in Nigeria to provide a comprehensive text on the appraisal of CEMA as relates to smuggling. Apart from examining the Nigeria customs service from historical and contemporary perspectives, this thesis identifies the major causes and effects of smuggling and proffers solution to combat the economic crime. This thesis is also a critical analysis of the relevant provisions and a comparative analysis with foreign jurisdictions with the aid of relevant statutory and judicial decisions.

1.5 Objectives of the Study

Even though the CEMA has undergone several changes largely in nomenclature since 1958 when it was made, it is imperative that far-reaching modifications are made to cope with the sophistication of the growing trend of smuggling in Nigeria. The problem therefore is that in

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93 *Ibid.*

94 *Loc. cit.*

95 *Op cit*

view of the changes[96] since the enactment, there is still the compelling need for the reform of the Act so as to tackle contemporary challenges.

For instance, section 14 (1) of the CEMA provides that:

The Board may by notice in the Federal Gazette:

(a) Approve for such periods and subject to such conditions and restrictions as it sees fit, places in any customs port for the loading and unloading of goods or any class or description of good, and any place so approved is in this Act referred to as an ñapproved wharfò.

(b) At any time for reasonable causes, revoke or vary the terms of any approval given under this section.

2) Any appointment or allowance of a place of unloading, an approved place of loading or a sufferance wharf in force immediately before the commencement of this Act shall have effect as if it were an approval of that place as an approved wharf under this section on the same terms as that appointment or allowance.

3) Any person who contravenes or fails to comply with any conditions or restrictions imposed under this section shall be liable to a fine of two hundred naira.

Section 77 (1) of CEMA also provides that:

> Any person who by any means makes any signal or transmits any message from any part of Nigeria or from any ship or aircraft for the information of a person in any ship or aircraft or across the frontier, being a signal or message connected with the unlawful importation or exportation of goods into or out of Nigeria, whether or not the person for whom the signal or message is intended is in a position to receive it or is engaged at the time in unlawful importing or exporting of goods shall be liable to a fine of two hundred naira or to imprisonment for two years, or both, and any equipment or apparatus used for sending the signal or message shall be forfeited.

[96] For instance by virtue of Decree No. 77 of 1993, the nomenclature ñCustoms and Exciseò was changed to ñNigeria Customs Serviceò (NCS)

It is submitted in respect of the above provisions that the penalty of two hundred (₦200) in todayôs socio-economic realities is grossly inadequate. We had earlier[97] contended that increase in the penalty is necessary in order that the role of the NCS in the realization of the economic potentialities of Nigeria could be enhanced. It is believed that penalty as it stands will not serve as enough deterrent in the actualization of this noble economic objective.

It is against this background that we intend to, in this thesis, make an appraisal of the CEMA especially as it relates to the crime of smuggling. The other relevant laws on the subject are also considered with a view to bring out the salient points thereby advocating a reform that will meet the modern and growing sophistication of smuggling. The operations of the NCS are put in focus and the various views of the officers of NCS are articulated with the aim of correcting the inadequacies of the past.

The NCS can through its Investigation and Inspection Directorate do a lot in this area so as to get the necessary reform of the Act accomplished. Since it is the duty of this Directorate to conduct investigations into offences against the CEMA and also recommend amendment to the various codes, it is submitted that the time has come when the Directorate should commence the process for the reform of the CEMA as contemplated in this work.

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[97] M. Omale; *Nigeria Customs Service Law and Practice* (Shomolu, Lagos, Cinnamon Press International, , 2000), p. 66.

It is expected that the reform to all intents and purposes will bring about an improvement in the multifunctional role that the NCS has been playing in the Nigerian Economy.[98]

With this humble attempt, it is hoped that the general public would be better enlightened as to their rights and obligations.[99] And invariably reduce the level of apathy and indifference, which have hitherto prevailed in the NCS.

1.6 Methodology

In producing this work, the CEMA is used as the main base, relevant textbooks, journals, articles and the Internet are consulted. Also other relevant statutes and case laws including those of other jurisdictions are reviewed. The intention here is to achieve a holistic view of the subject and see to it that, based on our recommendations; the necessary machinery will be put in place for the reform of the CEMA.

The research involves the use of both primary and secondary sources. CEMA, Criminal code, Penal code and other anti-economic crimes laws such as EFCC Act, NDLEA Act, etc. are the primary sources the research

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98 Address by Alhaji Ibrahim Coomasie, IGP, ñMultiple Security Agencies in a Nation: Imperatives of Close Collaboration at Ports and Bordersò presented at the NCS Workshop on National Security, Abuja (September, 15 1998)

99 Omale, *op. cit,* p. 66.

examined. Review of relevant foreign laws, local and foreign judicial decisions was also undertaken. Personal experience on the job and field work, which include interview of scholars, lawyers, customs officers, clearing agents, and traders have been employed to carry out this research.

As regards secondary sources, existing relevant literature including textbooks, articles in journals and newspapers and magazines reports were referred to. Also, reports of conferences, seminars, workshops and documents obtained from the internet were referred to. The law libraries visited include: University of Abuja, Gwagwalada, Lagos State University, Ojo ï Lagos, Institute of Advanced Legal Studies, Akoka ï Lagos, University of Nigeria, Enugu Campus. We also visited the library of the World Customs Organization (WCO) in Brussels, Belgium.

1.7 Scope of the Study

The thesis is an examination of the legal framework for combating the crime of smuggling in Nigeria. The CEMA which is the principal enactment that seeks to enforce the crime of smuggling is considered and its inadequacies in relation to the award of punishment are brought to the fore. The other enactments dealing with the crime of smuggling are put in focus and the other offences for smuggling like forgery, under-declaration and concealment were x-rayed. The thesis did not delve into other ancillary matters like Excise and Duty draw back. It should be noted that there is an

inbuilt comparative analysis of the position of the issues raised in other jurisdictions.

1.8 Definition of Relevant Terms

There are technical terms used in Customs and Excise which we have to explain here for the purpose of this thesis. The terms are as follows:

Camouflage: Means carrying any item under the cover of another thing.[100]

Cleared: In relation to goods, means removed, after release by the proper officer pursuance of the purpose for which the goods were entered. [101]

Commissioner: This means the head of the Customs Service of Ghana, Kenya and some other countries.[102]

Comptroller-General: This is the head of the Nigeria Customs Service.[103]

Condemnation:This refers to the process of bringing an application to the court so as to get an order of the court as authority to dispose the goods that was seized for contravening the CEMA.[104]

Customs Area: Section 20 of CEMA refers to it as a place approved by the Board for the deposit of goods brought to a particular

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100 Derived from the ordinary meaning of hiding something to deceive

101 Section 2, CEMA

102 Section 10, Ghana Customs Act, section 2 (1) Kenya Customs Act.

103 Section 2, CEMA

104 Paragraph 5, third schedule to CEMA

Customs Port, Customs Airport or Customs Station and not yet cleared, including goods not yet reported and entered under the CEMA.[105]

Customs Declaration: The declaration being submitted electronically or manually according to the Customs approved form wherein the importer indicates the customs procedures applicable to the goods and describes the details, which the Customs require to be declared for the purposes of such procedures.[106]

Customs Duties: The duties laid down in the Customs tariff to which goods are liable on entry or leaving the Customs territory. The amount or the percentage of the amount on the goods as per the Common External Tariff (C.E.T)[107]

Customs Examination: Authority conferred to Customs officers to examine goods, means of transport and persons including their baggage within Customs area.[108]

Customs Law: The provisions contained in the Customs and Excise Management Act or any other Act for the time being in force relating to Customs.[109]

Customs Value: The actual value of goods based on the principal basis for valuing or evaluating the goods for Customs purposes provided for in the law.[110]

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105 Section 20, CEMA.

106 Dubai Customs Customerôs guide, p. 5.

107 This was established under the auspices of the Customs Co-operation Council.

108 Section 21, CEMA, and section 145, CEMA.

Detention: This is the act of detaining a particular item pending the production of any documents or evidence to show that the relevant law as contained in the CEMA has not been breached. It could be a person held in custody immediately there is a breach of the CEMA and an arrest is made.[111]

Discipline: This is an application of authority in order to secure good conduct in obedience and compliance of the lawful orders and commands of the authority.[112]

Excise Duties: The duties laid down in the Customs tariff to which good manufactured in the country are liable.[113]

Excise Law: The provisions contained in the Customs and Excise Management Act or any other Act for the time being in force relating to Excise. [114]

False bottom: This is an additional construction to a container in order to hide the smuggled item so as to avoid its detection.[115]

False Declaration: The declaration of goods other than the ones imported for the purpose of evading prohibitions or payment of duty.[116]

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109 Section 2, CEMA.

110 Section 45, CEMA.

111 Section 167, CEMA.

112 Derived from the ordinary meaning of the word.

113 Schedule 5 Customs, Excise Tariff CET (Consolidation) Act, 2008 ï 2012.

114 Section 2, CEMA.

115 Derived from the ordinary meaning of the word.

116 Derived from the ordinary meaning of the word.

Goods: Any natural material or agricultural, animal, industrial or intellectual produce mentioned in the tariff nomenclature or may be classified under a tariff heading thereof.[117]

Government Warehouse: This means any place provided by the government and appointed by the Board for the deposit of goods for the security thereof and of the duties chargeable thereon.[118]

Jerquing: This is the process of striking off from the manifest all goods that have been cleared and making a record of goods not cleared from Customs control.[119]

Manifest: The document containing a full description of the goods carried on the various means of transport.[120]

Officer: This simply refers to a serving personnel of the Nigeria Customs Service [121]

Patrol: Movement of Customs officers from one place to another in order to prevent, detect, and arrest smuggling and smugglers.[122]

Prohibited goods: Those goods the import, export or movement of which is prohibited under the provisions of any law, notice, order or system issued by a legally authorized agency.[123]

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117 Section 2, CEMA.
118 Section 2, CEMA.
119 NCS Manifest Code.
120 *Ibid*.
121 Section 2, CEMA.
122 Section 158, CEMA.
123 Section 2, CEMA.

Proper Officer:Means any officer whose right or duty it is to require the performance of or to perform, the act referred to.[124]

Restricted goods: Those goods the import, export or movement of which is restricted under a system issued by a legally authorized agency.[125]

Role: The part played by the Nigeria Customs Service in suppressing and interdicting smuggling.[126]

Seizure: This refers to the process of seizing any item by the NCS for contravening the relevant provisions of the CEMA with regards to prohibitions, improper importation or exportation as the case may be.[127]

Service: This is a very simple way of referring to the Nigeria Customs Service as an organization.

Smuggling: Smuggling as defined by the *Concise Oxford English Dictionary*[128] is the crime of taking, sending or bringing goods secretly and illegally into or out of a country. The CEMA defines it as the act of illegal importation or exportation of goods into or out of a country without payment of duty payable therein and evasion of prohibitions

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124 Section 2, CEMA.

125 Section 10, CET.

126 Derived from the ordinary meaning of the word.

127 Section 167, CEMA.

128 Catherine Soarces, Angus Stevenson, *op. cit*. p. 185.

or restrictions order without legal documents required for that purpose.[129]

[129] Sections 46, 47, 63 and 64.

CHAPTER TWO

ORIGIN AND NATURE OF THE CRIME OF SMUGGLING

2.1 Introduction

Crime is old as man. It is a product of society and no matter the level of sophistication, it is manifesting itself not only in public, but even in privacy where there is no one watching. For example, óAô enters his fatherôs bed room in his absence and steals some money, or in the village at night when every body is sleeping, a thief enters a farm to steal the farm product. The history of the Israelites, of the Egyptians and the Romans was full of atrocities to which the word ñcrimeò may justly apply.[1]

The question then is what is a crime? Traditional criminal law writers have attempted different definitions with some difficulties. These difficulties arise from the fact that the definitions end up being descriptive of what crime is, while excluding other wrongs with varying consequences.[2]

Aguda and Okagbue outlined some of the definitions given by some common law writers.[3] For instance, Blackstone defines crime as ñan act committed or omitted in violation of a public law forbidding or condemning

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1 E. H. Ofori-Amankwah, *Criminal Law in the Northern States of Nigeria*, (Gaskiya Corporation Limited, Zaria, 1986) p. 1.

2 L. Ali, *Corporate Criminal Liability* (Lagos: Malthouse Press Limited, 2008), p. 27.

3 T. A. Aguda and I. E. Okagbue; *Principles of Criminal Liability in Nigerian Law* (Ibadan,: Heinemann Educational Books Nigeria Plc. 1990), p. 3.

itò, and also ña violation of the public rights and duties to the whole community.[4] This definition in effect means that such acts forbidden by law must have been expressed by law, the ñcommission or omission of which violates the lawò. Experience has shown that there may be some condemnable act or immoral wrongs which are not expressly provided for under a written law.

Another definition of crime is that it is acts which are ñboth forbidden by law and revolting to the moral sentiments of the societyò and also as ñacts forbidden by law under pain of punishmentò.[5]

The first arm of this definition seems to suggest that for an act to be a crime, it must not only be forbidden by law, but must also be revolting to the moral sentiment of the society. It is submitted here that there are however some acts like minor traffic offences that are criminal but may not be considered immoral. Also there may be acts, which may be considered immoral but are not criminal. For example, under the English Criminal Law, homo-sexual relations between two consenting adults in private, is not an offence.[6]

Glanvile Williams defines a crime or offence as a ñlegal wrong that can be followed by criminal proceedings, which may result in punishment.ò[7]

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4 *Blackstone Commentaries on the Laws of England*, p. 5, quoted in Aguda and Okagbue, *ibid.*

5 Stephen; *A General view of the Criminal Law of England*, pp. 3 ï 4, quoted in Aguda and. Okagbue; *op. cit.* p. 20.

6 See section 1(1), Sexual Offences Act, 1967 (U.K).

7 G. Williams: *Text Book of Criminal Law* (London: Stevens and Sons, 2nd ed. 1983),.

It is submitted that the restriction of the mode of redressing a crime, through criminal proceedings is unwarranted.

This definition also merely points to the consequence of a crime rather than explain what intrinsic characteristic of an act renders it subject of criminal as distinct from civil proceedings. Williams was quick however to say that there is no escape from studying the criminal law.[8] He buttressed his point by relying on the statement of Lord Atkin thus:

> The domain of criminal jurisprudence can only be ascertained by examining what acts of any particular period are declared by the state to be crime, and the only common nature they will be found to process, is that they are prohibited by the State and that those who commit them are punished.[9]

Different disciplines define crime from different perspective. The concept of crime as seen in the various definitions tends to be difficult to grapple with.

The theologian or moral philosopher talks of ñsinò while the behavioural scientist speaks in terms of behavioural disorder. Social scientists are content to equate crime with anti-social behaviour, and ethnologists with taboo. In criminology, however, the definition of crime per se is not of much interest except its implications for personality or social deviance.[10]

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8 Williams *op. cit,* p. 29.

9 *Proprietary Articles Trade Association v. Attorney General of Canada* (1931) A. C. 310 at 324.

10 Ofori Amankwah, *op. cit.* p. 1.

From the above definitions, it can be deduced that crime may be said to be any act or omission which the members of any given society consider to be sufficiently injurious to justify punishing the doer according to well defined and established procedures for dealing with criminals.

It is important to distinguish crime from tort and other civil wrongs. Whereas crime is redressible by the state itself, tort and other civil wrongs, are redressible by the aggrieved individual through a private, civil action. The problem again is that, some conduct may be both tort and crime as in ñAssaultò. The sanctions, which applied to an offender after the pronouncement of guilt, are in the form of punishment. Civil wrongs are rectified by the party liable in the form of damages (which may include compensation). Take the example also of a judgment debtor who is committed to prison in default of payment, which may not necessarily be ñcriminalò even though the treatment of the two types of wrong doers may not be materially different.[11]

It is pertinent here, to examine how the principal criminal legislation in Nigeria defines crime. In both the Criminal Code Act (CC)[12] and the Penal Code Law (PC)[13] the word ñoffenceò is used instead of the word ñcrimeò. These words are often used interchangeably.

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11 See Williams ñThe Definition of Crimeò - in 1955 *Current Legal Problems*, p. 107.

12 Cap. 77, LFN, 1990, Cap. C 38, LFN, 2004.

13 Cap. 89, Laws of Northern Nigeria, 1963.

Section 2 of the CC states that ñAn act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any Act, or law, is called an offenceò. In similar terms, section 28 of the PC states ñExcept where otherwise appears from the context, the word ówoffenceô includes an offence under any law for the time being in forceò. It is submitted that these definitions do no more require that for an act or omission to amount to an offence in Nigeria, it must be so stated in ówany written lawô.

Linus Ali[14] pointed out and we agree with him that, these definitions do not furnish the necessary features for an act or omission to be characterized as an offence. He concluded that to discover this, will entail a study of the substantive criminal law itself.[15] Thus, the summation is that in Nigeria, for an act to be described as criminal, it must be so stated by any legislation.

Another question that may arise is the determination of the distinction between morality and law towards the preservation and promotion of ñdecencyò and ñpublic goodò. As contended by Ofori Amankwah,[16] the inter-marriage between law and morality has been recognized from time immemorial. The Ten Commandments handed to Moses on Mount Sinai in deeply divine and moral contemplation are both law and an affirmation of basic principles of morality. To forbid murder, stealing, rape, fraud, etc.,

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14 Ali, *op. cit*. p. 35.

15 *Ibid*.

16 Ofori-Amankwah, *op. cit,* p.3.

has been the primary concern of the legislature and the Christians, Buddhists and Muslims.

With regard to the Christian faith, as far back as the founding days, Saint Augustine and Saint Thomas both identified natural law with divinity and consequently measured positive law with the natural law yardstick.

By the nature of man, he is a moral being, which means that law made for him should by necessary implication have some minimal moral content, if not it will be void and of no effect. It was therefore argued that law is ñthe agreement of reasonò[17] and ñan ordinance of reason for the common good.ò[18] The concern for morality as put by Stone[19] is only to the effect that men claim that the maintenance of general morality should be a constant concern of the law, alongside other claims, for example, those as to minimal standards of individual life, cultural and political progress, or the individual aspects of these things. It is however submitted that the claim that the law should support rules and standards of positive morality may be an important part of ñpublic opinionò to which democratic governments are thought to be responsive.

In the face of mounting crime in the society, a question that may arise is whether the government should tax money illegally obtained, say from

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17 View expressed by Cicero in Ofori-Amankwah, *op. cit,* p.3.

18 View expressed by St. Thomas in Ofori-Amankwah, *op. cit,* p.3.

19 J. Stone, *Social Dimensions of Law and Justice,* 1966, p. 268.

smuggling. Should the thief or prostitute be taxed on their gains? Should the State promote lotteries, gambling in aid of public revenue?

The concern of natural law for a high moral content in State legislation has become the legacy of most jurisdictions today, and has seriously engaged the attention of great thinkers even in recent times. The inter-marriage between morality and law is upheld by some and denied by others.

The analytical school, headed by John Austin, seeks to separate law from morality. This thought was articulately expressed in his province of jurisprudence determined in which the sovereign (but not morality) occupied a central position in the legal system. He concluded by saying that what ñisò rather than what ñoughtò to be, is the concern of the law. This view is shared by Hans Kelsen save that he gave it new dimensions in which he insists on a dichotomy between law and morality or justice. ñ*No theory of justice*ò, he stated ñ*can form part of a pure theory of law*ò.[20] He however, realized that the divorce of the óisô from the óoughtô is not easy in practice.

The utilitarian (Bentham, Mill and Hart) assumed that law must be utilitarian in its function in accordance with the theory of pain and pleasure. John Staurt Mill, writing in 1863,[21] took the view that the only legitimate purpose for which the criminal law ought to be involved is to prevent harm

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[20] Kelsen, 55 *Harvard L. Rev.* 44 (1941).

[21] Staurt Mill, *Essay on Liberty*, 1863 in Ofori-Amankuah, *op. cit*. p. 3.

to others. Hart, like Mill, in his book[22] draws a distinction between Justice and morality. He stated that justice is distinct segment of morality[23] and concluded that the proper end of human activity is ñsurvivalò.[24] To Hart, the inter-marriage between law and morality stems from the need for survival, while adopting a utilitarian view of morality, he insisted on demonstrable justification for the imposition of criminal penalties, challenging moralists to produce empirical evidence why sin should be punished.

It has been observed that Hart does not go as far as Mill to require harm to others as the only basis for moralistic legislation. He only demands demonstrable justification for he realizes that law can serve diverse functions. As Hughes points out, Hart is on ñsolid groundsò from orthodox theory of criminal law.[25]

From the foregoing, it is established that crime ever since the dawn of history has been with us. Crime is of diverse dimensions. It ranges from business crime,[26] commercial crime,[27] corporate crime,[28] crimes of capital,[29]

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22 Hart, *Concept of Law*, (Oxford University Press), 1961, p. 151

23 *Ibid*. p. 153

24 *Ibid*. p. 187.

25 Hughes, ñMorals and the Criminal Lawò, (1962) 71 *Yale L.J* 66.

26 M. Clarke, *Business Crime, Its Nature and Control* (Cambridge Polity, 1990).

27 L. Snider, *Commercial Crime in Deviance Conformity and Control in Canadian Society*, ed, Sacco, V, (Toronto Prentice Hall, 1992).

28 J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, (London: Routledge and Kegan Paul) 1984; M. B. Clinard and P. Yeager; Corporate Crime, (New York; the Free Press, 1990).

F. Pearce and L. Snider; *Corporate Crime in the Pharmaceutical Industry, Contemporary Debates*, (Toronto; University of Toronto Press, (eds) 1995).

29 R. Michalowski, *Crime of Capital in Order Law and Crime-an Introduction to Criminology* (New York Random House, 1985).

crimes of the powerful,[30] crimes at the top,[31] crimes of the suites,[32] economic crimes[33], elite deviance[34], occupational crime,[35] organizational deviance,[36] white-collar crime[37] and our discussion in this work the crime of smuggling.[38]

It is against this background that the discourse on legal framework for the crime of smuggling in chapter three will be appreciated.

2.2 The Nature of Crime of Smuggling

Smuggling is an old phenomenon. It is an illegal activity across frontiers of nations. It is usually defined as the taking of goods illegally from one country to another especially to avoid paying the necessary tax. It is not just avoiding payment of the necessary dues, but it is fundamentally a movement of contrabands, including hard drugs and other prohibited or

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30 F. Pearce: *Crimes of the Powerful*, (London: Pluto, 1978).

31 J. D. Douglas and J. M. Johnson, *Crime at the top. Deviance in Business and the Professionals* (Philadelphia J. B. Lippincoth 1978).

32 D. A. Timmer and D. S. Eitzen, *Crime in the Street and Crime in the Suites* (Toronto; Allyn and Bacon 1991).

33 H. Edelhertz, *Economic Crime in the Nature and Prosecution of White-Collar Crime*, National Institute for Law Enforcement and Criminal Justice, Department of Justice, Washington D.C. 1978

34 D. R. Simon and D. S. Eitzen, *Elite Deviance*; (Toronto Allyn and Bacon, 1986).

35 G. S. Green, *Occupational Crime* (Chicago, Nelson hall, 1990).

36 M. D. Emman and R. J. Lundman, *Corporate and Governmental Deviance: Problems of Organizational Behaviour in Contemporary Society*, (New York: Oxford, 1982). M. Punch, *Dirty Business Explaining Corporate Misconduct* (London: Stevens, 1996); D. Vaughan, *Controlling Unlawful Organizational Behaviour, Social Structure and Corporate Misconduct*, (Chicago, University of Chicago Press 1983).

37 H. Croall: *White-Collar Crimes*, (Buckingham: Open University Press, 1992); G. Geis and E. Stotland, *White Collar Crime Theory and Research* (eds) Beverly Hil Sage, 1980)

D. Nelken, *White-Collar Crime* in Maquire, M. Morgan, R. & Rainer, R. (eds), The Oxford Handbook of Criminology (Oxford Clarendon Press), 1994; and D. Nelkem, *White Collar Crime* (Aldershot Dart Mouth) (ed.) 1994.

38 Kofo Olugbesan, *Smuggling, The Law, The Crime*: (Stevman Law Publications, Lagos, 1993).

restricted goods in and out of the country, usually through unapproved entry points. The question now is how and to what level has smuggling attained in Nigeria. It is in fact a worldwide problem and it has taken a very complex dimension.

The various dimensions it has assumed shall be the focus of our discourse at this point. Nigeria is a country in which there is a very high taste for foreign goods. It has been estimated that about 90% of Nigeriaôs demand for industrial consumer goods is met from foreign countries.[39] Smuggling has a long and controversial history, probably dating back to the first time at which duties were imposed in any form.

In Britain, smuggling became economically significant at the end of the 17th century, under the pressure of high excise taxes. In 1724 Daniel Defoe[40] wrote of Lymington, Wiltshire, on the South Coast of England.

> I do not find they have any foreign commerce, except it be what we call smuggling and rouging; which I may say, is the reigning commerce of all this part of the English coast, from the mouth of the Thames to the landôs end in corn wall.

The high rates of duty levied on wine and spirits, and other luxury goods coming in from mainland Europe at this time made the clandestine import of such goods and the evasion of the duty a highly profitable venture for impoverished fishermen and seafarers. The smuggling industry became

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39 The Report of the Study Group on Customs and Smuggling presented to the Head of State and the Commander in Chief of the Armed Forces, October, 1984, p. 127.

40 Defoe, A tour throôthe whole Island of Britain, Letter III (London, 1724).

more economically significant than legal activities such as farming and fishing.[41]

In North America, smuggling in colonial times was also as a result of heavy taxes and regulations imposed by mercantilist trade policies. After American independence in 1783, smuggling developed at the edges of the United States at places like *Passamaquoddy bay*, St. Maryôs in Georgia, Lake Champlain and Louisiana. These same places became notorious for smuggling during Thomas Jeffersonôs embargo of 1807 ï 1809. In 1907 President Theodore Roosevelt tried to cut down smuggling by establishing the Roosevelt Reservation along the United States ï Mexico border.[42] Drug smuggling became a major problem after 1970 and in the 1990ôs when economic sanctions were imposed on Serbia,[43] a large percentage of the population survived by smuggling petrol and consumer goods from neighbouring countries. The Serbian government unofficially allowed this to continue so that the economy would not collapse.

In modern times when many countries have tried to contain the influx of immigrants, the smuggling of people across national borders has become a lucrative extra legal activity.

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41 Paul Theroux, *The Kingdom by the Sea*, 1983:84, the Kingdom refers to the various smugglers inn by the Coast.

42 Spangle, Steven L. (2008-02-11) *"Biological opinion for the proposed installation of 5.2 miles of primary fence near Lukeville, Arizona* (http:/www.fws.gov/southwest/es/ arizona/documents/Biolopin/080011 ï Lukeville primary fence p. 3 U.S. fish and wildlife service. Retrieved on 2008-10-11.

43 A land locked country located at the cross roads of Central and South East Europe.

The word ñsmuggleò itself probably originate from the Scandinavian and the Danish ñ*smugle*ò which literally means ósmuggleô and the Swedish ñ*smuga*ò which means a ólurking holeô or ñ*smugan*ò to ócreepô and is probably cognate with the Icelandic prefix ñsmugò which stems from ó*smjuga'* meaning óto creep through a holeò. [44]

No wonder then, that smuggling was effected from France to United Kingdom through the Channel Tunnel. In late January, 2006 the largest smuggling tunnel to date was found on the U.S. ï Mexico border. The 2,400 foot-long tunnel runs from a warehouse near the Tijuana airport to a warehouse in Sandiego. Authorities said it was unclear how long the tunnel had been in operation.[45] Authorities suspect Tijuanaôs Arellano-Felix drug syndicate or other well-known cartel, is behind the tunnel and its operations.[46]

Smugglers also use small ships, private airplanes and even small submersibles to avoid border checks.[47] In the Gulf of Mexico, the smuggling vessel of choice is the ñgo-fast boatò. Goods and people are also smuggled

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[44] R. Gutteridge*; Dorset Smugglers* (Red post Books, 1983) referred to in www.burtenbradstock.org.uk assessed on 26-10-2011.

[45] ñFeds smoke out largest drug tunnel yetò (http://www.cnn.com/2006/us/01/26/Mexico.tunnel/index.html) CNN.COM Retrieved May 1, 2007.

[46] ñDrug haul in secret border tunnelò (http://news.bbc.co.uk/2/hi/americans/ 4653536.stm) BBC. News Retrieved May 1, 2007. That of US ï Canada drug tunnel in 2005 was uncovered. A group of Canadian drug smugglers constructed a tunnel between a green house in Langley, British Columbia and the basement of a house in Lynden, Washington. Officials raided the home soon after and arrested them and they appeared before court in Seattle.

[47] Cost Guard hunts drug-running semi-subs CNN.com. (http://www,.cnn.com/2008/ crime/03/02 drug. Sub/index. Html).

across seas hidden in containers, and overland hidden in cars, trucks, and trains. They can pass a border as a stowaway.

The combination of acknowledged corruption at the border of Mexico and high import tariffs led smugglers in the 1970s and 80s to fly electronic equipment in cargo planes from one country to clandestine landing strips in another thereby circumventing encounters at the frontier between countries.[48]

During the siege of Sarajevo, Bosnia a tunnel underneath the no-manôs land of the cityôs closed airport provided a vital smuggling link for the beleaguered city residents. Guns were smuggled into the city and people were smuggled out.

Smuggling tunnels connect Egypt and the Gaza strip, bypassing the international border established by the Israel-Egypt peace treaty, the tunnels pass under the Philadelphia buffer zoneò known as ñPhiladelphia routeò in Hebrew. With the beginning of the *al-aqsa Intifada* (the war between Israel and Palestine) the tunnels were used mainly for smuggling of weapons and explosives used by Palestine militants.

The underground railroad was a collective name for the overland routes taken by escaped slaves seeking emancipation in the free states of the Northern United States and Canada. The title reflects the fact that the

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[48] Miller, Tom on the Border: Portraits of Americaô Southwest Frontier, pp. 44 ï 60.

network was hidden from authorities in slave States. The railroad consisted of clandestine routes, transportation, meeting points, safe houses and other havens. It is thought that 100,000 slaves were smuggled to freedom along this route.[49]

Smuggling has also extended to missile technology. It was reported[50] that on March 14, 2008 an employee of the Indian Embassy in Washington and Indian government agencies conspired with an Indian businessman to obtain secret weapons technology from U.S. Companies. The technology they tried to smuggle to India included microprocessors and electronic components used in the development of ballistic missiles, space launch vehicles and fighter jets.

Coming back to the Nigerian situation, Umar M. Birai[51] was of the view that since Nigeria is essentially a consumer import oriented economy, scarcity of foreign exchange and the national interest of the country dictate that unrestricted importation of goods including raw materials can not be allowed. As a developing economy, so many goods have to be prohibited from coming in and out of the country.

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49 New World Encyclopedia ï http://www.newworldenclyclopedia.org/entry/smuggling. Retrieved March, 2008.

50 Indians ñinvolvedô in missile technology smuggling. Dawn the internet edition; http://dawn.com; March 15, 2008 Saturday rabi-ul-auwal 6, 1429.

51 U. M. Birai, ñDimensions of Smuggling and the Nigerian Customsò, in I. E. S Amdii, *100 Years of Nigeria Customs and Excise 1881 – 1991*, (ed.) ABUP, Zaria,, 1991), p. 222.

A former Head of State in 1982[52] was quick to observe that the dimensions of smuggling over the years seems to suggest that it is also being carried out even through approved entry point into the country, using subtle manipulation of customs procedures and sometimes taking the advantage of inadequate equipment and bad eggs in the department of customs and excise. Even budgetary concessions to Nigerian manufacturers have been abused and turned to avenues ñfor over invoicing and smugglingò.

A former Director of Customs and Excise had also pointed out in 1984[53] that:

> Over the years, smuggling has assumed a new dimension in the country to include not only smuggling of prohibited and restricted import items but also illegal exportation of crude and refined oil, falsification of documents in excise factories and smuggling out of the country cash crops, essential commodities and food items.

By the nature of smuggling it is a flourishing business in Nigeria and according to a report,[54] it is for all comers. According to the report the only credentials required of smugglers or those with keen interest in the dirty but largely rewarding trade is guts and brain. Above all, however, is the unwritten but widely known fact that the palms of law enforcement officers should be handsomely greased.

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52 Presidential Annual Budget Speech, January 1, 1982, Text Published by *West Africa Newspaper*, January 4, 1982, p. 4.

53 In the Report of the Study Group on Customs and Smuggling, *op. cit*, p. 127.

54 *Vanguard*, September 7, 1991, p. 2.

The several dimensions smuggling has assumed in Nigeria are related to some factors. These factors it is submitted have over the years put the NCS under serious pressure so that all the efforts at combating the evil trade seem grossly ineffective.

The borders of African countries are artificial and more often the demarcations cut across language, culture and ethnic formations. A very good example as given by Umar[55] is the case of Bebe along Nigeria-Benin borders where some of them have their houses on one side and their farm on the other side. This kind of situation makes smuggling to thrive and enforcement becomes a problem. Bebe being an undefined area in Nigeria-Benin border at Idiroko, it becomes a centre of thriving smuggling activities. According to Umar[56], there was a particular warehouse at Bebe with five stores. Contrabands were stocked in the four stores on Benin side. Such goods were then transferred into the one store on Nigerian side through the ceiling and smuggling is completed.

The Nigerian border with Cameroun along the former Gongola State is very complicated, the terrain is unfriendly and in general the border is extremely porous. It is unpassable either because it is mountainous or swampy. There is also the case of border town of Banki on Nigeria ï Cameroun border in Bornu State. There are actually two Bankis (*Banki* Nigeria and *Banki* Cameroun). The people of the two towns are the same,

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55 U. M. Birai, Dimensions of Smuggling and the Nigerian Customs, *op. cit* 225.

56 *Ibid*.

speaking one local language. Portions of some houses in Banki Nigeria have their other parts in Banki Cameroun and vice-versa. Above all the market days of the two towns are the same.

Due to porous border between Katsina State of Nigeria and Niger Republic second hand cars are smuggled with ease. Motor licensing authorities have been accused of providing registration numbers to smugglers for easy movement once they have crossed the border. Political, socio-economic and cultural forces at work in the various border further compound the problem of effective enforcement. The management and control of the borders have not been easy.[57]

To this end, in 1984 the government of Nigeria, Benin, Togo and Ghana had to enter into an agreement meant to institutionalize co-operation on immigration, extradition of fugitives and criminals, smuggling and illegal trafficking in drugs, weapons and currency.[58]

The position of Nigeria often referred to as the ñ*Giant of Africa*ò is another serious dimension to the crime of smuggling. Nigeria no doubt, is in a strategic position in the West African sub-region. Nigeria is richer than all its neigbours. The countryôs economic resources and the taste of wealthy Nigerians and the elite in power have made it an ever expanding market for all sorts of foreign goods which are smuggled through the neighboring

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[57] In 1984/85, Nigeriaôs border with her neigbours were closed partly to check smuggling and reduce influx of aliens.

[58] I. A. Gambari, *Political and Comparative Dimensions of Regional integration: the case of ECOWAS,* (Humanities Press, 1991) p. 121.

countries. Olaniyan[59] was quick to observe that the Nigerian economy is essentially ñ*commercial*ò as destined from óindustrial capitalismô.

Nigeriaôs oil resource and lack of it in the neighbouring countries also guaranteed a good market for petroleum products smuggled into the neighbouring countries. Their relaxed Customs regulations may probably be seen as one way of taking the advantage of the Nigerian market through smuggling since they cannot export to Nigeria goods that do not originate form their countries.

This ñgiant of Africaò position becomes a peculiar perspective arising from the inequality in size and resources between Nigeria and her neighbours. It no doubt, to a large extent affected Nigeriaôs social, economic, cultural and political relationships with her neighbours, that they tend to dominate the borders. This has become a serious problem in combating smuggling along Nigeriaôs borders with her neighbours. For instance, the importation of rice in Benin is more liberal and thereby cheaper, therefore, Benin becomes a dumping ground for rice where they are eventually smuggled into Nigeria.

With respect to the smuggling of petroleum products, the Vanguard Newspaper of September 7, 1991 reported the discovery of an illegal oil deport at Gbethrome a coastal town in Badagry, where illegal export takes

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[59] O. Olaniyan; *Nigeria Economic Community of West African States: A Role and Problem Analysis* in G. O. Olusanya and K. Akindele (eds.) *Nigeria External Relations: The First Twenty-Five Years*, (University Press Ltd. Ibadan, 1986) p. 39.

place through the sea. The point was well made in the report on Customs and smuggling[60] where it was stated thus:

> In this regard, smuggling is a two way traffic our neighbours as well as Nigerians smuggle out of the country, the little we are able to produce ourselves and what we can import with our scarce foreign exchange. Again, because of the relatively more relaxed customs regulations of our neighbours, it is easy for smugglers to use their ports as staging points for smuggling imported goods into the country through over-land and sea routes. In this time when foreign exchange is hard to come by, smuggling out of the country is a way for the individual to make it and this in turn is used to purchase few goods, which are also smuggled back into the country.

The dimension smuggling has assumed in Nigeria makes a lot of people to suspect that officers collaborate with the smugglers to bring in the smuggled goods.

The 1984 Report [61] further conclude that

> The majority of smuggled cargos coming into the country are through the help of some of the unpatriotic officers.

This we submit is not unconnected with the pressures that come to bear on officers, which can easily push them into collusion with smugglers. This point was reiterated by Committee Four, in 1990[62].

Another dimension to the problem of smuggling is the role of the so called clearing agents. Even though licensed by the NCS to act as clearing agent to the importers, some of them end up being touts, and thereby

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60 The Report of the Study Group on Customs and Smuggling, *op. cit*., p. 127.

61 The Report of the Study Group on Customs and Smuggling, *op. cit*., p. 128.

62 The Report of Committee of Four set up by the Department of Customs and Excise on Combating Smuggling on our Borders presented at the Seminar for Senior officers, Bauchi, 18th ï 25th October, 1990, p. 6.

causing grave damage. At the sea and the border entry into Nigeria, the large and surging crowd of clearing agents is indeed embarrassing. They have been accused of aiding and abetting smuggling. The 1984 Report [63] acknowledged this by stating that:

> Many of them are not known to have any repute. They cheat both their clients and the government and are largely the avenue through which most of the smuggling takes place. They are ever ready to corrupt the customs officers so as to evade paying the correct duties even when they have collected such duties in full from their clients.

Abuse of official position is a very serious dimension in the crime of smuggling. Government, high ranking officials use their position, they even claim a kind of immunity, and bring in smuggled goods. This no doubt, put the Customs in a very difficult position to confront them. Activities of unpatriotic officers of other security agencies at every point aid and abet smuggling and organized armed smuggling by such unpatriotic officers has therefore constituted a big problem for the NCS in its anti-smuggling effort. A clearing agent was moved by the situation and he observed:

> It is a well known fact that smuggling in Nigeria is being aided and abetted by Nigerians in high positions using such position to influence their way through.[64]

These are the salient factors that have come to underscore the dimensions of smuggling in Nigeria. Smugglers are criminals engaging in the crime of smuggling.

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63 *Ibid.*

64 The Report of the Study Group on Customs and Smuggling, *op. cit*., p. 128.

As discussed, they use variety of unwholesome methods to carry on the evil trade. Smuggling is carried out through concealments, use of false declaration, bicycle carriers, motorcycle carriers, tri-cycles (usually employed by paralytics, and animals especially in the Northern part of the country). There may be many more yet to be discovered.

2.3 The Elements of Crime of Smuggling

The content of criminal law can be divided into two parts namely:

i) The General Part,[65] dealing with basic concepts of criminal liability and the defences;

ii) Specific offences.

We shall for the purpose of this work deal with the general part with particular reference to *actus reus* and *mens rea*. The basic elements for any criminal liability which has come to form the bedrock for criminal liability to this day is embedded in the Latin maxim, *Actus non facit reum nisi mens sit rea*, meaning, ñan act does not make a man guilty of a crime, unless his mind is blameworthyò[66] Although subject to some exceptions, this is a general principle governing liability for crimes. For our analysis, we shall examine the maxim from the constituent of the *actus reus* and the *mens rea*.

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65 This was invented by Dr. Glanville Williams after the Title of his *Monumental Book*, *Criminal Law – the General Part*, 1961.

66 J. C. Smith and B. Hogan, *Criminal Law*, (London, Butterworths & Co (Publishers) Ltd. 7th edn. 1992) p. 60.

2.3.1 Actus Reus of Smuggling:

This is to the effect that for a person to be guilty of an offence, it must be clearly proved that he has done the act. A kind of muscular contraction or cause of physical harm. This is however not necessary in all cases, for example, the result of an act distinct from other factors, as in a blow struck in hurt cases causing injury or death, to the victim.[67] It was therefore stated that *actus reus* includes all the elements in the definition of a crime except the accuserôs mental state.[68] It is generally made up of conduct and sometimes its consequences and also of the circumstances in which the conduct takes place (State of affairs), to the extent that they are relevant. These could be manifest in a gunshot (conduct) resulting in death (consequence). It could also take the form of an omission to act where there is a legal duty to do so. For instance, the act of failing to save life where there is a legal duty to do so or offences under the PC where section 130 punishes public servants who abandon their public duties.

Under the CEMA there is liability for failing to deliver to the proper officer an entry outward in the prescribed form.[69] The *actus reus* of an offence as seen is all the external manifestations of the human conduct resulting in the forbidden act, just short of the mental element.[70] We,

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67 K. S. Chukkol: *The Law of Crimes in Nigeria* (Zaria, Nigeria: A.B.U Press Ltd., 1998), pp. 22 ï 30.

68 *Ibid,* p. 30.

69 Section 50, CEMA.

70 Smith and Hogan, *op. cit,* p. 29.

however saw the exceptions, which came up in the case of *R. v. Larsonneur*,[71] where a French woman who entered the United Kingdom illegally was ordered to leave; but instead of complying, went to Ireland where she was arrested and brought to London and successfully convicted of vagrancy. As indicated, the offence of vagrancy need not strictly involve physical (i.e. muscular) movement at all.

It is worthy of note that gradually, the concept of *actus reus* began to change, largely as a result of increasing governmental responsibility to the generality of their subjects so as to protect them from unjustifiable harm.

By 1836[72] the problem was presented to Lord MacCauley and the other law commissioners as to what extent omission should be made punishable offences. The law commissioners took a middle course and from then they proposed that where acts are made punishable on the ground that they have caused or have been intended to cause, or have been known to be likely to cause the same effect, they shall be punishable in the same manner, provided that such omissions were on other grounds, illegal. An omission is illegal if it be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be good grounds for a civil action. The following illustrations will better drive home the point.

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71 (1933) L. T. 542.

72 A Penal Code was prepared by the Indian Law Commissioners (1836) Notem, 103 ï 106.

A omits to give B food and by that omission voluntarily causes Bôs death. Is it murder? It will be murder if A was under obligation by law to provide food for B. It is murder if B is the infant child of A, and has therefore a legal right to sustenance, which right a civil court would enforce against A. It is not murder if B is just a beggar who has no other claim on A than on humanity. This reasoning informed the decision in *Alimi Akani and others v. R.*[73] where Mbanefo, F. J. (as he then was) remarked:

> The members of the crowd who stood by and watched the house in which they know an old woman was locked in and being burnt and did nothing behaved disgracefully, but that does not bring them within the provisions of section 7 CC (dealing with principal offenders) as to be regarded as participants in the act of murder.

In conclusion and in proffering an answer to the question: When does an omission constitute an offence punishable by law? We submit that the position is jointly regulated by the common law and by both the CC and the PC.[74] An omission becomes a punishable offence when there is a deliberate refusal (or failure) to act where there is a duty to act. Section 24 of the PC states that ñexcept where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissionsò.

The position therefore at common law and our statutes is that where there is duty to act, failure to act may entail criminal liability just as in the case of a positive act or commission. The various duty situations depend

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[73] (1959) W.R.N.L.R 153 at 154.

[74] See sections 24-26 & 29 PC, and for the CC provisions see extensive discussion in Okonkwo and Naish, *Criminal Law in Nigeria, Excluding the North* "Sweet and Maxwellò 1964, pp. 49 ï 51.

largely on the facts of each case. The following situations may generally involve criminal liability.

i) Failure to act where there is a statutory duty to act. Failure to assist a public servant, when bound by law to assist him creates liability[75] by law.

ii) Failure to act where there is a contract.

Thus, in *R. v. Pittwood*[76] a gate keeper who left a gate at a railway crossing open was held responsible for the resultant injury to cart driver who was killed by a train while crossing. In *R. v. Lowe*[77] an engineer who deserted his post at a colliery, leaving an ignorant and incompetent boy in charge of machinery, was held guilty of the manslaughter of a collier who was killed through the failure of the boy to stop the engine properly.

iii) Failure to act where there is a special relationship. For example parent and child[78] in *R. v. Instan* [79] where a young woman who was dependant on her aunt, an aged helpless woman of 73 years of age, omitted to give the aged woman food, was found guilty of manslaughter where her omission accelerated death.

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75 Section 150 P.C. Note: The Sudanese provision is wider than the P.C. for where the positive act of the Good Samaritan does not endanger the life of the Samaritan, then failure to act can in some case give rise to criminal liability. See section 30 of the Sudanese Penal Code, and Commentary in Alan Gledhill, the Penal Code of Northern Nigeria and the Sudan, p. 7.

76 (1902) 10 T.K.R 37.

77 (1850) 3 C & K 123 (T.A.C) *Contra: R. v. Rees* (1886) C.C.S Sess Pap Civ. 271 (T.A.C)

78 *R. v. Gibbins* and Proctor (1918) 82 J. P. 287, 12 Criminal App. R. 134. See also *R. v. Senior* (1899) 1 Q.B 282.

79 (1893) 1 Q.B. 450.

Apart from these three basic duties, there are a large number of other (miscellaneous) situations.[80]

As discussed earlier we stated that for a person to be guilty of an offence, it must be clearly proved that he has done an act. A kind of muscular contraction or cause of physical harm. With regard to the crime of smuggling, it is no exception, in that there must be an act or omission before it can be said to have occurred. For example if a person imports anything whose importation has been prohibited under any order, (the *actus reus*) that person becomes guilty of the offence unless he can prove his innocence. If this is the case then it means that the *mens rea* has become subsumed in the *actus reus*.

Therefore as soon as a person brings an item of goods into the country, he is presumed guilty of an offence by virtue of section 190 of CEMA. This was the decision of the Supreme Court in the case of *Board of Customs and Excise v. Alhaji Ibrahim Barau*,[81] which was decided under the 1958 CEMA. The relevant section then was section 168, which provides:

> In any prosecution for an offence under the customs and excise laws, it shall not be necessary to prove knowledge or intent, but where the prosecution is in respect of an offense of doing anything knowingly or recklessly or with a specified intent, the onus of disproving that he did such things knowingly or recklessly or with such intent shall be on the defendant.

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80 G. Williams, *Criminal Law the General Part* (1961) pp. 4ï 8.

81 (1982) NSCC 154: 1982 1 SC 84.

The court held that by reason of the provisions of section 168 of the Act, in a criminal prosecution under any of the provisions of the Act, such as the case in hand, once the prosecution has proved that the carpets in question were imported by the respondent into the country, the law presumes in favour of the prosecution that:

> (a) as alleged in the two counts, the importation of the carpets is absolutely prohibited (See section 166 (2) (g) which is now section 188 (1) (g).
>
> (b) In respect of an offence punishable under section 145 (b) now section 164 (b) of the Act, the respondent was knowingly concerned in a fraudulent evasion of the import prohibition order.
>
> (c) In respect of an offence under section 44 (1) (b) now section 47 (1) (c) thereof the respondent intended to evade the prohibition imposed on the importation of carpets and was consequently concerned in the importation of the carpets.

The constitutional provision in section 36(5) however, provides for presumption of innocence. It is however, not strange that section 190 of CEMA as contended as reversed the burden of proof. While construing similar provisions of Public Officers (Investigation of assets) Decree Ezike argued that the onus of proving that there was no unjust enrichment lies on the public officer. [82] It was also acknowledged that the use of presumptions, the reversal in the burden of proof are some innovations introduced by Corrupt Practices and Other Related Offences Act, 2000.[83]

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82 Section 3 (2) Decree No. 5, 1966.

83 B-Ige, ñFighting Corruption and Sharp Practices in the Ports Systemò An Address by the then Attorney General and Minister of Justice on a Stakeholders Summit Organised by Nigeria Ports Authority 24th- - 26th October, 2000 (Hey Gate Press Ltd, Legos) p. 10 cited in ezike, loc.cit.

The Supreme Court in Bord of Customs and Excise v. Barauheld that the prohibition of the importation of carpets into Nigeria, having regard to the clear provisions of section 1 sub-section (1) of the prohibition order, is absolute and that this does not allow for any other interpretation notwithstanding the use of the word, ótradeô, after the heading entitled ñAbsolute Prohibitionò in Part II of the Prohibition Order..

The Supreme Court held further the use of the word, ótradeô, cannot and does not reduce the impact or effect of the mandatory provisions of section 1, sub-section 1 of the order. This word, ótradeô, and indeed the other words, ñother than tradeò added after the words ñabsoluteò prohibition: in part of the same first schedule, are superfluous.

This was the decision of the Supreme Court as decided then and that has continued to be the position. The *mens rea* being subsumed in the *actus reus*, the offence of smuggling is said to have taken place. We shall comment on this decision in the next chapter, as we strongly believe that the Court misdirected itself.

The point was made earlier that the notion of criminal responsibility generally requires the *actus reus* and the *mens rea*.[84] The mental element becomes very important that unless it is clearly dispensed within a criminal statute, there is every reason to import it as an ingredient in the offence charged. We also saw its application to the crime of smuggling especially

[84] J. C. Smith and B. Hogan, *op. cit,* p. 60.

instances where the *mens rea* becomes subsumed in the *actus reus* thereby culminating in liability.

It must however be stressed that the requirement of *mens rea* is not absolute in all cases. And although the tendency is to enlarge rather than restrict its requirement, yet in a few cases the mental element can be dispensed with. This leads us to the concept of strict liability offences,[85] Such as driving a car without license.[86] At common law *mens rea* will generally be read into an offence unless it is clearly excluded. To this end Lord Goddard, C. J. said in *Brend v. Wood*[87] that:

> It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

In spite of the tendency to restrict strict liability offences, there are a few areas where they still apply. Thus, the Privy Council observed in *Limchin Aik. v. R.*[88] that in determining when an offence can be said to be strict liability, a court must ascertain whether:

(i) it is a regulation which is made in the interest of the public to deal with a grave social evil; and

(ii) that the putting of the defendant under strict liability will assist in the enforcement of the regulation, for example, will make

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85 Smith and Hogan, *Criminal Law*, 3rd ed. (1974), p. 66.

86 E. O. Fakayode, *Criminal Code Companion*, Ethiope, 1977.

87 (1946) 175 L.T. 306 at P. 307, See also *Sweet v. Parseley*, (1969) 1 All E. R. 342.

88 (1963) 1 All E. R. 223.

> him carry out his work more efficiently through supervision, inspection or the improvement of his business method.[89]

Thus, in *Cundy v. Lecocq*,[90] a man who sold intoxicating liquor to a drunken man without knowing that he was already drunk was held guilty of an offence under section 13 of the Licensing Act of 1872, which was interpreted to create a strict liability offence.

Since strict liability offences are mostly regulatory and prohibitive, the main areas of their application include statutory offences, offences in their social context, road traffic offences and a variety of other miscellaneous offences like smuggling. Under the CEMA, it seems the unlawful importation of prohibited goods tends to be strict liability.[91] Similarly, it has been held that using a vehicle to convey smuggled goods, renders the vehicle liable to confiscation.[92]

It was held in the case of *Kayode Ilesanmi v. B.O.C & E.*[93] that the law regarding forfeiture of goods is absolute, which means that any vehicle used in conveying any smuggled goods, becomes liable to forfeiture. The statutory provision is in section 169 of CEMA.

Section 169 (1) provides:

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89 See Fakayode, *op. cit*. p. 10.

90 (1884) 12 Q.B.D 207 See also *R. v. Prince* (1875) L.R 20 C.R 154. See Archbold, *Criminal Pleadings Evidence and Practise*, 37th ed., para 2715, p. 857..

91 See Hubbard J. in *Olayinka Dosumu v. Controller of Customs and Excise* (1956) L.L.R 41.

92 Section 169 (1) (2), CEMA, Cap. C 45, LFN, 2004.

93 (1982) 2 NCR 161.

> Without prejudice to any other provision of this Act, where anything has become forfeited under the customs and excise laws -
>
> (a) any ship, aircraft, vehicle, animal, container (including any article of passengerôs baggage) or anything whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so forfeited either at a time when it was so liable or for the purposes of the commission of the offence for which it later become so forfeited, and
>
> (b) any other thing mixed, packed or found with the thing so forfeited, shall also be forfeited.
>
> (2) Where any ship, aircraft, vehicle or animal has become forfeited under the customs and excise laws, whether by virtue of subsection (i) of this section or otherwise, all tackle, apparel or furniture thereof shall also be forfeited.

This is the provision of the law and as was held in the case of *Ilesanmi*[94] that it is absolute thereby making the offence strict liability. We submit that the above decision is rather too harsh and the court ought to look at the circumstance of each case. What of a situation where a person uses a vehicle in carrying contraband goods without the knowledge and consent of the owner of the vehicle or where a contraband are found in the luggage of a passenger in a passenger vehicle unknown to the driver of the vehicle. In these situations, we think that the rigorous provisions of section 169 (1) should not apply. It was held in *B.O.C. & E v. Bolarinwa*[95] that a common carrier or the driver or owner of a passenger vehicle or omnibus would not know what is being carried as in the case of a private car owner who has in his vehicle contraband goods. We are not unmindful of the provisions of sections 24 and 48 of the CC and PC respectively in this regard.

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94 *Supra.*

95 (1971) 1 ALR 237 at 245.

Section 24 CC provides:

> Subject to the express provisions of this code relating to negligent act and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident.
>
> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
>
> Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention is immaterial so far as regard criminal responsibility.

Section 48 PC provides:

> Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.

Although, it is true that subject to the express provision of the Act, a man is not criminally responsible for an act or omission which occurred independent of the exercise of his will or an event which occur by accident there are situations where the provisions of an Act may be strict in relation to certain offences. One of such is section 46 (a), (b), (c), (d) and (f) of CEMA which provides:

> where ï
>
> (a) except as provided by or under this Act, any imported goods being goods chargeable with a duty of customs, are without payment of that duty landed or unloaded in Nigeria, or removed from their place of importation or from any approved wharf, examination station, customs station or customs area; or
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition; or
>
> (c) any goods, being goods chargeable with any duty or goods the importation of which is prohibited, are found whether before or

> after the unloading thereof, to have been concealed in any manner onboard any ship or aircraft or in any vehicle; or
>
> (d) any goods imported concealed in a container holding goods of a different description; or
>
> (f) any imported goods are found whether before or after delivery, not to correspond with the entry made thereof.
>
> Those goods shall be forfeited.

As seen above, the mental element of committing the offence is not expressly provided for. This is as opposed to section 46 (e) which provides:

> (e) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer.

In the case of *Board of Customs and Excise v. Okon Etim Uyah,*[96] Senlong J. held that the Court has discretion in a matter of forfeiture and whether a vehicle should be condemned as forfeited depends on the circumstances or facts of each case. In the instant case, since the applicant pleaded guilty to the charge and was convicted the strict rule of section 169 (1) (a) of CEMA should apply and the Peugeot 504 saloon car forfeited.

The learned judge referred to the case of *B.O.C.E v. Aro Olajide*[97] quoting Ayinde (J) thus:

> For how can the owner of a vehicle lose that vehicle merely because it was used by his driver in carrying contraband or uncustomed goods without his knowledge and consent, or will it not be travesty of justice for the driver of a passenger vehicle or omnibus who does not normally know the contents of the luggage of the passengers in his vehicle to forfeit that vehicle merely because contraband or uncustomed goods were found in the luggage of one of the passengers.

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96 FHC/CA/27C/92.

97 (1984) FHCLR 1.

We are proposing that a clause be added to section 169 of CEMA to the effect that unless it is established that ownership of the means of conveyance is different from the ownership of the goods forfeited and that the act of the owner of the goods is without the knowledge and consent of the owner of the means of conveyance, in that the means of transport shall not be subject to forfeiture.[98]

We conclude here by saying that strict liability is an area largely shrouded in uncertainty and vagueness as seen in the crime of smuggling under the CEMA. While, indeed, there is room for ñjudicial activismò as seen above, the position is unacceptable since it may involve a game of hazard, and an accused person may not reasonably know his chances of acquittal. There is, therefore, need for more authoritative legislative action.[99]

2.3.2 Mens Rea of Smuggling

In the medieval criminal law strict accountability was the rule. It was enough if the wrongful act satisfied the requirements of causation. Once the forbidden act could be traced to the conduct of the accused person there was liability without proof of any blame worthy state of mind.[100] Following a wave of petitions which were addressed to the Lord Chancellor as keeper of

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98 See section 254 of the NCS bill, 2012.

99 Ofori-Amankwah, *op. cit*. p. 85.

100 Smith & Hogan, *op. cit.* p. 42 Lord Mansfield was quoted to have said that the law could not enquire into a manôs mind since not even the Devil could know a manôs mind.

the kingôs conscience requiring the rigour of the law to be tampered with mercy, and with the successful intervention of the court of equity, it soon became accepted that *mens rea* was to be presumed to be a necessity in any crime created by statute. In *Fowler v. Paget,*[101] Lord Chief Justice Kenyon stated that: ñIt is a principle of natural justice and of our law that *actus non facit reum nisi mens sit rea*ò.

The rule then became established that to constitute a crime, there must be both the forbidden act (*actus reus*) and a blameworthy state of mind (*mens rea*). The requirement of *mens rea*, no doubt, is in accordance with natural justice and modern trends in penology, for why should a man be guilty of an offence, which he did not intend to commit?

Mens rea comprises of the mental element attendant to the commission of a crime. It has been variously described as óa guilty mindô[102] or ómalicious mindô[103] which an accused person must have to be able to convict him for an offence. This calls for an inquiry into the condition or state of mind of the offender as at the time of the offence. These phrases

may be anomalous in certain circumstance. For instance, guilty mind is not necessarily a feeling of guilt by the accused as he may indeed, be acting with a perfectly clear conscience believing his act to be morally, and even

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101 (1798) 7 T. R. 509 at 514.

102 Smith and Hogen. *op. cit*, p. 53.

103 Chukkol, *op. cit,* p. 24.

legally right, and yet to be held to have *mens rea*.[104] Similarly, a person may have killed out of compassion, but yet held to have acted maliciously in law.

Essentially, the *mens rea* is reflective of the mental attitudes, which a man may have with respect to the *actus reus* of the offence in question.[105] The mental attitude of an offender may take the form of intention, knowledge, recklessness and negligence. These may operate independently or coincide in a crime.

In this work, the above shall be used in the attempt to appraise the crime of smuggling. Glanville Williams with respect to this further asserts:

> Intention is a state of mind of knowledge of any requisite circumstances plus desire that any requisite result will certainly follow. Recklessness is a state of mind essentially negligent, where there is foresight that a certain result will probably or may possibly follow. Inadvertent negligence does not necessarily contain any element of foresight, and it is not a mental state. But is the condition of one who fails to behave in accordance with a proper standard of care.[106]

It is therefore established that apart from crimes of strict liability, the fundamental requirement for criminal liability is that a guilty mind (*mens*

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104 Smith and Hogen. *op. cit,* p. 54.

105 Chukkol, *op. cit* p. 25. For instance a father killing his terminally ill child to save him (the child) from the agonies of the pain of an ailment.

106 Williams, *op. cit,* 56 p. 20

rea) must coincide in point of time with prohibited act (*actus reus*).[107] *Mens rea* implies an intention to do a present act, not a future act. Thus, it has been held that one who walks out of Prison in a state of automatism does not commit the offence of escape by deciding when he recovers his senses, to remain at large.[108] It has been held however that where the *actus reus* is a continuing act, then it suffices that the offender has *mens rea* during its continuance[109] or that where the *actus reus* is part of a larger transaction it may be sufficient that the offender has *mens rea* during the transaction, though not at the moment the prohibited act was accomplished.[110]

The discourse here will be anchored on the mental attitude of the smuggler who engages in the crime of smuggling. This may take the form of intention, knowledge, recklessness and negligence. These species of mental element may operate independently or coincide in a crime. These species of mental element may be required to be proved either of each other or conjunctively. The question then is wherein lies the burden of proof? The burden ought to be on the prosecution, which is the general notion of criminal jurisprudence.

The relevant section here to be considered is section 164 of CEMA which is in *pari materia* with section 145 of the 1958 Act. The section provides that:

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107 *Jakeman* (1983), cr. App. Rep. 223 (1983), Crim. L. R 104 and commentary thereon, *Fowler v. Padget* (1798) 7 T. R. 509.

108 *R. v. Scott* (1967), V.R.P. 276.

> without prejudice to any other provisions of this Act, if any person ï
>
> (a) knowingly and with intent to defraud the Federal Government of any duty payable thereon, acquires possession of or is in any way concerned in the carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or government warehouse, or which are chargeable with a duty which has not been paid, or with respect to importation, exportation or carriage coastwise of which any prohibition is for the time being in force; or
>
> (b) is, in relation to any goods, in anyway knowingly concerned in any fraudulent evasion or attempt at evasion of any such duty chargeable thereon or of any such prohibition as aforesaid or of any provision of this Act applicable to those goods, he shall be liable to a fine of six times the value of the goods or four hundred naira whichever is the greater or to imprisonment for two years or to both.

There is no doubt, that the section makes knowledge and intention to defraud very vital issues regarding the culpability of the accused person. The question here is on whom is the burden to prove the element of the offence. If going by the general notion under our criminal jurisprudence that before a person is criminally responsible for an act constituting an offence, his guilt must be proved beyond reasonable doubt by the prosecution, then we can say that with regard to the CEMA the prosecution has to prove the elements. This is borne out of the provisions of the Constitution as well as the law of evidence.

Section 36 (5) of the 1999 Constitution provides:

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109 *Fagan v. Metropolitan Police Commissioner* (1969) 1 Q.B. p. 439.

110 *Thabo Meli v. Queen* (1954), 1 All E. R., 373.

> Every person who is charged with a criminal offence shall be presumed innocent until the contrary is proved. Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

By section 137 of the Evidence Act,[111] if the commission of a crime by a party to any proceeding is directly an issue in any civil or criminal proceeding, it must be proved beyond reasonable doubt. The burden of proof is on the prosecution being the person who normally asserts the guilt of an accused person *via* a charge.

Under the CEMA, the above general notion of criminal jurisprudence seems not to be the rule. It has now become ñ*you are guilty until you prove your innocence*ò. This is made manifest as seen in section 190 which is in *pari materia* with section 168 of the 1958 Act. The section provides:

> in any prosecution for an offence under the customs and excise laws, it shall not be necessary to prove knowledge or intent, but where the prosecution is in respect of an offence of doing anything knowingly or recklessly or with a specified intent, the onus of disproving that he did such thing knowingly or recklessly or with such intent shall be on the defendant.

The implication here is that apart from general guilty intent, which is to be read into all statutory offences, the section again places the onus of proving lack of knowledge, recklessness or specific intent where they are made a requirement of an offence on the defendant or accused.

While commenting on section 190 of CEMA, Olugbesan said apart from general guilty intent, which is to be read into all statutory offences, the

section again shift the onus of disproving knowledge, recklessness or specific intent where they are made a requirement of an offence. [112]

According to the learned author, contrary to judicial decision to the effect that intention or knowledge or recklessness need not be established by the prosecution, where it is not made a specific requirement of an offence and that the defendant has the burden of disproving same, the section did not relieve the prosecution of proof of such specific intent or knowledge or recklessness in offences created under sections 47, 64, and 164 of CEMA.[113]

The author therefore submitted that what the first part of section 190 of CEMA does is to curtail the general requirement of criminal law on proof of guilty intent where there is no specific mention of it in an offence.[114]

We are not in agreement with her submission in that the courts have expressly interpreted section 190, which is without any ambiguity. Her view as expressed is going against the spirit of section 190 and the legislature may not have intended that.

The only cure here is an amendment of the section, if not it has to be applied the way it is. We further rely on another provision of CEMA which offers a new dimension in support of our view. Section 188 (1) (g) provides:

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111 Cap. E 14, LFN, 2004.

112 Olugbesan, *op. cit*, at p. 122.

> (1) an averment in any process in proceedings, under the customs and excise laws é
>
> (g) that the offence was committed or that any act was done in a specified place in Nigeria, shall unless the contrary is proved be sufficient evidence of the matter in question.

This means that when a charge is adequately framed then an offence is said to have been committed. It therefore follows that going by section 188 (1) (g) statements of the particulars of the offence in the charge is *ipso facto* sufficient proof of the commission of the offence. Even when specific intent, or knowledge or recklessness is required, the fact that the charge is drafted with sufficient reflection of the ingredients shall be sufficient evidence that the offence is committed, except there is contrary evidence in favour of the accused.

Sections 188 (1)(g) and 190 of CEMA relieve the prosecutor of any proof except that he is enjoined to ensure that the charge adequately reflects all the material ingredients of the offence and that the charge is free from ambiguity or duplicity. In *Board of Customs and Excise v. Mustapha*,[115] it was held that although the evidential burden of proof in customs cases is shifted on the defendant, it would not arise unless it is shown by the charge that an offence is committed.

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113 *Ibid*. at p. 122.

114 *Ibid*. at p. 124.

115 (1978) 4 F.H.C.R See also *B.O.C. & E. v. Okon Eder* (1980) F.H.C.R 20; *B.O.C. & E. v. Ajilore* (1980) F.H.C.R 205.

From the above analysis it will appear that all the prosecutor needs do is to adequately frame the charge and he is relieved of further obligation. Olugbesan[116] however, stated that some cases do not seem to bear this out. It has been held that in case of unlawful importation of prohibited goods or evasion of duty chargeable on the goods, the prosecution must show that the goods so imported were unlawful because they contravene a particular prohibition or that the goods are chargeable, and the duties thereon have not been paid.[117]

It is submitted however that on the nature of the burden on the accused, all that he needs to do is to give some evidence consistent with his innocence which may be reasonably true, even though the court may not be satisfied that it is true, he should and ought to be acquitted. The burden is less than that required of the prosecution in proving their case beyond reasonable doubt.[118] It has also been held that lack of knowledge of the import prohibition order is no ground or proof of innocence.[119]

Under the Hawaiian Kingdom Civil Code, which deals with smuggling, there is the same evidential proof as in the CEMA. Section 657[120] provides that -

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116 Olugbesan, *op. cit*, p. 125.

117 *B.O.C & E. v. Barigbon and Anor.* Case No. FRC/P/P4/29C/76 delivered on July 25, 1976.

118 Per Anyaebunam C. J. in *Board of Customs and Excise v. Chike Okeke* (1980) F.H.C.R 208 of 214. See also *Board of Customs and Excise v. Banye* (1960) 1 A.N.L.R 178; *Nader v. Board of Customs and Excise* (1965 1 All N.L.R 33; *Egbutu v. Comptroller of Customs* (1960) 4 E.N.L.R. 4.

119 *Board of Custom and Excise v. Christiana Udumezue*; Comfort Ikeamaka (1978) 4 F.H.C.R. 45.

120 Civil Code of the Hawaiian Island Article XXVI.

> In all cases where any person shall be charged with smuggling, or attempting to smuggle, any goods, wares or merchandise, it shall be incumbent on such person to prove the legal importation, and the payment of duties required by law.

Under the New Zealand Customs and Excise Act.[121] there is a presumption of payment of duty unless the contrary is proved. Section 239(4) of the New Zealand Act specifically provides that:

> In any proceedings for an offence against this Act, where it is alleged that the defendant intended to commit the offence, the prosecution has the burden of proving that intent beyond reasonable doubt.

Section 208 (a) (b) of the Kenyan Customs and Excise Act[122] provides that it shall not, unless it is expressly so provided, be necessary to prove guilty knowledge and the onus of proof shall be on the person prosecuted or claiming anything seized under the Act.

In Ghana the onus of proof is two ways. Section 309 (1) of the Ghanaian Customs, Excise and Preventive Service (Management) Act, 1993 provides generally that in proceedings under the Act, the proof shall lie on the person who asserts. This provision is in line with the general criminal jurisprudence of the presumption of innocence. It therefore means that since it is the prosecution that often alleges, the onus is on him. The other way is provided for in sub-section (3) and (4) of the section to the effect that where

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121 New Zealand Customs and Excise Act 1996 (reprinted as at 1st October, 2008) part 15.

122 Cap. 47 Laws of Kenya, 1996.

in proceedings under the Act it is alleged that prohibited or restricted goods were dealt with for the purpose of importation or exportation contrary to the prohibition or restriction, the burden of proof that they were not dealt with for that purpose shall be on the defendant. It provides further that on the hearing or trial of a cause or matter under the Act, it is not necessary to prove guilty knowledge unless otherwise expressly required but the burden of disproving it shall be on the defendant.

The provisions, it is submitted, tend to be contradictory. If subsection (1) is saying that whoever asserts must prove which often is applicable to the prosecution, then sub-sections (3) and (4) which place the burden on the defendant is unnecessary.

In India the burden of proof according to the Indian Customs Act,[123] is on the person from whose possession the goods were seized or any person claiming ownership. This suggests that the burden is on the defendant who was in possession of the seized goods or who claims ownership of the seized goods.

[123] See section 123, Indian Customs Act 1962 Chapter XIV.

CHAPTER THREE

LEGAL FRAMEWORK FOR COMBATING THE CRIME OF SMUGGLING

3.1 Introduction

Ordinarily, smuggling as earlier defined[1] is the crime of taking, sending or bringing goods secretly and illegally into or out of a country. Olugbesan[2] stated that the economic repercussion of smuggling and the inordinate perpetration of the act may necessarily have led to its criminalisation. It has also been held not only as an economic activity, but one possessing and manifesting terroristic dynamics.[3] The CEMA is the principal enactment that seeks to enforce the crime of smuggling in Nigeria. Some other enactments[4] deal on some aspect of the crime.

A survey of some of the enactments becomes relevant at this point so as to fully grasp the dynamics of the crime of smuggling. Sections 78, 79

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1 Soarces, Stevenson, *op. cit*, p. 185.

2 Olugbesan, *op. cit,* p. 68.

3 O. B. C Nwolise ñ*Smuggling as International Economic Terrorism*ò a commissioned paper presented at the Nigerian Customs Service Seminar, held at Ladi Kwali Conference Centre, Sheraton Hotel and Towers, Abuja, 15th to 19th Dec., 1997.

4 Sections 78, 79 and 87, Criminal Code (CC), Cap. 77 LFN 1990 (now C 38, LFN, 2004), sections 423,424 and 425 Penal Code (PC) (Northern States) Provisions Act, Cap. 345, Vol. XIX, 1990, LFN (now Vol. 13, Cap. P3, LFN, 2004); sections 3 (1)(p), 8 (b) (c), 11(a) and 41 National Drug Law Enforcement Agency Act (NDLEA) Cap. N 30, LFN, 2004 and sections 6(b) and 46 of the Economic and Financial Crimes Commission Act (EFCC), No. 1 of 2004 which repealed the EFCC Act, Cap. E1, LFN, 2004 that was made in 2002.

and 87 of the Criminal Code[5] provide for the definition of smuggling as follows:

> 78 Any persons who assemble together to the number of three or more, armed with firearms, bows, arrows, spears, sword, knives, or other dangerous or offensive weapons in order to effect or aid in effecting any of the following purposes:
>
> (a) The unlawful shipping, loading, moving or carrying away of any goods the importation of which is prohibited, or any goods liable to customs duties, which duties have not been paid or secured.
>
> (b) The rescuing or taking of any such goods from any person employed by him or assisting him, or from the place where any such person has put them.
>
> (c) The rescuing of any person who has been arrested on a charge of any offence relating to the customs.
>
> (d) The prevention of arrest of any person guilty of such offence or any person aiding in effecting any of the purposes in this section mentioned.
>
> are guilty of a felony, and each of them is liable to imprisonment for seven years.
>
> 79. Any persons who are found assembled together to the number of six or more, having with them any goods liable to forfeiture under any law relating to the customs, and carrying firearms, bows and arrows, spears, swords, knives or other dangerous or offensive weapons or disguised, are guilty of a felony and each of them is liable to imprisonment of seven years.
>
> 87. Any persons who assemble together, to the number of three or more, for the purpose of unshipping, carrying or concealing any goods subject to customs duty and liable to forfeiture under any law relating to customs, are guilty of a misdemeanour and each of them is liable to a fine not exceeding two hundred naira or to imprisonment for six months.

Under the Penal Code,[6] sections 423, 424, and 425 are in *pari materia* with the provisions of the Criminal Code. Section 423 of the Penal Code is

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5 *Ibid.*

6 Applicable to Northern Nigeria.

not however as exhaustive as its equivalent in section 78 of the Criminal Code. Section 423 of the PC does not provide for the equivalent of section 78 (c) (d) of the CC. The sections provides:

Section 423:

> whoever assemblies with two or more persons armed with any dangerous weapon for any of the following purposes ï
>
> (a) to unlawfully ship, unship, load, move or carry away any goods the importation of which is prohibited, or any goods liable to customs duties, which duties have not been paid or secured;
>
> (b) to rescue or take any such goods from any person authorized to seize them, or from any person employed by that person, or assisting that person,
>
> shall be punished with imprisonment which may extend to seven years or with fine or with both.

Section 424:

> whoever assembles with five or more persons who have with them any goods liable to forfeiture under any law relating to the customs, and who are carrying dangerous weapons, or who are disguised shall be punished with imprisonment which may extend to seven years or with fine or with both.

Section 425:

> whoever assemblies with two or more persons for the purpose of shipping, carrying, or concealing any goods subject to customs duty and liable to forfeiture under any law relating to customs shall be punished with imprisonment which may extend to six months or with fine which may extend to ₦200.

An issue that may arise from the above provisions relate to the number of persons that can commit a crime of smuggling. This is because the codes only criminalise smuggling when it is done by more than two persons, even though it is possible for only one or two persons to carry out

the act. Section 46 of the CEMA adequately makes provision for offences relating to improper importation which amounts to smuggling without limiting the number of persons who may be involved.

Under section 87 CC and section 425 PC, goods therein mentioned must be subject to customs duty and liable to forfeiture. This is a cumulative requirement in that goods liable to forfeiture are not necessarily subject to customs duties. The importation or exportation of some goods are prohibited; the fact of their prohibition renders them liable to forfeiture even though such prohibited items do not attract customs duty. In some other cases like restricted goods, such goods can be subject to customs duty but liable to forfeiture when they have not met the conditions stipulated in the particular Restriction Order. Goods that are subject to customs duty, which are not prohibited or restricted, and upon which duties have been paid cannot be liable to forfeiture. Forfeiture is seen by CEMA in its ordinary meaning of taking away something from somebody especially in the context of being a penalty for breaking the law. Section 46 of CEMA adequately covers various areas where forfeiture can take place. The section provides:

> where ï
>
> (a) except as provided by or under this Act, any imported goods being goods chargeable with a duty of customs, are without payment of that duty landed or unloaded in Nigeria, or removed from their place of importation or from any approved wharf, examination station, customs station or customs area; or
>
> (b) any goods are imported, landed or unloaded contrary to any prohibition; or

(c) any goods, being goods chargeable with any duty or goods the importation of which is prohibited, are found whether before or after the unloading thereof, to have been concealed in any manner onboard any ship or aircraft or in any vehicle; or

(d) any goods imported concealed in a container holding goods of a different description; or

(e) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer; or

(f) any imported goods are found whether before or after delivery, not to correspond with the entry made thereof.

Those goods shall be forfeited

The punishment of two hundred naira or imprisonment for six months does not reflect the adversity of smuggling on the Nigerian economy today.

Another inadequacy in the provisions of the codes is the emphasis on importation of prohibited goods, thereby leaving out persons engaged in smuggling through exportation and as such definitely such illegal exporters cannot be prosecuted under the codes.

There is no doubt that, the provisions of the codes are deficient. If they were to be the only existing provisions on smuggling, a lot of offenders would have escaped prosecution.[7]

The NDLEA by virtue of its role has also delved into the realm of smuggling. The NDLEA was established to enforce laws against the cultivation, processing, sale, trafficking and use of hard drugs and to empower the Agency to investigate persons suspected to have dealings in drugs and other related matters.

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[7] Olugbesan, *op. cit*, p. 80.

The NCS before the establishment of the NDLEA was responsible for the enforcement of drug offences. When the NDLEA was established, the NCS had to handover all drug and drug related matters to the NDLEA. Some officers of the customs at the initial stage were even seconded to the Agency to help set up its operations.

The NDLEA Act in section 3 (1) (p) provided that the Agency should collaborate with other government bodies both within and outside Nigeria in carrying on functions wholly or in part analogous to those of the Agency. The section provides:

> (1) subject to this Act and in addition to any other functions expressly conferred on it by other provisions of this Act, the Agency shall have responsibility for ï é
>
> (p) collaborating with government bodies both within and outside Nigeria carrying on functions wholly or in part analogous to those of the Agency concerning, amongst others:
>
> (iii) the movement of narcotic drugs and psychotropic substances specified in the second schedule to this Act, and instrumentalities used or intended for use in the commission of such offences.

To this end, and, by virtue of sections 8 (b) (c), 11 (a) and 41 of the NDLEA Act, the two Agencies collaborate thereby enforcing the crime of smuggling.

Section 8 of the NDLEA Act provides that the NDLEA should ï

> (b) Work in collaboration with the Nigerian Customs Service in monitoring the movement of goods and persons in any customs area, custom stations, customs ports or customs airport and searching cargoes and incoming and outgoing vessels, including pleasure craft, and fishing vessels, as well as aircraft and vehicles and when appropriate, searching crew members passenger and their baggages.

(c) detect consignments suspected of containing narcotic drugs and psychotropic substances coming into or out of customs areas, customs station, customs port or customs airport.

Section 11 (a)

Any person who without lawful authority imports, manufactures, produces, processes, plants or grows the drugs popularly known as cocaine, LSD, heroine or any other similar drugs shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life.

Section 41

(i) for the purpose of this Act ï

(a) any police officer, or customs officer; or

(b) any officer of the agency involved in the provisions of this Act.

(ii) may, without warrant, enter and search any land, building or carrier, including aircraft, vehicle or container or any other instrumentalities whatsoever which he has reason to believe is connected with the commission of an offence under this Act;

(iii) arrest any person whom he has reason to believe has committed an offence under this Act;

(iv) seize any item or substance which he has reason to believe has been used in the commission of an offence under this Act.

An analysis of the above sections is to the effect that section 3 (i) (p) allows for collaboration between the NDLEA and other agencies.

Section 8(b) of the NDLEA Act specifically allows for collaboration with the NCS to especially operate in customs area. In collaborating, section 8 (c) further empowers them to detect any suspected consignment within a customs area.

Section 11(a) of the NDLEA Act makes any unlawful importation of drugs (cocaine) an offence which is punishable with life imprisonment. By virtue of the powers in section 41 of the NDLEA Act given to a police officer and a customs officer to arrest and to search, it is submitted that they become engaged in the enforcement of the crime of drug and drug related offences. It is a further boost to the powers given to a custom officer under section 47 of CEMA to prosecute for any improper importation.

The NDLEA on its part under the guise of collaboration as provided for under section 8 of the NDLEA Act finds itself monitoring goods which ought to have been the sole duty of the customs. The collaborative effort of the two agencies as contemplated is a good legislative arrangement. The snag however is that some zealous officers, not understanding the collaborative role, may take certain steps that lead to friction between the agencies.

Another enactment that deals with the crime of smuggling and which needs some consideration is the Economic and Financial Crimes Commission (Establishment) Act 2004. Section 1 of the EFCC Act establishes a body to be known as the Economic and Financial Crimes Commission (EFCC). The Commission has among others the function of investigating all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card

fraud, contract scam, etc.[8] Section 46 of the EFCC Act defines ñEconomic and Financial Crimes to mean ï

> Non-violent criminal and illicit activity committed with the objective of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing economic activities of government and its administration and includes any form of fraud, narcotic drug-trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, ***smuggling***,[9] human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractice including counterfeiting currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.

The above provision, no doubt is sweeping and the question is can the EFCC be able to cope with all the above stated crimes? It seems they may not, as they have to often rely on other specialized agencies in the spirit of inter-agency cooperation and avoidance of possible jurisdictional conflict.[10]

From the provisions of section 46 and for our purpose, we shall only focus on the crime of smuggling. As pointed out earlier in this work,[11] the principal enactment for combating the crime of smuggling in Nigeria, is the CEMA. The introduction of smuggling into the EFCC Act raises some salient issues that need consideration. Is it that the NCS has failed in its role in the enforcement of the crime of smuggling? What will be the

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8 *Section 6 (b)* of the EFCC Act.

9 Emphasis mine.

10 J. F, Olorunfemi, ñUnbundling EFCC or merger with ICPC: Which way?.. *Uniben Law Journal*, vol14, No1, (2013), pp. 68-90 at 70-74.

11 Chapter 1, *supra,* p. 1.

relationship between the agencies in view of this provision as the fight against smuggling continue in Nigeria? If the EFCC has the clout to combat the offence of smuggling then, why the secondment of customs officers to the Commission to assist in crimes relating to smuggling?

The supervisory role[12] of the EFCC over the NCS was further demonstrated when the then chairman of the Commission stated in a presentation[13] that since the inception of the Commission, it has among other achievements curbed smuggling activities in the seaports and land borders and that it played a key role in the government reform programmes of restructuring the NCS. With regard to the curbing of smuggling activities at the seaports and borders, it is difficult to see how the EFCC achieved that, as they are not one of the agencies on ground at the sea and land borders.

It is submitted that since the NCS is the administrator of the security of the Nigerian economy, thereby understanding the dynamics of the Nigerian economy, the crime of smuggling and its enforcement should be under its full control, while the roles of other relevant agencies may remain merely complementary.

3.2 Improper Importation or Exportation

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[12] The co-ordinating role of the EFCC as provided in section 7(2) of the EFCC Act makes the Agency a lord over other relevant Agencies of Government.

[13] Ribadu, ñImplication of Economic and Financial Crimes on the National Economy,ò Paper presented as the then, Chairman of EFCC to the Defence Adviser in a Conference at Abuja, on the September 10, 2004. (Unpublished).

This is an arm of smuggling. It could be the illegal bringing or illegal taking of goods or other items from a country. The illegal importation or illegal exportation could also be of prohibited or of restricted items.

Improper importation or exportation is provided for in sections 46, 47, 63 and 64 of the CEMA.

Section 46 provides:

where ï

(a) except as provided by or under this Act, any imported goods being goods chargeable with a duty of customs, are without payment of that duty landed or unloaded in Nigeria, or removed from their place of importation or from any approved wharf, examination station, customs station or customs area; or

(b) any goods are imported, landed or unloaded contrary to any prohibition; or

(c) any goods, being goods chargeable with any duty or goods the importation of which is prohibited, are found whether before or after the unloading thereof, to have been concealed in any manner onboard any ship or aircraft or in any vehicle; or

(d) any goods imported concealed in a container holding goods of a different description; or

(e) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer; or

(f) any imported goods are found whether before or after delivery, not to correspond with the entry made thereof.

Those goods shall be forfeited

Section 47 provides ï

1) If any person

(a) lands or unloads in Nigeria, or removes from their place of importation or from any approved wharf, examination station, customs station or customs area ï

i) any goods chargeable with a duty which has not been paid; or

ii) any goods imported contrary to any prohibition, or

(b) assist or is otherwise concerned in such landing, unloading or removal or

(c) imports or is concerned in importing any goods contrary to any prohibition whether or not the goods are landed or unloaded.

Then, if he does so with intent to evade any such duty or any prohibition, he shall be sentenced to imprisonment for five years without the option of a fine.

2) If any person ï

(a) imports or is caused to be imported any goods concealed in a container holding goods of a different description; or

(b) directly or indirectly imports or causes to be imported or entered any goods found, whether before or after delivery, not to correspond with the entry delivered thereof,

he shall be sentenced to imprisonment for five years without the option of a fine.

Sections 63 and 64 are respectively *in pari materia* with sections 46 and 47 save that the focus here is on exportation.

Our analysis will focus on section 47 which provides for the penalty for improper importation of goods. Section 46 is not fraught with any conflict in that it clearly provides for forfeiture of goods improperly imported.

Under section 47 the crime of smuggling can be committed by one person unlike the provisions of the CC and the PC. There is also no requirement of the person being armed before the offence can be committed.

Olugbesan,[14] contended that section 47 is fraught with possible problems of interpretation as to the extent to which paragraph (a) of subsection (1) qualifies sub-paragraphs (i) and (ii).

Section 47 (1) provides: if any person ï

> (a) lands or unloads in Nigeria or removes from their place of importation or from approved wharf, examination station, customs station or customs area
>
> i) any goods chargeable with a duty which has not been paid; or
>
> ii) any goods imported contrary to any prohibition é

According to the learned writer[15] it could be viewed that, the words ñlands or unloads in Nigeriaò in section 47 (1) (a) qualify the words ñany goods imported contrary to any prohibitionò in section 47 (1)(a)(ii). In consequence the remaining words under paragraph (a) of subsection (1) is of little significance to paragraph (ii) of paragraph (1)(a). This is because, it is the fact of importation of prohibited goods against any prohibited order that renders it an offence of smuggling.

The only circumstance in which the remaining words in paragraph (a) of sub-section (1) can be relevant to goods imported contrary to prohibition is where the person removing those goods from the approved wharf, examination station, customs station or customs area is not the importer.

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14 Olugbesan, *op. cit*. p. 72.

15 *Ibid.*

Where such person is the importer, it is sufficient that he lands or unloads those goods in Nigeria.

Another alternative rendering of section 47 (1)(a) *vis-à-vis* section 47 (1)(a)(ii) is that the ship owner whose ship is used in freighting (and thus landing) the goods to the Nigerian port will be within the purview of the section because an importer cannot be said to be the person who lands the goods in Nigeria, although the goods are landed for his benefit and on his initiatives.

However an importer is likely to be the person who will unload the goods from the ship or the clearing agent. If the ship owner qualifies as ña personò who lands the goods in Nigeria, it will be a defence that they are unaware of the prohibition of the importation of the goods thereby negating the requirement of the law regarding intent to evade the prohibition. This line of defence is also open to the clearing agent who may be contracted to clear the goods from the port.

The words: ñremoves from their place of importation or from approved wharf, examination station, customs station or customs areaò in paragraph (a) of sub-section (1) are reasonably associated with the words ñany goods chargeable with a duty which has not been paidò in sub-paragraph (i) of paragraph (a) of section 47 (1). Consequently, the words ñlands or unloadsò in paragraph (a) of subsection (1) have no relevance to sub-paragraph (i). This is underscored by the fact that it is premature to

accuse a person who has merely landed or unloaded goods in the port with evading the payment of chargeable duties payable on those goods. At that stage, the offence is not consummated. Where however, those goods after being unloaded are removed from the port, without payment of their duties, then the offender can be apprehended and prosecuted for the offence.

With regard to the place of landing or unloading, the section did not provide for the specific place in that goods being unloaded in an unauthorized place is in itself an offence. Under section 12(4)[16] of CEMA the master of a ship entering Nigeria shall not cause or permit the ship to call at any place therein other than a customs port, and any person importing or concerned in importing any goods by sea shall not bring the goods into Nigeria other than a customs port. Under sub-section 6 of section 12, a ship may, however be compelled by accident, stress of weather or other unavoidable cause, to call at a place other than a customs port. In this case, the master of the ship shall report such circumstances, which caused the ship to call at such unauthorized place to the customs officer or police officer and no goods shall be caused to be unloaded except with the consent of such officer.

Section 47(1)(c) punishes any person who imports or is concerned in importing any goods contrary to any prohibition, whether or not the goods are landed or unloaded. The snag here is that it may be difficult to identify

[16] See section 15(2) 18 of CEMA for similar provisions with respect to importation by air or by land.

some one who is concerned with the importation of prohibited goods where the goods have not arrived or landed in any place.

A further problem in determining the scope of an owner or any person as used in section 47 is, as it relates to a corporation. What then will be the position of a corporation? This is hinged on the growing use of limited liability companies or registered companies for businesses since the decision of the House of Lords in *Salomon v. Salomon*.[17] Also by virtue of the Interpretation Act,[18] 1964 an incorporated body is a ñpersonò. Section 47 of CEMA however concludes that such persons ñshall be sentenced to imprisonment for five years without the option of a fineò. The question then is since a corporation is a person (albeit artificial) does the section applies for the purposes of imprisonment? It is true that a corporation can be criminally liable as was held in *DPP v. Kent and Sussex Contractors*.[19] The concept of ñalter egoò comes to the fore here.[20] This reasoning has been codified in section 65 of the Companies and Allied Matters Act[21] to the effect that a company can be civilly and criminally liable for the acts of its agents.

Criminal responsibility of a corporation is only asserted but does not however amount to endorsement of imprisonment. In *A. G. (Eastern*

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17 (1897) A. C 22.

18 Now Cap. 123, LFN, 2004.

19 (1944) K. B. 146.

20 Per Aniagolu JSC in *Trenco (Nig.) Ltd. v. African Real Estate Ltd.* (1978) 1 LRN 146 at 153.

21 Cap. C 20, LFN, 2004.

Region) v. Amalgamated Press,[22] Ainly C. J. held that a corporation could not be charged with an offence, the only punishment for which is imprisonment. A corporation is an abstract entity acting through its agents who are natural persons and if they use the name of the companies to commit customs offences they shall be criminally responsible for such crimes. Depending on the law, the company used in perpetuating the customs offence may be fined or de-registered or both. Section 182 (5) of CEMA to this end provides:

> where an offence under the Customs and Excise laws has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributed to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity, he as well as the body corporate shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly é

Since section 47 did not provide for an option of fine, it will be difficult to bring a corporation as a ñpersonò under it for purposes of prosecution.[23] We shall now consider the position as it is in some other jurisdiction.

In Ghana, section 252 of the Ghanaian Customs Act[24] provides for a fine not exceeding three times the duty tax evaded or to a term of imprisonment of not less than five years and not exceeding ten years for any

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22 (1956 ï 57) 1 E.R.L.R.

23 Sections 46 and 47 of CEMA is reproduced in section 239 of the NCS bill, 2012 but the word ósmugglingô is specifically used, and the punishment prescribed is that if the goods are chargeable with duty, excise tax or other taxes, to imprisonment for a term of three years and to a fine of six times the true value of revenue lost and forfeiture of the item smuggled.

24 Customs, Excise and Preventive Service (Management) Act, 1993.

improper importation. The difficulty in determining the position of a corporation for purposes of punishment as against the position in Nigeria is cured by the imposition of a fine in Ghana. Any person as used in the Ghanaian Act can conveniently apply to a corporation.

In India, penalty for any improper importation provided under section 112[25] Indian Customs Act is confiscation and a fine not exceeding the value of the goods or five thousand rupees,[26] whichever is greater. It is interesting to note that there is no provision for imprisonment. This presupposes that the emphasis is on generating more revenue for the government instead of increasing the financial burden of the state in maintaining the convicts in prison custody.

Section 185 of the Kenya Customs Act provides for any improper importation a prison term not exceeding five years or a fine equal to three times the amount of duty and any taxes payable on the goods in respect of which the offence was committed subject to a maximum of one million five hundred thousand (sic) or to both fine and imprisonment. It is interesting to note that the name of the currency was not mentioned in the provision. It must have been an error on the part of the legislature. We however, assume it is shillings, since shilling was mentioned in section 184 of the Kenyan Act which provided penalty for another offence. Under the Kenya Act, a

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[25] India Customs Act 1962 Cap. XIV

[26] Rupees is the Indian national currency

corporation can come under the ambit of ñany personò just like in the case of Ghana.

Perhaps the better provision in relation to improper importation is that of the New Zealand. The Customs Act[27] of New Zealand provides in section 209(2) that for any improper importation the penalty shall be ï

> (a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding 10,000 dollars; or
>
> (b) in the case of a body corporate, to a fine not exceeding 50,000 dollars.

With the New Zealand Act providing specifically for the position of a body corporate, the kind of problem that arose in the situation of Nigeria do not manifest here.

Section 64 of CEMA deals with smuggling by exportation. It provides that

> If any person
>
> (a) except as provided by or under the Act exports or is ñconcernedò in exporting ï
>
> i) any goods chargeable with a duty which has not been paid; or
>
> ii) any goods contrary to any prohibition; or
>
> (b) Loads for exportation or as stores or brings to any place in Nigeria for the purpose of exporting or loading as stores any goods the exportation of which is contrary to any prohibition, or assists or is otherwise concerned in such loading or bringing.

[27] New Zealand Customs and Excise Act, 1996

> Then if he does so with intent to evade any such duty or any prohibition, he shall be liable to imprisonment for a term of five years without the option of a fine.

The question may be asked as to the scope of the word ñconcernedò. As Olugbesan[28] puts it ï the word ñconcernò connotes participation or involvement or perhaps initiation. If the word is not confined to the exporters per se, then those who, by whatever means and in whatever way partake in the process of exportation will be deemed to be *participis criminis*. The important thing then becomes the intention with which they participate or are concerned in the exportation. It was held in *Board of Customs and Excise v. Jamine Ernestine Viale and Anor*.[29] that even though the second defendant, accompanied the first defendant to the airport and even acted as an interpreter between him and the customs officials, it should not necessarily serve to implicate him as a person ñconcernedò in the offence of smuggling.

The next issue is when can it be concluded that *loading for exportation* has taken place. Is it only in the approved customs port or airport as the case may be or at other unapproved place. There is greater danger in restricting it to the approved place, in that often exportation of prohibited goods are almost likely to take place outside the approved ports.

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[28] K. Olugbesan, *op. cit,* p. 100.

[29] (1970) 2 All N.L.R 53.

To this end, it was held in *B.O.C. & E. v. Mustapha & Others*[30] that given the necessary intents, the moment goods were loaded into trailers the offence has been committed.

Finally we conclude and submit that all the aforementioned problems could have been avoided if the draftsmen were a bit more careful. No wonder Stephen J. in *Re Castioni*[31] warned:

> The drafting of a statute should aim at a degree of precision which a person reading in bad faith cannot misunderstand; and it is all the better if he cannot pretend to misunderstand it.

Draftsmen should always have this at the back of their minds so as to avoid any avoidable lacunae.[32]

3.2.1 Importation or Exportation of Prohibited Items

As seen from the discourse so far, one of the ways of smuggling is the importation or exportation of prohibited goods. Section 2 of the Act provides that ñprohibition, in relation to goods, means any prohibition or restriction on the importation, exportation or carriage coastwise of goods

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30 (1978) 4 FHCR 285 at 297 See also *B.O.C. & E. v. Alhaji Musa Abubakar & Anor* (1978) per Kachukwu J. 4 FHCR explains situation where concerned in loading may be different from actual loading. See also *B.O.C. & E. v. Odili Chikwendu* (1978) 4 FHCR 52 at 53 where Akamgbo J. gave a concrete example where one can sit in Lagos and via phone be concerned in loading in Warri.

31 (1891) 1 Q. B at 167.

32 The NCS bill, 2012 in section 151 (a) (i) (ii), (b) (i) (ii) (iii) provides for imprisonment for a term of two years without the option of a fine; or forfeiture of the goods where the exportation of the goods is prohibited; or where duty is chargeable, a fine of ₦500,000.00 or two times the value of the goods whichever is greater.

imposed by or under this or any other enactment and ó*prohibited'* shall be construed accordinglyò.

Some goods are, however, deemed not to be goods the importation of which are prohibited. Section 25(1) of the Act provides that ñsubject to sub-section (2) of this section, goods imported in transit or for transshipment or as stores shall not be deemed to be goods the importation of which is prohibited unless such goods are goods the importation of which is in transit or for transshipment or stores is expressly prohibitedò. Sub-section 2 provides ñwhere any goods imported in transit or for transshipment or as stores would, but for the provision of sub-section of this section, be goods the importation of which is prohibited, such goods shall duly be exported within such time as the Board may direct, and any such goods which are not so exported shall be forfeited.

This presupposes that goods imported in transit, for transshipment or as stores will not be deemed to be goods the importation of which is prohibited, thereby incurring liability under section 47. If, however, there has been express prohibition of the importation of certain goods in transit, for transshipment or as stores, then liability under section 47 will occur.

Where goods imported in transit, for transshipment or as stores would have been goods the importation into Nigeria of which is prohibited ï not expressly prohibited in transit, for transshipment or as stores such goods

without any penalty shall be duly exported within such time prescribed by the Board, failing which they shall be forfeited.

Transit goods are those, which are meant to pass through Nigeria only. Transshipment goods are those landed in Nigeria but required to be transferred to another ship for onward transportation to another country. Goods imported as stores are to be used or consumed by the crew of the ship.

Section 24 of the Act provides that the President may, by order

> (a) prohibit the importation of any specified goods;
>
> (b) prohibit the importation of all goods or any specified goods except as provided in the order;
>
> (c) subject to any specified exceptions, prohibit the importation of all goods except with the general or special permission in writing of a specified authority or authorities.

The third and fourth schedules to the Customs, Excise Tariff, etc. (Consolidation) Act list out goods that are ñprohibitedò and ñabsolutely prohibitedò respectively.[33] The CEMA however provides for goods which are exempted from payment of duty. These are often referred to as temporary importation.

Section 52 provides:

> (a) any goods are entered outwards for the purpose of being exported from Nigeria, and

[33] See Federal Government of Nigeria, Nigeria Customs Service Board, Common External Tariff (CET) 2008 ï 2012. See Cap. C 49, LFN 2004, formerly Cap. 88, LFN 1990.

> (b) the Nigerian customs service is satisfied that it is proposed to import those goods into Nigeria within such period as the service may determine in the case of those goods.

The Board may, either unconditionally or on such conditions as the Board may determine allow the goods to be exported from and subsequently imported into Nigeria without payment of any customs duty.

Schedule 2 of the Customs, Excise Tariff, etc. consolidation Act (CET) 2008 ï 2012 among others[34] excludes personal effects from duty payment. The schedule in paragraph 7 defines personal effects to include:

> (1) Personal and household effects, the property accompanying a passenger
>
> (2) Personal and household effects, the property of a passenger landed at any customs port, customs airport or customs station within two months of the arrival of the passenger within such further period as the minister may allow, to the extent permitted by the minister and subject to any conditions imposed by it; and
>
> (3) personal and household effects excluding jewellery, photographic equipment, electronics and other luxury goods of a citizen of Nigeria who had been resident in a place outside the limits of the jurisdiction of Nigeria for not less than 9 months.
>
> Provided that ñbaggageò shall not be interpreted to include any vehicle or any goods intended for sale, barter or exchange.

Under the Kenya Act, there is a similar provision like that of Nigeria wherein certain goods are prohibited. Section 14 (1) provides that the goods specified in part A of the Eight Schedule are prohibited imports and the importation thereof is prohibited.

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[34] See Appendix V

In Ghana, the Act left the issue to government regulation, which may be made from time to time. Section 28 of the Ghana Act provides that the Regulations may prohibit the importation or exportation of goods as may be prescribed.

Section 47 (1) of the CEMA requires that before a person can incur criminal liability regarding the offence created there, such a person must have done any of the acts with intent to evade any duty or any prohibition. As contended by Kofo Olugbesan[35] where the person is in fact unaware of the prohibition how will the prosecution establish the culpable intent? She further relied on section 22 of the CC which provides that ñignorance of the law does not afford any excuse for any act or omission, which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offenceò. Knowledge of the prohibition of the importation of the goods is not part of the definition or the requirement of the offence under the section. The section only requires that the person so involved, must have imported the goods with intent either to evade duty or to import prohibited goods. As discussed in chapter two, section 164 of the act provides for liability for any person who in anyway fraudulently evades any duty chargeable on any imported goods.

The section as discussed no doubt made knowledge and intention to defraud very vital elements regarding the culpability of the accused person.

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[35] K. Olugbesan, *op. cit,* p. 85

We also saw[36] how section 190 of the Act, provides that intention or knowledge need not be established by the prosecution where it is not made a specific requirement of an offence, and where it is, then the burden of disproving same is on the defendant. The section provides:

> In any prosecution for an offence under the customs and excise laws, it shall not be necessary to prove knowledge or intent but where the prosecution is in respect of an offence of doing any thing knowingly or recklessly or with a specified intent, the onus of disproving that he did such thing knowingly or recklessly or with such intent shall be on the defendant.

It is our view that this was a departure from the general notion under our criminal jurisprudence that before a person is criminally responsible for an act constituting an offence, his guilt must be proved beyond reasonable doubt by the prosecution. It was held, however, in the case of *Chief Olabode George v. FRN*[37] relying on the case of *Agumadu v. The Queen*[38] that the onus is upon the prosecution to prove offence as charged irrespective of the provisions of the statute creating the offence.

At this stage, we shall examine the position of the Courts with regard to whether lack of knowledge of a prohibition order is a defence or not.

This matter was seriously considered in the case of *Board of Customs and Excise v. Alhaji Ibrahim Barau*,.[39] where sections 145 (b) and 44 (1)(b)

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36 During our discussion in Chapter 2.3.2.

37 SC 180/2012.

38 1963 1 ALL NLR 203.

39 (1982) 10 SC. 48. See also *B.C.E v. Udumezue* (1978) F.R.C.R 454 H.C, *B.C.E v. Mohammed* (1978) F.R.C.R 48 H.C. where it was held that: *ignorance of a prohibition order is no excuse.*

of the 1958 Act which is in *pari materia* with sections 164 (b) and 47 (1)(a)(ii) of the 2004 Act were construed.

Section 145 (b) provides:

> 145 without prejudice to any other provision of this ordinance, if any person ï
>
> (b) is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any such prohibition as aforesaid or of any provision of this ordinance applicable to those goods, he shall be liable to a fine of six times the value of the goods or two hundred pounds, whichever is the greater, or the imprisonment for two years, or to both[40]

Section 44 (1) (b) provides:

> 44 (1) if any person ï
>
> (b) imports or is concerned in importing any goods contrary to any prohibition whether or not the goods are landed or unloaded;
>
> He shall be liable to a fine of six times the value of the goods or two hundred pounds whichever is greatest.[41]

The respondent was convicted by a High Court for being knowingly concerned in a fraudulent evasion of the Import Prohibition Order, 1978 an offence punishable under section 145 (b) of the CEMA 1958. He was also convicted on a second count of intending to evade the prohibition on the importation of carpets contrary to the import prohibition order 1978 thereby committing an offence punishable under section 44 (1)(b) of the Act. His appeal was allowed by the Court of Appeal on the reasoning that ignorance

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[40] Under *section 164* the punishment is now four hundred naira.

[41] Under *section 47 (1) (a) (ii)* the punishment is five years imprisonment without the option of a fine.

of the prohibition order is a defence for an accused person charged under section 145 (b) of the Act.[42] On further appeal, the Supreme Court overturned the judgement of the Court of Appeal restoring the judgement of the trial court. This was based on the reasoning that the importation of the carpets was absolutely prohibited and so the defendant can not be heard to plead lack of knowledge.

We, however tend to agree with the dissenting view of Bello J.S.C which is to the effect that, the most essential element of the offence under section 145 (b) of the Act is being ó knowingly concernedô in a fraudulent evasion of the Import Prohibition Order 1978ò. The element of the offence appears to mean that the offender must have knowledge of the prohibition order and must also have knowledge that its fraudulent evasion is taking place. Consequently, knowledge of the law is expressly declared by the section to be an element of the offence. Section 22 CC to this end provides:

> Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.

That being the case, ignorance of the prohibition order is a defence. Akinola Aguda[43] commenting on this case agreed with the dissenting view of Bello J.S.C and stated that:

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42 *Op cit.*

43 T. Akinola Aguda, ñRecent Cases and Commentò *Nigerian Current Law Review*, p. 10

> This is one case in which the majority of the members of the Supreme Court allowed themselves to be swept off their feet by cold principles of law and justice.

With regard to the above, we submit that the courts as indicated by the judgement of the Supreme Court, have misunderstood the provisions of section 145 of the Act.[44] We hope that either through legislative review or even judicial pronouncement the issue will in the near future be put on the proper pedestal.

It should be noted that what goods are prohibited will usually be determined by the economic considerations prevailing at a particular point in time and the list maybe revised from time to time. Prohibition could be import prohibition (trade) or absolute prohibition (other than trade).

Import prohibition (trade) is to the effect that the items listed in schedule 3 of the Customs, Excise Tariff, etc. (consolidation) Act cannot be imported for the purpose of trade. Absolute prohibition (other than trade) however is to the effect that on no account should it be imported into the country (See Appendix III). The Supreme Court in the case of *B.O.C. & Excise v. Alhaji Barau*[45] held under the Import Prohibition Order of 1978 that the use of the word (Trade) cannot, and does not reduce the impact or effect of the mandatory provisions of the trade. It construed the importation of carpet then to be absolute. The court stated that the words (Trade) and ñ*other than trade*ò are ñ*superfluous*ò. The same view no doubt today is

[44] Now section 164 of 2004 Act.

applicable to the present Import Prohibition Order. This, we however, submit cannot be the intention of the law. This is hinged on the fact that every word in a statute or in the constitution must be given its due force, and that no word ñcan be rejected as superfluous or unmeaningò.[46]

It is an elementary canon of construction that every word in a statute or in the constitution must be given effect. The court is not free to assume that any word is inserted in a statute or in the constitution without any object and to eliminate it as if it were not there.[47] The Indian case of *Gopalan v. State of Madras*[48] buttressed this point when it held that every word used in the constitution or in a statute must be given effect to and that no word is to be treated a superfluous. In *Auchterarder Presbytery v. Lord Kinnoull*,[49] Lord Brougham stated that ña statute is never supposed to use words without meaningò. Aguda[50] in his contention was of the view that a careful study of the items listed in the part II of the 1978 order and now schedule 3 will disclose the fact that most, if not all of them are articles for personal use or personal consumption and to hold that under no circumstances can any of them be imported will be absurd in the extreme.

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45 *Supra*.

46 *Holmes v. Jennison* (184) 39 U.S. 540; 10 L.Ed. 579, at 544 ï 595.

47 T. Akinola Aguda, *op. cit,* See the cases of *Knowlton v. Moore* (1900) 178 U.S 41; 44 L. Ed. 969, at 988; *Blake v. Mcchung* (1998) 172 US. 239; 43 L. Ed. 432, at 440.

48 (1950) A.I.R. 27, at p. 35.

49 (1839) 6 CL & F. 646 at 686.

50 T. A. Aguda, *op. cit*, p. 10.

If we go by the decision of the Supreme Court then, it means that anyone who brings into this country any of these items for personal use only has committed a crime. Akinola Aguda stated that surely, that cannot be the law; and we do know that almost every one imports some of these items for personal use when returning home from overseas. We hope that some day the Supreme Court will be asked to pronounce on the validity of the earlier decision as laid down in Barauôs case.[51]

Schedule 6 of the Act provides for the Export Prohibition List[52] and this is to the effect that on no account should the items therein be exported. The question however is that whether Artifacts should have come under this outright prohibition. This is in view of the fact that Artifacts are works of Arts, which ordinarily are restricted as will be seen in the next discussion in 3.2.2. It should have been restricted to only Antiquities, which often are old objects, which are collectable, decorative, valuable, and interesting dating back to a previous era. If however, artifacts are considered to be tool or ornament that has archaeological or cultural interest then it will be proper to have come under the schedule as outright prohibition.

3.2.2 Importation or Exportation of Restricted Items

Section 2 of CEMA defines prohibition in relation to goods, to mean any prohibition or restriction on the importation, exportation or carriage coastwise of goods by or under this or any other enactment; and *prohibited*

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[51] *Ibid*.

shall be construed accordingly. The focus here shall be on such restricted goods. By the nature of such restricted goods they are only to come in upon approval by the relevant authority. For example, section 8 of the Customs, Excise, Tariff etc. (Consolidation Act)[53] provides:

> The goods classified in the first schedule to this Act as arms and ammunitions; except for arms and ammunitions imported by the Armed Forces of Nigeria and the Nigeria Police Force under the second schedule to this Act shall only be imported into Nigeria by licence issued by the appropriate authorities.

The appropriate authority here is the Inspector General of Police (IGP) or the National Security Adviser in the presidency.

Item 20 which is spirits under schedule 4 are absolute prohibition but some exceptions exist as in alcoholic bitters, liquors, cordials and mixtures admitted as such in his discretion by the Comptroller-General and which are not deemed to be injurious spirits within the meaning of any enactment or law relating to liquor or liquor licensing[54]. The snag here is that the provision did not provide for the test to be applied before the discretion can be used. The Comptroller General ordinarily may not be a professional in determining the content of spirits. We submit that this may lead to abuse. They ought to have been reference to another specialized agency to deal with such cases as those handled by the National Agency for Food and Drug Administration and Control (NAFDAC) that regulates and must issue permits before any importation.

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52 See Appendix IV.

53 Cap. C 49, LFN, 2004.

54 See Appendix III.

There is also restriction on motor vehicles that should come into the country. If a vehicle is over fifteen years from the date of manufacture, it can no longer come into the country. This restriction needs to be given a rethink for the simple reason that some of those vehicles over fifteen years can still be useful for our purpose in Nigeria. The fear however, may be because of environmental hazards that the smoke from such vehicles would produce or the nuisance the wrecks may constitute.

With respect to exportation, whereas items like Artifacts and Antiquities are prohibited from being exported, other works of Art are placed under restriction as the National Commission for Museum and Monument has to issue a permit for such works of Art to be exported.

The provisions under the Kenya Act is similar to that of Nigeria save that in Kenya the provisions and the schedules are provided directly under the Act not in another legislation as in the case of Nigeria.

Section 14(1) of the Kenya Act provides:

> The goods specified in Part A of the Eighth schedule are prohibited imports and the importation thereof is prohibited.
>
> (2) The goods specified in part B of the Eight schedule are restricted imports and the importation thereof, save in accordance with any conditions regulating their importations is prohibited.

Section 59 deals with Exportation

> 1) The goods specified in Part C of the Eight Schedule are prohibited goods and the exportation thereof is prohibited.

2) The goods specified in Part D of the Eight Schedule are restricted goods and the exportation thereof, save in accordance with any conditions regulating their exportation, is prohibited.

The eight schedules is reproduced here below:

Part A ï **Prohibited Imports**

1. All goods the importation of which is prohibited under this Act or of any law for the time being in force in Kenya

2. False money or counterfeit currency notes or coins and any money not being of the established standard and weight of fineness.

3. Indecent or obscene prints, paintings, books, cards lithographs or other engravings, and any indecent or obscene articles

4. Matches in the manufacture of which while phosphorus has been employed.

5. Any article marked, without proper authority, with the Armorial Ensigns or Coat of Arms of Kenya, or having ensigns or arms so closely resembling them as to be calculated or deceive.

6.

1) Any advertisement or statement intended to promote sale of any medicine, appliance or article for the alleviation or cure of tuberculosis, or of cancer, or of any venereal disease affecting the generative organ or functions, or of sexual importance, or of any complaint or infirmity arising from or relating to sexual intercourse, in or of humans.

Provided nothing herein shall apply to a book, document or paper published for the advancement of medical science and intended for use of a government department or registered medical practitioner.

(2) any medicine, applied or article to which is affixed on advertisement or statement referred to in paragraph one (1) or which such an advertisement or statement relates.

7. Distilled beverages containing essential oils or chemical products which are injuries to health, including thujone, star anise benzoic aldehyne, salicylic ester, hyssop and absinthe; Provided that nothing herein contained shall apply to Aniseò and ñAnisetteò liqueurs containing not more than 0.1 per centum of oil of Anise and distilled from either Pimpinella anisum or the star of Anise allium verum.

8. Manufactured articles bearing the name, address, or trade mark of any manufacturer or dealer, or the name of any place in Kenya, calculated to impart to those articles a special character of Kenya manufacture and which are not of that manufacturer.

9. Fire arms and ammunition of all types and other articles having the appearance of lethal weapons imported by post.

Part Bï **Restricted Imports**

1. All goods the importation of which is for the time being regulated under this Act or any law for the time being in force in Kenya.

2. Tear gas and any other similar lachrymatory substance (whether in liquid or gaseous form) whatsoever, and any device or instrument especially designed to expel tear gas or any such similar lachrymatory substance (whether in liquid or gaseous form), except under and in accordance with the term of a written permit granted by the Minister responsible for Home affairs.

3. Portable spirits unless in respect of each consignment of spirits there is produced a certificate of age issued in the country of production or shipment by such official authority as may be acceptable to commissioner showing that the spirits have been stored in wood for a period of not less than four years.

Provided that ï

i) The commissioner may accept in place of a certificate of age a sworn declaration to the same effect from the blender or exporter of the spirits in respect of all shipments made within a period of twelve months from the date of such declaration;

ii) No certificate of age or declaration shall be necessary in respect of portable spirits which the Commissioner is satisfied are: ï

(a) Alcoholic bitters, liqueurs, cordials and similar alcoholic mixtures.

(b) Gin, Geneva, Hollandôs schnapps, rum or any similar portable spirits.

(c) Spirits imported for medical, industrial or specific purposes.

4. Postal franking machines except under and in accordance with the terms of written permit granted by the Managing Director of the Kenya Post and Telecommunication Corporation.

5. Traps capable of killing or capturing any game animal except under and in accordance with the terms of a written permit granted by the Chief Game Warden.

6. Articles bearing Boy Scout or Girl Guides badges, tokens or emblems, except under and in accordance with the terms of a written permit granted by the Boy Scout or Girl Guide Commission.

7. Sound moderators or silencers capable of being fitted to a firearm as defined in the Firearms Act, except under and in accordance with the terms of a written permit granted by the Chief Fame Warden.

8. Unwrought precious metals, and precious metals, which are not manufactured or made into any article of commerce, from Zaire, Rwanda or Burundi whether to be imported in transit or for transshipment or otherwise except under and in accordance with a written permit granted by the Minister.

Part C - **Prohibited Exports**

1. All goods the exportation of which is prohibited under this Act or any law for the time being in force in Kenya.

2. Firearms and ammunition of all types and other articles having the appearances of lethal weapons exported by post.

Part D ï **Restricted Exports**

1. All goods the exportation of which is regulated under this Act or any law for the time being in force in Kenya.
2. The following goods shall not be exported in vessels of less than ten tons registered.
   (a) Warehoused goods;
   (b) Goods under drawback;
   (c) Gods for transshipment.
3. The following goods shall be exported only after the written consent thereto of the Permanent Secretary to the Treasury has been obtained;
   (a) Medicaments (including veterinary medicaments) not manufactured in Kenya.
   (b) Motor vehicle components, parts or accessories not manufactured in Kenya.

The provisions of the Kenya Act seem more static and the general public will be well informed of the restrictions and prohibitions most often. In the case of Nigeria since it is not static but depending on the orders made by the President from time to time, the general public will not always be well informed as the orders become a recurring affair. The power to vary

the schedules is contained in section 13 of the Customs, Excise Tariff, etc. (Consolidation) Act, 2004 wherein the President on the recommendation of the Tariff Review Board can:

(a) Impose, vary or remove any import or excise duty.

(b) Add to or vary any part of any of the schedules

(c) Delete the whole or any part of any of the schedules

(d) Substitute a new schedule or schedules thereto.

It is of interest that in Ghana it has ten years restriction on the importation of vehicles. Section 90 (1) of the Act provides that a motorcar or commercial vehicle of more than ten years old shall not be imported into the country.

3.2.3 False Declaration

This refers to a situation where the goods declared are not what is actually brought into the country. This could be for the purpose of evading payment of the correct duty. An importer may import an item that attracts duty rate of 100%, but will declare another item that attracts a duty rate of 40%. Even though the item imported may not be prohibited, the false declaration in order to pay a lesser duty amounts to a crime.

Section 46 of the Act provides for different instances that can lead to or facilitate false declaration as follows:

> (a) any goods imported concealed in a container holding goods of a different description; or
>
> (e) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer; or
>
> (f) any imported goods are found, whether before or after delivery not to correspond with the entry made thereof, those goods shall be forfeited.

With respect to exportation section 63 of the Act provides:

> (e) any goods are exported or brought to any place in Nigeria for exportation concealed in a container holding goods of a different description, or
>
> (f) any goods are exported or brought to any place in Nigeria for exportation concealed or packed in any manner appearing to be intended to deceive an officer; or
>
> (g) any goods entered outwards are found, whether before or after loading, not to correspond with the entry made thereof.
>
> those goods shall be forfeited.

From the above provisions, it follows that the use of ófalse bottomô containers and camouflage can easily lead to false declaration. ñFalse bottomò is when the smuggler makes additional construction to a container in order to hide the smuggled goods to avoid its detection. It is a mode of concealment so to speak. The Metal Scrap case[55] is a very good example.

Camouflage means carrying any item under the cover of another thing. Outwardly therefore, it will appear as if non-offending items are being carried whereas the real items being carried are against the law. A

[55] The German Customs in this case made a seizure of 20 tons of Indian hemp concealed behind the compartment of a container accommodating the metal scrap, the container was aboard the then Nigerian National Shipping Line (NNSL). Refer to in K. Olugbesan, *op. cit*, p. 8.

good case is the Mercedes in Container Case:[56] where the customs stumbled on the container declared as containing cartons of milk which turned out to be a mobile garage containing a brand New Mercedes Benz car.

The burden of proof here is as already discussed in Chapter 2.3.2 wherein by virtue of section 190 of CEMA, it is the defendant that has to prove his innocence. False declaration by its nature can also lead to the offence of forgery, which we shall consider later.[57] This normally will occur because to be able to achieve false declaration, there is the likelihood of tampering with the importing documents so as to reflect the intended item to be so falsely declared. According to the provisions,[58] once the false declaration is made, the goods become forfeited. This again brings to fore the principle as established in section 169 of CEMA, which was discussed earlier[59] to the effect that any ship, aircraft, vehicle, animal, container (including any article of passengerôs baggage) or anything whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so forfeited either at a time when it was so liable or for the purposes of the commission of the offence, for which it later became so forfeited shall be liable to forfeiture.

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56 Sunday Times, February, 17, 1980 cited in K. Olugbesan, *op. cit.,* p. 12.

57 3.2.5 *infra.*

58 Sections 46 and 47 CEMA.

59 2.6 *supra.*

Another dimension to the issue of false declaration is specifically the provision of section 161 of the Act, which deals with untrue declaration in relation to customs document. The section provides:

> 1) if any person ï
>
> (a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered, to the Board or an officer, any declaration, notice, certificate or other documents whatsoever; or
>
> (b) makes any statement in answer to any questions put to him by an officer which he is required by or under this Act to answer.
>
> Being a document or statement produced or made for any purpose of customs and excise, which is untrue in any material particular, he shall be guilty of an offence under this section.
>
> 3) é he shall be liable to a fine of one thousand naira, or to imprisonment for two years or to both; and any goods in relation to which the document or statement was made shall be forfeited.

This provision, it is submitted is related to the offence of false declaration. They ought and in fact can be read together. This is because, in the case of false declaration, as provided under section 46 of the Act, it becomes effective through the instrument of the Single Goods Declaration (SGD) form which is used for the purpose of clearing goods out of customs control. Save for accompanied baggage wherein a passenger opens his or her baggage for examination, there will be a written declaration of what the importer has brought in and this is often done via the SGD or other declaration form as applicable. Sub-section (b) of section 161 however, extends the liability of untrue declaration to any statement in answer to any question, this suggests oral communication. If this is the case, then passengers arriving accompanied with baggage can be liable here for any

untrue oral declaration. Under section 47 of the Act, there is no option of fine as provided under sub-section 3 of section 161. Section 47 provides:

> 47 (2) If any person ï
>
> (a) imports or causes to be imported any goods concealed in a container holding goods of a different description; or
>
> (b) directly or indirectly imports or causes to be imported or entered any goods found, whether before or after delivery, not to correspond with the entry delivered thereof,
>
> he shall be sentenced to imprisonment for five years without option of a fine.

While under section 47, a jail term of five years is prescribed, only two years is prescribed under sub-section 3 of section 161. It is submitted that the two provisions can collapse into one in the advocated reform of the CEMA.

Another dimension of false declaration is seen in the definition of what constitutes Economic and Financial Crimes. Section 46 of the EFCC Act, classified false declaration as an aspect of trade malpractice.[60]. It is in

[60] The section defines Economic and Financial Crimes to mean: Non-violent criminal and illicit activity committed with the objective of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing economic activities of government and its administration and includes any form of fraud, narcotic drug-trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal,

line with this classification that the then chairman of the EFCC in a paper[61] listed false declaration of goods as a serious smuggling offence that affects the Nigerian economy. He stated that trade malpractices constitute a dent on Nigeriaôs image. They diminish the respect and regard Nigeria commands internationally and contribute to the loss of confidence in the nation by foreign investors and international development partners. The nature of trade malpractices in Nigeria has multivariate dimensions. However, the following are prevalent:

i) Direct copying of local brands by manufacturers

ii) Importation of fake/counterfeit and substandard products.

iii) Diversion of ñtrans-shippedò goods

iv) False declaration of goods

v) Recycling of Clean Report of Inspection (CRI) and Customs Duty Receipt.

vi) Smuggling.

If you look at item (iii ï vi) above, it has direct bearing on smuggling as provided for by the various sections of the CEMA.[62]

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smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractice including counterfeiting currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.

61 N. Ribadu, ñ*Implication of Economic and Financial Crimes the National Economy" op. cit,* p. 3.

62 Under the NCS bill, 2012 section 234 provides for false statements, concealment, and false document including electronic documents and attracts a fine of ₦1,500,000 or imprisonment for a term of not more than three years. Section 236 provides for concealing or destroying invoices or other documents which attracts a fine of ₦2,000,000 or imprisonment for a term of not more than three years. Under section 237 where counterfeiting of documents is involved, it attracts a fine of ₦5,000,000 or imprisonment for seven years.

This presupposes that smuggling is a serious crime that needs to be viewed seriously as it occurs in many ways. Nuhu Ribadu concluded in the paper that the overall consequences of the above listed trade malpractices have damaging effects on the industrial sector. Apart from the excessive revenue losses to government, they contribute to low capacity utilization, unemployment, pressure on the naira and general mass poverty.[63]

3.2.4 Under Declaration

This offence derives its root from the provision of section 46 (f) of CEMA which provides that it shall be an offence if any imported goods are found, whether before or after delivery, not to correspond with the entry made thereof. This often arises when there is difference in the quantity declared. The Form ôMô[64] may for instance contain 500 cartons but on physical examination, it may be discovered that the container contains 700 cartons. This amount to under declaration and going by section 46 (f), the goods liable to seizure and forfeiture.

The position of the law, no doubt, is based on the fact that the extra quantities not declared are an attempt to evade the appropriate payment of duty. This is hinged on the fact that with the under declaration, it is sure to affect the value of the goods. Importers are advised that even if the form ôMô is carrying a lesser quantity, they should declare the right quantity

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63 *Ibid*.

64 This is an importing document containing, among other things, the proper description of the goods.

before physical examination so as to erase any feeling of intention to be fraudulent. The Customs will always rely on the declaration made by the importer in spite of whatever is on the form ôMô or the Risk Assessment Report (RAR).

The punishment prescribed for any under declaration is forfeiture of the goods and possible prosecution of the suspects. We submit that this is too harsh and the cure ought to have been issuance of Demand Notice (DN) so that the difference in the amount will be collected. There is sense in this, in that more revenue will come in. Instead of encouraging issuance of DN, the NCS issued a circular[65] to the effect that goods improperly imported on account of concealment, under declaration of quantities or false description etc., with a view to evade payment of appropriate duties or the prohibition order shall be seized and forfeited to the government and defaulters may be prosecuted. Accordingly officers are to desist from issuance of demand notices on account of the aforementioned offence and treat same in accordance with the provisions of sections 46 and 47 of CEMA. The circular further stated that genuine cases shall continue to be addressed through the normal dispute resolution mechanism to ensure trade facilitation.

The question then is, what amounts to genuine cases and how will the dispute resolution mechanism resolve this issue. The normal thing if a

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[65] NCS Circular No. 026/2008 Seizure of Improperly imported/Undeclared goods of June 12, 2008.

conflict arises when values and quantities are at variance is to issue a DN as earlier suggested. If the circular recognizes this procedure, then why the hard stance on the seizure and forfeiture of the goods? If the defence is on the provision of the law, then we submit that in the reform being advocated of the CEMA, there ought to be a rethink of the provision.

3.2.5 Forgery of Documents

False declaration by its nature is an offence of forgery. The focus now is what constitutes forgery. Importation or exportation is full of documentation. This is in line with international trade practice. Right from the time an importer opens his Form óMô through the arrival of the goods to the clearance and final release from customs custody, several documentation takes place. In order to prevent any abuse of the process, the CEMA provides for sanction in case of any forgery.

Section 162 provides:

if any person ï

(a) counterfeits or falsifies any document which is required by or under the customs and excise laws or which is used for the transaction of any business relating to customs and excise; or

(b) knowingly accepts, receives or uses any such document so counterfeited or falsified;

(c) alters any such document after it is officially issued; or

(d) counterfeits any seal, signature, initials or other mark of or used by any officer for the verification of such a document or for the security of goods or for any other purpose relating to customs and excise

he shall be liable to a fine of one thousand naira or to imprisonment for two years, or to both.

Forgery of customs and excise documents is a very serious offence. If the punishment prescribed is the yardstick and in comparison to the provisions of the ordinary criminal law, then we conclude that the sanction prescribed under CEMA does not fit the crime and ought to be reviewed.

This offence is dealt with in sections 362 ï 380 of the PC and 463 ï 489 of the CC.

Section 362 specifies the making of a false document to embrace:

> (a) a dishonest or fraudulent making, signing or execution of a document or part thereof with intent of causing it to be believed that it was made by or with the authority of the proper person entitled to make that document; or
>
> (b) fraudulent alteration of a document in any material part after it has been duly executed by the true author or some other person; and
>
> (c) dishonestly causing a person to sign, seal, execute or alter a document by reason of unsoundness of mind or of intoxication that he cannot be expected to know the content of the document or the nature of the alteration.

Section 363 defines forgery and forged document while section 364 prescribes the punishment for forgery, which is 14 years imprisonment. Section 365 provides that to forge the seal of the United Kingdom or of State of the Federation is punishable by life imprisonment or a lesser term plus a fine.

Section 366 deals with uttering or using a forged document as a genuine one, which is punishable as the very act of forging the document.[66]

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[66] *Patrick Okpalo v. C.O.P* (1962) N.R.N.L.R 14.

Section 367 deals with counterfeiting of seal, plate or other instrument for making an impression for the purpose of committing forgery, which is punishable by up to 14 years imprisonment. Under section 368, the possession of forged document knowing it to be forged and intending it to be fraudulently used as genuine is punishable by up to 14 years. Section 369 imposes up to 14 yearsô imprisonment on counterfeiting any device or mark used for authenticating documents. Under section 370, fraudulent cancellation or destruction of a document of title or the attempt to do these things is punishable by up to 14 years.

Section 371 of PC deals with falsification by a clerk, officer or servant whether employed or only acting in the capacity of a clerk, officer or servant; or destruction of book, paper, document of title, or writing, or account and is punishable by up to 7 years imprisonment. Sections 372 ï 380 deal with property marks. Under the CC, section 463 tries to define bank note, document, seal and writing which was stated to include an inscription on wood, stone, metal, or other material, it includes a mere signature and a mark of any kind. Section 464 contains further definitions as to when a document or writing can be said to be false.

Section 465 provides that a person who make a false document or writing knowing it to be false, and with intent that it may in any way be used or acted upon as genuine, whether in a state or elsewhere, to the prejudice of any person, or with intent that any person may, in the belief it

is genuine, be induced to do or refrain from doing any act, whether in the State or elsewhere, is said to forge the document or writing.

A person who makes a counterfeit seal or makes an impression of a counterfeit seal knowing the seal to be counterfeit, or makes a counterfeit representation of the impression of a genuine seal or makes without authority an impression of a genuine seal with intent in either case that the thing so made may in any way be used or acted upon as genuine, whether in the State or else where, to the prejudice of any person, or with intent that any person may, in the belief that it is genuine, be induced to do or refrain from doing any act whether in the state, or elsewhere, is said to forge the seal or mark.

Under section 467 of CC, any person who forges any document, writing, or seal, is guilty of an offence, which unless otherwise stated, is a felony, and is liable, if no other punishment is provided, to imprisonment for three years. Under Sub-sections (1)(a ï b), (2)(a ï q) (3)(a ï c) and (4) (a ï u) for some special cases mentioned therein the punishment ranges between 7 and 14 years imprisonment and life imprisonment.

A look at the above provisions brings out the common facts which are the ingredients of the offence. There must have been a form of document (whether private or official), falsity of the document and then an intent to defraud or to deceive.

Under section 365 of the PC, reference to the United Kingdom suggests that the law was also made for that country or is it the evidence of the reflection of law made during the colonial era. The CC on its part referred to the offence being committed in a state or elsewhere. Is the state referring to a state of the Federation such that state mentioned means reference to other part of the country? If however, the state is referring to Nigeria as a country, then elsewhere will then mean reference to the U.K. as in the PC or may be any other country.

The provisions in the PC and CC are not limited to any specific area before the offence can be said to have been committed. Under the CEMA however, it must be for any purpose of customs and excise. The question here is what is the status of a forged invoice under the provision of section 162 of CEMA. Under the PC and CC there may not be a problem in holding a forged invoice to be a document for the purpose of prosecution. It may not be easy to so hold under the CEMA. In the case of *Regina v. Akanji and Others*,[67] it was held that if the invoice was for customs purpose then it will qualify as a document if not it will be otherwise.

Under the provisions, it seems the mere making of an untrue statement in an official register or record may not be forgery.[68] Falsity means that the document must tell a lie about itself, that is either in terms of

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[67] 1961 L.L.R 3 See *A. G of the Federation v. Thompson* (1985) FHCLR 305, where the Court went further to explain how to establish the offence.

[68] This is however an offence under sections 36 and 37 of the Forgery Act of 1861.

words and figures on it or the signature of the author. Even dates may be material as for example on a passport, birth certificate or even a cheque. In *Re-windsor*,[69] the law was succinctly stated by Blackburn, J. in the following words:

> Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statement. Telling a lie does not become forgery because it is reduced to writing.

With regard to intent, it was not clearly stated under the CEMA as in the codes. We however submit that it has to be imported into it for the purpose of liability. Section 1(i) of the English Forgery Act, 1963, talks of the intent to defraud or deceive.

Under section 465 of the CC, the intention in forgery is:

> (i) either that the forged document may be used or acted upon as genuine to the prejudice of any person; or
>
> (ii) that any person may, in the belief that the forged document is genuine, be induced to do or refrain from doing anything

Section 362 of the PC appears to adopt the CC position and in addition the intention here may be dishonest or fraudulent. Section 16 PC stipulates that a dishonest intention must be to cause a wrongful loss to any person. Section 17 PC too provides that a thing is done fraudulently or with intent to defraud where there is an intent to deceive and by means of such deceit to obtain some advantage for any person or to cause loss to any person.

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[69] (1856) 10 Cox 118 at 123

In *R. v. Hodgson*[70] the accused forged the Diploma of the College of Surgeons and hanged it on a wall in his room. In acquitting him, it was held that there could be forgery only if at the time of the act complained of there was an intention to defraud some person(s).

However in *R. v. Toshack,*[71] the accused forged a certificate to show that he was an able-bodied seaman in order that he might be allowed to sit for an examination for employment. It was held that there was forgery once the intent was to defraud some one.

Another interesting thing is the provision of section 162 (b) of CEMA which is not in the codes:

> 162 (b): If any person knowingly accepts, receives or uses any such document so counterfeited or falsified.

This provision puts the officers who often accept documents from the importers or Agents at a very high risk. Since by section 190 CEMA, knowledge need not be proved, the onus will be on the officers to disprove knowledge of the counterfeited. The clearing procedure is in a chain and this put any body receiving any such document at a risk.

Our earlier submission that section 161 talks of untrue declaration and that section 46 which talks of false declaration are related and ought to

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70 (1856) 169 E.R 891.

71 (1849) 169 E.R. 241; See also *R. v. Bassey* (1931) 22 Criminal App. Rep. 160; *Welham v. D.P.P.* (1961) A. C. 103; *R. v. J. K. Mensah* (1959) G.L.R. 314.

be read together or even merged as one section. This is the case under the Indian Act wherein both were merged in one section. Section 132 of the Indian Act provides:

> Whoever makes; signs or uses, or causes to be made, signs or make declaration, statement or document in the transaction of any business relating to the customs, knowing or believing that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

This provision, it is submitted, is preferred to that of CEMA which tends to be clumsy. It summarizes the offences under one section simply as false declaration and false documents. Under the Ghana Act the word forgery was specifically used as the heading of section 95 which provides:

> (c) A person who furnishes or causes to be furnished any information relating to any other matter under this Act which the person knows to be false, is liable to sanction.

The Ghana Act like that of Nigeria in section 250 and 251 provides for false declaration, falsifications and alterations.

The Kenya Act, following that of India, simply brings all those related offences under one section (187) as offence to make or use false documents.

Under the New Zealand Act, the offence as mentioned in section 183 has to do with falsification of any record or information stored in any customs computerized entry processing system. This provision is an indication of the level of sophistication of the clearance procedure of the New Zealand

customs. Prior to importation, all declaration would have been made and stored in the system. The emphasis then centers on the records in the system.

Under the customs law of Brunei,[72] the offence is stated in section 124 as incorrect declarations and falsifying documents and includes any such declaration, whether oral or written or any document that has been proved to be untrue or incorrect or counterfeited or falsified in whole or in part. It shall be no defence to allege that such declaration or document was made or used inadvertently or without criminal or fraudulent intent or that the person signing the same, was not aware of, or did not understand the content of, such document, or where any declaration was made or recorded in English or Malay[73] by interpretation from any other language, that such declaration was misinterpreted or not fully interpreted by any interpreter provided by the declarant.

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72 Cap. 36, 1997.

73 A major local Language in Brunei.

CHAPTER FOUR

CAUSES OF SMUGGLING

4.1 Introduction

Smuggling as seen so far, is a worldwide problem and its complex dimensions were discussed earlier.[1] The Nigerian economy is import oriented and there is a very high taste for foreign goods from industrial countries. What then are the reasons for wanting to bring in the goods illegally? It has been estimated that about 90 percent of Nigeriaôs demand for industrial consumer goods is met from outside the country.[2] The urge for the foreign goods which often lead to them being smuggled is due to the fact that good quality locally produced goods most times are not available. The people then have no option but to look for such goods elsewhere and try to bring them in, in spite of ban or restrictions placed on such goods. This leads to importation of foreign goods, which is believed to be of better quality than the locally produced goods. The restriction on the importation of the foreign goods leads to smuggling since they want to have them at all cost. Some notable causes of smuggling are therefore herein identified.

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1 In 2.2 *supra.*

2 Appendices to the Report of the Study group on Customs and Smuggling presented to the Head of State and the Commander-in-Chief of the Armed Forces, October, 1984.

4.2 Scarcity of Good Quality Locally produced Goods

The reason why the foreign goods have to be controlled is not far to seek. Since Nigeria is essentially a consumer import oriented economy, scarcity of foreign exchange and the national interest of the country dictate that unrestricted importation of goods, including raw materials cannot be allowed.[3] As a developing economy, so many goods have to be prohibited from coming into the country; many others have to be placed on restrictions. These regulations often lead to scarcity of the foreign goods, which are often believed to be of better quality than the ones produced locally.

The austerity measures of the early 80ôs introduced during the second republic exacerbated the situation in the country and accentuated smuggling. The measures introduced triggered the alarming rate of smuggling due to the severe prohibition and import restriction laws meant to discourage indiscriminate importation of goods.

The Structural Adjustment Programme (SAP) of the Mid 80ôs most especially during the military regime of Ibrahim Babangida worsened Nigeriaôs conditions that smuggling went out of control. This led to serious reduction in the quantity of available goods thereby resulting in inflation.[4] This consequently led to smuggling in the attempt to bridge the gap.

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[3] Umar M. Birai, ñDimension of Smuggling and the Nigerian Custom in *100 years of Nigeria Customs and Excise 1891 – 1991*, I. E. S Amdii (ed.) ABUP Ltd., (1991), p. 222.

[4] A. Wakili, The Anti-smuggling roles of NCS: An Assessment, Unpublished Research Project at National Institute for Policy and Strategic Studies, Kuru, 2005, p. 25.

The abolition of export duty further encouraged people to export more of Nigerian products with the view of making money from the export. The intention was to earn foreign currencies. This further put pressure on the goods that were being carted away from the country all in the name of export. Consequently, there was also the need to smuggle back other goods into the country so as to meet the vacuum created. It becomes a two-way traffic as put by the 1984[5] Report.

> In this regard, smuggling is a two-way traffic, our neighbours as well as Nigerians smuggle out of the country, the little we are able to produce ourselves and what we can import with our scarce foreign exchange. Again, because of the relatively more relaxed customs regulations of our neighbours, it is easy for smugglers to use their ports as staging (sic) points for smuggling imported goods into the country through over-land and sea routes. In this time, when foreign exchange is hard to come by, smuggling out of the country is a way for the individual to make it and in turn is used to purchase few goods, which are also smuggled back into the country.

The SAP brought about deterioration in the living condition of Nigerians. It heightened unemployment and led to the collapse of industries thereby raising the illegal activities of smuggling.

With the return to democratic rule, it was thought that the situation would change. This was not to be as the forecast then was to make the private sector the engine of growth. The real sector of the economy represented by the industrial manufacturing sector suffered a great deal in the last one decade. This is evident in the continuous decline in the purchasing power of consumers, paucity of demand for goods and services,

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[5] The Report of the Study Group on Customs and Smuggling, *op. cit,* p. 124

under-utilization of capacity, and prohibitive cost of doing business. The naira continued to depreciate in value, the energy crisis and insecurity of lives and properties continued unabated.

The negative impacts of these indicators have further compounded, the policy inconsistencies on pre-shipment inspection, destination inspection, port reform, banning and un-banning of so many commodities. As far back as 2005, there were over 100 banned and prohibited items. This no doubt led to serious smuggling. Okereke[6] was of the opinion that:

> High imports tariff, vast number of prohibitions and unstable tariff policies, which appear unfavourable and cumbersome to importers, tend to encourage smuggling.

The high duties, which have been imposed upon the importation of many different sorts of foreign goods, in order to discourage their consumption, have only served to encourage smuggling.[7] This happens worldwide because the incentives to avoid some form of government intervention are large enough to overcome the expected costs of undertaking an illegal activity. As Thornton[8] puts it, most interventions on products such as alcohol and tobacco are intended to be supply-reduction policies. The result of the policy is that the cost of supplying the legitimate product increase, which at the margin decreases supply, the quantity demanded will

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6 U. Okereke, ñ*The Role of Customs in National Security and Implication for Crime Prevention*ò, NIPSS Essay, SEC 18, Kuru (1996), p. 15 Unpublished.

7 Adam Smith, *The Wealth of Nations*(1776). After the Publication, he was appointed Commissioner of Customs at Edinburgh.

8 M Thornton,. *The Economics of Prohibition*; (University of Utah Press, 1991) p. 11.

fall at higher price, and demand will shift to substitutes which often are smuggled goods.

4.3 Preference for Imported Goods

The preference for imported goods in Nigeria can not be over-emphasized. This leads to the reduction in the demand for locally manufactured goods. Smuggled foreign goods are in greater demand than the locally produced ones thereby leading to complex dimensions. The complexity is accentuated by the fact that Nigeriaôs economy is import oriented. Nigeria is a country in which there is very high demand for foreign goods from industrialized countries.[9] This made the Manufacturersô Association of Nigeria (MAN) and the Nigerian Chamber of Commerce to protest and appealed to the government to intervene and save the economy from collapse.[10] Even when local goods are produced, there is lack of demand. So much is this deficiency that most warehouses are full to the brim.[11]

Smuggling therefore becomes a flourishing business in Nigeria ñbecause of the nationôs insatiable appetite for foreign gadgets and the general drive for quick wealth. Everybody is guilty of this social malaise, which the countryôs leaders prefer to shop in London, Paris, New York during their innumerable foreign tours and claim immunity at the ports.

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9 Bature, *Industrial Relations in the Nigerian Textile Industries*. (An unpublished PhD Dissertation, Sussex University, 1983) cited in Olugbesan, *op. cit,* p. 55.

10 *Ibid.* p. 55.

11 Olugbesan; *op. cit*, p. 55.

Virtually everything is smuggled into Nigeria.[12] The countryôs economic resources and the taste of wealthy Nigerians and the elites in power have made it an ever expanding market for all sorts of foreign goods a lot of which are smuggled through the neighbouring countries. This is further hinged on the fact that our economy is essentially ñ*commercial*ò as distinct from ñindustrialò capitalism.[13]

Even in the developed countries, there is the tendency to prefer goods made in other more developed countries. The consumer demand may be stimulated by a perceived difference. For example, smoking smuggled but genuine American cigarettes in India is fashionable because these are perceived to be of a higher quality than supposedly identical locally produced versions. In spite of the banning of the importation of some goods, the restriction of others and the high import regime, Nigerians insatiable appetite for foreign goods, their desire to cut-corners makes the smuggling of these items ña do or die affairò. Illegal importation of these commodities like alcohol and beverages, textiles, second-hand clothing, vehicles, frozen poultry products, cosmetics became rampant. The oil boom of the early 70ôs contributed to this problem. It was believed that the problem then, was how to spend the Nigerian money. To this end it was free for all and one of the easiest ways to spend the money then was the import

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12 T. A. Imobighe; NIPSS Studies on Nigeriaôs International Borders. The Marine Border with Chad; Vol. III 1988, p. 7.

13 O. Olaniyan, ñNigeria and Economic Community of West African States: A Role and Problem Analysisò G. O. Olusanya and R. Akindele (eds.), *Nigeria's External Relations: The First Twenty-five years*; (University Press Ltd., Ibadan, 1986), p. 12.

of foreign goods under whatever guise. The naira was in fact over-valued at the period, but it was not used to advantage. This tempo was not sustained long enough. The oil price in the late 80ôs declined and the resultant effect was sudden shortage of foreign exchange earnings.

The need therefore, arouse to control the import dependent industries and the importation of consumer goods. The government has to introduce import licence,[14] foreign exchange approvals, price control so as to minimize inflation in the country and curtail deficit. The value of the naira which hitherto was determined by administrative fiat, was now left to be determined by the forces of demand and supply. In line with the planned removal of administrative controls, the level of import and excise duties was not only raised, but there was a reduction in the dispersion of tariff rates and a new Customs and Excise Tariff Consolidation Decree of 1988 was enacted.

As a further check, the government established a Tariff Review Board under the presidency so as to be keeping the level of tariff protection in constant forecast. It was also to offer local manufacturersô protection against dumping and unfair competition. Export duty then became abolished so as to promote domestic manufacturers and to diversify the economy.

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[14] The regime of Import Licence was however finally abolished in 1984 when Maj. Gen. Mohammed Buhari took over.

4.4 Liberalization of Trade by Neighboring Countries

The discussion here is anchored on the theory of ñBig Brotherlinessò which is a peculiar perspective arising from the inequality in size and resources endowments between Nigeria and her neighbours (Benin, Niger, Chad, Togo and Cameroun). The neighbouring countries look at Nigeria as a big brother and thereby dominate the activities at the border with the intention of surviving on Nigeria.

To this end, their essentially relaxed customs regulations and other trade policies may probably be seen as one way of taking advantage of the Nigerian market through smuggling since they can not export to Nigeria goods that are not produced in their countries.[15]

The Republic of Benin is a trade center and thus committed to the principle of free trade. After discarding the Marxist-Leninists model in 1990, Benin has progressively liberalized its economy in recent years.[16]

The import duties, at an average of 12 percent, are among the lowest in Africa and for transit goods only small administrative charges are applicable. This policy by necessary implication encourages importers from Nigeria to Benin where on clearing their goods they find their way into Nigeria. With regard to the transit goods they are supposed to come in their

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15 Birai; *op. cit,* p. 222.

16 Report by the WTO Secretariat on Beninôs trade polices and Practices. Downloaded from http: www:wto.ord/english/trape/tpr_e/t p59_e.htm accessed on March 26, 2008.

original form in a container from foreign country to Benin, then under escort come into Nigeria. This however, is not the case as the goods are off-loaded into Benin trucks to the border and then loaded into Nigeria bound trucks. The reason for this is that if the goods come in their original form in a container and properly escorted according to international guidelines on transit goods, then Benin will loose revenue on them. The government of Nigeria has made several attempts to enforce the transit rules but all to no avail.

The operation at the Nigeria and Benin border is also not helping the matter. Since the occupation of the ECOWAS building, which is at the soil of Benin, the Nigerian officers are helpless to stop any smuggling activities within that area. The general operations at the border by the customs and the other government agencies hitherto was conducted at a place referred to as the ó*old baggage*ô which is situated at a buffer zone between Nigeria and Benin. The first stretch of the baggage is the Nigerian side while the second stretch is the Benin side. This scenario clearly identified the border lines of the two countries and there was no conflict of interest as both security agencies of the countries operated within the limits of their country laws.[17]

On the April 6, 2001 via a directive from the presidency, Nigeria security operatives moved into the National joint juxtaposed control offices located about 100 metres west of Benin ï Nigeria Border line on Benin territory (ECOWAS Building). It was contended that the ECOWAS building

[17] Memo Presented by the Customs Area Controller Seme border, to the Chairman Senate Committee on Industries on the General Security Operations at the Seme border, 2007.

is to be a symbol of bilateral relationship between Nigeria and Benin Republic and indeed was to be a pilot project towards total re-integration of the ECOWAS sub-region.

The present scenario, it is submitted is unfortunate as it causes serious smuggling activities there and the Nigerian security operatives do not perform effectively so as to curb same. It in fact takes tact, patience and diplomacy for the operatives to operate from the ECOWAS building without creating serious diplomatic problem between the two countries. A glaring example is the incident of January 30, 2006 wherein over thirty vehicles belonging to Nigerians were damaged by Beninoise security operatives. Nigerians were defenselessly embarrassed, humiliated and assaulted by Beninoise.[18]

It is hoped that with the coming into effect of the Common External Tariff (CET) prescribing the same rate of duty for imports into the sub-region the hitherto lower rate of duty in Benin may no longer be an advantage.

The policy in Ghana not to prohibit the exportation of timber with its attendant advantage in the country is causing the smuggling of it from Nigeria. In Nigeria under schedule 6 of the Customs, Excise Tariff, etc. (consolidation) Act,[19] Timber is banned from being exported. In Ghana

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[18] Position paper by the Immigration Area Controller, Seme Border to the officials of the Ministry of Integration and Corporation in Africa on the General Security Operation at the Seme border, 2007.

[19] Cap. C 49, LFN, 2004.

however, the export of timber has generated so much income. The Timber Industry Development Division of the Forestry Commission in a statement stated that about 28,907.45 Euros was earned in 2006 and the trend was that of increase in subsequent years.[20]

The implication here is that in view of the flourishing trade in timber in Ghana, Nigerians will take all the risk and smuggle it to Ghana so as to earn Euros. This is with the active connivance of the Ghanaian exporters.

Also scrap metal is banned from being exported in Nigeria but in Ghana it is good business. It was confirmed that the world market prices for scrap metal was soaring and the local scrap entrepreneurs are exporting in order to earn more foreign exchange.[21] Nigerian Exporters in connivance with the Ghanaian exporters will do anything to get it smuggled out of Nigeria. It should however, be noted that in Ghana there is now a campaign to ban the scrap metal industry because of its subsequent effect on the economy.[22] The steel manufacturers are claiming that they are not getting the adequate local scrap metals to enable the foundries to operate to maximum capacity, they claimed that the local steel companies require at least 600 metric tones of steel scraps daily to operate. And that as at 2007,

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20 Trade News published in the *Ghanaian Times*, Monday February 19, 2007, p. 3.

21 *Ibid*. p. 8.

22 *Ibid.*

presently they employed about 2000 workers and have the potential to double it if there is a total ban on the scrap export.[23]

Some trade policies in the Republic of Niger has also led to causing smuggling in Nigeria. Niger is one of the worldôs poorest countries, having a Gross National Product (GNP) per capita of 200 dollars in 2003. A landlocked country located in the Sahara and characterized by subsistence agriculture and low levels of industrial development, Niger has suffered major fluctuations in revenue since the 1970s. The revenue/GDP ratio has fallen from 14 percent in 1980 to 10.6 percent in 2002.[24] The decline trend has been continuous and the implication of this on Nigeria is that Niger has become a dependent nation on Nigeria for survival. The concept of the big brotherliness and its implications come to light here.[25] Niger for most of its imports depends on Nigeria *via* the use of transit. The snag here however is the abuse of the transit trade, which often through connivance has become a conduit pipe to deprive the Nigerian government duties that ought to be paid on such goods.

Under the guise of transit to Niger the goods may end up somewhere else or may even get to Niger and finds its way back to Nigeria. The Embassy of Niger at times especially in cases of vehicles on Temporary Importation (TI) issues introduction letters to effect such entry, but often the

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23 *Ibid.*

24 Ali Zafar; Revenue and the Fiscal Impact of the Trade Liberalization: The Case of Niger; World Bank Policy Research Working Paper 3500, February, 2005, p. 6.

25 Birai, *op. cit*, p. 223.

vehicles disappear never to come back. The lack of oil (petroleum products) in Niger also guaranteed a good market for it to be smuggled across. The impact of trade liberalization on Niger can not be over-emphasized. The effort made by the United Nations Conference on Trade And Development (UNCTAD) to harmonize the trade liberalization in Niger is a welcome development and it is hoped that it will improve on the impact already stated.[26]

Togo situated on the West Coast of Africa is a least-developed country (LDC), which became independent on April 27, 1960. A considerable portion of the GDP (44 percent in 1996) comes from the tertiary section, whose development has been assisted by transit operations through the port of Lome from which an important road network leads to the land-locked countries to the North of Togo.[27]

What is a blessing to Togo (transit trade) has turned out not to be to Nigeria. As is the case of Niger, Togo becomes a very good route for smuggling in the name of transit often through Niger and then finally to Nigeria. Corruption and the porosity of Nigeriaôs borders tend to facilitate the illegal transit of goods.

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[26] World Trade Organisation ñ*Niger-Trade Policy Review*ò, Geneva, 2003, p. 21

[27] Report by the WTO Secretariat on Togoôs Trade Policy Review downloaded from http:// www.wto.org/english/tratop_e/tpre_e/tp102_e.htm. Retrieved on April 10, 2009.

4.5 Desire to Evade High Rate of Duty[28]

This is a situation where an importer or even an excise trader does not want to pay the prescribed duty or taxes on the goods being imported or being produced in the country. When they do not want to pay duty, then what comes to their mind is to find a way of bringing in the goods illegally and that is smuggling. The desire to maximize profits is responsible for evasion of duty payment, which in turn leads to smuggling. It could be that the importer outrightly refuses to pay any duty at all or in some cases will conceal, or even make false declaration for the purpose of paying a lesser duty.[29]

We saw earlier in our discussion[30] how in Britain the high rates of duty at that time made the clandestine import and the evasion of duty a highly profitable venture. Also in North America in the 1780ôs heavy taxes and regulations imposed by mercantilist trade polices led to the desire to evade duty thereby leading to the development of smuggling.[31]

In Nigeria until 2008 when the CET came into operation reducing the different rates of duty to the barest minimum, there have been cries that our import duties are punitive and thereby encourage people to smuggle.[32] The

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28 Duty means ña payment levied on the import, export, manufacture or sale of goodsò.

29 Extensively discussed in 3.2.3 of this Thesis

30 Discussed in Chapter 2.2 *supra*.

31 *Ibid*.

32 Views expressed by the NCS and the Nigerian Ports Authority (NPA) reported by Ifeyinwa Obi in *Vanguard*, Friday, 09 May 2008, p. 4.

matter is further aggravated with high cost of clearing goods at the Nigerian ports. This has compelled the importers to either smuggle or consign the goods through neighbouring countries by way of transit.[33] The introduction of concessionaires[34], which was intended to make for faster clearance of goods, has instead worsened the situation and has led to congestion at the ports.[35]

In Nigeria, exorbitant duties tend to discourage importers from clearing their goods at the ports; this in turn leads to congestion of the ports. And this is a recurring decimal in the importation business. In 2009, for instance, over 54 vessels were trapped on the high sea because of their inability to berth at Lagos Ports because of the congestion.[36] The Federal Government had to move to decongest the ports. A task force was set up to remove all the impediments that led to the congestion.[37]

To this end, consignees were invited to come forward and clear their goods and that failing to clear them within the prescribed period, they will be treated as improper importation and seized. All cargo lying within the ports for over 90 days were disposed of by an overtime cargo disposal

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33 The danger of transit was considered during our discussion on Liberalization of Trade by Neighbouring countries in 4.4.

34 Some of the Concessionaries include: A.P Moller Terminal Ltd., Bua Ports and Terminals Ltd. and Ports Terminal Operations Ltd. (PTO).

35 David Ogah reported in *Guardian,* Thursday, January 08, 2009 that over 9000 Containers clog the gateways, p. 9

36 David Ogah, ñ54 vessels trapped due to congestionò in *Guardian,* Wednesday, January 14, 2009, p. 6.

37 Part of a Communiqué issued and signed by the Minister of Transport and that of Finance reported by John Iwori in *ThisDay*, January 2009, p.2.

committee which was constituted by the federal government. The intention of setting up the task force was laudable but the problem continued unabated as the importers refused to come forward to clear their containers. They contended that the various charges especially that of demurrage charges by the concessionaires were so high and they cannot afford to pay. The clearing agents went on strike and the Minister of Transport had to intervene before the strike was called off. The above scenario no doubt, is capable of discouraging any would be importer and since the importer must stay in business the next option is to think of evading the hurdles, payment of duty inclusive thereby leading to smuggling.

A comparative study between the Philippines and Nigeria indicated that high tariffs do not necessarily lead to high revenue. With the high tariffs, Nigeria as compared to that of Philippines, Philippines collected 49 billion dollars as customs duty in 2008 while Nigeria never collected more than 3 billion dollars in the same year.[38] It is, however, hoped that with the introduction of the CET and with the various Port reforms programmes and the handover of the ports to the various terminal operators, it would bring about a reduction in cost on the long run.

If this is achieved it will cure the diversion of goods into the neighbouring ports, which of course is intended to be smuggled thereby evading the necessary payment of duties.

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[38] Obi, *op. cit,* p. 4.

4.6 Inefficient Enforcement Machinery

The increase in smuggling activities over the years especially across the Nigerian borders is caused by the inefficient enforcement machinery. Effective enforcement equipment is lacking as well as the level of efficiency of the officers themselves. The view was expressed in the 1984 Report[39] that the NCS.

> Is not very competent in combating smuggling due to lack of adequate equipment, such as boats, vehicles, arms and ammunition and radio phone.

In this type of situation, effective checking of smuggling is hardly possible without adequate communication and enforcement equipment and therefore little or nothing can be done especially by the nature of Nigerianôs porous borders. The porous nature of the borders, their artificiality and the way the colonialist drew them indiscriminately cutting across language groups, cultural ethnic formations causes smuggling. Nigeria has a very long and complicated border with her neighbours, the terrain very unfriendly and the boundaries extremely porous and characterized by poor road infrastructure. People of a common culture and language live on both sides of the borders. This has made the control of interaction between these categories of people very difficult. The Katsinawa of present day Nigeria are separated from their kith and kin in Katsina Maradi in Niger Republic,

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[39] 1984 Report, *op. cit,* p. 124.

while the Daurawa people of Daura in Katsina State, Nigeria are separated from those at Kanche and Magaria in Niger Republic.

Similarly, the people of Idiroko in Ogun State, Nigeria are separated from their kith and kin in Benin Republic. In the northeast part of Nigeria, the Kanuri and the Mandara, people of Banki and Gamboru are separated from their brothers in Republic of Cameroun. All these people on both sides of the border interact freely, perform social function together and intermarry oblivious of the international boundaries that separate them. As a result, they engage in trade, attend markets and since the control of interaction is difficult, there is the likelihood of smuggling to thrive.

The use of helicopter would have been an asset in Nigeria, so as to properly patrol the air. In the oil fields, officers have to rely on the use of helicopters of the oil companies to get to oil wells to ascertain figures loaded and shipped out of Nigeria. In most cases therefore, they have to rely on information made available to them by the oil companies. This is not good enough as such information could be distorted to the advantage of the oil companies who may want to protect their own interest. The air wing of the NCS, which is supposed to assume this role cannot as the plane is grounded for lack of maintenance.

The lack of adequate welfare package for officers also affects their effectiveness in anti-smuggling operations and other enforcement duties. It is therefore not difficult to understand why officers posted to border

stations, largely unarmed and living a poor primitive condition will succumb to intimidation by smugglers that have superior arms.

Committee four[40] in 1990 also identified lack of adequate training, equipment and welfare facilities as a factor that aids smuggling at Nigeriaôs borders. If the enforcement operations are not vigorously pursued, then smuggling will definitely thrive. Nigeria should in conjunction with her neighbours try to improve on the various enforcement machinery so as to curb the illegal trade.

The United States and India signed a bilateral agreement in 2004[41] which was intended to improve the effectiveness of their customs laws enforcement. The agreement, a Customs Mutual Assistance Agreement (CMAA), allows two Homeland Security Agencies, US. Immigration and Customs Enforcement (ICE) and US Customs and Border Protection (CBP), to exchange information, intelligence, and other data with India in order to enhance the enforcement of customs laws.

If Nigeria can enter such agreement with her neighbours, not as done in the past without seriousness, it will help to improve general enforcement of their customs laws and thereby reduce smuggling.

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40 The Report of Committee of Four set up by the Department of Customs and Excise on combating smuggling on our borders, presented at the Seminar for Senior Officers, Bauchi, 18th ï 25th October, 1990.

41 In a December 21, 2004 news release, the U.S Customs and Border Patrol Agency said the agreement signed December, 15 provides for information exchange and co-operation in detecting and investigating commercial fraud, Smuggling and related crimes.

4.7 Corruption

Corruption here can be defined as ôthe intentional use of an organization or its objectives to achieve personal and private goal by members of that organizationô.[42] Criminologists tend to label crime as a deviant behaviour, corruption falls under crime and as such presupposes that the society through corrupt practices engages in the commission of any particular crime. Our concern has been the crime of smuggling and to which we submit to a large extent is caused by the element of corruption in the society.

It affects the whole society and at various levels. Every body tends to be guilty. With regard to the NCS the only evidence of corruption is the fact that in spite of its role in combating smuggling, it still persists. As Olugbesan[43] puts it, it would appear that in Nigeria, customs officers have had a sizeable share of the stigma called corruption. So much is the assumption in the mind of Nigerians that the name customs is almost synonymous with corruption. In a study of corruption in Nigeria Customs Service, it was established that 87 percent of those interviewed associate customs with corruption.[44]

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42 I.M.D, Jatau *A Sociology for Medical Practice* (Promocomms Nig. Ltd., Lagos, 1992) p. 74.

43 Olugbesan, *op. cit,* p. 30.

44 Jatau: *op. cit,* p. 74.

The craze and demand for recruitment into the NCS however, continues to be astronomical. In fact in a reported interview by the then Minister of Internal Affairs, he claimed that for every one thousand applications for employment, eight hundred were for Customs.[45] These revelations support the claim that corruption is a social problem that affects the society generally. The 1984 Report[46] concluded that the majority of smuggled cargoes coming into the country are through the help of some unpatriotic officers.

The roles of the clearing agents have always been of suspect. They have been accused of aiding and abetting smuggling and some officers interviewed expressed reservation over some of their activities.[47] In fact, the 1984 Report described them as ever ready to corrupt the custom officers so as to evade payment of correct duties even when they have collected such duties in full from their clients.[48]

For some Nigerians, smuggling is a means of livelihood and they care less whether any law is being breached. This is a reflection of the level of corruption in the society.

Abuse of official position is another level of corruption that leads to smuggling. High ranking government officials import whatever and claim

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45 John Shagaya, Interview with *African Concord Magazine* September , 15, 1989, No. 159, p. 6

46 The Report of Customs and Smuggling (1984), *op. cit,* p. 124.

47 Birai, *op. cit,* p. 126.

48 1984 Report, *op. cit,* p. 125.

immunity at the ports. Their position makes it very difficult for customs officers to confront them. The 1984 Report[49] indicated that it is a well-known fact that smuggling in Nigeria is being aided and abetted by Nigerians in high positions using such position to influence their way through. The desire to make quick money and huge profit often leads to corrupt tendencies and smuggling being a flourishing business is seen as veritable source of accruing such illicit wealth. Nigerians tend to worship materialism without questioning the sources.

There is the feeling that because successive government due to corruption failed the nation, then the cure is to help oneself by cheating on government.

To this end, Nweke[50] stated that many Nigerians indulge in smuggling through the evasion of customs duty because they perceive that the:

> Past government and in particular, the past military regimes failed in providing basic necessities of life in spite of the very high tariff regimes prevalent in the country as against what is obtainable in many other countries. To that extent many Nigerians believe that the way out of the woods is for them to cater for themselves at the detriment of government revenue, by evading payment of customs duties.

Another level of corruption is the activities of numerous agencies operating at the ports, which creates other illegal activities. The multiplicity

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49 *Ibid*.

50 Nweke, is a member of the National Association of Government Approved freight forwarders (NAGAFF) in a Paper ñThe Federal Governmentôs Economic Reform Programme, Internal Trade and Customs facilitation, Matters arisingò to then Minister of Finance, Hon. Dr. Mrs. Ngozi Okonjo Iweala, 2004.

of these agencies causes unnecessary delays, sharp practices, and inter-agency rivalry thereby wittingly and unwittingly forcing some people to smuggle.

4.8 Lack of Proper Enlightenment of the Public

Smuggling is a formidable assault to Nigeriaôs National Security and the NCS is its basic and surest line of defence against the nefarious activities of smugglers. The snag however is that there is a basic ignorance among most Nigerians concerning the activities of the NCS. There is no doubt that the NCS is the administrator of the security of the Nigerian economy, in fact, it is the NCS that really understands the dynamics of the Nigerian economy. By virtue of the afore-stated role, the NCS is placed in a position where it comes into contact with persons coming into the country or going out.

This position puts the NCS in the forefront of being the first security agency to detect any hoodlums and criminal gangs that infiltrate the nation either through the sea, air or land.

The ignorance on the part of the people about the role and activities of the NCS tend to undermine its operations, thereby unknowingly engaging in the crime of smuggling. Some people look at smuggling as trading and so see no evil in it.

This is where the role of proper enlightenment campaign to the public becomes very important. There is the need to embark on an intensive public enlightenment campaign through the print and electronic media as well as writing and distribution of anti-smuggling/anti other economic vices posters especially among the border communities. It should be translated in the three major Nigerian languages and distributed down to the grassroots, so that the people should be aware of the dangers of smuggling.

The NCS in performing its duty has over the years engage in public education and enlightenment about the rules and regulations guiding imports and exports. This particularly concerns, importers, exporters, clearing agents, manufacturers and investors on exportable or importable goods. The essence here is for all stakeholders to understand these rules and regulations as well as the list of prohibited goods, and tariffs on items as may be effected by government from time to time. The Customs Community Consultative Forum (CCCF) and in recent time the Customs Duty News Programme which is aired every Monday by 10.00pm by the Nigerian Television Authority (NTA) are performing this role greatly.

A public affairs analyst[51] was of the view that the federal government could help strengthen the effort of the NCS in the area of public enlightenment, by compelling all her public enlightenment agencies to help sensitize residents of areas where smuggling thrives on the need to assist

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[51] M. Ikhilae, *The Re-Birth of Nigeria Customs Service*; (Delink Ultimate Ventures, Lagos; 2001), p. 10

customs personnel with relevant information that would help them track down smugglers. We agree with this view but suggest further that the government agencies should extend the campaign against smuggling to all parts of the country, so that the awareness can be there.

The Nigerian Press (media) can also through its role assist in the campaign against smuggling. Being the fourth estate of the realm as well as an acclaimed watchdog of the Nigerian society, the media without mincing words can perform the role effectively. If the dangers of smuggling are brought to fore, the society will change for the better.

As part of the enlightenment campaign, the efforts of Godson Offoaro[52] is commendable. He wrote a poem which was posted on the net on the dangers of smuggling and on what should be done so that smuggling will not thrive. He stated that if Nigeria institutes a true liberalized trade policy today, the economy of Benin Republic and other adjoining countries on the West African Coast will collapse. He posed a question that, is it true then that it is the fear of these republics collapsing that has made successive policy makers in Nigeria to look the other way while countries as Republic of Benin, Togo, Ghana and Cote Dôlvore turn into a haven for smugglers across and into Nigeria.

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[52] Offoaro ï Poet without Borders; *I am now a Smuggler, Part I*; http://nigeriaworld.com/columnist/offoaro/053005.html accessed on 9/1/2009.

A very effective public enlightenment strategy, which we recommend should also be posted on the Internet like that of Godson Offoaro[53] are the words O.B.C. Nwolise has for the Nigerian smuggler[54].

A word for the Nigerian smuggler.

> Yes, a word for you indeed. For years we have heard of your activities organized or unorganized you smuggle, and smuggle. You collude with foreigners to smuggle out food, petroleum, currency.
>
> You collude with foreigners to smuggle drugs, electronic items, textile, and unnecessary things. But you that never smuggled in the much desired foreign technology. Is it part of the ñinferiority: syndromeò? Or are you too unpatriotic to smuggle in foreign technology?
>
> A word for the Nigerian smuggler:
>
> The selfish quisling of the year; while your country battles to stabilize her naira, you smuggle out her currency. While your relatives starve, you smuggle food out of the country.
>
> Canôt you see? Eh? Canôt you see? That while smuggling feeds you fat, it kills your brothers and sisters? We say canôt you see? Eh? Canôt you see?
>
> That while your smuggling enriches other nations, it impoverishes your country and worsens her political problems?
>
> A word for the Nigerian smuggler:
>
> What are you in the business? The boss or an errand boy? Do you exploit youth as boss, or as an errand boy risk your life. For others while they orgasm, booze and smoke cigar?
>
> What will you do when caught? Weep, commit suicide, or blame the devil? Where will you run to when customs acquires weapons, boats and cars superior to yours?
>
> What will you do when the porous borders are effectively manned? Who will you bribe when customs sacks your few friends in it?
>
> Yesterday, we heard of smugglers, today we hear of smugglers with the fast changing scheme of things, where will you be tomorrow?
>
> The answer is clear, in the prison or in the soil?

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53 *Ibid*.

54 First published in O.B.C. Nwolise and Okunade; *Combating smuggling in Nigeria*, (Ibadan Jator Pub. 1987), p. 12.

> A word for the Nigerian smuggler:
>
> We donôt want you jailed or killed. The prisons are congested, enough Nigerian blood has been shed but you must not force the hand of society.
>
> When then are you quitting smuggling?
>
> It must be today, ha, it must be now!, now!! Now!!! You must come back to the law abiding fold. The extended family, the kind friends can help you start a new life if necessary.
>
> Smuggling, robbery, embezzlement, petty quarrels and Jealousies, and immoral quick richness must pass away with our first 25 years of national experiment.
>
> Come now, you must leave the nation destroyers and join the nation-builders, this is where the honour lies even if you live and die poor like Mallam Aminu Kano, for it is better to be penniless than to be honourless or did you not hear. Euripides say ñsilver and gold are not the only coin; virtue, too passes current all over the worldò?

A look at Nwoliseôs word for the smuggler é ñquick riches must pass away with our first 25 years of national experimentò indicates that the words have come a long way. If we substitute 25 years with 53 years of our national experiment one may not be able to safely conclude that we have fared well in the area of combating the crime of smuggling.

4.9 Other Causes

We have seen the trade policies of some of the countries and as it affects Nigeria in the smuggling trade. We are now going to look into some of the policies entered into by Nigeria with the other countries in the sub-region and see the impact, some of them have on the economy of Nigeria.

4.9.1 ECOWAS Trade Liberalization Scheme (ETLS)

The objective of the ETLS scheme is to establish a Customs Union among the member states aimed at the total elimination of customs duties and taxes and non tariff trade barriers and the establishment of a common customs external tariff to products produced in member states. The products under the scheme include: unprocessed goods, traditional handicraft and industrial products of community origin.[55] It was intended that such goods would be exempted from import duties and taxes and no quantitative restriction will apply to them.

The concept of the scheme is very much laudable but the effect it has brought since inception is our concern. It is our submission that instead of achieving the objective stated, the scheme has further increased the level of smuggling into the country. Nigeria tends to be on the receiving end. The scheme as observed by Godson Ikoro[56] is that of petty envy and mutual suspicion. He stated that cold facts emerging from member countries, particularly the French speaking countries indicate that the dream of inter regional trade pursued under the ETLS will take a longer while to be realized than the heads of state have imagined. The testimony of traders

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55 The Protocol on (ECOWAS) Common External Tariff (CET) was signed by the federal government with other member State in 2000.

56 ECOWAS: Trade Liberalisation, the petty Envies, by Godson Ikoro; *ThisDay* Online http://www,thisdayonline.com/archieve/2002/02/03/ 2002023wbuol.html. retrieved on May 6, 2009.

operating within the corridor[57] is one of woes ranging from harassment at the borders, extortion and discriminatory imposition of duties or outright seizure, depending on whether they were going into a Franco-phone country.

The case of Afprint Nigeria Plc., one of the leading textile manufacturing companies in the country exporting its product to Senegal is another good example of how Franco-phone countries resist export from member countries contrary to consolidation of customs duties or charges of equivalent effect and non-tariff which the ETLS hopes to achieve. While it has so far made a qualitative success in Anglo-phone countries, it was no success in Franco-phone countries.

Afprint was not able to clear the containers of textiles it formerly exported to Senegal because Senegal has not removed all duties on processed and finished goods under the law on the ECOWAS approved products. The existence of sub-sets within ECOWAS, especially in Franco-phone West African Economic Group known as (WEMOA) does not help matters. The Franco-phone prefers WEMOA to ETLS, and therefore down play the expected co-operation within the regional grouping and thereby weaken ECOWAS and the full implementation of its trade programmes such as the ETLS.[58]

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57 The Corridor runs through the ECOWAS member states especially Cotedô Ivoire (Ivory coast), Ghana, Togo, Benin and Nigeria.

58 Ikoro, op cit.

The failure of the ETLS was further reiterated and was described by Yomi Olomofe[59] as a ruse for organized smuggling. The view was expressed that nearly ten years after the ETLS was initiated a cabal in the Nigerian business sector in active collusion with other people of similar sinister motive in the other ECOWAS member states especially Ghana have hijacked a scheme that would have otherwise transformed the manufacturing landscape of ECOWAS States. The contention is that under the guise of ETLS, goods manufactured in far away countries like Pakistan, Dubai, China, Singapore and Malaysia are labeled to be made in the sub-region and brought into the country. The list of goods ranges from Pharmaceutical products, medicaments, furniture, leather materials, sweets and candies, biscuits, mosquito coils, and other sub-standard goods. The ETLS should therefore, be scraped as it has only succeeded in legalizing smuggling.

4.9.2 The Benin/Nigeria Joint Committee on Commerce (JCC)

The JCC is a programme established between the Benin and Nigeria government in order to reinforce the economies of both countries. It was intended that goods which are prohibited in Nigeria can be manufactured in Benin using at least 75 percent of local raw material from Benin and then exported free of duty to Nigeria. The scheme was officially opened by the former president, Chief Olusegum Obasanjo on September 15, 2006. About

[59] Executive Director, Badagry Prime News, writing as Guest Columnist in Maritime *Voice*, Vol. 7, No. 112, 2009, p. 5.

eleven factories were listed to function under the scheme.[60] The need to fully grasp the real intention of the scheme cannot be over-emphasized. Since the inception of the scheme the factories are producing at minimal level, which is not even meeting their local demand. The same game of hiding under the guise of ETLS to bring in goods from other foreign countries reared its head here. The factories in fact cannot produce using at least 75% local material as intended by the scheme. The tendency here then is to import, re-label and export them to Nigeria. We submit that the scheme only aids smuggling and so Nigeria should withdraw from it.

4.9.3 Benin-Nigeria Togo Co-prosperity Alliance Zone (COPAZ) [61]

This is another union specifically entered into by Benin-Nigeria and Togo. It is aimed, among others, to facilitate cross-border trade in products originating and manufactured from the three countries. Our submission in the ETLS and JCC scheme is also adopted here as this scheme is another way that is likely to cause smuggling at the detriment of Nigeria. The Memorandum of Understanding (MOU) was signed in 2007 and in the preamble of the MOU it is stated: the desire to put in place a suitable and equitable institutional framework and alliance which emphasize shared economic development, growth, free movement of goods, persons, capital

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60 Report by the Customs Area Controller, Seme Border to the Comptroller General of Customs on the Operations of the Benin/Nigeria Joint Committee on Commerce, 2007.

61 Memorandum of Understanding, Benin ï Nigeria ï Togo, Co-Prosperity Alliance Zone, Abuja, Nigeria, February 8, 2007.

and services, harmonization of monetary and investment policies and mechanisms, and the equitable sharing of gains and costs.

Article 2: of the MOU provides:

> The Alliance is established for the following purposes:
>
> i) The Three States freely choose to integrate their national economics on the basis of common platform that seeks to promote interests in dealing with shared visions and concerns arising from the imperatives of global competitiveness and inter-dependence.
>
> ii) The Three States share sufficient mutual aspiration as to commit themselves at the political leadership and followership levels to the endeaovur, and
>
> iii) The Three States propose, in due course, to admit other likeminded neighbours desirous of participating in the Alliance.

However, we are watching the trend for further analysis.

4.9.4 Manufacture-in-Bond Scheme (MIBS)[62]

This scheme was designed to encourage manufacturers to import duty free raw material inputs and other intermediate products whether prohibited or not for the production of exportable goods. This has been seriously abused by some Nigerians; they instead bring in finished product without payment of duties and channeled them to the domestic markets. From the above, it can be seen that the inefficient enforcement machinery and corruption is a contributory factor to the abuse of the scheme by the manufacturers.

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[62] This Scheme is designed to encourage Manufacturers to import duty free raw material inputs and other intermediate products, whether prohibited or not for the production of goods for export, backed by a bond issued by any recognized Commercial Bank, Merchant Bank, Insurance Company or Nigerian Export - Import (NEXIM) Bank. The bond will be discharged after evidence of exportation and repatriation of foreign proceed has been produced.

4.9.5 Proliferation of Bonded Warehouses and Private Jetties

The contention here as put forward by Okey Ibekwe[63] is that proliferation of bonded warehouses in the clearing system of cargo is yet another great issue in illegal activities of evasion of duty payment. A bonded warehouse is a place licensed by the NCS for the deposit of imported goods pending payment of customs duty. He contended that it has become havens for perpetuation of smuggling activities. We disagree with this view in that as defined, it is a place licensed by the NCS and officers escort the goods there and are resident there to monitor the goods pending clearance. Save for connivance on the part of the officers we submit that with the proper checks put in place and due process followed, it will be difficult to perpetuate smuggling there.

This however, can not be said of private jetties spread across the coastal areas of Nigeria running from Lagos to Calabar. The jetties often owned by highly placed Nigerians have been turned to dens for illegal activities. These activities range from the illegal importation of arms, oil bunkering and other smuggling activities.

The various causes of smuggling as discussed appear to have one common denominator. This is the ñhuman elementò that tends to make the human person to indulge in the crime of smuggling. In the attempt to x-ray

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[63] Okey, Ibekwe, ñBonded Warehouse, a haven for Smugglingò in *ThisDay* August, 8 2004, p. 3.

these human elements, the realm of criminology comes to the fore. In this regard Gesinde[64] captures it thus:

> The relationship between a particular smuggler and his or her environment can be likened to some aspects of the personality theory which observe that in the interaction with the environment, each person strives for the enhancement of self. Unfortunately there usually arise inconsistencies between the ñ*self I see myself to be*ò and the ñ*self that others perceive me to be*ò.[65] He said conceptually, man from the beginning is believed to be the planner of his own affair as well as the destroyer; the motivator and the demotivator, the óapprobatorô and the óreprobatorô.

He went on to state that the smuggler revels in these contradictions because societal conflict is a congenial disease of homosapiens. In examining the psychology of the smuggler he said:

> In the first place, the smuggler does not believe he is doing anything offensive. He believes that he is doing a job just as the one being performed by the customs officers apprehending him. He believes he is not preventing the customs officials from carrying out their functions and wonders why they should disturb him. [66]

In a study[67] of about 20 smugglers, in which a few of them had pending cases with the customs, it was found that 35 percent of them saw smuggling as their only way of getting their own share of the national cake which they said others were getting using their offices. Thus, they believe that the customs, the army, the police and civil servants in the ministries as

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64 S. A. Gesinde; 1977 paper presented at the in-service workshop on Guidance and Counseling organized for secondary school teachers in Rivers State held at Port Harcourt referred to in K. Olugbesan; *Smuggling the Crime the Law, op. cit.* p. 21

65 Emphasis mine.

66 *Ibid*.

67 Jatau, 1988 ñFactors Associated with Corruption in a Complex Organizationò A case study of the Nigeria Customs and Excise organizations, Postgraduate thesis, University of Maiduguri, Nigeria, referred to in K. Olugbesan op. cit. p. 22

well as manufacturers engage in fraudulent acts that give them their share of the national cake.

From the study, Olugbesan[68] posits:

> That as far as the smuggler is concerned, he believes he is doing a job like any another person. Thus, he does not see his action akin to that of an armed robber. It is, however, doubtful if this is tenable as there is hardly any disparity between the armed robber and the smuggler. The armed robber dispossesses a person of his legitimate property by force while the smuggler disposes the State of its dues i.e. the accruing tax which he evades. Consequently, one imminent problem law enforcement officers grapple with is the lack of remorse on the part of the smuggler which hitherto would have made him automatically submissive on apprehension or detection, but which have contrarily emboldened him to resist arrest in a dangerous manner.

The societal factors in aiding the smuggler also need consideration. Kofo Olugbesan[69] observed that sociologist especially those who believe in the structural stress approach theory like Durkheim, identify the cause of crime in the society they live in. She stated that Durkheim was convinced that crime is determined by the society, that even suicide which is an individual act was seen as caused by the society. Smuggling therefore can be said to be a social phenomenon that is fuelled by the society. Olugbesan[70] concluded by identifying four types of smugglers produce by the society as follows:

(i) Those who smuggle as a way of life in and around border communities;

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68 *Op. cit*. p. 22.

69 *Op. cit*. p. 24.

70 *Ibid*.

(ii) Business or profit motivated smugglers i.e. evaders of customs duties and prohibition orders;

(iii) Those who smuggle arms and ammunition as well as hard drugs so as to undermine state security;

(iv) ñExternal model mentalityò smugglers. These are smugglers of prohibited items in contempt of anything produced in Nigeria. They smuggle to satisfy or maintain their vanity and ego.

The societal pressure especially on the law enforcement agents tends to make them overlook certain act, which makes smuggling to continue.

We shall in the next chapter examine the effects of smuggling, but let us state here that a look at the causes of smuggling as x-rayed clearly indicate that human element(s) are greatly to a large extent responsible for the causes of smuggling. It becomes therefore imperative on every body to live up to expectation so that as captured in the words of Nwolise[71] we should think about the evil of smuggling and desist from being a party to it.

[71] Nwolise, *op. cit,* p. 12.

CHAPTER FIVE

EFFECTS OF SMUGGLING

5.1 Revenue Leakage

The contribution of the NCS in terms of revenue collection since its establishment cannot be over-emphasized. Apart from the revenue from oil and in recent time, the one generated by the Federal Inland Revenue Service (FIRS), the NCS remains the most important sector that generates substantial revenue for the development of the Nigerian economy. This fact was recognized by a Minister of Finance as far back as 1959[1] when he stated that:

> The material well-being of any nation is dependent upon the revenue it received. This is particularly so with a young and rapidly growing nation like Nigeria, which need to develop its resources and provide for fast expanding social services é eighty percent of this countryôs revenue comes from indirect taxation that is from imposed (sic) on goods coming into and being exported from Nigeria and also on certain commodities manufactured é these monies are collected by the customs and excise department acting on the authority of customs and excise.

The view expressed by the then Minister of Finance means that the revenue generated by the NCS remains intrinsically a *sine-qua-non* for national development.

The generation of revenue by NCS is however not without its attendant challenges. We intend to examine the extent to which the effects

[1] Chief Festus Okotieï Eboh, Minister of Finance, 1959, referred to in *100 Years of the Nigerian Customs and Excise 1891 – 1991*, *op. cit,* p. 13.

of smuggling have hampered the revenue drive of NCS and the economy of Nigeria.

Smuggling generally as we have argued earlier, is the illegal importation or exportation of goods. The intention is to evade any form of tax or duties on the goods. It was in this light, that O.B.C Nwolise and Bayo Okunade warned that[2]:

> Smuggling possesses the potential to ruin the economy of a victim nation as the outflow of its currency reduces the currency value, outflow of food and other items creates scarcity and thus raises prices internally, while the inflow of items from outside weakens the productive capacity of the nationsô industries, thus resulting in retrenchment of workers, reduction in profits, etc.

They concluded that it is an economic terrorism against the Nigerian state, and has to be fought with all the resources and machinery the State can muster.

The necessary implication of the above is that smuggling leads to serious loss of revenue, which could have been applied in the provision of socio-economic services and materials for the people. There is also reduction in national wealth due to reduced revenue and productivity.

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[2] OBC Nwolise and A. Okunade (eds) *Combating Smuggling in Nigeria*, (Ibadan: Jator Pub, Co. 1987), p. 14.

The London *Guardian* alleged that Nigeria loses about half a billion pounds a year to smuggling.[3] This figure we submit, may not be accurate especially in recent time, yet the point is made that the government loses serious revenue due to smuggling activities. When revenue is lost the government may not be able to provide and maintain social amenities such as pipe-borne water, hospitals/clinics, good/motorable roads, reliable electricity, provision of qualitative education *via* construction of well equipped institutions of learning.

Another dimension to the issue of revenue leakage is that of balance of trade. Balance of trade whether surplus or deficit always provide diplomatic leverage in international relations. In this respect, therefore, smuggling could be tagged an attempt by criminal economic elements to seize the control of international trade from the government.

This is further hinged on the fact that smuggled goods are not recorded in the statistical trade record. In 1986 India claimed to have sold goods worth 70 million pounds sterling to Nigeria. But of this only 40 million was reflected.[4] The extra was not reflected even though the Indian export record showed it.

If we look at some other jurisdictions, the same impact of smuggling on the revenue base of the countries is in the same direction of gross

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3 London *Guardian*, October 15, 1991, p. 4.

4 Bature, *op. cit*, p. 48.

reduction in the revenue. In the U.K Tobacco smuggling was held to cost the U.K Exchequer over 1.7 billion pound yearly.[5] The situation in many other European countries is similar as with other products, like alcohol. It is estimated by the British brewing industry that over one million pints of beer cross the English Channel every day, some of which is illegal, and the U.K Exchequer is losing hundreds of millions of pounds to the French and Belgian authorities.

In the U.S, the smuggling of cigarette has great impact on the revenue that ought to be generated from this area.[6] A broad consensus among independent economic studies (from 1955 to 2003) indicated that in the U.S. cigarette smuggling has remained at 2% to 6% of total consumption.[7] There is however, an exception to this as given by the California Board of Equalization (BOE), which has estimated that 27 percent of cigarette smoked in California are smuggled.[8] This, they conclude, represents about 292 million dollars loss of excise tax revenue.[9] The tobacco industry claims

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5 The London Times (1999) referred to by Roger Bate, in a paper titled: Smuggling ï the Unintended Consequence of Government Intervention, October, 2000, p. 6.

6 F.J Chaloupka, K.M Cummings, C.P Morley, J.K Horan, *Tax Price and Cigarette smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*. Tobacco Control 2002; 11 (Suppli) 162 ï 172.

7 ACIR. *Cigarette Tax Evasion: A second look*, Advisory Commission on Inter Governmental Relations: 1985.
A. A. Yerukle, P. Zhan. *The Impact of Clean Indoor-air laws and Cigarette Smuggling on Demand for Cigarettes*: An empirical model. Health Economics 2000; 9:159 ï 170.

8 B.O.E *Preliminary Estimates of California Cigarette Tax Evasion*, Agency Planning and Research Division: April, 30, 1999.
J. Fitz Documentation of Board of Equalization, 2003. Cigarette Tax Revenue Evasion estimates, Board of Equalization Sacramento 12003 February 25

9 *Ibid.*

that it is not only the government that suffers from smuggling of cigarettes. It argues that smuggling hurts it financially too.

A private letter written in August 22, 1997 from Philip Morris (Cigarette Manufacturer) to investigative reporter Christopher Drew at the New York Times indicates this fact.

> Contraband is always a problem for the tax authorities, but it also has a negative impact on our business and at times is a disaster for us é in a number of countries the disruption to our business caused by contraband has jeopardized major manufacturing investment which we have made in those countries. In some cases, we have expended tens and even hundreds of million of dollars in factories, equipment, and the hiring and training of workforces only to have our sales replaced by cheaper smuggled products which pay no import duties or excise duties.[10]

In the Philippines, smuggling or illegal entry of goods, used to be confined to the numerous private ports. This was facilitated by the fact that the smuggled goods could be easily sneaked in through one of the 7,000 islands of the Philippinesò.[11] In recent time smuggling is even prevalent in the countryôs free ports where in products are shipped as ordinary goods and unloaded in broad day light into the local market. From garments to ceramic tiles, luxury cars, agricultural products, electronic gadgets thereby depriving government necessary revenue. In 2000 the Philippines trading partners reported that they had exported 44 billion dollar worth of goods to the

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[10] Philip Morrisôletter to Christopher Drew. Philip Morris; 1822, 1997.
Cigarette smuggling in California. Fact and Fiction, Benjamin Alamar, Leila Mahmoud, Stanton A. Glantz; escholarship repository, University of California, http://repositories. cdlib.Org /ectere/tcpmus/smuggling2003, retrieved on April 5, 2009.

[11] Smuggling in the Philippines, http://mongpalatino.motime.com1?from=93accessed on 6/1/2009

country, but government figures revealed 34 billion dollars worth of goods.[12] This means that about 10 billion dollars worth of goods were unaccounted for indicating they were smuggled.

Since 2006, an estimated 100,000 vehicles were smuggled leading to serious loss of revenue.[13] In the same vein, in 2007 serious revenue loss occurred due to the smuggling of about 4 billion liters of oil.

In Yemen, a special Yemen Times survey report revealed the secrets of smuggling as it affects the economy.[14] The report stated that the smuggling of various goods to Yemen seems to be eating away their national pride towards their products. It is crushing their economy and is bringing tens of local factories to the verge of breaking down and announcing bankruptcy. It is a dangerous phenomenon, which is holding back any means of future hope for their national productivity of the Yemeni market. In brief, it is the nightmare of national producers. The report quoted Mr. Mohammed Sharafundin, the Chairman of the Parliamentôs Trade and Industry Committee that:

> Smuggling is very destructive to our national economy. It is unfair trade for our importers, investors and industrialist. It brings goods unchecked and uncontrolled for quality to our consumers while depriving the state of *legitimate revenue*. It also creates an underground economy and encourages a law-breaking culture based on bad moral values. In short, smuggling is disastrous for our nation.

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12 *Ibid*.

13 *Ibid*.

14 Surveyed by Jamal Al-Awadhi; ñ*Smuggling the Nightmare of our National Economy"* Published in Yemen Times 34 August 23, thru August 29, 1999, Vol. IX

It is clear from the above analysis that the effect of smuggling on the revenue base of a nation is enormous. It is a global phenomenon and really need to be put in check.

5.2 Promotion of Money Laundering

The persistence of smuggling could be viewed against the backdrop of the sinister motive of smugglers, which is the desire to make money at the expense of the government through the evasion of customs duties. Most importers and their agents often abhor payment of tax and therefore view payment of customs duty as a huge loss of their illegal revenue and as such usually strive to outsmart Nigeria Customs personnel.

The effect of smuggling therefore becomes grave on both the security and economy of the nation. It affects the nation by cutting directly from its economic mainstream, dislocating it and consequently enriching few individuals who will eventually flaunt their ill-gotten wealth in the society. It is the attempt to protect the illicit wealth from smuggling that leads to the concept of money laundering. It, in fact promotes money laundering. Since smuggling is a flourishing business, the tendency is that when the money is acquired, and in order not to raise any suspicion that it was acquired illegally, they try to put it into another legitimate business.

Money laundering arising from smuggling is a process by which smugglers attempt to hide and disguise the true origin and ownership of the proceeds of their criminal activities thereby avoiding prosecution, conviction and confiscation of criminal funds. The relationship between smuggling and money laundering could be interwoven. Take for instance, funds acquired from smuggling and cannot be pushed through the banks and other financial institutions by eluding financial regulators and law enforcement agencies around the world are laundered through trade malpractices such as, massive importation of all kinds of goods like spare parts, pharmaceutical products, chemicals, automobiles, etc. The motive here may not be for profit but to legitimize the illegal proceeds from smuggling. The imported items are quickly sold at give away prices and people will believe that they are international business men engaging in trading.

The imported goods which most of the times are produced at cheap costs and higher quality abroad unfairly compete with local goods produced at perhaps high costs and lower quality in Nigeria. Hence, this causes prices to crash and massive losses occasioned by large stock of unsold products for lack of patronage and eventual collapse of industries.

Figures released, indicated that Nigeriaôs foreign exchange figures of imports from China stood at about 797 million US dollars while figures from other international sources for the same year puts it at 1.787 billion

U.S. dollars.[15] This disparity is associated with trade malpractices wherein goods which are most probably sub-standard, and for which appropriate import duty may not have been paid were brought into the country. This was buttressed by the disclosure of the president of Manufacturers Association of Nigeria (MAN), that 55 percent of imports for the year 2003 circumvented import procedures. He singled out Chinese companies for this disturbing revelation. Another report also claimed that close to 40 percent of imports into Nigeria in 2003 came in under ñNot valid for foreign Exchangeò.[16] It is alleged that the goods were paid by criminal proceeds of money laundered.[17]

As a derivative, it could flow from the following crimes amongst others; illegal arm sales, activities of organized crimes, including for example drug trafficking and prostitution rings, embezzlement, insider trading, bribery and computer fraud scams. It is interesting to note that section 46 of the EFCC Act 2004 defines economic and financial crimes to mean all the above listed crimes. The list is unending as mentioned in the Act, and it includes smuggling and drug trafficking.

Drug syndicates, barons and couriers are known to be ready to employ any means including murder and assassinations to attain their

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15 N. Ribadu, *op. cit*, p. 2.

16 *Ibid.*

17 *Ibid.*

objectives however ignoble.[18] Rival drug gangs are known to engage in open shootouts *inter se* and against law enforcement agents in various parts of the globe. Faced with this kind of prospect, against the background of an ever increasing involvement of her nationals in the drug trade, the federal government of Nigeria in 1989 promulgated a National Drug Law Enforcement Agency Decree (The NDLEA Decreeò).[19]

As originally enacted, the NDLEA Decree in section 13 provided against money laundering and therefore created offences relating to laundering of monetary instruments. This section was however repealed in 1995.[20]

These enactments represent yet another move on the part of the government to redouble its effort at eliminating the scourge of money laundering and its attendant consequences on the nationôs economy. The law is divided broadly into three parts. The first part deals with the prevention of money laundering, the second creates offences regarding money laundering, and part three provides for miscellaneous matters.

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[18] I.J G. Irokalibe, ñ*Money Laundering and Financial Crimes in the New World Order*.ò ABULJ, 2002, p. 15.

[19] The NDLEA Decree No. 48 of 1989, now in NDLEA Act Cap. N. 30, LFN, 2004.

[20] Money Laundering Decree No. 3 of 1995 now in ñMoney Launderingò (Prohibition) Act, 2004, which has been further amended to be Money Laundering (Prohibition) Act, 2011 (hereinafter referred to as amended).

The Money Laundering (Prohibition) Act (MLPA), 2004 has its origin in the provisions of section 13 of the NDLEA Act of 1989. Nigeria enacted the NDLEA Act sequel to her ratification of the United Nations convention against illicit traffic in Narcotic Drugs and psychotropic substances (Vienna Convention) of 1988.

The provision of section 13 of the NDLEA Act, which criminalized the offence of money laundering relating to proceeds of drugs, was in line with the provision of the convention requiring state parties to criminalize money laundering.

The inadequacy of this provision to check the activities of launders and the making of the forty recommendations, consisting of detailed rules to fight money laundering, by the Financial Action Task Force (FATF) in 1990 led to the enactment of the Money Laundering Act No. 3 of 1995. Though this legislation had elaborate provisions against money laundering, its scope of application remained restricted to proceeds of illicit traffic in drugs. The need to expand the scope of Nigeriaôs anti-money laundering (AML) legislation to cover proceeds of all serious crimes in line with the new requirements of FATF led to the making of series of AML legislations in 2002 and 2003, culminating in the enactment of the MLPA of 2004.[21]

[21] As amended.

The Act is the basic law that regulates money laundering in the country and presently constitutes the basis of Nigeriaôs Anti-Money Laundering (AML) enforcement regime. This underscores the necessity for operators of the financial and designated non-financial institutions within the contemplation of the Act to have a clear perception and understanding of its provisions.

The main objective of the MLPA is to check the activities of money launderers by preventing them from laundering ill-gotten wealth in the country. For this reason, the Act like similar legislations in other jurisdictions has made provisions that will facilitate the monitoring of financial transactions by regulatory and law enforcement authorities. Consequently, there are provisions to entrench the three AML cardinal principles of record keeping, customer due diligence/know your customer (CDD/KYC) and prompt reporting of specified transactions to appropriate authorities into the culture of Nigeriaôs financial system.

In making this legislation, one of the major challenges government confronted, was the cash based nature of the Nigeria economy, as the economic culture was one, in which huge financial transaction in cash were prevalent. It is within this context that section 1 of the MLPA, 2004[22] made provisions to bring a huge chunk of financial transactions into the formal sectors of the nationôs financial system. This section prohibits any cash

[22] As amended.

payment in excess of ₦500,000[23] and ₦2,000,000[24] or their equivalent for individuals and corporate bodies respectively. One can only make such cash transaction in excess of the above thresholds through the financial institutions.

The provision of section 1 is further reinforced by section 15 (1)(d)[25] of the Act, which makes it an offence for any person to make or accept cash payments in excess of the above thresholds. This offence is punishable with a term of imprisonment of 2 to 3 years or a fine of ₦250,000 to ₦1,000,000 respectively.[26]

The offence of money laundering is a recent addition to the growing list of international crimes. We have seen the position in Nigeria and perhaps a consideration of some other jurisdictions becomes necessary here. In line with the concept of a new world order which refers to the era of cooperation among nations of the world to eradicate the various evils that afflict the human society, the US authorities in conjunction with the Mexican police was able to arrest a group that used laundered money to buy air planes to smuggle drugs.[27] A total of 74 people allegedly participated in

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23 Now ₦5,000,000.

24 Now ₦10,000,000.

25 Now section 16 (1) (d).

26 Section (1) (b) now provides for a forfeiture of 25% of the excess above the limits placed in section 1 of the Act.

27 *International Herald Tribune*, the Global Edition of the New York Times, November 8, 2007, p. 3.

the targeted money-laundering ring, which apparently sent drug money to the United States to buy airplanes.[28]

The Sinalo Cartel formed by an alliance of drug Lords, is one of the main trafficking organizations, which have engaged in a bloody battle for control of shipping routes to the U.S. market.[29]

In the US the legal framework for combating money laundering originated from the Bank Secrecy Act (ñBSAò, 31 U.S.C 5311 ï 5314, 5316 ï 5324, 1996) which imposes extensive record keeping and reporting requirements on financial institutions.

The Money Laundering Control Act of 1986, 1957, 1956 had created criminal liability for individuals who conduct monetary transactions knowing or with reasons to know, that the proceeds involved were obtained from unlawful activity. Both laws have been significantly amended by Title III of the U.S.A Patriot Act, adopted in October, 2001. This Act extends the coverage of U.S. anti-money laundering laws to non-financial institutions.

The BSA requires financial institutions to file Currency Transaction Report (CTRs) with reporting deposits, withdrawals, and exchanges of more than 10,000 dollars. The concept of KYC as in Nigeria is also applicable here. The Banks here are required to file Suspicious Activity Report (SAR),

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[28] *Ibid.*

[29] *Ibid.*

which may be independent of the transaction, but is relevant to possible violations of Federal Law or regulation.

According to International Monetary Fund (IMF) estimates, laundered proceeds from criminal acts, amount to 8.5 percent of worldôs GNP annually (as much as 1.5 trillion dollars).[30] This figure reflects the laundering of money where underlying acts are criminal and those, which are legal, but motivated by either a desire to evade taxes or to place once savings or profits in a more stable economic environment in violation of currency restriction. We submit, however, that in so far as there is a desire to evade taxes, the transaction becomes illegal and criminal. Even though the transaction could be legal as stated by the IMF, the desire to evade makes it illegal.

There are numerous international conventions and organizations concerned with the problem of money laundering. With respect to treaties, the European Unionôs Strasbourg convention of 1990 and Untied Nations (UN) convention against illicit traffic in Narcotic drugs and psychotropic substances (the Vienna convention) dated December, 1988, are the more well known.

Perhaps the unilateral action of the US in the past need to be mentioned. The U.S had illegally invaded Panama during the President

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[30] Research Project: Money Laundering and Economic Crime, Terrorism, Transnational Crime and Corruption Centre, School of Public Policy, George Mason University; http: // policy-traccc.gmu.edu/transcrime/moneylaundering,shtml accessed on 17/2/2009.

Bush administration to seize Manuel Noriega after accusing him of drug trafficking and money laundering offences.

We have seen the extent to which smuggling and the other offences mentioned have led to the promotion of money laundering. The need to put the activities of the criminals into check can not be over-emphasized. This is hinged on the fact that the criminal acts leading to money laundering only tend to interfere with the smooth running of legitimate commercial and financial business and the tenor of life in society at all levels. The economic stability and prosperity of any nation become subverted by the illegal inflow and outflow of financial resources through unauthorized channels. This trend must be discouraged.

5.3 Killing of Infant Industries

Smuggling no doubt has serious adverse effect on our local industries. It renders all local industries, which ordinarily are protected by government policy dead. The demise of local industries is equally bound to result into the problem of mass unemployment since workers in the organizations would have to be laid off by entrepreneurs whose firm has stopped production. The reason for this trend was captured by Imobighe[31] in the following words:

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[31] T. A. Imobighe. NIPPS Studies on Nigeriaôs international Border: *The Costal Border* Vol. V, 1988 President Shehu Shagari, also attested to this fact in the presidential annual budget speech, January 1, 1982 text published by *West Africa*, January 4, 1982, p. 3

> Many of our industries are suffering because they have found it difficult to compete with smuggled goods, which abound in our markets. The obituaries carried out in the nationôs dailies of our dying industrial sector due to the activities of smugglers denote the extent of the countryôs vulnerability.

This submission is the true state of affairs and the result is that the nation cannot be industrialized. If there was demand for home made goods, then there will be greater perfection in the production and efforts will be made to produce goods that will compete with the foreign ones.

This effect was recorded as far back as 1986, when the Nigerian Tobacco Company reportedly made 700 workers redundant and cut down its shifts. The United African Company (UAC) had on its part made 56,000 workers redundant whereas Bata Shoe Company made 400 workers redundant. Terylin Textiles Ltd. dismissed 900 workers.[32]

In a memo to the Senators of the Federal Republic at a retreat held in Kano, Saka Raji Audu stated that the situation of the textile industries in Nigeria especially in Kano was still endemic. There was no market for the goods produced and that this with other factors like insufficient power supply was killing the industries. He said the industries have reached the point of diminishing returns. He gave an example of the Africa Textile Manufacturers Ltd., situated in Challawa Industrial Estate in Kano with over 2,000 workforce had to send all its workers on one month compulsory leave as a result of the challenges. This was a company that needed the total sum

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[32] *Ibid*.

of ₦35 million naira monthly to pay its workers, but this was not possible because of the adverse effect smuggling had on the local industries.[33].

The Company between the month of April and August, 2008 was forced to cut down its production capacity due to large unsold stock as a result of the invasion of Chinese textile goods sold in markets in every nooks and cranny of Nigeria, occasioned by heavy uncontrolled smuggling. As a result of the temporary closure of the company in August 2008, it lost about 160 million naira.[34] The company product selling price decreased in the face of the heavy competition with the Chinese sub-standard but cheap textile goods smuggled unabated in large quantity into the country through our porous borders.

The government was accused of being indolent and indifferent even in the face of the challenges faced by the textile industries. This is hinged on the fact that the 70 billion naira loan facilities which was initiated by president Obasanjo was yet to be disbursed by the Nigerian Export-Import Bank (NEXIM). The loan was intended to be a kind of life line to the various qualified mills. During the YarôAdua administration, the National Union of Textile, Garment and Tailoring Workers of Nigeria (NUTGTWN) demanded to no avail for the disbursement of the 70 billion naira loan facilities to the textiles industries.

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33 Saka Raji Audu is the author of a book ñKano industries at crossroadsò. The memo to the Senators was published in the *Daily Triumph*, Monday November 10, 2008, p. 5.

34 *Ibid.*

The efforts of Banquaires Facilities International Limited in the campaign against smuggling are also commendable. The company based on Allen Avenue, Ikeja Lagos launched a campaign tagged: ñNigeriaôs Textile Industry Roll-back Initiativeò to associate with and complement governmentôs huge efforts to revamp the industry. The company further held the 1st international conference on Nigeriaôs Textile Industry in Abuja in March, 2008.

The company suggested the composition of a textile industry turn-around committee which will carry out due diligence and re-certification of all the companies in the industry so as to determine those to be revived.[35] The question is, can all the issues raised by the company, even if implemented, be able to genuinely put the industries on proper pedestal? Our answer is that it may not in view of the fact that the crux of the matter is smuggling which needs the will power of every Nigerian, to come to a stop.

The Nigerian situation came to the fore in Pakistan. The illegal import of goods from other countries, especially from neighbouring states has adverse effects on the local industry and the economy.[36] The problem became complicated as in Nigeria because most of the people preferred to buy imported goods, most of which have been brought by several traders without paying any duties and were thus available at low prices.

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35 *BusinessDay*, Monday, January 05, 2009, p. 8

36 The Nation on Web September 24, 2008 http://www.nation.com.pk/pakistan-news-newspaper-daily-online/regional/islambé accessed on February 2, 2009.

An owner of a departmental store at Islamabad was quoted as saying that:[37]

> Consumers preferred imported goods due to their good quality durability and low prices, people are least bothered about the fact that the trend of purchasing non-custom paid items is weakening our indigenous industry.

All efforts to bring the problem to an end in that country have not yielded the desired result.

In the Philippines, a survey indicated that the same problem applicable in Nigeria and Pakistan is also prevalent. It was discovered that smuggling affects local industries in a negative way. There is low manufacturing of goods, companies lose profit and many small traders are affected. Smuggling in that country wipes out jobs in the local economy and destroys the farmers. It has also displaced vegetable farmers, 60,000 shoe workers and 7,000 workers in the industry.[38]

From the foregoing, and according to Nasir Lawal,[39] the Nigerian market has been bastardized and many factories closed down with thousands of workers laid off and the bargaining power of the Union reduced. He stated that since 1997 when Nigeria sadly joined the World Trade organization (WTO), many factories have closed down, while some others are (HIV) positive, that is economically and financially handicapped.[40] The

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37 *Ibid.*

38 Smuggling in the Philippines, *loc cit.*

39 One time President of NUTGTWN in an interview with Victor Ahiuma of *Vanguard*, March 25, 2003, p. 7

40 *Ibid.*

implication of this is that we now depend almost wholly on the outside world for our clothing needs. Studies carried out on small scale traders by analysts show that we spend a minimum of about 158.4 million dollars (19 billion) naira annually on importation of fabrics and textiles from Dubai alone.[41] The Chinese through the Nigerian local collaborators are daily flooding our markets with their textile goods without any counter resistance by the Nigerian authority.

The effect as discussed has clearly shown that smuggling in particular constitute a serious problem to the textile industries in Nigeria. The glory of the era of textile boom of the eighties are gone. As we await the release of the 70 billion intervention fund, we hope that the situation will soon improve.

5.4 Negative Social Effects

Smuggling affects nations by cutting directly from its economic mainstream, dislocating it and consequently enriching few selfish individuals who will eventually flaunt their ill-gotten wealth in the society thereby weakening the moral fabric/status of the society.

Smugglers import prohibited and dangerous items like arms and ammunitions into the country and allow it to get to wrong hands, who use

[41] *Business Day*, Monday, January 5, 2009.

them for anti-social activities such as armed robbery, assassination and in recent times kidnapping of innocent citizens.

Smuggling has the potential to spell doom for a nation and her citizens in the health sector. The health of the citizenry is endangered when dangerous, expired, harmful goods and medicines, which may cause death or health hazard among the people are smuggled in. This could lead to the extinction of a nation. A higher danger is noticeable in drug trafficking and uncontrolled use of hard and dangerous drugs. The morale killing aspect of it all is that the pride and integrity of a countryôs citizens are ridiculed when such country has allowed herself to be turned into consumers of items already used and discarded by the other races under the guise of being ñ*tokunbo*ò.[42]

Rethreaded or second-hand tyres for instance, is a risk to life since the tyres life span is not commensurate to its seemingly cheap price and often results in accidents on our roads. In the area of economic fraud, resulting from under declaration and under invoicing, smuggling destabilizes genuine efforts meant to secure essential statistical records.

It encourages the existence of ñblack marketò[43] and illegal market where currencies of various countries are being sold in exchange with other currencies. This is because the smuggler is not interested in following the

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[42] Used items brought from foreign countries which Nigerians feel are better than even the new ones produced in the country

[43] Black-market is an illegal trade in officially controlled or scarce commodity.

right channels of obtaining foreign exchange. Such deals in the *black market* do not allow the government to know the exact amount of money circulating in the economy. This is injurious to the economy because economists have proved that such results in situation where too much money is chasing too few goods. With the activities of the black market, the nation cannot know how much money is in circulation. Thus, the government cannot apply the knowledge to either inject more money into circulation or to withdraw money from circulation. Such a situation makes it difficult for government to formulate good fiscal policies.

Furthermore, some of the currencies that are found in the black market are fake. The effect is that Nigeria is being labeled by the Western world as tricksters. The ripple effect of this is that innocent Nigerians on genuine business trips are more often subjected to unexplained hostility and searches by the outside world.[44]

It is a fact that the Nigerian printed wax are of better quality than those coming from India, China and other Asian countries. The textile material from these countries are injurious to health because the chemicals used in waxing or printing them are outlawed by the WTO as a result of their harmful effect to human skin. The Asian countries use the chemicals because they are cheaper for clothes meant for export. Most of the chemicals are used for leathers. Sadly they use them to produce the so

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[44] K. Olugbesan, *op. cit,* p. 57

called African print and sell at very cheap prices between ₦350 naira to ₦450 naira for six yards.[45]

An average Nigerian would prefer to buy the smuggled cheaper prints no matter the health risk. The irony however, is that even though in India and China, the level of poverty is higher than that of Nigeria, yet people do not compromise quality.[46] There is the need for a rethink on this negative social effect of smuggling. The trend as seen above is very dangerous and capable of destroying a nation.

Drug smuggling is probably the transnational crime generating the greatest revenues to participants, approximately 20 billion dollars, mostly from cocaine and heroin.[47] This is the reason why the negative social effect as raised does not mean anything to them and the business continue unabated.

A small number of poor countries produce the vast majority of cocaine (Bolivia, Colombia and Peru) and opium/heroin (Afghanistan, Myanmar). A slightly larger number of (slightly richer) countries serve as transshipment countries for delivery to wealthy consumer countries.[48] Which countries play a role in transshipment is probably a function of geography, weak central government and smuggling tradition. It is

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45 Nasir Lawal one time President of NUTGTWN, *op. cit,* p. 7

46 *Ibid*.

47 P. Reuter, Transnational crime: Drug smuggling, paper delivered in a Conference on Transnational Crime, University of Cambridge, January 7, 2000.

48 *Ibid.*

interesting that the fortunes are made by a small number of entrepreneurs, many of whom come from the producing countries. Actual producers and refiners receive less than one percent of the total.[49]

In the late 1990ôs in the U.S., the Federal Bureau of Investigation (FBI) estimated that 5% of the murders were drug related[50] and these were drugs, which were smuggled in one way or the other. It was further reported *via* a National Survey on Drug Use and Health (NSDUH) in 2005 in the U.S. that over 800,000 adolescents ages 12 ï 17 sold illegal drugs during the 12 months preceding the survey.[51]

The impact of smuggling through the spread of Bird flu is another worrisome dimension to the negative social effect. There is increasing evidence that a thriving international trade in smuggled poultry including live birds, chicks and meat is helping the spread of bird flu.[52]

The situation in Nigeria where several birds were destroyed in some states in the north is still fresh in our memories. The government had banned the importation of day old chicks so as to protect young domestic industry. Instead of trying to master the delicate technology of hatching, the traders took to smuggling and since the chicks were not inspected, they came in with flu which caused serious havoc to the local birds.

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49 *Ibid.*

50 Drug-Related Crime ï Factsheet-Drug facts: http:// en wikipedia.org/wiki/drug-smuggling accessed on 6/1/2009

51 *Ibid.*

52 *The New York Times*, April 15, 2006, p. 15.

Poultry products can also bring the virus into a country: infected chicken parts in feed or fertilizer, second-hand cages once used to house infected birds, or cheap meat that ends up being used on a farm or in a home where other birds are kept. The main concern is China, a country with a serious bird flu problem. In order to forestall a possible occurrence, the need to regulate imports from China can not be overemphasized.

Smuggling also undermined intellectual property and consequently discouraged innovation. A former Director-General of the Standard Organisation of Nigeria (SON) to this end, identified piracy as threats to the Nigerian economy. He stated during the seizure of some pirated book materials from Italy that:

> Piracy as an economic malaise that destroys innovation and deprive authors of their income, should be rejected by all.[53]

According to the Director-General of the Consumer Protection Council, substandard smuggled goods recovered in 2008 amounted to about 5 billion naira and that it constitutes not only a drain on the purse of consumers but constitutes health risk to consumers, even death as exemplified in the damage caused by the teething mixture,[54] ñMy pikinò, which killed many innocent children.

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[53] Dr. John Akanya: The *Punch*, Wednesday 22 August 2007, p. 5.

[54] Mrs. Ify Umenyi, during an Interview with the *Punch*, Sunday, December 21, 2008, p. 9.

Smuggling in drugs have led to the death of many Nigerians in other parts of the world. In 2003, a Nigerian convicted of smuggling hard drugs into the Kingdom of Saudi Arabia was executed. The report earlier stated that 39 people before now had been beheaded.[55]

Two Nigerians were also executed in Indonesia in the same 2003 to mark the United Nations (UN) anti-drug day.[56] Samuel Okoye, 37 and Hansen Nwaolisa, 40 were arrested at Jakartaôs International Airport in 2001, and were held at a high-security prison on Nusakambangan Island since their conviction.[57]

Another negative social effect of smuggling came to the fore when a Nigerian woman, Peace Sandberg was convicted in Britain for smuggling in a baby boy so as to get a council house.[58]

The police fear the case is one of thousands where children are being smuggled into Britain by people hoping to exploit the benefits system.[59] Cases like this unfortunately had been treated as ñfacilitationò of illegal entry into Britain, which is regarded as a less serious offence.

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55 *Daily Trust*, Tuesday, September 9, 2003, p. 3.

56 Indonesia executes 2 Nigerians drug smugglers to mark UN anti-drug day. http: // www.iht:com / articles/ap/2008.6.27 accessed on 8/1/2009

57 *Ibid.*

58 Mail on line updated 12 April, 2008, http://www.daily mail.co.uk/news/articles-559198/ Nigerian-woman-facing-jail-smuggling_ba é accessed on 7/1/2009

59 Priority housing offered by the homeless unit of the Eailing Borough Council which one is entitled if only he has a child.

Human smuggling/trafficking has made the best teachers leave the Philippines in droves. In the bid for better-paid jobs, they get involved and often charged with conspiracy to smuggle aliens, visa fraud and money laundering especially in connection with the recruitment of Filipinos for jobs abroad.[60]

It is important to take a look at the difference between human smuggling and trafficking. The two it is submitted are overlapping concepts. Human smuggling refers to the facilitation of entry into a country in violation of immigration regulations, against payment. Most asylum seekers depend on human smugglers to reach Europe and then present their claims. Smuggling does not necessarily imply an element of exploitation. Trafficking denotes that people are forced, tricked or threatened into situations in which they are exploited either sexually, financially or in through forced labour. Both may involve organized crime, but not necessarily.[61] Poverty, crime, corruption and violence have been part of a vicious circle in Nigeria and this leads to the activities of human smuggling and trafficking, all in the bid to find better opportunities.

In Nigeria, international human trafficking is mainly but not exclusively concentrated around Edo State with its capital Benin City, where it has helped many families to escape extreme poverty. They often travel by

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[60] http :// www.gmanews.tv/story/73387/RPs-best-teachers are leaving Indonesia, accessed on 6/1/2009

[61] Jorgen Carling, Migration Human Smuggling and Trafficking from Nigeria to Europe, Paper prepared for International Organization for Migration

road through the Sahara and are smuggled into Europe by Ship. Many become stranded in North Africa and elsewhere in their unsuccessful attempt to reach Europe.

Human smuggling here, has represented a considerable drain of labour from Nigeria. At the same time however, the Nigerians abroad represent a substantial resource to their country of origin and they send more than a billion U.S dollars back to their relatives every year.[62]

The efforts of the National Agency for the Prohibition of Traffic in Persons (NAPTIP) and other related matters in combating this menace was met with brutality in May, 2006, when armed men raided NAPTIP headquarters and destroyed computers, documents and archives, apparently in a deliberate attempt to obstruct the agencyôs anti-trafficking operations.

These illegal activities no doubt, are a smear on Nigerians abroad. It is however important to note that though, they are affected indirectly, there are Nigerians in Europe who do not have anything to do with the illegal activities. Many Europeans associate Nigerians with prostitution and crime and therefore meet them with skepticism.

Smuggling has been proved to also have a domino effect.[63] This was seriously noticeable in the case of Indonesia when the price of rice was very cheap compared to the Philippines. The Philippines undertook massive

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62 *Ibid*.

63 Domino effect theory is where a country is thought likely to be affected by political events in another country particularly by the spread of communism.

purchases of rice at sharply increased price, which created a fast-buck opportunity for traders in Indonesia. The Philippines traders consequently smuggled the rice through Singapore for eventual higher prices.[64] The scenario created later led to skyrocketing rice price and the Indonesian government lost control of the price. This had led to serious political concerns in both countries. The massive purchases created shortage and it led to political unrest and the United Nations Secretary-General Ban Kin-moon was alerted to take measures so as to save the commodity markets.[65]

This domino effect of smuggling is capable of creating serious breaches in other countries too as in the case of Indonesia and Philippines.

5.5 Insecurity of Life and Property

Smuggling is a very worrisome phenomenon to all nations. It undermines the security of a nation. No country seems to have the wherewithal with which to completely eradicate the phenomenon of smuggling. Smugglers are hardened criminals always ready to ruthlessly confront and beat the security of a nation. It is a high level assault on national security. A countryôs security and defence network could be penetrated or compromised if subversive elements are able to smuggle their arsenals into the country. It encourages illegal use of force against citizens particularly security

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64 Smugglingôs domino effect, http://www.quezon.ph/1779/smuggligns-domino-effect accessed on 6/1/2009

65 *Ibid.*

operative. This was exhibited on February 5, 2009 when diehard smugglers set ablaze two customs officers in their patrol vehicle.[66] The incident took place at Kongolan village in Katsina State.

Smuggling of arms and ammunition poses great threat to the national security as lives and property of the citizen are usually jeopardized.

In effort to arrest this tide, the NCS between the months of January 2005 to April 2006 made arrest of some arms and 40,716 rounds of ammunition and arrested 5 persons in connection with smuggling of these dangerous weapons.[67] Also, recently in the month of February, 2009, 190 magnum automatic pump action riffles hidden in a truck was intercepted along Ijebu-ode/Benin Express way. The arms were concealed among sacks of clothes.[68] The Ports and Terminals Multi-services Limited (PTML) command of the Nigeria Customs Service also in September, 2008 during its routine physical examination of containers intercepted a large cache of arms and ammunition hidden in vehicles parked in a container. About 10,200 pieces of ammunition were discovered in the offensive containers.[69] On Wednesday, October 27, 2010 Security agents intercepted 15 containers of dangerous weapons illegally imported into the country through the nationôs

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66 *Daily Trust*, Sunday 08 February 2009, Ships and Ports (*A Maritime*) February 16-22, 2009 Vol. 3, No. 6.

67 *Smuggling: A threat to National Security*, being a paper presented by Elder J. G. Buba, Former Comptroller General of Customs at the 2006 Security Watch lecture held on Tuesday and Wednesday, May 30 ï 31, 2006 at Ladi Kwali Hall, Sheraton Hotel and Towers, Abuja.

68 *Punch,* Friday, February 6, 2009, *Tell*, February 23, 2009, p. 15.

69 *Vanguard*, Wednesday 10 September, 2008, p. 2.

port at Apapa.[70] The illicit cargo contained rocket launchers, mortar, bombs, small light arms and ammunition which was described on the bill of lading as building materials.

In Nigeria, the port town of Warri plays a vital unacknowledged function of being the hub of the gun trade in the Niger Delta. It has been known for years that sailors trade in guns at the port.

The rise in the number of ethnic clashes and in recent time, the agitation for resource control in the Niger Delta, has expanded the frontiers of the gun trade and sparked an increase in the number of gun owners. Supply has since leapt to include smugglers from countries in the sub-region of Guinea-Bissau, Gabon and Cameroon.[71] Using fast boats, these smugglers cruise to ships anchored in the high seas and obtain guns the origin of which may be as far as Eastern Europe and Asia. These guns could find their way into the hands of robbers who terrorize people on highways and in cities. The Customs Marine Unit is helpless in curbing these illegal activities of the smugglers due to lack of effective boats. The Nigerian Navy is also challenged as the smugglers match them force-to-force in their attempt to defend the territorial security of the nation at the sea.

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70 Deadly Cargo, *Daily Sun*, Wednesday October 27, 2010, p. 6.

71 Babafemi Ojudu; *Gun smuggling in the Niger Delta*; World Press Review correspondent, Lagos Nigeria July 9, 2001. http://www.worldpress.org/Africa.118.cfm accessed on 8/1/2009.

It is surprising to observe that while the world was busy shipping in vital supplies including food and medicine to help the people of Zimbabwe, the UN reported that President Mugabe, who allowed the Harare area water system to deteriorate because they could not afford supplies, nevertheless managed to buy guns and other military weapons from China and imported them from the Democratic Republic of Congo (DRC)[72], contrary to existing embargo forbidden shipment of arms to that country under international law.

According to the Alliance Against Contraband,[73] the battle for lucrative contraband markets can lead to violence and heightened street crime. A few example as recorded will suffice here.

In Berlin, key members of a Vietnamese gang were charged with committing nine murders in 1998 as part of the bloody fight for control of cityôs lucrative contraband trade.[74]

In the U.K, retailers were warned to be on their guard in 1999 after a series of roadside hijackings.[75]

In Italy, an Italian Police Union called for a government crackdown ñafter a series of fatal accidents caused by smugglers fleeing policeò in 1999. In some cases, smugglers use amoured, four wheel vehicles to

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72 Mugabe smuggling in arms via the DRC: Blogger News Network, *African News*; http:// www.bloggernews.net/119138 accessed 5/1/2009.

73 Alliance Against contraband (2000) ñCigarette smuggling and the cost of crime: Working Paper

74 Agency France-Presse (1998) ñVietnamese Mafia Chief gets life in prison in Germany: February, 24.

75 *Off Licence News* (1999) ñOff-licence staff are Prime targets for Thieves: February, 26.

transport their cargoes.[76] In Ireland, eight armed and masked men hijacked a train in 1999 and used a crane to remove 800,000 pounds worth of cigarettes.[77] In Naples, the battle for control of the Italian cityôs lucrative cigarette smuggling trade claimed at least 50 lives in 1998.[78]

The increasing wave of smuggling are readily seen in Sweden Finlandôs Vastra Nyland who in early June 1998 ran a story saying Stockholm was well on the way to turning into the ñChicago of the Northò in the following words:

> The warnings that smugglers and criminal gangs would flourish because of the high price of cigarette and alcohol have come true. é Together with the massive and incredibly profitable cigarette and alcohol smuggling, increasing quantities of narcotics are coming into Sweden, usually via the Baltic rout.[79]

Even in France, which has not reported a substantial smuggling problem, the effects of contraband smuggling are seen. On average, there is one assault on a tobacconist every day, generally when a shop is opening or closing, or when money is being transferred. The Confederation of Tobacconists Reports that in four years, 12 tobacconists have been killed.[80]

Summarily, it is very clear that smuggling is indeed a high level assault on the nationôs economy. As discussed in the various effects, it is a complex phenomenon with many factors and measures encouraging and

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76 Bloomberg (1999) ñItalian Police Union wants to Hit buyers of smuggled cigarettesò, August, 30.

77 Birmingham Post (1999) ñthe Police Hunt Gang after Great Irish train robberyò July, 13.

78 Los Angeles Time (1998) ñBrother of Alleged Italian Crime Boss, killed in Shootingò May 18.

79 Vastra Nyland (1998) ñStockholm is the Chicago of Northern Europeò June 9.

80 *Ibid.*

sustaining it. All these factors make the suppression rather difficult but not insurmountable. The NCS is fully aware of this and is poised to meeting the challenges squarely. This will lead us to the various preventive measures put in place over the years, all in the attempt to stem smuggling.

CHAPTER SIX

PREVENTIVE MEASURES AGAINST SMUGGLING

6.1 Pre-shipment Inspection

There is an old adage that ñprevention is better than cureò. It is on this premise that some policies were put in place so as to prevent any evasion of duty or prevent smugglers from undermining importation or exportation regulations. The traditional role of the NCS is to examine and assess duties on all imports or exports as the case may be.[81] In 1978 this traditional role of the NCS was stopped and the regime of pre-shipment inspection was introduced. The idea was conceived to prevent the flight of capital and under valuation of goods. By virtue of Pre-shipment Inspection (PSI) Decree, No. 11 of 1996,[82] the Comprehensive Import Supervision Scheme gave power to pre-shipment inspection agents appointed by the Federal Government to perform inspection of all cargo destined to Nigeria prior to their shipment.

Section 1 of the Preshipment Inspection of Imports Act[83] provides that as from the commencement of the Act, no goods to which the Act applies.

> (a) whether containerized or not and irrespective of value and personal effects (excluding such personal effects which are accompanied and subject to 100 percent inspection at destinations); and

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81 Sections 45 and 145 of CEMA

82 The Law is now contained in Cap P. 25 and Cap P. 26 LFN, 2004 which deals with pre-shipment inspection of exports and imports respectively

83 Cap P. 26, LFN, 2004.

(b) whether re-exported into Nigeria from any neighbouring country.

Shall be imported into Nigeria unless accompanied by a Clean Report of Findings (CRF) and an Import Duty Report (IDR) issued in respect of such goods to the overseas sellers of the goods by the inspecting agent referred to in section 4 of the Act.[84]

Section 1(2) further provides:

> For the purposes of subsection (1) of this section, any person intending to import any goods to which the Act applies shall, before shipment of such goods to Nigeria, furnish the Central Bank with the particulars specified in the schedule to this Act (See Appendix VI) together with such additional information as the Central Bank may specify from time to time and, for this purpose, the Central Bank may issue such forms as it thinks appropriate for the use of importers, under zero duty as certified by the inspecting Agent.

The following goods are however exempted from preshipment.[85]

(a) explosives and pyrotechnic products, arms and ammunition, weapons and implements of war;

(b) supplies to diplomatic consumer missions and international organization for their own needs; and

(c) such other goods as may be prescribed by the federal government of Nigeria from time to time.

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[84] The section provides that the president shall appoint such number of bodies corporate as inspecting agents to carry out any pre-shipment inspection required by or pursuant to the Act. To this end, Bureau Veritas (BV), Swede Control Intertek Services, Societe Generale de Surveillance (SGS), Cotecna Inspection Services L:td. and ISC Services Limited were so appointed. Note also that IDR later became Clean Report of Inspection (CRI)

[85] Section 1 (5) of the Act

Where, after inspecting the goods, the inspecting agent is satisfied that all requirements as to quality and quantity and price of the goods have been complied with, the inspecting agents shall issue the overseas seller of such goods documents to be known as a ñClean Report of Findingsò and ñ*Import Duty Report*ò. Where the inspecting agents is not so satisfied, it shall issue a document to be known as ñnon negotiable report of findingsò in respect of the goods.[86]

Any person guilty of an offence under the PSI Act shall be liable upon conviction in case of an individual, a fine of ₦50,000 or the value of the goods which ever is higher, or to imprisonment for a term not more than twelve months or to both.[87] If a body corporate, a fine of ₦100,000 or twice the value of the goods, whichever is higher.[88]

It is submitted here that save for the very low prison term which will not serve as enough deterrent, the provisions here for an option of fine makes it a better one than if the prosecution was brought under section 47 of CEMA for improper importation. This is because there is no option of fine in section 47.

The provision here also for a body corporate is unlike that of section 47 of CEMA where no such distinction was made thereby making it difficult

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86 Section 2(1) of the Act.

87 Section 7 (3)(a) *ibid.*

88 Section 7 (3) (b) *ibid.* Note that section 7 (4) provides in addition to the above, the forfeiture of the goods to the Federal Government of Nigeria.

to prosecute a body corporate therein. It is further provided that where an offence under this section is proved to have been committed with the connivance of, or to be attributable to any neglect on the part of any director or other similar officer, servant or agent of the body corporate (or any person acting in such capacity), he as well as the body corporate shall be guilty of the offence and may be proceeded against and punished as an individual.[89]

With regard to pre-shipment inspection of exports, section 1(1) of the Act provides:

> As from the commencement of this Act, no goods to which this Act applies shall be exported from Nigeria unless an inspecting agent appointed pursuant to section 12 of this Act[90] has issued in respect of the goods a clean certificate of inspection to the overseas buyers of the goods.

Section 1(2) further states that no department of government shall forthwith issue any clean certificate of inspection again. Section 2 provides that any oil and non-oil goods liable to pre-shipment will only be in respect of quality, quantity and price comparison. Section 3 provides that the goods listed in the Export Prohibition List set out in the sixth schedule to the Customs, Excise, Tariff etc. (consolidation) Act[91] are exempted from preshipment inspection. The exemptions also include:

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89 Section 7 (5) *ibid.*

90 Section 12 of PSI Act provides that the president shall appoint such number of companies as inspection agents to carry out any pre-shipment inspection required by or pursuant to the Act

91 See Appendix IV

a) gifts and personal effects

b) trade samples and printed business matters

c) machinery and equipment being shipped out of Nigeria for repairs and return

d) return of empty container

e) transshipments;

f) supplies to diplomatic consular missions and international organizations for their own needs;

g) such other goods as may be prescribed.

The inspection as to quality as prescribed in section 2 is not applicable to chemical based goods.[92]

The inspecting agent shall, with respect to the inspection of pharmaceutical products restrict its inspection to the expiry date, cost of the products and ensuring that the products conform with the active ingredients and chemical requirements specified by the overseas buyers.[93]

Section 12 (3) of the PSI Act provides that subject to the provisions of section 16,

> Nothing in sub-section (1) of this section shall be construed as preventing pre-shipment inspection pursuant to this Act of any goods (whether or not goods of a description mentioned in this Act) by any department or agency of the government of the federation or of a state or of any statutory body (corporate or unincorporated) established by that government or accredited representative of that such government or by any exporter or his authorized agent.

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92 Section 5 of the PSI Act.

93 Section 6 *ibid.*

Section 16 (1) provides that:

> Without prejudice to the duty imposed on the inspecting agent to take responsibility for all preshipment inspections carried out pursuant to this Act, the following departments and agencies of the government of the federation, that is to say ï
>
> (a) The inspectorate division of the ministry of petroleum resources
>
> (b) The quarantine division of the Federal Ministry of Agriculture and Rural Development
>
> (c) The Standard Organization of Nigeria; and
>
> (d) The National Agency for Food and Drug Administration and Control
>
> shall continue to carryout the specific pre-shipment inspection functions which had hitherto been carried out by those departments and agencies prior to the coming into force of this Act except that the responsibility for the issuance of the clean certificate of inspection provided for under this Act shall be vested only in the inspecting agent appointed under section 12 of this Act.

Our consideration here is the combine effect of sections 1 (2), 12 (3) and 16 of the PSI Act. If according to section 1 (2) and 16 no agency or department of government can issue a clean certificate of inspection (CCI), then the question is why the inspection. The inability to issue a CCI renders the departments powerless. That function is a traditional role of the Agencies and we submit that, there ought not to be any appointment of any other inspection agent to do the job.

It is in the light of this reasoning that the oil unions threaten strike over pre-shipment inspection.[94] Cobait International Services was appointed by the federal government as preshipment inspector for the 21 Crude Oil

[94] Vanguard, January 9, 2009, p. 10

Export Terminals.[95] Following the appointment, the Department of Petroleum Resources (DPR), National Union of Petroleum and Natural Gas Workers Union (NUPENG) and Petroleum and National Gas Senior Staff Association of Nigeria (PENGASSAN) issued a 21-day ultimatum calling for the reversal of the appointment or face the risk of an industrial action in the sector. They contended that the appointment of pre-shipment inspectors amounted to colossal economic waste as pre-shipment inspection function was already being statutorily performed over the years by the DPR. It is hoped that the government will reconsider its stand and revert to the *status quo*.

Section 18 of the PSI Act provides for offences and penalties for unlawful exportation.

> Any person found guilty of an offence under this Act is liable on conviction ï
>
> a) In the case of an individual, to a fine of N50,000 or the value of the goods; whichever is higher, or to imprisonment for a term of not more than twelve months or to both such fine and imprisonment; and
>
> b) In the case of a body corporate, to a fine of N100,000 or twice the value of goods, whichever is higher.
>
> Where there is connivance or any neglect on the part of the officers or director of the body corporate, they can be held liable under sub-section (a) above.[96]

It is submitted here that save for the very low prison term which will not serve as enough deterrent, the provision here is a better one than if the

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95 *Ibid*.

96 Section 18 (3) of the Act

prosecution was brought under section 64 of CEMA for improper exportation. This is because there is no option of fine in section 64. The provision here also for a body corporate is unlike that of section 64 of CEMA where no such distinction was made thereby making it difficult to prosecute a body corporate therein.

The regime of Pre-Shipment Inspection (PSI) as discussed above was intended to be a very serious preventive measure. Since its commencement in the 1970s, its performance however became a matter of concern to the government. The PSI especially in the case of Export is in line with the African Growth and Opportunity Act (AGOA)[97] which was enacted by the United States.

AGOA is a unilateral trade preference agreement decided upon by the United States and targeting sub-Saharan African (SSA) countries, it accords the president of the U.S the right to cease the status of a SSA country that does not meet the requirements set out in AGOA. Only eligible SSA countries that meet certain requirements outlined in the Act can benefit under AGOA. Under AGOA, certain goods from eligible SSA countries can enter the U.S duty free and quota free.

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[97] AGOA was signed into law on May 18, 2000 by president Bush. The Act offers tangible incentives for African countries to continue their efforts to open their economies and build free markets. It was to encourage the export of African goods like African traditional textile, crafts, etc. It was however subject to some level of standard determinable by the United States.

It is however alleged that AGOA is in contradiction with WTO rules. Furthermore, it is seen as a one-sided agreement as there was little African involvement in its preparation.[98] It also encourages fraud by making Chinese and Indian clothing manufacturers label their goods ñMade in Kenyaò and transship them to the United States through Kenya.[99]

As a result of the poor performance of pre-shipment inspection scheme especially in the area of imports, the need arose for a re-think on its continuation. It was held to have outlived its usefulness.[100] The government then believed that the NCS could not curtail some negative international trade practices as they affected the nation as there were heavy traces of gross under and over valuation of imported goods and related matters; such as services in terms of quality, quantity and comparative pricing, which meant revenue leakage and socio-economic cum security risks which are inimical to increased productivity and adequate safety of consumer goods.

It was against this backdrop that the government enthroned pre-shipment scheme in place of destination scheme, pending when the customs, would improve its integrity and know-how as to reclaim its former status.

The PSI Agents did not justify the huge sum of money 1% Free On Board (FOB) expended on them. If 05% of the 1% FOB paid to them is paid

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98 http://en.wikipedia.org/ wiki/AfricanGrowth and Opportunity Act accessed on 3/3/2009

99 *Ibid.*

100 Inuwa Mohammed, Pre-shipment Inspection Scheme has outlived its Usefulness; http: //www. ThisDay online.com /archive/2001/01/19/20010/19 bus 13. html accessed on 3/2/2009

to the customs, it will go a long way to improve on the performance of the organization.

The activities of the foreign inspection agents over the years fell below standard. It lacked momentum and effective force to change the nationôs foreign trade policy for the better and reduce the gamut of import fraud and environmental hazards.

The volume and value of Demand Notice (DN) issued to importers by the NCS and the various seizures made attest to the glaring presence of false declaration, under and over invoicing, concealment, drug trafficking, lading of goods at variance with Clean Report of Inspection (CRI) and dumping of all kinds of hazardous goods.

It is in view of the lapses arising from the contractual obligations of PSI agents and the apparent fact that Destination Inspection (DI) had been adjudged as the better inspection scheme for Nigerian imports, that the government had to go back to that regime thereby giving back what it took from the customs.

6.2 Regime of Destination Inspection (DI)

The regime of destination inspection has always been a serious preventive measures over the years. Section 145 of CEMA gives the power to examine, mark, seal and take account of goods to the NCS.

The section provides:

> without prejudice to any other power conferred by this Act, an officer may examine, mark, seal and take account of any goods.
>
> (a) which are imported; or
>
> (b) which are in or at a warehouse, government warehouse, customs area, or examination station; or
>
> (c) which have been loaded into any ship or aircraft at any place in Nigeria; or which are entered for exportation or for use as stores; or
>
> (d) which are brought to any place in Nigeria for exportation or for loading for exportation or as stores; or
>
> (e) in the case of which any claim for drawback, remission or repayment of duty is made.
>
> and may for that purpose require any container to be opened or unpacked.
>
> 2) Any examination of the goods by an officer under this Act shall be made at such place as the Board appoints for the purpose.
>
> 5) If any goods which an officer has power under this Act to examine are without the authority of the proper officer removed from the place appointed under this section for their examination before they have been examined, or any mark or seal placed upon any goods by an officer is, without the authority of the proper officer, altered or broken, those goods shall be forfeited, and any person who so removed them or so altered or broke such mark or seal, if he did so with intent to defraud the government of any duty chargeable thereon or evade any prohibition with respect to the importation, exportation or carriage coastwise thereof, shall be liable to a fine of six times the value of the goods or four hundred naira, whichever is the greater, or to imprisonment for two years or both.

Section 45 of CEMA further provides for valuation of imported goods for purpose of advalorem duties.

> 1) The Board may require any importer or other person with the importation of goods to furnish the board, in such form as it may require, such information as is in the opinion of the Board necessary for a proper valuation thereof, and to produce any books of account or other documents of whatever nature, relating to the purchase, importation or sale of the goods by that person.

The above provisions over the years have been relied on by the NCS in the performance of its role as a revenue-generating agency. Destination inspection and subsequent valuation for the purpose of duty payment was the order of the day until the 1970ôs when the government thought otherwise and conceived the idea of pre-shipment inspection. As a result of the pitfalls of the PSI, the government in 2001 set up a presidential committee to review the PSI. In 2002, a Specialized Technical Committee of different stakeholders was set up to review the PSI policy towards the take off, of destination inspection.[101] Consequently, in 2003, the Federal Executive Council set up a presidential committee on the take off, of DI and the Automated System for Customs Data (ASYCUDA) under the chairmanship of the then Minister of Transport, Hon. (Dr.) A.S.P. Sekibo.

The PSI continued up to January 1, 2006, when the federal government decided to return to destination inspection regime, with a redefined import guideline.[102] With the re-introduction of the DI, the government released new guidelines for its implementation.[103] Under the new guidelines, goods destined for Nigeriaôs ports are inspected at the point of entry rather than at the point of shipment, which was the practice. The

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101 J. Alagbaoso; *Eyes Right: Nigeria Customs Service on the Dais*; (University of Lagos Press, 2006), p. 16

102 In a Public Circular reference number X/194965/PICDIA/IT2/206 dated December 19, 2005, the government abolished PSI scheme and introduced DI scheme for imports to Nigeria, effective January 1, 2006.

103 Letter No. X194 965/PICDIA/162 of 30th November, 2005 issued by the Hon. Minister of State for Finance on Import guidelines, procedures and documentation requirements under the destination inspection scheme in Nigeria.

NCS will carry out the scheme. The government also retains the services of three DI service providers to provide scanning services at the ports.[104]

Under the new regime any person intending to import goods into the country shall process his Form óMô[105] through any authorized dealer bank irrespective of the value and whether or not payment is involved. Supporting documents shall be clearly marked ñ*VALID FOR FOREX/NOT VALID FOR FOREX*ò as the case may be. The validity period of Form óMô shall be six months for all general goods while for plants and machineries is for a period of one year. The Form óMô and relevant proforma invoice shall carry a proper description of the goods to be imported so as to facilitate price verification. Standards should be met and where expiry date is involved, it should be stated.

Any wrong or fraudulent misrepresentation of facts will result in detention, seizures, and prosecution. The goods to be imported shall be labeled in English in addition to any other language of transaction, otherwise the goods shall be confiscated.

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104 The Central Bank of Nigeriaôs (CBN) circular (TED/AD/150/2005) dated December 28, 2005 appointed, Cotecna Inspection Limited, Society Generale DU Surveillance (SGS) and Global Scan System Limited as scanning companies to act as service providers.

105 Form óMôis usually issued for a particular supply contract and account for part shipments. For large project, a bulk Form óMô can be issued, which allows continuous part shipment throughout the validity of the Form óMô. It is valid for six months and can be extended once for another six months.

Form ôMô shall be valid for importation only after acceptance by the relevant scanning company and risk management service provider. The authorized dealer bank will ensure that the Form ôMô is actually provided. A kind of ô*Know Your Customer*ô (K.Y.C) comes to play here. The bank will then make necessary endorsements on the Form ôMô, retain the original copy and thereafter forward the remaining three copies to the relevant Scanning and Risk Assessment Service Provider.

The following documents are required to accompany all imports into the country.

i) Final invoice and combined certificate of value and origin (CCVO) duly attested.

ii) Packing list

iii) Bill of lading/airway bill as applicable

iv) Carrier certificate

v) Insurance certificates,

vi) Manufacturerôs certificate of production, which shall state standards

vii) Laboratory test certificates of chemicals, foods, beverages, pharmaceuticals, electrical appliances and other regulated products where applicable.

Upon the receipt of the Form ôMô and pro-forma invoice the scanning company will carry out a preliminary review on the application, using information provided therein. If the Form ôMô is accepted, the scanning company will generate a Risk Assessment Report (RAR) within five working

days of the receipt of the import documents. One copy of the Form óMô will be retained by them and the remaining two copies are sent to the customs area controller of the port of clearance and the customs headquarter respectively. The importer at this juncture can inform the supplier to ship the goods.

It is important to note that under the regime of D1 the goods are not physically inspected as in the case of PSI before the RAR is issued. It is submitted that this shall be the bases of our consideration in the re-introduction of the D1 scheme. We stated that the re-introduction of the DI scheme represents an efficient and effective tool for government, customs, and traders to combine the facilitation of legitimate trade with the need for responsible enforcement, it is however a departure from its original form as provided under section 145 and 45 of the CEMA.[106]

Under the PSI regime when goods were physically inspected before the CRI were issued, there was the complaint of poor performance, which led to the change to D1 scheme. Under the D1 relying only on the description given by the importer on the Form óMô to issue the RAR is not good enough. Even though scanning may come up later, the risk at this level is serious as a fair assessment may not be given thereby compounding the problem for the customs. Although the RAR is an advisory document, which is subject to being queried by the customs, relying on it to ship in the goods in the first place we submit may not lead to facilitation of trade as intended.

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[106] Section 43 of the NCS bill, 2012 prohibit any mandatory pre-shipment and post-shipment inspections

The introduction of the service providers is another move that may be viewed with suspicion. It amounts to bringing in the former PSI agents under the guise of DI. Even though the DI scheme is anchored on a seven year Build-Own-Operate and Transfer (BOOT) arrangement involving the three Scanning and Risk Service Providers (SRSP) with a fourth company, Webb Fountain Nigeria Limited providing an interface between the customs and the service providers, not much progress have been recorded so far. The companies are not interested in brining in the required capital to develop the scheme but are rather sourcing for local capital and in no time wanting to recoup.

The 0.97 percent FOB value on all imports paid to the service providers in dollars, which runs into several billions of naira in local currency is a drain on our economy.[107] The cargo x-ray scanning machines provided by the service providers are far below world standards and cannot give accurate image analysis of scanned containers.

To this end, the objective of the programme which among others is to strengthen the capacity of the NCS by replacing PSI using latest technology to facilitate trade through risk management and the use of Non-intrusive inspection (x-ray scanning) of imports thereby minimizing the need for physical examination, and to enhance government import revenue collection and the detection of illegal and misdeclared imports have not been met.

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[107] See DI Service Agreement via CBN Circular, *op. cit*.

It is however hoped that as a preventive measure the DI in view of the development of the ASYCUDA project will trigger off the various facets of the customs service towards effective cargo clearance from the Ports.

6.3 Administration of Manifest

As stated earlier[108] a manifest is a document containing a full description of the goods carried on the various means of transportation. The manifest must have relevant details such as consignee, description; weight. Also it is expected that the consignment must have Form óMô and in recent time RAR. The manifest as a preventive measure is governed by the NCS manifest closing code. It is an important measure in the sense that all the goods arriving the country are in the manifest and must be accounted for at all times.

Section A, Part (1) (a) of the manifest closing code provides that all import documents which authorize the clearance or release of goods from customs seaport, airports, or warehouse are to be struck against the relevant ship/aircraft inward manifest.

This process is referred to as ñjerquingò[109] and it helps in accounting for the goods as entered. The documents are to be struck against the manifest in the customs processing center (CPC) before the goods are

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[108] See Chapter 1.3 Definition of Terms

[109] The Searching of a ship for unentered goods (Eng) (1913 Webster) http://online dictionary.datasegment.com/word/jerquing. accessed on April 10, 2009.

examined and released. The process in recent time has been simplified by the Automated System for Customs Data (ASYCUDA) system where in the manifest module will strike the item automatically as the document is lodged.

At the expiration of the free storage period following the completion of discharge of the importing ship, the officer is to prepare promptly a list on Form óCô 73 summary of discrepancies showing all the outstanding items in the manifest for which no bill of entry have been received.[110] It is prepared in three copies.

The officer is also to issue unclaimed cargo list: Form C 84 (UCL) for all outstanding items in the manifest for which no entries have been received.[111] This is to be prepared simultaneously with the summary of discrepancies. The UCL is prepared in triplicate and numbered serially for each craft and a record of such number is to be maintained in a register opened for this purpose. The original UCL is dispatched to the Nigeria Port Authority (NPA) or the shipping company to effect prompt transfer of the cargo listed therein to the government warehouse. The other copies of the UCL will be dispatched to the government warehouse keeper to wait for the receipt of the goods. After receiving the goods he endorses the three copies accordingly and returns the original to the NPA or shipping company.

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110 Section A Part 2 Item (c) NCS Manifest Closing Code.

111 Item (e) *ibid*.

The triplicate copy will be sent to the officer in charge of manifest, where action will be taken to close the relevant items on the summary of discrepancies list.

In addition to the preparation of a summary of discrepancies and UCL, the officer is to carry out a detailed examination of the file and compile particulars of items closed with entry or any other document, which may require a follow up action as in the case of temporary importation.[112] The importance of this is for the purpose of revenue control and such officer will carry full responsibility for any omission detected at subsequent checking.[113] A further check here is the submission of the summary of discrepancies list and the follow-up list, which are enclosed, in another file jacket to the Inspectorate and Investigation Unit at the Zonal offices from where necessary checks can be conducted by the Deputy Comptroller General in-charge of the division.[114]

Where no import was in fact made, immediate step will be taken to alert the Central Bank to close foreign exchange and the purported importer must be held to explain and possibly prosecuted.[115] Where goods are known to have been imported and delivered without entry and release by customs, the matter is immediately referred to the Inspectorate and Investigation

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112 Item (f) *ibid.*

113 Item (h) *ibid.*

114 Item (i) *ibid.*

115 Item (k) *ibid.*

Zonal office to initiate action for prosecution.[116] It is the duty of the shipping/aircraft company to confirm landing or otherwise of all goods detailed on the Discrepancy list. If the goods are confirmed landed but not entered, then such a list will be complied and sent to the NPA or in recent time the different concessionaires.[117] If they fail to produce the goods, then a demand notice will be made by the customs for them to pay the duty due on the goods.[118]

The administration of manifest no doubt has effectively been a serious control in the clearing process. The attempt by the NCS in line with the computerization of its operations, to introduce the electronically generated manifest is a welcome development. This means that before the goods arrive, the manifest is transmitted on line to the customs thereby further enhancing the control of the goods against any fraudulent practice. The NCS manifest closing code need to be modified to capture the regime of electronically generated manifest.

In China, the general administration of manifest has been developed in accordance with the customs law of the Peopleôs Republic of China.[119]

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116 Item (k) *ibid*.

117 Item (s) *ibid.*
The concessionaires managing the ports include A.P. Moller, Bua Ports and Terminals Limited, Ports terminal Operations Limited.

118 Item (s) *ibid.*

119 General Administration of Customs Order No. 172 (Management Measures on Advance Manifest of Conveyance into and out of China of the Customs of Peopleôs Republic of China) April 7, 2008

Management measures on advance manifest of conveyance into and out of China of the customs of China has been approved by the working conference of general administration of customs on March 10, 2008 and took effect from January 1, 2009.[120]

Article 4 of the Order[121] provides that the operator of non-vessel operating common carrier business, freight forwarding agencies, shipping agencies, postal enterprises and express operators, and other obligors of electronic data transmission of manifest (hereinafter referred as ñmanifest transmission operator ò) shall transmit the electronic data to the Customs within the specified time limit according to the scope recorded in the customs. The operator of the Customs supervision site, tally department, export good shipper and other obligors of electronic data transmission of manifest shall transmit the electronic data to the customs within the specified time limit. In case that the operators do not transmit the electronic data to the Customs in accordance with this method, the customs may suspend the application procedure for the conveyance into and out of China.

Article 8 provides further that before the electronic data of the original manifest was transmitted, the responsible person of conveyance shall inform the customs of the arrival time for the conveyance arriving at the destination port of China. Before the conveyance arrives at the port, the responsible person of conveyance shall inform the customs of the exact

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120 *Ibid.*

121 *Ibid*.

arrival time for the conveyance arriving at the port. When the conveyance arrives at the port established by the Customs, the responsible person of conveyance shall make the declaration to the customs for the arrival of the conveyance.

The provision of article 10 is very interesting and clearly bring to the fore the advantage of manifest administration. It provides that in case the customs find prohibited goods and articles into China on the original transmitted manifest, the Customs may notify that the responsible person of conveyance shall not ship the goods and articles into China.

Article 37 makes any breach of the method a serious offence when it provides that the customs shall handle any behaviours violating this method, constituting the smuggling which violates the stipulations of the customs supervision or other behaviour violating the customs laws, in accordance with the customs laws and the related stipulations in the Application Rules of the customs of the Peopleôs Republic of China on administrative punishment; the criminal responsibility shall be investigated for any behaviours constituting the crime.

The importance of manifest cannot therefore be overemphasized. If properly managed as in the case of China it will ensure that all the goods imported are accounted for in accordance with the customs laws. This is

because, unlike in China, the administration of manifest has not been expressly provided for in Nigeria.[122]

6.4 Scanning

Scanning was introduced by the NCS in the effort to detect any concealment. It was mainly used at the Airports at the time drug smuggling was on the increase. Sensory equipment were used to detect any concealment. These equipments were just simply x-ray machines. This system was not so effective as the criminal could use charcoal which had the capability to help muffle any detection by the x-ray machines.

The need to have modern scanners that could produce the desired result became paramount. With the computerization of the customs operations, it also became necessary to develop the scanning operations side by side. In order to make scanning an effective preventive measure, a technology that could use non-intrusive energy X or gamma rays which can penetrate steel to create an image of contents in sealed container, needed to be introduced.

The opportunity came with the re-introduction of the DI scheme wherein the service providers were to provide, maintain and operate cargo

[122] Section 25 of the NCS bill 2012, which seek to provide for exchange and storage of data using electronic data procession technique is a step in the right direction

x-ray scanning machines in selected Nigerian ports. This was to be done in co-operation with the NCS. The introduction of the scanners was also intended to reduce the physical examination of goods thereby reducing the clearance time of goods out of the ports. This is in line with the federal government directive that goods should be cleared within 48 hours from the ports. The International Maritime Organization (IMO) had made it a trade policy that all nations should endeavour to ensure that goods are cleared within 48 hours.

In order to avoid multiple examinations and minimise delays during inspections, all the relevant agencies [e.g. National Agency for Food and Drug Administration and Control (NAFDAC), Standard Organisation of Nigeria (SON) NCS, NDLEA, DPR, etc.] are encouraged to simultaneously work with the inspection agents. The scanners put in place is anchored on a 7 years build-own operate and transfer arrangement.

Under the arrangement Cotecna Destination Inspection Services Limited is to take charge of Apapa port, Tin-can Island port, Aminu-kano International Airport, Nnamdi Azikiwe International Airport Abuja, Banki and Jibiya Borders in the North. *Societe Generale De Surveillance* (SGS) Limited is to take charge of the Port Harcourt main port, Onne port, Port Harcourt International Airport and the Idiroko border.

The ASYCUDA module on selectivity will be triggered and lanes of the declarations are automatically determined. The declarations are selected

on Green, Blue, Yellow and Red lanes. The red lanes are the high-risk goods and they will be subjected to physical examination by the customs. The snag however is that some consignments like used vehicles will be triggered through the green channel. This will create a serious problem as the officers will not honour such and will recommend physical examination. This no doubt put pressure on the system. The scanners provided are not up to world standards. The images captured are not good enough to project what is in a container. For example a pistol hidden in a container will only reveal that a kind of metal is there. It will not bring out clearly the frame of a pistol. To this end, the customs not wanting to rely on this high level risk management refers such cases for physical examination.

Since scanners have been shown not to be effective, the provision of the scanners to reduce physical examination could not be achieved. The Heiman Cargo Vision (HCV) Mobile scanners provided especially at the Seme border is not fit for the purpose at all. This is hinged on the fact that the trucks that bring the imports are not normal size trucks thereby making it difficult for them to go through the scanners. As a result, all the imports are treated as high risk level thereby going for physical examination. The lack of an examination bay at the border is affecting the performance of the officers in the bid to conduct physical examination.

The former president, Chief Olusegun Obasanjo was confronted with this problem but his promise to provide an ultra modern examination bay at the Seme border was not actualized before his exit.[123]

The importance of scanning cannot be over emphasized. It has been part of the Customs operations though at a very less developed level. With the re-introduction of the DI scheme and the appointment of service providers, it was expected that world class scanners ought to have been provided so as to sustain the DI scheme. This is however not to be as the service providers were only interested in the profit not minding the gadgets used.

The government should have been more serious in enforcing the use of latest technology in the provision of the scanners. If we look at the effort of the US government in this area, it is highly commendable. The US government has gone a step further, by negotiating through the Container Security Initiative (CSI) placing customs and border protection inspectors in 20 major overseas ports to help ensure that cargo containers bound for US do not constitute a threat.

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[123] He confirmed the award of the contract for the building of an ultra modern examination bay at the Seme border on the occasion of the First Economic forum of Business opportunities between Benin and Nigeria, held on February, 12 ï 13, 2007 at the International Conference Center, Cotonou, Republic of Benin.

Scanning as a preventive measure, which the NCS has adopted over the years and fortified in recent time through the re-introduction of the DI scheme, is a technology that exists and has to be improved upon for better performance. Since Nigeria cannot own and control the system, it must work with other trade partners and foreign companies so as to ensure the construction of a comprehensive global container inspection system that scans the contents of every single container arriving the port of Nigeria.

6.5 Automated System for Customs Data (ASYCUDA)

This is the Customs computerized system of operation. It is the current style of computerizing customs procedures for the purpose of simplifying and facilitating assessment of imports for customs duties.[124] It is also meant to help boost NCS revenue collection efforts and ensure speedy clearing of goods thereby enhancing attainment of the 48-hour target for clearance of goods as desired by the government.[125]

In this respect, the NCS has commenced the training of a substantial part of its workforce in computer handling, thereby ensuring computer literacy in the NCS. The NCS has connected some of the Zonal and Area commands to the system. The system is known to have a risk assessment

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124 M. Ikhilae; *The Re-Birth of Nigeria Customs Service*; (Delink Ultimate Ventures, Lagos, 2001), p. 21

125 *Ibid*.

module in-built to enable it develop risk profiles of importers over a specified period of time. This will help to complement intelligence reports in targeting traders, goods, vessels, aircrafts with a view to track down and check effectively, sophisticated smugglers without delaying or embarrassing honest person engaging in legitimate business activities.

ASYCUDA was founded in the early 80ôs to automate the operations of customs administrations by the United Nations Conference on Trade And Development.[126] ASYCUDA programme has become the leading media of customs modernization worldwide. It is today the core component of comprehensive, integrated customs information systems in more than 80 countries.[127]

The main objective of the programme is to assist countries to achieve a global aim-facilitation of trade, by strengthening the customs administrations operational capacity to carry out their fiscal and control missions, through the implementation of modern and reliable systems.

ASYCUDA is provided by United Nations Conference on Trade and development (UNCTAD) at no costs.[128] The implementation of the system is carried out through UNCTAD technical assistance projects, comprising

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126 UNCTAD

127 ASYCUDA World; Information sheet ï AW-IS/BG

128 This is made possible by economies of scale

general support activities, training, documentation and/or specific product developments on a cost-recovery (non profit) basis.[129]

The implementation of these strategic concepts has led to the development of three major versions of the software products, ASYCUDA version 1, ASYCUDA version 2 and ASYCUDA version 3 (ASYCUDA ++), and in recent time the development of ASYCUDA world.

6.5.1 ASYCUDA Version 1:

This was created in the early 80ôs. The main achievement was the availability of trade balances and other related statistical data developed by using the Basic Programme Language and operating on early personal computers. Its enhancement was relatively quickly abandoned. Yet, it demonstrated that a complex application, such as customs clearance, could be computerized on low-cost computers.

6.5.2 ASYCUDA Version 2:

This was developed in the Mid 80ôs when new programming languages and new operating systems for personal computers emerged in the market. It was implemented in more then 40 countries and it is still operational today in a few countries that have not completed the migration to ASYCUDA++. The version 2 led to increased revenues, availability of statistics and a better

[129] ASYCUDA Information Sheet, *op. cit.*

command of the chain of clearance operations. It introduced the local area network computing in hundreds of customs offices, allowing for a comprehensive integration of functionalities. Initially running on the only multi-tasking operating system (PROLOGUE) available on the market. It has been overhauled by the UNIX operating system, opening the way to high transaction volumes and, consequently ASYCUDA implementations in large customs office.[130]

6.5.3 ASYCUDA++

This started in 1992, when a wave of new information technology (IT) was emerging. It is based on a real client-server architecture, takes advantage of the power of object oriented programming languages and uses the potential of relational data base systems such as Oracle or Infor Mix. It is, in fact, an advanced customs information system, which integrates a number of modern and robust technologies.[131]

It integrates more customs functionality than the previous version, particularly in the area of Direct Trade Input[132] risk management and transit monitoring. From the first projects to date, the success of AYCUDA++ is constant. It processes millions of customs declarations every year, implements uniform procedures, and offers an unrivalled advanced

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130 Has been replaced by ASYCUDA++ in most countries

131 E.g. UNIX servers, windows 9x/2000/XP clients, internet protocol etc.

132 DTI

functionality to customs offices, regional customs houses and customs headquarters.

ASYCUDA++ is an essential core component of million dollar projects worldwide, where customs administrations, private sector and UNCTAD partner for the benefit of governments and trade. In that respect, it is more than often integrated into coherent nets of IT systems, therefore increasing the added value of each of these systems.

Yet, with the millennium, the programme has considered the complementary use of another generation of technological tools and the emergence of the widely used internet environment. A first outcome of this work is that the current version of ASYCUDA++ allows customs brokers to submit the declaration through an Internet Service Provider.[133]

6.5.4 ASYCUDA World

This is the latest result of a process that began when UNCTAD identified the first signs of the commercial potential of the worldwide web. UNCTADôs trade efficiency summit (Columbus, Ohio, 1994) looked at how to reduce transaction costs by applying information technologies to every link of the trade transaction chain. At the time, the potential annual costs savings were estimated at up to 100 billion dollars.[134]

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133 ISP

134 http://wwwasycuda.org/awintro.asp accessed on 5/3/2009

That objective is now being pursued by the World Customs Organizations (WCO), which is developing a global, harmonized standard data set that uses uniform electronic messages. The WCO customs data model, as it is called, is likely to have a significant impact on the processing of business-to-business, business-to-government and government-to-government transactions.

These developments combined with the fact that 85 countries[135] around the world are already using the same customs IT system. ASYCUDA, represent a unique opportunity for using the internet to make international trade simpler and cheaper while also making international markets more accessible to enterprises from developing countries.

The programme has therefore worked in internet related technologies and reliable state of the art IT tools to design the ASYCUDA world system. The selection of new technologies was done in respect of the fundamentals of the programme strategy and following the paramount principle that the selected tools have to allow the development of ASYCUDA++ extensions, taking full advantage of the new available technologies and the internet environment.

The programme has selected an integrated set of components, which is the basis of the new generation of ASYCUDA products. In addition, the programme believes that the next technology that will radically change the

[135] As at September, 2002.

business (and customs) world is the emergence of wireless devices. The ASYCUDA world platform includes therefore the support of these new ñinternet appliancesò. In that respect, the programme is currently working on the definition of functionalities to be made available through such advanced technology. The programme is in force in some countries.

On July 3, 1997, the NCS signed the contract that would lead to the upgrading of its computerization systems, in accordance with the worldwide accepted and Economic Community of West African States (ECOWAS) designed automated system for customs data (ASYCUDA). In 1981 UNCTAD had received a request from the secretariat of ECOWAS to assist in the compilation of foreign trade statistics in their member states. After an initial evaluation it became apparent that this would require the involvement of customs clearance offices, and the modernization of customs clearance procedures, to achieve quality results.[136]

The ASYCUDA programme therefore is aimed at effecting comprehensive reforms in customs processes, especially the clearance process, for better performance. In the words of Peter Froebler, ASYCUDA is

[136] ASYCUDA: http: // www.asycuda.org accessed on 5/3/2009

> é to increase revenue which is the major contribution to national budget in most countries by ensuring that all goods are declared, that duty/tax calculations are correct and that development exemptions are properly managed, é to provide reliable and time trade and fiscal statistics to aid the economic planning process automatically as a by product of the customs system.[137]

The introduction of ASYCUDA became a serious preventive measure as it has the sophistication to prevent any fraud in the system.

The NCS adopted the version 2 of ASYCUDA and within some years migrated to version 3 (ASYCUDA++). The features therein ensure faster clearance of goods from customs control and can effectively check any fraud.

The declarant may refer to their copies of the RAR to prepare the Single Goods Declaration form[138] attaching all the necessary and supporting documents. The completed SGD will be presented to the face vet officers.

6.5.5 FACE Vet

This is a seat in the Customs Processing Centre (CPC), where the authenticity and validity of the documents are checked. If there is no error and the officers are satisfied, they refer the checked single goods declaration form (SGD) to the technical supervisor. If however, there is error the SGD is sent to the error resolution officer who will liase with the agent for the error to be corrected and for re-submission.

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137 P. Froebler, ñUNCTADò Automated System for Customs Dataò in Customs and Efficiency in International Trade, (Dubai, Dept. of Ports and Customs, 1996), pp. 164 ï 165.

138 SGD

6.5.6 Technical Supervisor

The technical supervisor is in charge of the technical aspect of the CPC; his duty is to streamline the flow of SGDs for control by data capture.

6.5.7 Data Capture:

This is a seat in the CPC wherein the data capture officers input the SGD and the manifest details into the ASYCUDA++ respective modules, register the declarations, print the declaration and refer the entries to verification and query seat.

6.5.8 Verification and Query Seat:

This is a seat in the CPC where the officer receive risk assessment report (RAR) messages from the scanning companies and check details of the SGD against the attached documents, but with emphasis on the values and commodity codes of the goods. The ASYCUDA++ selectivity is triggered and lanes of the declaration are automatically determined. The declarations are selected on Green, Blue, Yellow and Red lanes only. The ASYCUDA++ SGD with the selected lane and the name of the officer for examination is stamped automatically. The terminal copies of the manual SGD are stamped with the selected lane stamp and the importerôs copy is delivered to the respective shipping company.

If any discrepancy is found, it shall be entered into the ASYCUDA++ inspection report, and the declaration is modified and returned to the

declarant to sign and stamp. If a dispute continues to exist, then dispute settlement mechanism is followed.

Assessment notices are printed so that declarants can pay the duties at the bank. Verification process is completed at this point. All other discrepancies will be the result of physical examination or scanning as the case may be. Sorting of the SGD takes place and depending on the lane-selected dispatch takes place and release is effected. The exit gate pass is issued and the container can leave the port.

It should be noted that the procedures outlined are subject to changes as the regime of D1 progresses. More features may be added or removed as circumstance may warrant.

The operation of the version 3 of the ASYCUDA has been quite encouraging. It is however submitted that with new development in international trade there ought to have been a migration to the next and highest version of ASYCUDA.[139] The government directive for a 48 hour clearance time[140] and the introduction of the DTI and e-payment for duty collection, it becomes imperative to introduce other features which the ASYCUDA world can offer.[141] The importance of migrating to the highest version of ASYCUDA cannot be over emphasized.

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139 ASYCUDA world which is based on the world wide web. (Columbus, Ohio, 1994)

140 This is in line with the International Maritime Organisation Directive.

141 See the Discussion on ASYCUDA world, *op. cit*.

Zimbabwe who came into the ASYCUDA programme after Nigeria in 1999 has migrated in 2007 to the highest version because of the inherent advantage.[142]

Ghana has even tried to develop their own automated system which they claim is better than ASYCUDA.[143] The automated system is made up of two components known as the Ghana Community Network and the Ghana Customs Management System [GCNET/GCMS]. The GCNET component is an electronic data interchange (EDI) plat form that allows stakeholder to share and exchange information with customs and with each other. It is a joint venture company that was created to implement and manage the electronic platform for the use of the trading community. It is a Public Private Partnership [PPP] collaboration that has shareholding from the private and public sectors and the Ghana customs is a shareholder. The implementation started in 2002 and in no time was rolled out to twelve customs sites spread across the country from south to north, Accra Headquarters, Tema, Kotoka international airport, Kumasi, Koforidua, Paga, Kulungugu and from east to West, Aflao, Cape coast, Takoradi and Elubo.[144]

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142 On the 9th May, 2007 Mr. Tichaona Chiradza, Deputy Commissioner General of Zimbabwe Revenue Authority signed the ASYCUDA world project document during the visit of an UNCTAD delegation to Harare. This was with a view to strengthening its e-government strategy. http: // www. asycuda.org accessed on 5/3/2009

143 Address by Mr. E. N. Doku, Commissioner of Ghana Customs at the CGCôs Conference on 48 hour clearance in Sokoto, Monday 26th to Friday 30th November, 2007.

144 *Ibid*.

By the end of 2008, all customs sites in Ghana were connected to the system. The success of the system reduced the clearance time at the land borders and the Kotoka international Airport to a few hours only and the sea ports to 1-2 days.[145] Previous clearance times ranged from 1 day at the land borders, 2 ï 3 days at the Kotoka international Airport and an average of 2-3 weeks at the main seaports of Tema and Takoradi.[146]

The question is, should Nigeria in line with Ghana example develop its Nigeria Community Network (NCNET) and Nigeria Customs Management System (NCMS) and see whether it can move ahead like Ghana? The issue however is not how to develop but whether the government is ready like Ghana to support such a project by developing an infrastructure that will obviate a relatively weak infrastructural environment. A sustainable financing arrangement also becomes necessary.

We submit that in view of the importance of the ASYCUDA system developed by UNCTAD as a preventive measure in customs operation, Nigeria should after almost twelve years of starting with the version 2, now migrate to the highest version of ASYCUDA world. This will further enhance the concept of the e-government strategy as was the case in Zimbabwe.

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145 *Ibid*.

146 *Ibid.*

We noted earlier that the procedures outlined were subject to changes as the regime of DI progresses. To this end, a new robust procedure was introduced with some other features. The procedures have been reduced drastically with the introduction of the Direct Traderôs Inputs (DTI). The importer or his agent can now input the data from his office or any of the DTI café, or through the DTI/wireless internet access, which becomes effective within a radius of 1.5km of a customs formation.[147]

After the Direct input of Data having made self assessment, there is acceptance in the system and if there is no query, payment is effected and confirmed, then release is effected to the exit gate. It is better illustrated thus:

Self assessment (DTI)

↓

Acceptance

↓

Query

↓

Payment

↓

Exit gate

[147] Musa Omale, ñ*Modernizing the Nigeria Customs Service*ò, paper published in *Thisday*, July 2, 2011, p. 60

The above became achievable on the platform of the ñsingle windowò project which foreclosed the migration to the ASYCUDA world.

The ñsingle windowò allows for the lodgement and exchange of data and standardized information which fulfills all regulatory requirements with a single administrative document for all customs regimes. The need for its establishment was as a result of[148] concerns raised by stakeholders on slow, cumbersome and expensive clearance procedures.

- ï Multiplicity of regulatory agencies in the clearance procedures.
- ï Government desire to facilitate trade and make Nigeria the trade and investment hub in the West African sub-region.

A public private partnership is being proposed to manage the employment of the single window. In the interim, the NCS has set up a team to develop and manage this programme. The team known as ñZumaò [149] would operate using the Nigeria integrated customs information system (NICIS) in preparation for the full take over from the service providers as stipulated in the D.I agreement. Zuma is to develop the single window project, curriculum for the customs staff college, the service providersô contract and a coordinated border management strategy (CBMS).

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148 ñSingle windowò for Trade and Customs Transaction (an alternative solution for Nigeria) Publication of ASYCUDA Dept, NCS Headquarters, Abuja Nigeria 2011

149 The significance of the name is that the programme is sweet and is full proof. Zuma in Hausa means honey and rock

While this robust system of modern clearance procedure was being put in place in the customs, a group[150] signed a contract with the Ministry of Finance without any input from the NCS, to set up a ñsingle windowò project for the NCS. The whole scenario was captured succinctly thus:

> The beauty of democracy is the fact that there are adequate checks and balances between the various arms of government. Therefore, when the executive arm of government does something and fowl play is suspected, the legislature has the right to call to question the decision of the executive arm. This was exactly the case with last weekôs probe by the House of Representatives, Ad-hoc Committee to question what was seen as illegal concession given to a private organization by the federal ministry of finance, ostensibly to commence a single window system for goods clearance at the nationôs ports. At the public hearing, Ahmed Bello, the son of a former Comptroller ï General of the Nigeria Customs Service (NCS). Alhaji Hamman Ahmed Bello Kojoli, appeared as the director of single window systems and technology limited (SWSTL), the company that was granted the concession, but claimed that he doesnôt know the managing director of the company. But who knows if the father is actually the one behind the scheme? No one can really tell? There is nothing wrong really being the son of a former Comptroller - General of Customs and coming up with an initiative like this. But to not know the chief executive officer of the company or those running the company, that leave doubt in our minds? May be something else is actually in all of these, but then we think a contract of this magnitude should not be handled in a rush, and such a hush-hush manner. If truly the concession was done secretly, and without recourse to due process, then the Federal Ministry of Finance went about the concession in a wrong way é [151]

During the public hearing on the single window system probe, there was a lot of public outcry at the way the contract was signed. The government intervened and based on the recommendation of the committee, the said contract was put on hold.

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150 Single Window Systems and Technology Limited (SWSTL)

151 Commentary on the single window system probe, published in ships and ports, Sept 1925, *.2011,* pp, 1 and 4

6.6 100% Physical Examination

The NCS has a statutory duty to conduct examination on all imports coming into the country.

Section 145 of CEMA provides:

> 1) Without prejudice to any other power conferred by this Act, an officer may examine, mark, seal and take account of any goods.
>
> (a) which are imported; or
>
> (b) Which are in or at a warehouse, government, warehouse, customs area or examination station.
>
> (c) which have been loaded into any ship or aircraft at any place in Nigeria, or.
>
> (d) which are entered for exportation or for use as stores; or
>
> (e) which are brought to any place in Nigeria for exportation or for loading for exportation or as stores; or.
>
> (f) in the case of which any claim for drawback, remission or repayment of duty is made.
>
> and may for that purpose require any container to be opened or unpacked.

By virtue of this provision the NCS has always continued to examine imports and assess duties payable on them. With the introduction of pre-shipment inspection in the 1970s, even with the issuance of the IDR or the CRI, it is still the responsibility of NCS to examine and possibly raise DN for any under valuation or false declaration or concealment, which often is revealed as a result of examination.

Under the regime of DI the traditional role of physical examination becomes more relevant as the goods were not inspected from abroad. The

NCS under this regime and with the introduction of the scanners, and depending on the lane selected still continue to perform physical examination. The thinking is that with the introduction of the scanners examination should only be performed on the items going on the red lane which are considered the óhigh riskò goods. This however is not the case as some of the goods that are high risk like used vehicles are often found on the green lane. This situation therefore calls for physical examination.

The need for physical examination in spite of the scanning by the service providers is hinged on the argument by the NCS that the images from the scanning machines come out blank and unanalyzable.[152] What then should be the level of the physical examination? The NCS has always insisted on 100% physical examination. The reason is that it is a full proof preventive measure. 100% physical examination has often revealed the concealment of contraband. 100% physical examination entails the offloading of the whole container to be able to examine the whole content. It also entails opening all the cartons to determine its contents.

The scanning companies do not however support the 100% physical examination. They disagree with the customs on the argument that the images are unanalyzable.[153] The Deputy Managing Director of Cotecna Destination Inspection Limited, Mr. Godfrey Nyambu, stated that about 80

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[152] See, ñCustoms Service Providers differ over scanned images,ò *Vanguard,* Thursday, February 05, 2009. p. 2

[153] *Ibid*.

percent of goods imported, are still being subjected to 100 percent examination by the NCS.[154]

The Managing Director of Cotecna, Mr. Yahya Adetayo Rabiu stated that with the scanners in place, 100 percent examination does not make for effective and efficient port operation.[155] The need for 100 percent physical examination cannot be over-emphasized. The advantages are there, but the effect it may have on the clearing process, especially in the attempt to clear goods within 48 hours can be negative. If a container is to be examined 100 percent, how many will be examined in a day? Are the necessary logistics in place to off-load and load back? Is the NCS sincere in insisting on 100% examination? Even if all these are possible, they may create serious delay in the clearing process. We agree with Cotecna that if 100 percent examination is performed on all imports it will not make for effective and efficient port operation. We submit that with the scanners in place and the selectivity module, which determine the lane of goods, the NCS ought to restrict its 100% examination to the Red lane. If for any reason there is no belief in the scanners and the selectivity module then the government should dispense with it and look for better alternative instead of creating duplication. If better scanners are in place,[156] which image analysis will not be disputed and with the processes of scanning taking less than 10

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154 ñCustoms Service Providers differ over 100% examination,ò *Vanguard*, Wednesday, July 30, 2008, p. 4

155 *Vanguard*, February 5, 2009, *loc. cit*, p. 3.

minutes,[157] it will no doubt be better than 100% examination that can take a whole day.

With the introduction of scanning in modern time, 100% physical examination ought not to be used again. Even in the US where their scanners are of the highest qualities, 100% scanning is even discouraged. This was evidenced in the rejection of a legislation to make scanning of containers 100%.[158]

The fast-track policy will to a great extent help to eliminate some of the problems associated with 100% physical examination. This policy is to the effect that bulk shipments will be examined and released at the premises of the importer.[159] To this end the MAN and the NCS have agreed to implement some measures aimed at fast tracking export and import activities at the ports.[160]

In the United States, sample packages of the merchandise may be retained by customs for appraisal or classification purposes and the

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156 See Chapter 6.4, which dealt with the different types of scanners. The vehicle and cargo inspection system, the radiation portal monitors as prescribed by the Advanced Cargo Container scanning technology to be of the best quality

157 ñCustoms Service Providers differ over 100% examinationò *Vanguard*, Wednesday July 30, 2008, p. 4.

158 SGMA Relieved by Senate Defeat of 100% Cargo Scanning Amendment http://www. sgma.com/publicpolicy/ cargoscanning accessed on 19/12/2008.

159 Detail discussion will be in chapter 6.9 when post clearance audit which is related to fast-tracking will be considered.

160 MAN, Customs Parley over Fast-track Policy at Portsò, *Punch*, Sunday, August 31, 2008, p. 5.

remainder of the shipment released. These sample packages will also be released to the importer after examination.[161]

In Costa Rica there are three types of examinations.[162] There is the physical examination where a customs inspector and a customs broker[163] will examine to ensure that the products are labeled properly and for other reasons. There is the document examination wherein a customs inspector looks at your document and ensures that they are all in order. There is the liquidation examination where the customs inspector appraises the merchandise and determines custom duties that has to be paid and that they are paid. Once the duties are paid, customs will release the products. The last two types of examination, we submit depending on the honest disposition of the importers may be open to importing prohibited items as no physical examination takes place to confirm what is on paper.

On the part of customs it may be abused in that it is at their discretion or at random to decide what type of examination they will conduct. In Indonesia, article 3 of the 1945 constitution[164] codified the type of

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161 http://www.itintl.com/determining_admissibility_customs_examination_of_goods.html accessed on 10/3/2009

162 http: // www. costarica.com accessed on 10/3/2009.

163 Customs broker in Nigeria is known as Customs Agent.

164 The Republic of Indonesia, as a Constitutional State, wishes to establish a firm national legal system that serves the national interests, based on Pancasila and the 1995 Constitution. However, there is no national customs law since the declaration of Indonesian Independence; therefore the *Indische Tarief Wet* (Indonesian Tariff law) staatsblad year 1873 No. 35, *Rechten ordonnantie* (Duty ordinance) staatsblad year 1882 No. 240 and *Tarief ordonnantie* (Excise ordinance) year 1910 No. 628 are still in effect by virtue of Clause 11 of the Transitional Provisions of the 1945 Constitution.

examination to be conducted. The law[165] places customs formalities as the national obligation, which reflects the participation of the people in collecting funds through import duties. It is regarded as a part of the fiscal law and ensures the security of the peopleôs interest, the expeditious flow of goods, persons, and documents, the optimality of import duties revenue, and establishment of a business climate that induces the pace of national development. Article 3 provides:

> To obtain accurate data and evaluation concerning the lodged Customs Declaration, customs examination shall be carried out upon imported goods through the inspection of the goods and verification of documents. To ensure the expeditions inspection, inspection flow of goods, the physical inspections of the goods shall be done selectively, in a sense that the inspection shall only be focused on imported goods pertaining to high risk, such as goods with high import duties, dangerous goods for the state and the people, and goods imported by blacklist importers.

This provision it is submitted clearly regulates the application of selective examination. In Nigeria there is no such codification and the selectivity of lanes as provided by the ASYCUDA has become subject to one abuse or the other.

The problem in this respect is the management of the ASYCUDA lane selectivity. There is supposed to be a risk management team in place to manage the ASYCUDA lane selectivity. The team was in place for some time and then later for some obvious reasons[166] stopped to exist. The inherent problem now is that the lane selectivity still remains the same as

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[165] Article 3 of the Indonesian 1945 Constitution.

when the ASYCUDA first started. About 50% of the goods go for 100% physical examination, that is the red lane, 30% goes on green which does not require examination, 10% goes on yellow which means they have to be scanned and another 10% goes on blue which falls under post clearance.[167]

It is submitted that our risk management level ought to be higher than this. For 50% of the cargoes to go for 100% physical examination is not in line with modern trend. It is capable of causing congestion at the ports. We suggest that more cargoes should go on the green and blue lanes so as to facilitate trade. If better scanners are provided then more can go on yellow lane. This, it is submitted, is the essence of risk management. Risk management is a system that involves systematic risk assessment, profiling and selectivity, intelligence gathering and analysis.[168] With the growing volumes of international trade and passengers, the traditional method of Inspecting every traveler or cargo consignment has become a hindrance and is no longer practical. Risk management offers a solution by allowing customs to focus its resources on detecting and examining ñhigh riskò cargoes, while not impeding the movement of ñlevel riskò cargoes. Time for customs clearance can be further shortened by combining risk management

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166 The then Comptroller-General of Customs Hamman Bello Ahmed appointed some 82 officers referred to as the wise men to take over the clearance system in the bid to attain the 48 hours clearance time See *National Mirror* Tuesday, August 5, 2008, p. 2

167 Source: ASYCUDA Project office, NCS Headquarter, Abuja

168 CAREC Trade Facilitation Project; http://www.adb.org/project.tradefacilitation/risk management.asp. accessed on May 7, 2009

with post entry auditing, in which customs scrutinize the shipment after its entry has been cleared. [169]

100% physical examination may have the advantage of being a serious preventive measure. In line with modern trend as seen in the case of Costa Rica, Indonesia and the US Senate defeat of the bill to establish 100% scanning,[170] it may not be absolutely necessary again. With the effort to achieve trade facilitation and the concept of risk management, we urge the NCS to de-emphasize it. A codification of the examination selectivity as in Indonesia will go a long way to put the issue on proper pedestal.

6.7 Task Force/Ad Hoc Duties

The primary function of the NCS is to collect revenue and to suppress smuggling. The main duty of suppressing smuggling apart from the various enforcement unit of the various area commands, is undertaken by Federal Operations Unit (FOU), which is a unit under the Enforcement, Investigation and Inspection department of the service.

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169 Detail discussion in Chapter 6.9 *infra*

170 See our Discussion in chapter 6.4 *ante*

At the nationôs frontiers there is a joint national border patrol, which is a combined team of patrol officers comprising the police, immigration and customs to checkmate any menace.[171]

The FOU has been in the forefront of the vanguard for the crusade against smuggling. It was deduced in 2006 that the performance of the FOU stood at 70% leaving the balance of 30% to the area/marine commands, nationwide.[172]

With the effective performance of the FOU in its traditional role of combating smuggling, why are task forces and other ad-Hoc committees established to perform the same role?

The need for task forces or other ad-hoc committees as contended by an Assistant Comptroller-General, N. O. Iheanacho is to complement the efforts of the FOU. He contended that task forces has the element of speed, confidentiality and complete surprise which makes them to achieve great success over and above the regular FOU or Area Officer. With due respect to the contention of the Assistant Comptroller-General (ACG), we submit that the FOU and the Area commands if given the logistics given to the task forces could also achieve speed, confidentiality and surprise. They are all trained officers and can do the job in line with the training received. It is in

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171 The first Launching of the Joint National Border Patrol (JNBP) took place early in 2006 at Jibiya border with the then Minister of internal Affairs as the Chairman of the Occasion. The second launching took place mid July, 2006 at Seme border, with the then Head of State being represented by both Minister of Police Affairs and Minister of Cooperation and Integration in Africa

172 Annual Report on activities of Enforcement, Investigation and Inspection Department. January-December, 2006

line with our submission that a former Comptroller General (CG) of Customs had to scrap all taskforce teams when he took over.[173]

The use of taskforce teams and ad-hoc bodies we submit further amounts to passing a vote of no confidence on the regular officers and it further duplicates the functions being performed by the regular officers. This brings to memory the attempt by the Babangida regime to introduce a new anti-riot and crime squad (the National Guard) to patrol the borders and to handle civil disorder. It was however challenged on the ground that it was going to duplicate authority and likely to create a clash of authorities as its functions duplicates that of the existing riot squad and that of the customs. The National Guard however did not see the light of the day.

There are however, some advantages of the task forces as a preventive measure, even though it is not limited to it alone, but the regular officers can achieve the same. The taskforces come up in several forms and over the years have been named severally. There was ñoperation 20-20ò throughout the country from December 20, 1988 to January 20, 1989. The operation was regarded as successful then because of the level of success recorded.[174]

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173 When Jacob Buba Gyang took over as C.G. in 2004, he scrapped all task forces and ad-hoc bodies. Area controllers were vested with full powers and authority and were to be held responsible for any problem in their commands. See New Regime of Transparency in Customs, Editorial published in the Newswatch Magazine, Monday, April 11, 2005, p. 5

174 A total number of 50 seizures with a duty paid value of Eighteen million, nine hundred and twenty six thousand and thirty eight naria, thirty two kobo. (₦18,926,038.32) was made. 10 arrests were made. See Report of Senior officers seminar for 1989, *op. cit*.

In 1990, the Service organized two special anti-smuggling operations code-named, ñoperation spit fireò [175] and ñoperation shock 90ò.[176] These two operations had a countrywide coverage. By the number of seizures made, the operations had a salutary effect and regarded as a huge success. It made a total of 283 seizures with the total duty paid value of Sixty one million, Nine hundred and seventy eight thousand, nine hundred and thirty five naira, seventy seven kobo (₦61,978,935.77), and making a total of 51 arrests.[177]

Dr. Bello Mohammed, the then Director of Customs and Excise pointed out however that ñthe success of anti-smuggling operations is not measured only by the number and value of seizures made. The deterrent effect although not quantifiable should be seen as the major goalò.[178] The deterrent effect was also seen in the setting up of the Special Tribunal Miscellaneous (Amendment) Decree[179], and the Export Prohibition Decree[180], which prescribed stiff penalties of life imprisonment and confiscation of the equipment used in smuggling as well as the assets of persons convicted of the offence.

In April 2002, the then CG of Customs, Alhaji Aliyu Ahmed Mustapha set up a taskforce to carry out a special assignment in the Eastern

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175 Organised from 20th November 1989 ï 20th January, 1990.

176 Organised from 21st May ï 21st July, 1990

177 See Report of Director of Customs and Excise at the 1990 Senior Staff Seminar, Bauchi 8th ï 12th October, 1990

178 *Ibid*.

179 No. 48 of January 1, 1989.

180 No. 7 of February 16, 1989.

Zone. The taskforce was to curb irregularities associated with cargo clearance.[181] It concentrated on raising the revenue profile coming especially from the Eastern ports and by the end of 2003 there was a kind of diminishing return. A presidential task force comprising other security agencies was set up at the end of 2003, which automatically ended the life span of Mustaphaôs task force. Mustapha had serious belief in the use of task forces. He was himself a product of a ministerial task force on anti-smuggling in Kano between 1981 and 1982. He was also a member of a Presidential Task force on disposal of seized goods.[182] After the CGôs conference at Owerri, Imo State, in 2003 he retired from the NCS. DCG Akintayo Ogungbemile acted for some months and within that period set up his own task force ostensibly believed to enhance his chances for confirmation to the substantive office.

This was however overtaken by event as Elder Buba Gyang was appointed the new substantive Comptroller-General of Customs on March 19, 2004. When Buba came on board, he never believed in the use of task forces, he consequently scrapped them forthwith.[183]

When Alhaji Hamman Bello Ahmed took over he not only set up a CG task force to cover the Northern, Eastern and Western axis of the

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181 By virtue of Circular, NCS/ADM/MGT/017/S.8/C/Vol. IV of 23/04/2002

182 In 1983 a presidential task force was set up to dispose seized goods in the Northern part of Nigeria.

183 *Newswatch Magazine*, Monday April 11, 2005, p. 5

country but he selected a team of 82 officers to take over the clearance system in the ports.[184] They came under the guise of facilitating the 48 hours clearance project and to ensure seamless service delivery at the ports.[185] On the contrary however, investigations revealed that their presence actually dislocated the clearing system fashioned out by each of their host commands.[186]

The 82 officers were supposed to collaborate the operations of the host commands, instead took over the clearance system. The Area Controllers of the host commands lost their ñauthority of releaseò to the special squad who had the final say on which goods leaves the port. This was a repeat performance of the tenure of Mustapha when his anti-smuggling squad took over the functions of the FOU and rendered it redundant.

In the same vein, the presidential taskforce headed by the then Chairman of the EFCC, Nuhu Ribadu had a similar effect on the NCS as it made the area controllers powerless under the guise of looking for contrabands. The creation of such squads often become monsters whose members are so arrogant and power drunk that they resort to activities which are outside their primary mandate. It tends to create the avenues to enrich the members and give them undue advantage over their colleagues. While

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184 *National Mirror*, Tuesday August, 5, 2008, p. 32

185 *National Mirror*, *ibid.*

186 *National Mirror*, *ibid.*

the 82 officers were busy at the ports in the so called attempt to facilitate the 48-hour clearance time, the ports became congested.

The president of the National Council of Managing Directors of Licensed Customs Agents (NCMDLCA), Mr. Lucky Amiwero stated that the Federal Government lost well over one trillion naira due to the congestion at the nationôs ports. [187]

To this end the federal government set up a taskforce, which was to decongest the ports within 60 days.[188] It, among others, conducts 100 percent physical examination of containers, which have no Form óMô or RAR. With respect to overtime cargoes that are over 90 days another committee on over time was set up to dispose same.[189] The problem was aggravated as the importers or their agents refused to come forward to clear their containers.

The setting up of an overtime cargo committee we submit is a breach of the traditional role of the NCS to dispose same as provided in the CEMA. Section 167 (1) of the Act empowers the NCS Board to seize or detain any Imports/Exports in contravention of extant fiscal policy. Section 167 (2) of the Act empowers the Board to take possession of the said goods and deal

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187 *Vanguard* Friday, January 09, 2009, p. 7

188 *This Day*, January, 7, 2009, p. 2

189 *This Day*, *ibid.*

with them as prescribed under the third schedule to the Act. The third schedule requires the Board to give notice in writing of the seizure or detention of any goods (cargoes) as forfeited, to any person who to its knowledge was at the time of the seizure the owner or agent and delivered to him personally, by post or published in the federal gazette.

The third schedule to the Act vests the power to condemn and forfeit such goods on the Board in the court through civil proceedings in a court of summary jurisdiction. Section 31 (a) of the Act further empowers the board to dispose of goods deemed abandoned or seized or condemned accordingly.

By the combined effect of sections 31 (9), 167 (1) and (2), the third schedule to the Act, the Board represented by the CG of Customs, has the power to sell, destroy, distribute or dispose of the goods as it deems fit.[190]

In view of the above, we submit that the setting up of an overtime cargo committee by the government is a breach of the functions of the NCS. It rather amounts to duplication of duties and creating more expenses as the committee members have to be paid all the necessary sitting allowance.

Internationally the need to have task force to perform some duties urgently was recognized by the United Nations. It set up the UN Ad Hoc inter-agency taskforce on tobacco control.[191]

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[190] By virtue of section 4(2) of CEMA and section 6 (i) of the Board of Customs and Excise Decree 45 of 1992, the Board can delegate its powers to any officer of the service.

It was contended in the report that the fight against the tobacco epidemic cannot be led by one agency alone hence the urgent need for the Ad-Hoc Inter-agency taskforce. We quite agree with the UN reasoning on the need for inter-agency co-operation, our concern however, especially in the case of Nigeria using the customs example where taskforces spring up within the same agency. It may have the element of speed, confidentiality and complete surprise as contended by an ACG of Customs, but we submit that the excesses often associated with such task forces makes them to miss the objective for setting them up. It is important to consolidate on the status quo rather than creating emergency situations.[192]

6.8 Reconciliation

The NCS Board is responsible for administering the CEMA and subject to the general control of the minister, control and manage the administration of the customs and excise laws.[193] It shall collect the revenues of customs and excise and account for them in such manner as the minister shall, from time to time, direct.[194] The effect of this is that the NCS is saddled with the

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Note also that section 191 of CEMA provides that the sales by Auction Act shall not apply to sales under the Customs and Excise Laws when conducted by an officer authorized by the Board to conduct such sales.

191 Report of the Sixth Season of the UN, Geneva, Switzerland, 30 November ï 1 December, 2005.

192 Task force/Ad-Hoc Duties are such emergency situations, which often tend to be ñ*fire brigade*ò in approach. We should evolve a system of strengthening our existing institutions for better performance

193 Section 3 (b) (i) NCS Board Act

194 Section 3 (b) (ii) *ibid.*

responsibility of implementing the policies of government in this regard so that the necessary revenue is collected and accounted for. Collectable duties are paid by traders to Customs Designated Banks who in turn prepare relevant payment schedules to customs. The Customs Designated Banks are also to, within seven days, remit the amount collected to the Federal Government Account in Central Bank of Nigeria (CBN).

The reconciliation unit comprising officers from accounts, investigations, ERR & P and the Area Command ensure that the payment schedules submitted by designated banks tally with the remittance report from CBN. Discrepancies arise either due to delayed remittance by designated banks or by issuance of bogus receipts and schedules even by authorized signatories of the banks. An automated system of payment whereby payments made to the banks are captured simultaneously by customs and CBN is been suggested. The various duties are paid via bank draft issued in favour of the federal government of Nigeria.[195] The question is how effective has the NCS performed the role of collection of revenue and accounting for same?

The regime of Late General Sani Abacha gave a vote of no confidence on the customs in this regard. To this end, the then Minister of Finance, Chief Anthony Ani recruited and introduced the Professional Import Duty

[195] In 1995 when the Professional Import Duty Administrators (PIDA) was introduced. The duty of collecting import duties was given to some collecting banks. That has been the position till today.

Administrator (PIDA) to work side by side with the NCS. This was when S.O.G. Ango was the sole-administrator of the NCS.

They worked with the Customs for a few years but had to go when it was realized that, they were just a clog in the import duty administration.[196]

When A. A. Mustapha became the C.G. of Customs in 1999, he gave serious thought to the issue of reconciliation. He consequently, introduced a team of officers charged with the responsibility of reconciling all the duty collection with the remittances to the CBN. Reconciliation since then became an important preventive measure in the NCS.

Reconciliation has really assisted in curing the issue of late remittances to the CBN. With the appointment of some banks to collect duty on behalf of the customs it is the duty of the customs reconciliation team to ensure that there is no delay in remitting the duty to the CBN. It becomes more prominent with the introduction of e-payment and on line remittance to the CBN.

The NCS discovered that some of the banks use the duties collected in sourcing foreign exchange for fast business transactions before remitting the money to the CBN.[197] The Service had to consider the option of insisting on seeing evidence of remittance from CBN before releasing goods for which such duties are supposed to cover. This we submit may create delays in

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[196] 1999 Budget of realism by General Abdulsalami Abubakar discontinued with the services of PIDA

trade facilitation. The Customs, however, is serious about it in view of the experience where banks sent duty remittance advice to it but for which it was discovered later that the money did not get to the apex bank.[198] An audit query from the office of the Auditor-General of the Federation further revealed that about Two hundred and Eighty seven million, nine hundred thousand naira (₦287.9 m) part of revenue generated by the NCS was not remitted to the CBN in 2003.[199]

And that about eleven million naira (₦11 m) of the customs revenue was trapped in two failed banks and all efforts for the Nigeria Deposit Insurance Corporation (NDIC) and the CBN to address the issue yielded no result.[200] If the Banks were complying with their responsibilities with regard to duty collection as provided under the D1 scheme all the problems would have been avoided. The issue as viewed by the Customs may be deliberate on the part of the banks due to the benefit derivable from such deals.[201]

Reconciliation has continued to be an effective check on the banks and with the searchlight always focused, any defaulting bank can be blacklisted.

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197 *This Day*; http: /// www. thisday online.com./archive/2001/10/20011/01 bus 01.html accessed on 16/3/2009

198 *Ibid*.

199 *The Punch* Monday, June 16, 2008, p.10.

200 *The Punch*, *ibid.*

201 See Appendix VII for the 21 Responsibilities of Banks under the Destination Inspection Scheme, and the particulars to be supplied by all importers to the CBN.

In some other jurisdiction, reconciliation has gone beyond that of monitoring the remittances to the Apex bank as in Nigeria. Reconciliation is extended to a new process made available to importers for reporting post-summary changes to customs.[202] It is available to importers, who meet eligibility requirements wherein they can ñ*flagg*ò entries for reconciliation.[203] Changes can include value and classification.

In Singapore, the import and export regulation allows the user to submit the Manifest Reconciliation Statement (MRS) to the Customs in accordance with the terms and conditions of the MRS.[204] ñUserò refers to the owner, master or agent of any vessel/aircraft who is required to register with Singapore Customs. The MRS is intended to address any potential area of problem that may lead to any amendment. It becomes a real preventive measure in manifest administration.[205]

In the United States, Reconciliation become a concept arising out of Customs Modernization Act, which provides for post-entry revisions to certain elements of entry summaries while allowing the entry to liquidate for all other purposes.[206] It permits the importer to file entry summaries with customs based on currently available information, with the understanding that certain elements, such as the declared value, remain undeterminable.

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202 http :// www. combellandgardiner.com/recon.html accessed on 11/3/2009.

203 Cambell and Gardiner, *ibid.*

204 Singapore customs; http://www.customs/gov.sg/leftnav/trad/per/manfiest + reconciliation + statement.htm accessed on 11/3/2009

205 This became very relevant in our earlier discussion on manifest administration in chapter 6.3 *ante.*

206 http : // www. strtrade.com/reconciliation.htm accessed on 11/3/2009

Once the elements have been determined, the importer is to file a reconciliation, which provides the final data on the particular element(s), which remained open. The reconciliation will then be liquidated with a single bill or refund, as appropriate.[207] Just like in Singapore it applies basically to value and classification. The advantage of reconciliation here as a preventive measure is that in cases of drawback claim[208] there will be no difficulties in determining those that qualify for a refund.

The US customs further require importers to file a periodic report reconciling estimated declared values with actual values. This is often done when the value declared on the Customs invoices is not the actual value of the products imported. If however the declared value on the Customs invoice is the actual value of the imported product then no reconciliation is required.[209] In this situation, the valuation of the imported products must move from computed value to transaction value.[210] Computed value is the reason for reconciliation. Computed value must be used when the value declared on the customs invoice is not the real value of the product. The true value is subsequently ñ*computed*ò and declared to customs via the reconciliation. The Joint Industry Group (JIG)[211] commended the efforts of the US Customs in the introduction of the Automated Commercial System

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207 *Ibid*.

208 Drawback claim, which in Nigeria is Duty drawback, allows for a refund of import duty paid wrongly due to wrong classification or other reasons.

209 US Customs Reconciliation http: // www. maquilaportal.com/public/artic/artic/14e.htm accessed on 11/3 2009

210 *Ibid*.

(ACS). Reconciliation prototype, which has addressed many of the concerns expressed by their members. It was a major improvement to business like procedures.[212]

The success of reconciliation as a preventive measure in the import and export transactions cannot be over emphasized. The success in the case of the US is overwhelming as affirmed in the JIG submission. Its success in the administration of manifest in the case of Singapore is another test case, which is in line with customs modernization. The NCS should therefore look at these two countries and expand the scope of its reconciliation team, which for now is limited to reconciliation of account.

6.9 Post Clearance Audit

This is another reliable modern method of customs operation which has so far been adjudged most decent, efficient and cost-effective technique used to verify declarations of duties paid, exemptions, refunds and draw back. The records of traders or organizations are targeted for the purpose of surveying, reviewing and evaluating their business activities and premises. The method does not disrupt the free flow of goods and services, but rather provide better access to information for detecting fraud and effect correction when detected.

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211 The JIG is a coalition of more than 100 companies, trade associations, professionals and business actively involved in international trade.

212 http://www.jip.orgn/news/submissions/1998/import/reconciliation.htm.accessedon 11/3/09

According to a retired comptroller of customs, it is a sort of post mortem approach to proper scrutinization, verification, regularization and vetting of import and export oriented documentation and clearance associated problems for the overall purposes of blocking revenue leakages and the suppression of smuggling.[213] The gains of post clearance audit as a preventive measure cannot be over-emphasized.

The then C.G of Customs, Elder Buba justifying the establishment of the Post-Clearance Audit unit stated that it will eliminate delays in the clearing procedure while at the same time ensuring that the Service collects all collectable revenue on imports and that it will strengthen the optimal performance of the NCS in the bid to actualize the 48-hour clearing of cargo in our ports and border stations.[214] The implementation of post clearance audit is part of risk management strategy.[215]

The Post Clearance Audit (PCA) as a preventive measure against smuggling is a worldwide phenomenon and from the various definitions, it underscores the fact that it is a tool for trade facilitation. In the US, it is a systematic based approach, which evaluates internal controls, and then determines the likelihood of non-compliance and assess risk. In Canada, it is a post-release verification meaning duty and tax are paid after release. The European Union defines it as the examination of the clearance process

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213 J. Alagbaoso, *Eyes Right: Nigeria Customs Service on the Dais*, op. cit, p. 15

214 Address delivered by J.G Buba, C.G of Custom at the closing ceremony of the Year 2007 C.G of Customs Annual Conference at Sokoto

and documents after release. Accuracy is to be however ensured. In Australia, it is a monitoring power of pre-arrival/at arrival/post clearance, which leads to examination of cargoes, documents then capital flow.

In Japan, it is focused on imported goods, importers, customs brokers, documents, account books, correct/wrong declaration and provide guidance so as to ensure fairness of taxation.[216]

If one looks at the various definitions, they are intended to achieve faster clearance of goods, supplement to clearance automation, preventive strategy, combat customs fraud, evaluation of compliance level, facilitation of movement of goods and protection of revenue.

The PCA in the context of the WTO is a measure to expedite the movement of goods by minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements. [217]

The key measures aiming at expediting the clearance and release of goods at the borders, are inter alia pre-arrival clearance, separate release from clearance, authorized trade schemes, risk management, and post clearance audit proper.[218]

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[215] This was discussed in detail in chapter 6.6 *ante* that is, ó100% physical examination as a preventive measureô

[216] Source for the various definitions is from the WTO

[217] Article 8 of GATT 1994 1 (c)

[218] WTOôs reference document TN/TF/W/43 (Latest revisions) Chapter K, 2 (d)

Chapter 6 of the General Annex of the Revised Kyoto Convention also sets out a large number of recommended standards relating to all aspects of customs control, including the use of Audit-based controls and the audit of tradersô commercial systems.[219]

The various definitions reflect a different approach to Customs control which have the effect of offering an immediate release of goods or reduced release times. As a direct consequence of the expedite clearance process, storage and warehouse fees together with insurance costs for goods under storage will be reduced.

In Nigeria the PCA is related to another policy of the NCS which is referred to as the ñfast trackò. The MAN and the NCS had agreed to implement some measures aimed at fast-tracking export and import activities at the ports. [220]

The fast track is available to importers who registered under the scheme and by entering into a bond with the NCS. When their goods arrive, they are fast-tracked to their warehouses or other designated places and are subsequently released there. The then CG of Customs, Hamman Bello stated that the fast track clearance system would continue to be reviewed and updated periodically with the aim of bringing in more

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[219] For details see, Standard 6.6 and 6.10 of the General Annex of the Convention

[220] MAN, Customs Parley over fast-track Policy at Ports; *Punch* Sunday 31 August, 2008

importers/manufacturers into the fold.[221] He warned that whoever abused the concessions would be treated as a saboteur.[222] This brings us to the issue of the kind of punishment that should be given out to such a saboteur. Apart from withdrawing such a concession, or perhaps being prosecuted under section 47 of CEMA for improper importations, there is no legislation dealing with the policy. If the NCS is to succeed on PCA and the ñ*Fast track*ò, then the need to have a legislative package cannot be over emphasized. A comptroller of customs, Ahmadu Mamman Jamo argued that there should be a legislation conferring legal powers on the officers to examine the commercial record of all persons/companies directly or indirectly involved in international trade.[223] He argued further that the essential powers to implement the PCA must provide at the adequate levels (sic) of customs laws and regulations, such as authority of PCA officers, scope of PCA (person/company to subject to PCA), obligation of auditees, panel scheme and right to appeal on any action of the PCA.[224]

We agree with the comptroller and further emphasize that since PCA is an examination process conducted by customs officers, customs laws and regulations ought to provide for it.[225]

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221 *Punch*, *Op. cit*.

222 *Punch*, *Op. cit*.

223 A. M. Jamo, A Guide to Destination Inspection, 48 Hours clearance process and post clearance Audit; Goad Educational Publishers, Abeokuta, 2008

224 A. M. Jamo, *ibid*.

In Paupa New Guinea, the PCA is well articulated in the countryôs Customs Act.[226] Section 131 (A) (1) provides that:

> A person who imports or exports goods shall keep sufficient records to enable an authorized officer to inspect, audit, examine the documents, property or processes of that person to obtain or verify the information on which a determination of the amount of the duties paid, payable, deferred or relieved was made, and shall retain these records for a period of 5 years after the completion of the transaction, acts or operations to which they relate.
>
> (3) A person who causes goods to be imported or exported; or receives goods that have been imported or are to be exported; must retain all the relevant commercial documents and records that come into the personôs possession or control at any time and relate to the goods concerned or to their carriage to enable an authorized officer to inspect, audit, examine the documents, property or processes of a person to determine
>
> (a) whether the person is complying with a customs related law; or
>
> (b) as to the correctness of information communicated by, or on behalf of, the person to customs (whether documentary or other form);
>
> and
>
> shall retain these records for a period of 5 years from the time when the goods were imported into, or exported from Papua New Guinea
>
> (4) A person who is required by this section to retain a commercial document or records relating to particular goods may keep the document at any place within Papua New Guinea, must keep the document in its original form and must store it in a manner that will ensure access, reliability and readability of the information recorded.
>
> (6) A person who fails to keep records as specified by this Act, to make them available for inspection, audit or examination or to comply with a request to produce documents or information, is guilty of an offence.
>
> Penalty: A fine of not less than K 5000.00[227] and not exceeding K 50,000.00 or a term of imprisonment not exceeding 3 years, or both.

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225 Section 32 (7) of the new bill made an attempt to provide for PCA as a kind of compliance measurement . In section 36, it provides for post-clearance audit after clearance of good

226 Cap. 101, 2006

This is a well fashioned legislation within the customs laws and regulations and with such legal powers, the PCA will be fully implemented,

A different approach to PCA was introduced in Pakistan, which was intended to be a check on any excesses of the customs officers. In Nigeria both valuation officers and PCA officers are all officers of the NCS. The fear here is that not being an independent body the desired checks and balances may not be achieved. This is what the Pakistan authorities tried to prevent by making the valuation and PCA department independent of the Customs.

The Central Board of Revenue (CBR) empowered the valuation officersô appraisers and authorities of valuation department and PCA department to exercise powers of customs officials within their assigned areas of jurisdiction. The CBR through a notification issued gave maximum powers to them.[228]

Through the notification, auditors, senior auditors, appraisers, principal appraisers, assistant director, deputy director, additional director, director and director general of post clearance audit would exercise powers of customs officials and will in fact operate under the Customs Act, 1969.[229]

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227 Local Currency of Papua, new Guinea

228 This notification superseded the formal SRO 917 (1) 1 2004 which did not give them such maximum powers.

229 Islamabad (October 05, 2006) http: // www. accountancy.com.pk./newsgen.asp? newsid 1732 accessed on 6/3/2009

The intention to create a kind of check and balances is laudable but we want to submit that the new system is too cumbersome and will lead to confusion. It will erode the powers of the professional customs officers. More so how can about four departments of government engage in a job that one department is supposed to do. Our contemplation of legislative power to implement the PCA is not to create the kind of situation in Pakistan. We contemplate a legislation that will give full legal powers to the customs officers in the implementation of the PCA and especially *vis-à-vis* the right of the importers, so that fairness will be the rule.

Traditionally, customs documentary checking and physical examination connected with importations and exportations takes place before the goods are released. The concept allows for speedier clearance of the goods with the audit examination being performed subsequently at the importers premises. It is even possible in some instances to examine and release (pre-release/before scrutinizing the documents later.

These are all measures to fast-track the clearance of goods. it should however be noted that in order to prevent abuses, it should only be afforded to reputable importers who should be made aware that their records will at any time be subject of audit.

The successful implementation of PCA will no doubt help strengthen enforcement,[230] provide the necessary support and confidence in the implementation of trade facilitating measures, and simplify procedures in cargo processing and valuation.

6.10 Warehousing

Warehousing is the process of securing the custody of goods on which duty is to be paid but has not being paid. Its importance cannot be over emphasized as a preventive measure against smuggling.

The law relating to warehouses is contained in part 4, sections 81 - 98 of the CEMA.[231] There are two types of warehouses namely the bonded warehouse and the government warehouse. The government warehouse is the property of the government and is controlled by the NCS. All goods arriving the ports and especially seized goods are deposited in that place for safe custody until payment of duty or final determination in the case of seizure.

The bonded warehouse is a building approved and licensed by the NCS for the Deposit of ñ*Duty not paid goods*ò. It could be a general warehouse or a private warehouse. It is general when it is approved and

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230 This shall be our focus as we discuss the various enforcement measures in chapter 7 *infra*

231 See also the Customs (Warehousing of Goods) Notice, 1959, Legal Notice No. 85 of 1959 which provides for eligibility of goods to be warehoused.

licensed for the deposit of goods, which are the property of the owner[232] or/and, any other person(s). It is private when it is approved and licensed for the deposit of goods, which are property of the warehouse keeper only.

As a preventive measure to guide against any evasion of duty the warehouse must conform to certain structural requirements before the licence can be given.[233] The main door of the warehouse must open to a public road or is so placed as to be capable of being consistently under observation. The building must be constructed of stones, bricks or cements. The doors strongly built of thick woods or metal, and if of the runned type, it should be constructed so that it cannot be lifted off the runners.

The doors must be fitted with at least one metal bar, which is capable of taking two heavy padlocks. The hinges must be securely bolted on the lintels on the inside and the pins soldered or otherwise fitted so that they may not be removed nor lifted thereof. Nuts must be lifted to each bolt on the inside of the doors and soldered, or otherwise rendered incapable of being removed. Each window must be shuttered on the inside and may be locked or bolted from inside with each window secured by affixing on the outside vertical and horizontal, metal bars with 190.5 thickness which must be embedded in the surrounding masonry. The roofs must be securely

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232 Owner is referred to as the warehouse keeper who is licensed and is liable and answerable as the owners of any goods deposited in his warehouse for their safety and proper delivery. He is also responsible for duties chargeable on them

233 Customs and Excise Notice No. 9

constructed and fixed to the tops of the walls and if spaces are left for ventilation purposes, such space must be secured with expanded wire.

The applicant in addition to the above structural requirements will enter into three kinds of bond before the final approval can be given.[234] There has to be evidence of ASYCUDA++ connectivity so as to enhance faster clearance of goods.

Section 82 (3) of CEMA provides that the licence shall be in such form as the Board may direct and shall be subject to the payment of a fee of forty eight naira and shall expire on the 31st day of December, in each year. This provision it is submitted has been overtaken by the fact that in recent time in addition to other requirement for renewal, the fees to be paid now is sixty thousand naira (₦60,000).[235] If you compare this amount to the renewal of customs agency licence which is, two hundred and fifteen thousand naira (₦215,000),[236] a review of the renewal fees for a bonded warehouse becomes imperative. This is hinged on the fact that to operate a bonded warehouse has more greater responsibility than being a licenced clearing agent.

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234 Form C 171 ï Warehouse Bond which covers Thirty million naira (₦30,000,000)
Form C 172 ï Warehousing and Removal of Warehoused bond which covers Ten million naira (₦10,000,000)
Form C 173 ï General Bond for Warehousing and Removal of Warehouse goods which covers Ten million naira (₦10,000,000)

235 Licence and Permits Unit of the Trade and Tariff Department at the NCS Headquarters, Abuja.

236 *Ibid*.

As a further check, any warehouse keeper who without the previous consent in writing of the Board makes any alteration in, or addition to, a warehouse shall be liable to a fine of four hundred naira (₦400).[237] This fine is grossly inadequate and does not portray the seriousness of warehousing as a preventive measure.[238]

The goods shall normally on arrival at the ports be escorted to the warehouse and the Board may give direction as to the times between which goods may be received at a warehouse; and the goods shall not be removed for warehousing except at such times as will allow them to be received at the warehouse within the times directed by the Board for that purpose. If any goods are removed in contravention of this section, the person removing them shall be liable to a fine of two hundred naira (₦200).[239] In order to monitor the activities of the warehouse, resident officers are posted there to perform the normal customs duties.

Except as permitted by the Board, all goods shall be warehoused in the containers or lots in which they were entered for warehousing; and any goods warehoused in contravention of this shall be forfeited.[240] In such instances since the containers cannot enter into the warehouse it is

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237 Section 82 (5), CEMA

238 The NCS bill, 2012 seeks to increase the fine to ₦1,500,000.00 under section 123 (8)

239 Section 85 CEMA. Section 123 (9) of the NCS bill, 2012 seeks to provide for a fine of ₦1,500,000.00

240 Section 86 (3) of CEMA

constructively warehoused.[241] If, except as permitted or directed by the proper officer, any goods deposited in a warehouse are moved from the part of the warehouse in which they were deposited, or any alteration is made in the goods or in the containers or lots thereof, or in the marks or numbers of such goods or the containers or lots thereof, such goods shall be forfeited.[242] The provision of section 88 is another aspect that may tend to whittle down the effectiveness of warehousing as a preventive measure. The section provides:

> The warehouse keeper shall produce to the proper officer on request any goods deposited in his warehouse, which have not been lawfully removed therefrom; and if he fails so to produce any such goods, he shall be liable to a fine of ten naira for each container or lot not so produced.

It should however be noted that except as permitted by or under the Act, goods shall not be removed from a warehouse until any duty chargeable thereon has been paid.[243] And it shall be with the authority of, and in accordance with any direction given by, the proper officer.[244] If at any time after any goods have been warehoused and before they are lawfully removed from a warehouse, the goods are found to be missing or deficient, and it is not shown to the satisfaction of the Board that their absence or deficiency

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241 Constructive warehousing is the stacking of the container in a space outside the warehouse since it can not enter into the warehouse

242 Section 87 (3), *ibid.*

243 Section 90 (4), *ibid.* Section 128 (3) of NCS bill, 2012 seek to provide that where goods are deposited contrary to any directions of the Customs Service, the warehouse keeper shall be liable to a fine of ₦1,500,000.00

244 Section 90 (5), *ibid.*

can be accounted for by natural waste or other legitimate causes then, without prejudice to any penalty or forfeiture incurred under any other provisions of the Act, the Board may require the warehouse keeper to pay immediately the duty on the missing goods or on the whole or any part of the deficiency, as the Board sees fit.[245]

The goods deposited in the government warehouse mostly consist of seizures and overtime cargo. Section 97 (8) of CEMA provides that if any goods are not cleared from the government warehouse within a period of fourteen days after being entered, or after being sold under or by virtue of any provision of the Act, they may be disposed of in such manner as the Board may direct. This section may lead to some contradictions. In respect of other goods that may be warehoused, for a time limit of fourteen days to be given will be contrary to the normal dwelling time of a cargo which is twenty eight days before it becomes over time. Even the twenty-eight days we contend is not long enough for a cargo to become overtime. To make it fourteen days by the section, we submit is contradiction of the existing dwelling time for cargoes.[246]

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[245] Section 96, *ibid.* Section 129 of the NCS bill, 2012 provides for a fine of six times the value of the goods or imprisonment for a term of five years or both.

[246] Under the NCS bill 2012, section 128 (7) seek to provide that goods admitted into a warehouse must be withdrawn from the warehouse not later than three years after admission into a warehouse.

In the case of other goods, which are sold,[247] if not cleared within fourteen (14) days could be disposed by the Board. The question is when to start counting the fourteen days, is it from the time the auction or allocation paper is issued, or received or when payment is effected. Considering that it will take quite sometime from the date the auction or allocation paper is issued through when payment is made and delivery takes place, it will be unfair and may lead to loss as the days will not be enough for the processes to take place.

Warehousing as discussed is a serious preventive measure, which seeks to prevent any evasion of duty. The goods are properly secured until duty is paid on them. With growing trend in the activities of the bonded warehouses, the bond for warehousing which ranges from ten million naira to thirty million naira cannot be said to be enough cover. A bond in the range of three hundred to five hundred million naira we suggest should be the bench mark for the operatives.

In Kenya, goods deposited in a government warehouse if not removed within twenty-one days after deposit, the proper officer shall give notice that unless such goods are removed within twenty-one days from the date of the notice, they shall be deemed to have been abandoned.[248] This we submit is a better provision than the fourteen days period in the case of Nigeria. In the case of other warehousing, the Kenya Act in section 46 (1) provides:

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247 This could be seizure or overtime, which are auctioned or allocated as the case may be.

248 Section 34 (1) Kenya Customs Act.

> All warehoused goods which have not been removed from a warehouse in accordance with this Act within six month of the date on which they were entered shall be entered for re-warehousing; but those goods shall not be re-warehoused more than once.

The CEMA should have specifically made this kind of provision. Since there is this Lacuna, what then will govern the period that goods should stay in a bonded warehouse.[249]

Ghana improved further on the six months warehousing period of Kenya by providing in section 145 (1) thus:

> Warehoused goods shall be entered and delivered é not later than two years after the day on which the goods were warehoused, or within any further time and in any cases as the commissioner shall direct, unless the owner of the goods wishes to re-warehouse the goods.
>
> If at the expiration of one year from the previous entry or within a further time as may be directed and the goods is not re-warehoused, the goods shall be sold by public auction as soon as possible, after thirty days notice by advertisement in the gazette or the national newspapers.[250]

By way of conclusion, the various preventive measures put in place is laudable. The snag however, is the problems of failure, which is characteristic of our system. In case of any failure in the measures what then is the next option? The answer is found in our discussion in the next chapter that deals with the various enforcement measures.

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249 Is it the normal dwelling time of twenty-eight days applicable to goods coming into the ports after which an unclaimed cargo list is issued?

250 Section 146 (1), Ghana Customs Act.

CHAPTER SEVEN

ENFORCEMENT MEASURES AGAINST SMUGGLING

7.1 Arrest of Suspects

If the old adage that ñprevention is better than cureò fails[1] then there is no option than to apply the rules by way of enforcement. In this respect the various enforcement measures put in place in the bid to curb smuggling shall be the focus here.

Arrest is one of the process by which the attendance of a suspected offender in court is secured[2]. It can also be effected by a court issuing a summons to compel the appearance of any person accused of having committed an offence. Arrest therefore can be defined to mean the deprivation of the liberty of one person by the act of another.[3]. According to Amadi however, ñarrestò is nowhere defined under the various statutes[4]. Amadi states that the nearest case law defining the term is perhaps in the case of *Christie v. Leachinsky*[5] where Lord Simmonds stated that ñarrest is the beginning of imprisonmentò. The court appears to be defining arrest here, but it merely states the consequence of what may occur as a result of

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1 The Preventive measures were fully discussed in Chapter 6 *ante.*

2 D. Oluwatoyin; *Criminal Procedure in Nigeria Law and Practice*, (London, Black Stone Press Limited, 1990), p. 91.

3 M. Omale, *Nigeria Customs Service Law and Practice*; (Lagos: Cinnamon Press International, 2000), p. 7.

4 G.O.S. Amadi; *Police Powers in Nigeria,* (Nsukka, Afro-Orbis Publications Ltd; 2000), p. 29.

5 (1947) AC 573, at p.600, see also *Asemota v. Yesufu* (1982)3 NCLR 419.

arrest. With this observation, Amadi adopts the ordinary meaning of arrest as defined by different authorities[6] as apprehension, stoppage, seizure or to check or hinder the motion or action of a person or thing.

We shall for our purpose adopt our earlier definition which is the deprivation of the liberty of one person by the act of another. The Constitution of the Federal Republic of Nigeria 1999 provides in section 35(1) for the right to personal liberty.

> 35 (1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law.
>
> (a) In execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty.
>
> (b) By reason of his failure to comply with the order of a court or in order to secure the fulfillment of any obligation imposed upon him by law.
>
> (c) For the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.
>
> (d) In the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare.
>
> (e) In the case of persons suffering from infectious or contagious diseases, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purposes of their care or treatment or the protection of the community; or
>
> (f) For the purpose of preventing the unlawful entry to any persons into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detection for a period longer

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[6] E.g. *Oxford Illustrated Dictionary*, 1962, p. 219; *The Lexicon Webster Dictionary, Encyclopedia Ed*, p. 272

> than the maximum period of imprisonment prescribed for the offence.

From the above provisions, it is submitted that save for the exceptions provided in (a) ï (f) above, any arrest made amounts to a deprivation of personal liberty[7] and therefore null and void and the victim shall be entitled to compensation.

Under the CEMA, a customs officer can arrest any offender of the provisions of the Act. This wide-power of arrest is the same conferred on police officers and since the CEMA gives the customs officer the powers of a police officer, it could be conveniently said that the wide power of arrest conferred on the police is by necessary implication conferred on customs officers. The police have several power of arrest as contained in section 10 of the Criminal Procedure Act[8] which provides:

> 1) Any police officer may, without an order from a magistrate and without a warrant, arrest é
>
> (a) any person whom he suspects upon reasonable grounds of having committed an indictable offence against a federal law or against the law of any other stateé unless the written law creating the offence provides that, the offender cannot be arrested without a warrant.
>
> (b) any person who commits any offence in his presence;
>
> (c) any person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;
>
> (d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to such thing
>
> (e) any person whom he suspects upon reasonable ground of being a deserter from any of the armed forces of Nigeria.

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7 *Iyere v. Duru* (1986)2 NSCC 1215, at pp. 1222, 1224.

8 Cap. C42, LFN, 2004

(f) any person whom he suspects upon a reasonable grounds of having been concerned in any act committed at any place out of Nigeria which if committed in Nigeria, would have been punishable as an offence, and for which he is, under any enactment in force in Nigeria, liable to be apprehended or detained in Nigeria;

(g) any person having in his possession without lawful excuse, the burden of proving excuse shall lie on such person, any implement of housebreaking;

(h) any person whom he has reasonable causes to believe a warrant of arrest has been issued by a court of competent jurisdiction in the state;

(i) any person who has no ostensible means of subsistence and who cannot give a satisfactory account of himself;

(j) any person found in the state taking precautions to conceal his presence in circumstances which afford reason to believe that he is taking such precautions with a view to committing an offence which is a felony or a misdemeanour.

2) The authority given to a police officer to arrest a person who commits an offence in his presence shall be exercisable in respect of offences committed in such officerôs presence notwithstanding that the written law creating the offence provides that the offender cannot be arrested without a warrant.[9]

Section 8 of CEMA provides:

> For the purpose of carrying out or enforcing the provisions of the Customs and Excise Laws, all officers shall have the same powers, authorities and privileges as are given by law to police officers.

This provision confers the powers of police officers on customs officers. The question is why conferring such powers on the Customs? Since the Customs has its own Act providing for different offences it would have been better to just give them their powers under the Act providing for the scope of such powers. Referring to the powers of the police which is

[9] See generally sections 214 ï 216 of the 1999 Constitution for Powers of Police as the foremost civil security institution in Nigeria. See also the Provisions of sections 11 and 55 of the CPA, and 26 of the CPC, and Column 3 of Appendix A to the CPC which empower a police officer to arrest a suspect without a warrant of arrest.

derived under another Act[10] is unnecessary.[11] The arrest may be with warrant or without warrant of arrest. A warrant of arrest is usually issued by the court in the following circumstances.

(a) When the statute creating the offence or any other law provides that the offender cannot be arrested without a warrant.

(b) When a serious offence is alleged to have been committed by the offender.

(c) When an offender granted bail jumps bail, to procure his further attendance or that of his surety.

(d) When a summons[12] issued by a court has been disobeyed.

In most cases arrest can be made without warrant due to the wide power, of arrest given to officers[13] in order that they may act swiftly for the prevention of crime. The power here with respect to the police officers is very wide[14].

Section 24 of the Police Act creates an additional source of police powers of arrest without warrant.

> 24 (1) In addition to the powers of arrest without warrant conferred upon a police officer by section 10 of the Criminal Procedure Act, it shall be lawful for any police officer and any person whom he may call to his assistance, to arrest without warrant in the following cases:

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10 Police Act, 1967 amended by Police Amendment Decree 1987 now Cap. P.19, LFN 2004.

11 Section 6 of the NCS bill, 2012 also provides for the exercise of police power by the Customs Service

12 A summons is used to compel appearance upon receiving a complaint against an offender.

13 Sections 10,11 and 55 CPA, section 26, CPC, section 20, Police Act, and section 8, CEMA

14 Duffus J. in *I.G.P v. Ogbomo* (1957) WRNLR 200 at p.201

(a) Any person whom he finds committing any felony, misdemeanour or simple offence, or who he reasonably suspects of having committed or being about to commit any felony, misdemeanour or breach of the peace.

(b) Any person whom any other person charges with having committed a felony or misdemeanour,

(c) Any person whom other person

(i) Suspects of having committed a felony or misdemeanor, or

(ii) Charges with having committed a simple offence if such a person is willing to accompany the police officer to the police station and to enter into recognizance to prosecute such charge.

With respect to arrest with warrant, it can be issued for any offence irrespective of whether the offences are declared by the law creating them, to be offences for which the offenders can be arrested with or without a warrant[15]. In practice, a warrant of arrest is usually issued by a magistrate when the statute creating the offence or any other law provides that the offender cannot be arrested without a warrant. The police therefore in the performance of their duties may not arrest if the particular statute provides for the arrest to be with a warrant.

Under the CEMA, no offence requires a warrant of arrest before the offender can be arrested. In view of the powers of arrest given to the customs officer, we need to examine the relationship of this power *vis-à-vis* the other security agencies especially the police when offenders on the face of it have not contravened the CEMA but other relevant laws[16]. The

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[15] Section 21 CPA, section 154 CPC, and Column 4 of Appendix A to CPC.

[16] For example under section 165(2) CEMA, if an offender is armed with any fire arms and it causes injury to an officer he shall be sentenced to death. The question is whether customs can prosecute for illegal possession of arms. Note that the sub-section relates to when the fire arms is used to cause injury, not just mere possession.

relationship will be better understood if the security role of the NCS is put in perspective.

There is no doubt that the NCS is the administrator of the security of the Nigerian economy; in fact it is the NCS among the security agencies that really understands the dynamics of the Nigerian economy. By virtue of this role, the Service is placed in a position where it comes into contact with persons coming into the country or going out. This position puts the NCS in the forefront of being the first security agency to detect any hoodlums and criminal gangs that infiltrate the nation either through the sea, air or land.

In this vein, when examination of goods are carried out and where suspicion exist depending on the nature of the offence, the case is referred to the appropriate security agencies. Cases involving drugs are referred to the NDLEA while those of arms and ammunition go to the Nigeria police. The NCS at all times while conducting examination of goods watches out for illegal importation of arms and ammunition.

A fundamental principle of law is that a person being arrested must be informed of the reason of his arrest. This is a common law rule.[17] This rule is codified in section 5 of the CPA as follows:

> Except when the person arrested is in the actual course of the commission of crime or escapes from lawful custody, the police officer or other person making the arrest shall inform the person arrested of the cause of the arrest.

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[17] *Christie v. Leachinsky* (1947) AC 573; *Abu Anakwa v. State* (1969) 1 All NLR 133; *Ikonne v. C.O.P* (1987)2 NSCC 1130 *Reg. v. Kulynyez* (1971)1 QB 367

Section 5 of the CPA is enabled by section 35(3) of the Constitution which provides as follows:

> Any person who is arrested or detained shall be informed in writing within 24 hours (and in a language that he understands) of the facts and grounds for his arrest or detention.

Compliance in practice with the above provision by officers is extremely difficult.[18] This is often due to lack of knowledge of the provision. The officers are therefore expected to even if orally, to inform the accused the simple reason for his arrest.

Arising from the above provisions, the issue that may arise is the extent to which the noncompliance with the provisions by the officers will affect the legality of the arrest. In determining the issue an analysis of the provisions becomes important. The examination of the provision by Amadi[19] appears to have cured any doubt that may arise. He posits:

> These two enactments do not exactly mean the same thing although they have a common denominator in the sense that an arrestee must be informed of the reason(s) for his arrest. The differences between the two enactments lie in the following: first under section 5 of the Criminal Procedure Act, the information of the reason(s) for the arrest must be made concurrently at the time of the seizure of the body. The prompt information does not seem to be a requirement under section 35(3) of the 1999 Constitution. The reason for this assumption is founded on the abrogation and replacement of section 21(2) of the repealed 1963 Constitution by section 35 (3) of the 1999 Constitution

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[18] Detail discussion will be in Chapter 8.2 *infra* dealing with Criminal Proceedings

[19] Amadi, *op cit.* p. 36.

Under section 21 (2) of the repealed 1963 Constitution it was provided that:

> Any person who is arrested or detained shall be promptly informed in the language that he understands, of the reasons for his arrest or detention.

Amadi[20] went on to conclude that there was nothing preventing the makers of the 1999 constitution from adopting the provision. And since they did not do so, the presumption is that the 1999 Constitution as provided in section 35 (3) does not envisage prompt information for reason(s) of arrest. We agree with Amadiôs analysis of the provisions but disagree on the presumption that section 35 (3) does not envisage prompt information. We submit that the use of the word ñwithin 24 hoursò in section 35 (3) by necessary implication points to the fact of promptness. In practice arrest, detention and arraignment in court takes much time in our criminal justice system, so for the Constitution to refer to ñwithin 24 hoursò is mindful of the delays, hence that qualification. Our submission therefore is that section 5 CPA and section 35 (3) 1999 Constitution fall within the meaning of the repealed section 21 (2) of the 1963 Constitution. Non-compliance with the provisions will appear to make the arrest unlawful.

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[20] *Ibid*.

Amadi[21] in this regard puts it succinctly.

> It is submitted that even though the police must later comply with the provision of section 35 (3) of the Constitution, the failure to do so should not vitiate the arrest, which was duly executed under section 5 of the Criminal Procedure Act. This is because the provision of the section operates immediately to render lawful any arrest under it, and the person so arrested may even be charged to court before ever it becomes necessary to comply with the constitutional provisions. In other words, where a person is arrested under section 5 of the Criminal Procedure Act and brought before the court within 24 hours, it becomes irrelevant to comply with section 35 (3) of the Constitution.

7.1.1 Procedure in Making Arrest:

Over the years, a lot of officers were found guilty of irregular arrest. Some officers go into physical combat in attempt to make an arrest. This is wrong. An officer is only to use reasonable force where it is necessary. Any officer effecting an arrest and engages in physical combat would be criminally responsible for excessive use of force. Though no physical combat is required to affect an arrest, any officer arresting is required to actually touch or confine the body of the person so arrested, unless there is submission to custody by word of mouth or action[22]. The submission here, it is submitted, is only by word of mouth as there is no physical touch. But it was held in *Sadiq v. The State*[23] that arrest can not be effected by mere words. The

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21 Amadi, *op cit.* p. 30.

22 Section 3, CPA.

23 1982(2) NCR 142.

police here merely used the words ñI invite you to the police station for questioning,ò it was held that no clear words were used to arrest. Moreover, mere words could not constitute an arrest. There must be additional overt act of physical restraint of the accused liberty. The decision in the case did not make provision for where there is submission to custody by word or action. If there is submission then why the physical restraint? The physical restraint often leads to physical combat, which can be construed to be excessive use of force. The provision of section 3 of the CPA seems to be the better option as it recognizes submission to custody by word or action. The section provides:

> In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Amadi[24] expressed his views in the following words:

> Touching or confining the body and the words of arrest take place almost concurrently. An arrest is infective in law if one of the elements is lacking é consequently, the mere pronouncement of the words of arrest is not an arrest unless there is a submission to this procedure by the person sought to be arrested.

In the case of *Sadiq v. The State,*[25] the accused refused to accompany the police officer to the station. Other officers were sent to the accused and she was eventually persuaded to accompany them to the police station. The accused was charged and committed *inter-alia* with the offence of resisting

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[24] G.O.S. Amadi; *Police Powers in Nigeria*, (Afro-orbis Publications Ltd: Nsukka, 2000) p. 34

[25] *supra.*

police arrest. On appeal it was held that the refusal did not amount to resisting police arrest as there was no restraint of the appellant. In *Ateze v. Momo*[26] it was held, where the plaintiff evidence could only show that the police officer ñtookò him to the charge office that there was no arrest.[27]. Under section 11 of CEMA, any person who obstructs, hinders, molests or assaults any person engaged in the performance of any duty or the exercise of any power imposed or conferred on him by the customs and excise laws, or any person acting in his aid shall be guilty of an offence.

The section is aimed at protecting officers from undue harm or molestation by offender under the CEMA. The provision and the punishment prescribed thereto will serve as a deterrent to likely offenders and ensure and protect the life of officers and those acting on their behalf. More often, offenders under CEMA usually charmed with the staggering profit associated with the illicit trade pursue their nefarious activity with every desperation that at times they harm or injure officers of the customs who are supposed to enforce the law. The CPA does not actually provide for the word to be used in effecting arrest. An officer can pronounce ñin the name of the head of state or by virtue of the power conferred on meò, you are under arrest. In *Russen v. Lucas*[28] it was held that it may be proper words of arrest to simply say ñI arrest youò without saying in the name of

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[26] (1958) NR NLR 127.

[27] *Donnelly v. Jackman* (1970)1 All ER 987, See also C. O Okonkwo, The Police and the Public in Nigeria, 1966, p.41.

[28] (1824) 1 C & P. 153.

any one. This is underscored by the fact that the arrester has power under the law to arrest.

7.1.2 Effect of an Irregular Arrest

Any irregularity in effecting an arrest does not invalidate any subsequent trial of the offender.[29] Any such irregularity merely renders the arrest unlawful but does not in anyway affect the validity of the trial.[30] An irregular arrest may give a civil action in trespass to the offender so officers are to be very careful in making an arrest so as not to incur personal liability in civil action.

Though the CEMA does not make provision in respect of an irregular arrest, section 101, CPA is very clear on this issue.

> No irregularity, illegality, defect or error in summons or warrants or in the issuing or service of the same or in the arrest of an offender or in the complaint shall by itself vitiate a criminal proceeding and that a court may not withstanding any of such defects hold a trial or a preliminary inquiry.

Compare the above provision with the provision of section 384, CPC[31] which provides as follows:

> A court may at any time amend any defect in substance or in form in any order or warrant issued by such court, and no omission or error as to time and place, and no defect in form in any order or warrant given under this criminal procedure code, shall be held to render void or unlawful any act done or intended to be done by virtue of such order or warrant, when it is therein mentioned, or may be inferred therefore, that it is founded on conviction or

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29 Section 101, CPA, section 384 CPC.

30 *Ibid*.

31 Criminal Procedure Code applicable to Northern region

> judgement, and there is a valid conviction or judgement to sustain the same.

Finally, the words of Abott, Ag. CJF in the case of *Okotie v. Police*[32] summarized the issue thus:

> This section[33] is extremely wide in its terms, particularly in its last phrase, and it would be contrary to the whole spirit of the administration of the criminal law for the prosecution to rely on it too readily. We do not wish it to be thought that it can be invoked to exempt police officers either from carrying out their duties under the law in the proper way or, indeed from any civil, criminal or disciplinary responsibility which they might incur by failure to observe the provisions of the criminal law of this country relating to procedure for procuring the attendance of an accused person before a court.

The combined effect of these provisions is that even though an arrest can be unlawful, it does not however vitiate any subsequent trial.

It appears that sections 101 and 384 of the CPA and CPC respectively are about arrest founded on document like warrant and summons. We submit that an irregular arrest can also be founded on an arrest without warrant. According to Oluwatoyin[34] a warrant of arrest may be issued by a magistrate or a judge of the high court after receiving complaint on oath that a person has committed an offence.[35] In *Ikonne v. Commissioner of Police* and *Nnanna Wachukwu*[36] the chairman of a judicial commission of inquiry, a high court judge, received a letter containing serious allegations against the

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32 4 FSC 125.

33 Section 101, CPA.

34 D. Oluwatoyin *Criminal Procedure in Nigeria Law and Practice* (Blackstone Press Ltd. London (1990) p. 91.

35 Sections 22 (1) and 23 CPA.

36 (1986) 4 NWLR (Pt 36) 473.

appellant. On the strength of the letter, he issued a warrant of arrest against the appellant. It was held that the warrant of arrest was improperly issued by the respondent in his capacity as chairman of the Judicial Commission of inquiry and not in his capacity as a High Court Judge. That it was issued by him without receiving a complaint on oath against the appellant as required by section 23 of the CPA.

An arrest can be made without a warrant when a person is alleged to have committed an offence. It is lawful for a police officer to arrest without warrant any person alleged to have committed a felony, misdemeanour or simple offence.[37]

The police officer can also arrest without warrant any person designing to commit any offence, if it appears to him that the commission of the offence cannot otherwise be prevented.[38]

A magistrate and a judge may, within their magisterial district or judicial division, arrest or direct the arrest of any person who commits an offence in their presence, without a warrant of arrest[39] provided they could have lawfully ordered the arrest if the facts were stated by another person on oath.[40]

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37 Section 10, CPA.

38 Section 55, CPA, section 26 (e) CPC.

39 Section 15, CPA, section 29 CPC.

40 Section 16 (1), CPA, section 30 (1) CPC.

A private person may arrest any person who commits an indictable offence in his presence or whom he reasonably suspect of having committed a felony or a misdemeanour by night.[41] After the arrest, the arrestee must, without unnecessary delay be delivered to a police officer or the nearest police station.[42]

It should be noted that save for the instances[43] where force can be used to effect arrests, it is unlawful if force is used[44]. To this end section 261 of the CC provides that ï

> It is lawful for a person who ... in making any arrest, and for any person lawfully assisting him, to use such force as may be reasonable to overcome any force used in resisting such arrest.

Amadi in his comment on section 261 of the CC stated that apart from the fact that the provision envisages a situation where resistance is offered during arrest, any person whether or not he is a police officer can arrest an offender. The arrest can be in respect of any offence since no category of offence is specified in the provision. He stated further that the manner of arrest should not be forcible beyond the mere touching or confining the body as provided in section 3 of the CPA. He concluded that force can be used

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41 Sections 12, CPA, section 28 (d), CPC, See *Nweke v. The State* (1965) 1 All NLR 114.

42 See case of *Lewis v. Tims* (1952) 1 All ER 1203.

43 The use and nature of force applied in each case depends on the reaction of the suspect. See, *The State v. Patrick Nwankwo* (unreported) No.E/IIC/82 delivered on 1/11/82 by Ubaezonu, J. (as he then was) High court Enugu; *Patrick Nwankwo v. The State* (unreported) No. FC A/8283, delivered on 23/3/84 CA, Enugu Division; *Uzoka v. The State* (1990) 6 NWLR (Pt 159) 680; *Ibe v. State* [1993]7 NWLR (Pt. 304) 185 referred to in G. O .S. Amadi, *op. cit*. p. 42.

44 *R. v. Shaw exparte Kane* (1915)27 DLR 494 (NB); *Truscott v. Carpenter and man* (1697)1 Ltd. *Rayzza; L. H. Leigh, Police Powers in England and Wales*, 1979, p.29.

when the person being arrested resists arrest and the force used should be such as to reasonably overcome any force used in resisting the arrest[45].

We agree with the learned author but we wish to add that if an arrest is held to be unlawful then there is no justification in not vitiating any subsequent trial. Holding the officers only liable in criminal[46] or civil[47] action or both is not good enough. It is desirable that if arrest is unlawful, then the trial should be null and void.

7.1.3 Treatment of Arrested Offender

On arrest, the offender shall be informed by the officer making the arrest of the cause of arrest[48] except in a case where he is apprehended in the actual course of the commission of the crime or is pursued immediately after the commission. For instance, in the case of an officer at a border station who stops a smuggler carrying contraband and the smuggler takes to his heels.

The offender should then be taken to the station where the legal seat officer will make the necessary arrangement for prosecution[49]. While in custody, the offender should be afforded reasonable facilities for obtaining legal advice for his defence and for securing his release on bail[50].

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45 Amadi, *op. cit*. p.43.

46 *R. v. Shaw*, *exparte Kane, supra.*

47 *Ibid*.

48 *Christie v. Leachinsky, supra*

49 There will be detail discussion in chapter 8.2 under criminal proceedings , *infra*

50 Chapter 8.2 *infra* section 36 (6)(b)(c) 1999 Constitution

The person so arrested shall not be subjected to handcuffs unless there is reasonable apprehension of violence or it is expedient for the safety of the person arrested[51]. Arrest has continued to be a serious enforcement measure in the operations of the NCS. Arrest is often related to Detention and Seizure[52]. For instance in February 2009, operatives of the NCS Federal Operations Unit Zone óAô, Ikeja, Lagos seized three trailers and two buses belonging to Dangote Group, over alleged smuggling and at the same time arrested some staff of the company[53].

In 2004 some smugglers and their customs accomplices were arrested in connection with one of the largest customs seizures of metal scraps and teak wood in 300 containers being exported illegally through the Lagos/Niger and Cross marine terminals[54]. The consignment was worth about ₦450 million and about 75 people were arrested[55].

In 2008 the FOU at one time arrested six suspects who brought in 526 bales of Austrian/Swiss lace materials, 362 bales of assorted textile materials and 380 bales of second hand clothing and others[56].

Under section 5 of the Customs Laws of Brunei[57] unlike section 8 of the CEMA gives the power of customs officers to some category of police officers. The section provides:

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51 Section 4, CPA and section 37, CPC.

52 This shall be the focus in chapter 7.2 and 7.3 respectively, *infra*.

53 *Daily Independent*, February 16, 2009, p. 1

54 *Newswatch*, Monday, July 19, 2004, p. 3

55 *Ibid.*

56 *Vanguard*, Monday, October 27, 2008, p. 10

57 Cap 36, 1997.

> For the purposes of this Act, subject to the general direction and supervision of the controller, and all police officers not below the rank of inspector shall have and may exercise all the powers by this Act conferred on senior officers of customs, and all police officers below the rank of inspector shall have and may exercise all the powers by this Act conferred on officers of customs.

Section 106 of the Brunei Act unlike CEMA specifically provides for the officers power of arrest as follows:

> (1) any officer of customs may arrest without warrant.
>
> (a) any person found committing or attempting to commit, or employing or aiding any persons to commit, or abetting the commission of, an offence against this Act or any regulation made here under;
>
> (b) any person whom he may reasonably suspect to have in his possession any uncustomed or prohibited goods or any goods liable to seizure under this Act;
>
> (c) any person against whom a reasonable suspicion exists that he has been guilty of an offence against this Act or any regulation made here under;

The snag however is in the provision of subsection (2) that require any arrested person to be taken to a police station. The question here is that if the Brunei customs as an agency have the power to arrest and the police even deriving some power from them, why cannot they have their own station for enforcement purposes. In Nigeria, save for other offences that has to be transferred to the police, the customs has its own full enforcement machinery, which includes a station having of a cell where offenders can be kept.

In New Zealand, the Customs and Excise Act, 1996 provides that a customs officer or member of the police can arrest any offender under the

Act without warrant[58]. The power here is specifically provided under the Act and it is extended to both the customs officer and the police. Another interesting thing is the provision of subsection (3) where a customs officer arrests a person under a power conferred by the section, the officer shall, unless the person is sooner released, as soon as practicable call a member of the police to his or her aid and deliver the arrested person into the custody of that member of the police. This suggests that may be the duty to file any charge will be done by the police. A look at sub section (4) however is to the effect that if the person so delivered into custody is released by a constable without bail pursuant to section 19A of the Summary Proceedings Act 1957 of New Zealand, then the filing of an information shall be the duties of a customs officer and not of a constable. This system in our view is not a well developed system as the police and the customs should have their clearly defined role specified.

The position in Kenya[59] is related to the position in New Zealand section 173 of the Kenya Act provides:

> (1) An officer may, if he has reasonable grounds to believe that a person is committing, or has within the past year committed or been concerned in the commission of, an offence under this Act, arrest that person; and the officer may for that purpose use all reasonable force.
>
> (2) A person arrested in accordance with this section shall forth with be taken before a magistrate, or a police station to be dealt with according to law.
>
> (4) é for the purposes of this section the expression ñ*officer*ò includes a police officer.

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[58] Section 174(1), New Zealand Customs Act.

[59] Customs and Excise Act Cap 472 Laws of Kenya 1978

In Ghana,[60] section 235 of the Act is the same with section 8 of CEMA. It provides:

> For the administration of this Act, all officers shall have the same powers, authorities and privileges as are given by law to police officers.

Section 238 of the Ghana Customs Act unlike under the CEMA specifically provides that an officer may arrest and detain a person whom the officer reasonably suspects to be committing, or to have committed, or to be or to have been concerned in the commission of an evasion of or offence under this Act. Sub section (2) provides that the person can be arrested within seven years[61].

Even though differences exist in level of the power of arrest in the different jurisdictions, one point is clear and that is the effect of the power of arrest as an enforcement measure. The arrest by an officer, police officer and customs officer depending on what is used in the jurisdiction becomes a serious step to setting the law in motion against any offender of the customs law. All the countries mentioned recognizes the importance of the police in the fight against crime. Save for Brunei, New Zealand and Kenya that gave power to the police under their Customs Act, Nigeria and Ghana gave the customs the powers of the police. It is however surprising that even where power was given to the police in Brunei, New Zealand and Kenya, the taking

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60 Customs, Excise Preventive Service Management Act, 1993

61 Compare with the section 176 (3) of CEMA, which provides that no proceedings shall be instituted except within seven years of the date of the commission of the offence.

of an arrested person to a police station is a confirmation of our submission that the police are held in high esteem in crime prevention and enforcement.

7.2 Search

The relevant section under the CEMA is 147 which provides:

> 1) Without prejudice to any other power conferred by this Act, where there are reasonable grounds to suspect that anything liable to forfeiture under the customs and excise laws is kept or concealed in any building or place, any officer may, without a warrant, enter that building or place at any time, whether by day or night, and search for, seize, detain or remove any such thing and may, so far as is reasonably necessary for the purpose of such entry, search, seizure, detain or break open any door, window or container and force and remove any other impediment of obstruction.
>
> 2) Where there are reasonable ground to suspect that any steel, vessel, utensil, spirits or materials for the manufacture of spirit is or are unlawfully kept or deposited in any building or place, the provisions of sub-section (1) of this section shall apply in relation to any police officer as it would apply in relation to an officer.

When an officer suspects any person of committing any of the offences under the CEMA, it may be necessary as an enforcement measure to conduct a search. The purpose of the search is to look for any material that may be used as evidence at the trial of the accused person. The same too applies to the police. Even where a complaint is made before a police officer about the commission of an offence, it may be necessary on the basis of the complaint, for the premises of the offender to be searched.[62] For some offences as stealing, it may be necessary to conduct a search in order to retrieve what is alleged to have been stolen. Similarly for drug offences,

such as being in possession of cocaine, it may be also imperative to conduct a search, in order to retrieve the drug.[63] During investigation generally, it may become necessary to conduct a search so as to reveal certain things.

The search may be conducted with or without a search warrant, depending on the subject-matter of the search. The search may also be of a public or private place or some other things.[64] According to Amadi,[65] the search in a public place should not be a major concern as the police have free access to a public place to exercise the power of search.

The protection of a private place from intrusion however becomes of paramount importance. This, he went further traces its origin beyond modern legal thought.[66] Traditionally, a personôs private place particularly his dwelling house, is his refuge and that is why when a person is being pursued for what ever purpose and he runs into his house, the pursuer normally stops the chase in recognition of the sanctity of his abode.[67] This became evident in the Anglo-Saxon tradition to the effect that an English manôs house is his castle.

Sequel to this, the Police therefore lack the powers, unless permitted by law to, enter a dwelling house to conduct a search or carry out other

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62 Oluwatoyin, *op. cit*, p. 113

63 *Ibid*.

64 For instance search of premises, persons, vehicles, ships or Aircraft

65 Amadi, *op. cit,* p. 135

66 *Ibid*.

67 *Ibid*.

lawful duty.[68] This became celebrated at common law in the case of *Entick v. Carrington*[69] where it was held that by the laws of England every invasion of property, be it ever so minute, is a trespass.

The decision in this case is amplified in the 1999 Constitution. Section 37 thereof provides:

> The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communication is hereby guaranteed and protected.

This provision in essence guarantees and protects the privacy of the citizens. The power given to a customs officer to conduct search is automatic as no search warrant is required. [70]

The CEMA has tried to specify the circumstance when a search can be made. This is purely an attempt to strike an acceptable balance so as not to negate the provisions of section 37 of the Constitution to freedom from encroachment of private property. It is in the bid to strike a balance between the individual privacy and the security of the public from criminal harm that section 45 (1) (1) and (b) of the Constitution provides:

> 45 (1) Nothing in section 37, 38; 39, 40, and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society.
>
> (a) In the interest of defense, public safety, public order, public morality or public health; or

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68 *Ibid*.

69 (1865) 19 St Tr. 1029; 95 ER 807.

70 Section 147 (1), (2) of CEMA.

(b) for the purpose of protecting the rights and freedom of other persons.[71]

The officers should however, in the exercise of the power of search act within the provisions of the law.

Consideration is now given to the following as provided for in the CEMA.

7.2.1 Search of Vehicles, Ships or Aircraft

Customs officers are empowered to search any vehicle, ship or aircraft reasonably suspected of carrying goods liable to forfeiture under the CEMA. The police here, unlike in the search of premises, can conduct a search on a vehicle at a mounted road block without a search warrant. This is derived from the power of police to prevent and detect the commission of crime.[72] Though not expressly mentioned this power it is submitted extends to the search of a ship or Aircraft.

Section 149 (1) CEMA expressly provides that:

> Without prejudice to any other power conferred by this ordinance, where there are reasonable grounds to suspect that any vehicle or ship is or may be carrying any goods which are

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[71] Section 38 provides for right to freedom of thought, conscience and religion. Section 39 provides for right to freedom of expression and the press.
Section 40 provides for right to peaceful assembly and association.
Section 41 provides for right to freedom of movement.

[72] See also section 35, Police Act.

(a) Chargeable with any duty which has not been paid or secured; or

(b) In the course of being unlawfully removed from or to any place; or

(c) Otherwise liable to forfeiture under the customs and excise laws, any officer or police officer may stop and search that vehicle or ship.

The section did not expressly mention the power to search aircraft. We however submit that it can be inferred since an aircraft can conveniently be suspected of carrying any goods which duty has not been paid or secured.

It is also better that the power of search as provided in section 149 should be read in conjunction with section 21 of the Act which provides for the power of boarding a ship or aircraft.[73]

Section 21 provides:

1) At anytime while a ship or aircraft is within Nigeria, or a vehicle is at a customs station or on an approved route, the Master of such ship, the commander of such aircraft or the person in charge of such vehicle shall,

   (a) Permit an officer to board the ship, aircraft or vehicle and inspect it and any goods carried therein and any documents relating to the ship, aircraft or vehicle or to the goods or persons carried therein.

   (b) Answer all such questions as an officer may put to him concerning the ship, aircraft or vehicle or its voyage, or the goods or persons carried therein

2) Any officer shall have the right of access at any time to any place to which access is required for the purposes of sub-section (1) of this section.

3) If the Master of any ship or the commander of any aircraft or the person in charge of any vehicle neglects or refuses to provide means of safe access to and egress from the ship, aircraft or vehicle when required so to do, or refuses to answer any questions put to him by an officer under this section, he shall be liable to a fine of four hundred naira or to imprisonment for six months, or to both.

[73] See the NCS Boarding Code which provides further the powers of an officer to Board and Rummage any ship, aircraft and vehicle. Rummaging here is the intensive search of the ship or aircraft as the case may be.

4) An officer who has boarded a ship, aircraft or vehicle under this section may:

(a) remain therein for any period;

(b) lock up, seal, mark or otherwise secure any goods carried therein or any place or container in which they are so carried;

(c) require any goods to be unloaded and removed for examination or for the security thereof or unload and remove such goods for such purpose at the expenses of the master of the ship, commander of the aircraft or person in charge of the vehicle.

(d) require any container, locker or place to be opened and, without being liable to any prosecution or action at law for so doing, break open any such container, locker or place which is not opened on demand.

5) Where an officer in exercise of the power conferred by paragraph (a) of sub-section (4) of this section who has boarded a ship remains there for more than twelve hours, it shall be the duty of the master of the ship to provide that officer with free boarding and lodging.

6) Any goods found concealed on board the ship, aircraft or vehicle shall be forfeited.

7) Where in pursuance of any power conferred by this Act, an officer has placed any lock, mark or seal upon any goods in any ship, aircraft or vehicle, or upon any place or container in which such goods are kept, then if, without the authority of the proper officer, at any time while the ship, aircraft or vehicle is within Nigeria that lock, mark or seal is willfully opened, altered or broken, or if, before that lock, mark or seal is lawfully removed, any such goods have been carried away, the master of the ship or commander of the aircraft or person in charge of the vehicle shall be liable to a fine of two hundred naira.

The above provision is well embracing in the search of a ship, aircraft and vehicle. It should therefore, as suggested above be read in conjunction with section 149.

The CEMA further provides for punishment when stopped and the offender fails to stop.

Section 149 (2)

> If, when so required by any officer or police officer, the person in charge of any such vehicle or ship refuses to stop or to permit the vehicle or ship to be searched, he shall be liable to a fine of two hundred naria.

The punishment of two hundred naira, we submit, is inadequate for the offence. We submit further that since section 21 is wide enough to cover the three situations as intended by section 149 it should suffice.[74]

The only thing that needs to be done is to increase the penalty of four hundred naira as provided in section 21 (3) of the act. Another problem in the interpretation of section 149 is the application of the objective test of reasonability. The section provides that é where there are reasonable ground to suspect é the question is what then will amount to ñreasonable groundsò? To provide an answer, it becomes a matter of who is raising the suspicion. It often then become difficult to determine what is reasonable ground. The correct judicial attitude should be that in order to avoid abuse of this ground that appears omnibus, the court should not only rely on the subjective view of the officer but should go ahead to examine whether the reasonable ground can pass objective test. In the case of arrest which is relevant also in the case of search Amadi[75] was quick to observe as follows:

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[74] That is the search of ship, aircraft and vehicle.

[75] Amadi, *op cit.* p. 72.

> The validity of arrest here depends on whether the requirements set out in the provisions are known to the police officer at the time of arrest or he reasonably believes the conditions exist or there is a reasonable cause to make him believe that they exists. Reasonable suspicion is, therefore, a prerequisite for a valid arrest.

The statements of Scott L. J in the case of *Dumbell v Roberts*[76] discussing the circumstances which may generate reasonable suspicion becomes relevant. He said:

> The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest in a very modified degree, it is true, but at least to the observant, receptive and open-minded and to notice any relevant circumstances which points either way, either to innocence or to guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but where there is no danger of the person who has ex-hypothesis aroused their suspicion, that he probably is an ñoffenderò attempting to escape, they should make all presently practicable enquires from persons present or immediately accessible who are likely to be able to answer their enquires forthwith. I am not suggesting a duty on the police to try to prove innocence; that is not their function, but they should act on assumption that their *prima-facie* suspicion may be ill-founded. That duty attaches particularly where slight delay does not matter because there is no probability in the circumstances of the arrest or intended arrest, of the suspected person running away. The duty attaches, I think, simply because of the double-sided interest of the public in the liberty of the individual as well as in the detection of crime.

Amadi[77] also observed that a reasonable suspicion can be disproved by a reasonable explanation by the suspect. If the suspect can reasonably explain

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[76] 1944 1 All ER 326 at p. 329 referred in Amadi, *op. cit.* p. 73.

[77] *Op. cit*. p. 77.

the situation to his advantage, and there is nothing to counter it, any arrest at this point will not be reasonable.[78]

Section 21 is not fraught with this problem rather it goes straight to provide for the powers of the officers to board and perform his normal duties including search.

At this point, we shall look at other jurisdictions and see what is obtainable.

For instance section 193 and section 246 of the Ghana Act, just like section 21 of the CEMA clearly provided for the power of search *via* boarding to search any ship, aircraft and vehicle.

Section 193 provides:

> An officer may go on board a coasting aircraft or ship in a port or place in Ghana or on a coasting ship at a period of her voyage, and section 246 applies accordingly.

Section 246 provides:

> 1) An officer on duty may board an aircraft or ship within Ghana and stay on board for a period, and shall have free access to every part, with power
>
> (a) to search the aircraft or ship.

[78] Hogg v. Ward (1958) 3 H & N 417 referred in Amadi, *op. cit.* p. 77.

Failure to cooperate with the officer which attracted a fine of four hundred naira in the Nigeria[79] attracts a fine of not less than fifty thousand cedis.[80]

The snag however is in the provision of section 245[81], which is fraught with issue of reasonable suspicion as in section 149 of the CEMA.

Section 245 provides:

> Any officer may on reasonable suspicion stop and examine a ship, aircraft or vehicle to ascertain whether an unaccustomed, prohibited or restricted goods or any goods on which the duties or taxes have not been paid or secured by certificate or otherwise as required by law are contained in it.

The other sections[82] dealing with boarding and search like that of section 21 of CEMA should have been better except that vehicle is not mentioned in those sections. That being the case, section 245 should then be left to deal with only vehicles or it should be read in conjunction with section 193 and 246. It is submitted that section 21 of CEMA has the advantage of dealing with ship, aircraft and vehicles.

In Brunei, the power of search of ships, aircraft and vehicles was clearly brought out in two sections.[83]

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79 Section 21 (3), CEMA.

80 Section 246 (5), Ghana Act

81 *Ibid*.

82 Section 193 and 246, Ghana Act.

83 Section 99 and 101 Customs Laws of Brunei, Cap 36, 1997

Section 99 provides:

> 1) A proper officer of customs may ï
>
> (a) go on board any vessel or aircraft in any customs port or customs airport or place or within territorial waters;
>
> (c) rummage ands (sic) search all parts of such vessel or aircraft for prohibited or uncustomed goods;

Section 101 (2) provides:

> Any officer of customs may stop and examine any vehicle for the purpose of ascertaining whether any uncustomed or prohibited goods are contained therein, and the person in control or in-charge of such vehicle shall, if required so to do by such officer, stop such vehicle and allow such officer to examine the same.

The provisions of Brunei is not fraught with the issue of reasonable suspicion as in, that of Nigeria and Ghana.

Under the Indian Customs Act, 1962 which we think is quite interesting brought the power of search in respect of four things under one section.[84]

Section 106 of the Act provides:

> Where the proper officer has reason to believe that any aircraft, vehicles or animal in India or any vessel within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods, he may at any time stop any such vehicle, animal, vessel and in the case of an aircraft; compel it to land, and ï
>
> (a) rummage and search any part of the aircraft, vehicle or vessel;
>
> (b) examine and search in the aircraft, vehicle or vessel or on the animal.

[84] Search of aircraft, vehicle, animal and vessel, which the section refers to as Power to Stop and Search Conveyances.

The section as if recognizing the difficulty in stopping a vessel or aircraft provided that if a vessel fails to stop, chase (sic) may be given thereto by any vessel and if after a gun is fired as a signal the vessel fails to stop or the aircraft fails to land, then they can be fired upon.[85] In the case of any vehicle or animal, the proper officer may use all lawful means to stop it, and where such means fail, the vehicle or animal may be fired upon.[86]

The Indian Act which brings vehicle, vessel, aircraft and animal under one section is clearly unique from the provisions of Ghana, Nigeria and Brunei. The introduction of animal is a reflection of its recognition as a serious method that can be used to smuggle.

Under the Kenya Act,[87] the power of search was in respect of three things.[88] And it was brought under one section as in the case of India.

Section 170 (1) provides:

> An officer may, in the course of his duty, stop, board and search an aircraft, vessel or vehicle within Kenya and may examine, lock up, seal, mark or otherwise secure any goods on the aircraft, vessel or vehicles, and for the purposes of the examination or security of any goods the officer may require the goods to be unloaded or removed, at the expense of the master of the aircraft or vessel, or the person in charge of the vehicle.

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85 Section 106 (2) (a) of the Indian Act.

86 Section 106 (2) (b) *ibid*.

87 Customs and Excise Act, Cap. 472, Laws of Kenya, 1996.

88 Power to board and search aircraft, vessel or vehicle.

The normal power of boarding and conducting examination which often is exercised in the course of an officerôs duty comes to the fore here. Ordinarily any ship or aircraft within a customs area is subject to be boarded and rummaged.

Failure to co-operate with the officer attracts a fine not exceeding sixty thousand shillings[89] and contravention of any other provisions of the Act attracts three years imprisonment or one million, five hundred thousand shillings.[90]

The penalty in Kenya is a thousand shillings like that of Ghana which is fifty thousand cedis[91] compared to a similar offence in Nigeria which is four hundred naira,[92] we submit that the fine in Nigeria is comparatively low this calls for a review of section 21 (3) of CEMA.

Section 149 (2) of CEMA which provides for a fine of two hundred naira is not better than section 21(3) which provides for a fine of four hundred naira. Having argued that the provisions of section 21 is adequate to cover the search of vehicles and ships as contemplated by section 149, we submit further that since the punishment here is only two hundred naira, the best thing is to collapse the sections into one and increase the punishment.

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89 Section 170 (3), of the Kenyan Act.

90 Section 170 (5), *ibid*.

91 Section 246 (5), Ghanaian Act

92 Section 21 (3), CEMA

7.2.2 Search of Persons

The CEMA empowers officers to search any person reasonably suspected of carrying anything chargeable with duty with intent to evade payment of duty, or any person carrying any articles, the importation or exportation of which is prohibited.

Further more, a woman can only be searched by a woman, which must be with strict regard to decency. Though the CEMA does not prohibit the search of a man by a woman, it is desirable that a man should be searched by a man with strict regard to decency.[93]

The limitation that a woman may only be searched by another woman is restricted to the search of the body and does not extend to anything appurtenant to the woman, such as the womanôs handbag.

The relevant provisions is section 150 of the CEMA ï

1) Where there are reasonable grounds to suspect that any person to whom this sections applies is carrying any article ï

(a) which is chargeable with any duty which has not been paid or secured; or

(b) the importation or exportation of which is prohibited, any officer or any person may search him and any article he has with him.

[93] Section 165 (5) of the NCS bill, 2012 to this end seeks to provide that personal searches shall be carried out by same sex customs officers as the person being searched, except where there is an immediate threat to an officer or public safety in which case, steps necessary to minimize or alleviate the threat shall be taken

Provided that:

(i) The person to be searched may require to be taken before a magistrate or officer appointed by the Board, for the purpose of this paragraph, who shall consider the grounds for suspicion and direct accordingly whether or not the search is to take place.

(ii) No female shall be searched in pursuance of this section except by a female.

This provision in effect means that an officer cannot in certain situations act independently in exercising the power to search persons. The officer may have to take the person to be searched before a magistrate who shall then determine the grounds for suspicion if the person to be searched so require. The magistrate shall direct accordingly if he is satisfied that there are reasonable grounds for suspicion as stipulated in section 150 1(a) and (b) of CEMA. It is submitted that this presupposes the obtaining of a search warrant since a magistrate is involved.

In the case of an officer appointed by the Board, it could be any immediate superior officer. If he cannot determine the reasonable ground for suspicion, then the most superior officer in the Customs Area where the matter arises may be invited to determine the reasonable grounds before the search is conducted.

Seven categories of persons are further listed upon whom this power of search can be exercised.

Section 150 (3) of CEMA provides that:

This section applies to ï

(a) any person who is on board or has landed from any ship or aircraft.

(b) any person entering or about to leave Nigeria

(c) any person within the wharf area of a customs port

(d) any person in a customs aircraft.

(e) any person within a customs area

(f) any person travelling from or to any place, which is on or beyond the frontier.

(g) any person who the officer may suspect has received any goods from any such persons.

Our comment on this provision is that while it will not be difficult to determine that item (a ï f) can easily be within a customs area, that cannot be the case with item (g). The person who receives such goods may not necessarily be within a Customs Area. Section 150 (3) (g) suggests that such search could also be effected if the suspect is not in a custom area.[94]

Under the Police Act, a police may detain and search any person whom he reasonably suspects of having in his possession or conveying in any manner anything which he has reason to believe have been stolen or otherwise unlawfully obtained.[95] The reasonable ground under the CEMA is also applicable under the Police Act in determining the validity of a search.[96]

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94 The NCS bill, 2012 in section 31 (2) (a) and (b) seeks to provide further for a customs zone to include a place suitable, or already recognized as a centre of international trade, and export processing or free zone, suitable to provide a high level of service in terms of traffic flows and clearance demands.

95 Section 29, Police Act.

96 This is the same as the objective test employed by the Courts in determining whether an arrest by a police man without a warrant of arrest was lawful or unlawful. See *Jackson v. Omorokuna* 1981 (1) NCR 283, *Commissioner of Police v. Obolo* (1989) 5 NWLR (Pt. 120) 130.

A police officer arresting a person or to whom a person arrested by a private person is handed over, may search the person so arrested.[97] Any person arrested and detained in lawful custody may be subjected to a medical examination where such examination will afford evidence of the commission of an offence.[98] Any person suspected of concealing on their bodies hard drugs, such as cocaine and heroin can also be subjected to medical examination in order to retrieve the drugs concealed on his person. The police officer may remove from the arrestee anything found on him other than necessary clothing.[99]

Also, under the Police Act, section 29 provides:

> A police officer may detain and search any person whom he reasonably suspects of having in his possession or conveying in any manner anything which he has reason to believe have been stolen or otherwise unlawfully obtained.

Under this provision no search warrant is required save that there has to be reasonable suspicion that something was stolen or unlawfully obtained. The section seems to be restrictive in nature as there may be other reasons for the search of a person. For instance, a person can be searched if suspected to be in possession of smuggled goods. Smuggled goods are not necessarily stolen goods. Where any property had been taken from a person searched and the person is not charged before any court but is released on the ground that there is no sufficient reason to believe that he has committed

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97 Section 6 (1), CPA, section 44 (2), CPC.

98 Section 6 (6), CPA, section 127, CPC.

99 Section 6 (1), CPA, section 44 (2), CPC.

any offence, any property so taken from him shall be restored to him.[100] It is however submitted that by virtue of the general powers of the police to prevent and detect crime, he can stop and search any person he suspects[101]

Section 236 of the Ghanaian Act provides for the power to search persons just like section 150 of the CEMA. There is however a restriction on the power of search which is similar to the proviso to section 150 of the CEMA. The proviso is to the effect that the person to be searched may require to be taken before a magistrate or officer appointed by the Board, for the purpose of the paragraph, who shall consider the grounds for suspicion and direct accordingly whether or not the search is to take place.

The restriction to section 236 of the Ghanaian Act is in section 237 which provides:

> 1) Before a person is searched that person may require to be taken as soon as possible before the commissioner or any other superior officer who shall discharge that person if there is no reasonable cause for the search, but shall otherwise direct that that (sic) person be searched.
>
> 2) A female shall not be searched except by a female.

The ñtakenò before the commissioner[102] may not necessarily be a requirement of a search warrant as in the case of Nigeria where a magistrate is mentioned but it however means a kind of approval from a higher authority.

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100 Section 56 (5), CPA.

101 Section 4, Police Act.

102 The Commissioner is the head of the Customs, Excise and Preventive Service. How practicable can he be contacted always before a search is conducted.

Under the Kenyan Act, section 172 (1) provides for the power to search a person and section 172 (2) provides that a female shall not be searched except by a female. The snag however is the discretion given to the person to be searched as provided in section 172 (3) of the Act.

> Where an officer informs a person that he proposes to search him, then that person shall, if he so requires, be taken forthwith before a magistrate, the commissioner or any other superior officer, who may, if he sees no reasonable causes for the search, order that person not to be searched.

The reference to a magistrate here, we submit as in the case of Nigeria presuppose a search warrant, which however in practice is not applicable.

In Brunei, the section of the relevant Customs Act dealing with the search of persons is section 103, which provides:

> Any person landing, or being about to land, or having recently landed, from any vessel or aircraft, or leaving any vessel or aircraft in territorial waters, whether for the purpose of landing or otherwise, or entering or having recently entered Brunei by land shall, on demand by any proper officer of customs either permit his person goods and baggage to be searched by such officer, or together with such goods and baggage accompany such officer to a customs office or police station and there permit his person, goods and baggage to be searched by an officer of customs.

Provided that:

> (a) any person who requests that his person be searched in the presence of a senior officer of customs shall not be searched except in the presence of and under the supervision of such officer, but such person may be detained until the arrival of such officers, or taken to any customs office or police station where such officer may be found;
>
> (c) No female shall be searched except by a female.

The section talks about persons arriving or leaving Brunei. The interpretation here means that the search must then be done within a customs area as in the case of Nigeria. The proviso (a) gives discretion to the person to request that his person be searched in the presence of a senior officer of customs. This discretion we submit is unnecessary as the officers should be the one to exercise the discretion to search.

Section 100 of the Indian Act provides for five categories of persons that the search could be applicable and all that tend to be those within a customs area.

Section 101 unlike the Nigeria provision specifically provides for the power to search suspected persons in certain other cases.[103] If the person to be searched so requires he should be taken without delay before a gazette officer of customs or magistrate who will determine the grounds for the search.[104]

No female shall be searched by anyone except by a female.[105] There is a further provision for the power to screen or x-ray bodies of suspected persons for detecting secreted goods.[106] Such a person shall be taken before

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[103] The Commissioner of Customs may by special order authorize same.

[104] Section 102 (1) of the Indian Act.

[105] Section 102 (5), *ibid*.

[106] Section 103 (1), *ibid*.

a radiologist possessing qualifications recognized by the government and such a person shall be screened or x-rayed.[107]

Where on receipt of a report from a radiologist, the magistrate, any person has any goods liable to confiscation secreted inside his body, he may direct that suitable way of bringing out such goods be taken on the advice and under the supervision of a registered medical practitioner; provided that in the case of a female no such action shall be taken except on the advice of a female registered medical practitioner.[108]

Under the New Zealand Act, there is no distinction as to whether only a woman can be searched by a woman. The search however is done with regard to decency. Section 149A of the New Zealand Act provides for a preliminary search of a person by use of aids before the real search if need be.

149 A

1) A customs officer or member of the police may conduct a preliminary search of a person to whom this section applies, and may detain that person for the purpose of conducting that preliminary search.

2) A preliminary search is a search that ï

   (a) involves little or no physical contact between the person conducting the search and the person being searched; and

   (b) is conducted by using an aid or aids such as a dog, or a chemical substance, or x-ray or imaging equipment, or some other mechanical, electrical, or electronic device, or other similar aid, but not by any invasive means.

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[107] Section 103 (4), *ibid*.

[108] Section 103 (6), *ibid*.

> 3) If, after a preliminary search under sub-section (1) a customs officer or member of the police has reasonable cause to suspect é , then before the proper search can take effect.[109]

This seems to be a better provision as there is great care not to rush into the search of persons. It is only after the use of the necessary aid and there is the need to proceed before the proper search can commence. We submit that this provision has offered a serious protection against any abuse of search here. Search of a person is a serious matter and any unjustifiable or an arbitrary use of it may lead to serious consequence.

7.2.3 Search of Premises

The power of search of premises as provided under the CEMA deviates from the general trend whereby for premises to be searched, a search warrant must be obtained by the police. The relevant section is 147 which provides:

> 147 (1)
>
> > Without prejudice to any other power conferred by this Act, where there are reasonable grounds to suspect that anything liable to forfeiture under the customs and excise laws is kept or concealed in any building or place, any officer may, without a warrant, enter that building or place at any time, whether by day or night, and search for, seize, detain or remove any such thing and may, so far as is reasonably necessary for the purpose of such entry, search, seizure, detain or break open any door, window or container and force and remove any other impediment of obstruction.

[109] Section 149B of the New Zealand Act provides for the search of persons if there is reasonable cause to suspect that an item is hidden; section 149 BA provides for the search of person for dangerous items; Section 149C provides for the seizure of items found as a result of the search; section 149 D provides for the rights of persons to be searched.

This provision to all intents and purposes gives a very wide power to an officer to search a premise. It expressly excludes the issue of obtaining a search warrant. It only provides for reasonable ground of suspicion,[110] which we submit, is often objective as in the case of arrest without warrant.[111]

The section tends to fall in breach of section 37 of the 1999 Constitution, as amended, notwithstanding its derogation in section 45 (1) of the constitution.

Section 37 provides:

> The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected

Section 45 (1) provides:

> Nothing in sections 37, 38, 39, 40, and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society.
>
> (a) In the interest of defence, public safety, public order, public morality or public health; or
>
> (b) for the purpose of protecting the rights and freedom of other persons.

The breach of the constitution by section 147 of CEMA stems from the fact that it seems to make a customs officer a law unto himself. The only possible check is the provision of ñreasonable groundsò of suspicion.

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[110] Section 233 (2) of the NCS bill, 2012 seeks to provide for the obtaining of a written authorization from the Comptroller-General or his designee, which under sub-section (3) can be dispensed with by reason of exigent circumstances. Exigent circumstances is define in sub-section (4) to include situations in which the delay necessary to obtain a written authorization would result in danger to human life or safety, the loss or destruction of anything liable to seizure or evidence of a suspected violation of customs and excise laws.

[111] See *Jackson v. Omorokuna*; *supra. Commissioner of Police v. Obolo*; *supra.*

For this reason the courts must be circumspect in interpreting the provision in favour of the customs officer. The onus should be on the customs officer to prove reasonable grounds, and failure to do so renders his search under the section unlawful. In *Joseph Odogu v. A.G* of the Federation[112] referred to in Human Rights Law Report of Africa (HRLRA) 2000, 1 ï 226 Vol. 2. It was held that a fundamental right is a right guaranteed in the Nigerian Constitution and it is a right which every person is entitled, when he is not subject to the disabilities as enumerated in the constitution, to enjoy by virtue of being basic and fundamental that they are entrenched in a particular chapter of the constitution. One of such right is the right to personal liberty[113].

In ordinary situations search of premises is conducted between 5 am. and 8 pm.[114] but under the CEMA the search can be done at any time, whether by day or night, there is no limitation of time. Power is also given to an officer to break any impediment or obstruction preventing him from conducting a search. This in effect means that there should be no hindrance of whatever nature at all. The officer must be allowed access into the premises to be searched.

Section 147 (2) further provides that:

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112 S.C 58/1993 p. 86

113 Per Adio J.S.C

114 Section 11 of CPA.

> Where there are reasonable ground to suspect that any steel, vessel, utensil, spirits or materials for the manufacture of spirit is or are unlawfully kept or deposited in any building or place, the provisions of sub-section (1) of this section shall apply in relation to any police officer as it would apply in relation to an officer.

The sub-section is an extension of the power of search to cover other matters as enumerated in the provision and also extends the power to a police officer who may act in the same way a customs officer will act. This is only in so far as the matters enumerated are concerned. Officers are advised to preferably conduct searches in the presence of other independent persons who could serve as witnesses especially in circumstances where allegation of planting the items is raised by the offender.

It is submitted that the above provisions of the CEMA is a deviation from the general trend that for a premises to be searched, a search warrant must be obtained by the police. However, if a person to be arrested under a warrant of arrest is suspected of being within a premise, the premises may be searched for the person to be arrested without a search warrant.[115] A search warrant may be issued by a Magistrate when he is satisfied by information on oath and in writing that there is reasonable ground for believing that any building, ship, carriage, receptacle or place is being used for the commission of an offence.[116] It can also be issued where the search will further the purpose of any investigation, inquiry or trial.[117]

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[115] Section 7, CPA; section 34, CPC.

[116] Section 107 (1), CPA.

[117] Sections 74 and 75, CPC.

Under the Police Act,[118] a superior Police Officer[119] may by authority under his hand authorize any police officer to enter any house, shop, warehouse, or other premises in search of stolen property and search therein and seize and secure any property he may believe to have been stolen, in the same manner as he would be authorized to do if he had a search warrant, and the property seized, if any, corresponded to the property described in such search warrant.

However, such written authority may only be given where the premises to be searched have been in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves or of any offence involving fraud or dishonesty and punishable by imprisonment within the preceding twelve months. It shall not be necessary on giving such authority to specify any particular property provided that the officer granting the authority has reason to believe generally that such premises are being made receptacle for stolen goods.

Section 28 of the Police Act is restrictive in nature. The emphasis is on stolen goods. The question is: can the police invoke this authority so as to conduct search for other offences, which may not be related to receiving

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[118] Section 28 thereof. This can be best described as search warrant under the Act.

[119] A superior police officer is defined under section 2, Decree No. 23 of 1979 as amended to mean any police officer of the ranks above a cadet Assistant Superintendent of Police (ASP).

stolen property? The answer seems to have been provided by Amadi[120] when he said:

> It follows, therefore, that a superior police officer has no power to authorize entry and search of a private place for anything in connection with any crime, with the exception of the offence of stealing. However, while exercising these powers, a police officer is entitled to act in a similar manner as if he had been issued a search warrant by a magistrate. Consequently, the same principles of law will govern the exercise of the powers both under a warrant and under the authority of a superior police officer.

In practice instead of a recourse to the search warrant issued by a magistrate, which is wider in scope, the police hide under section 28 of the Police Act to conduct search. Generally, under the CEMA the officers have the power to break any impediment or obstruction preventing him from conducting a search. In the case of the police, he can only break in and out if in the execution of the search warrant free ingress is not allowed.[121]

Under the CPC,[122] it is provided that a Search Warrant must be executed whenever possible in the presence of two respectable inhabitants of the neighbourhood to be summoned by the person executing the warrant. If the premises to be searched are occupied by women in Purdah, provided that the women are not the persons to be arrested, the person executing the warrant should allow the women to withdraw if they so wish.[123]

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120 Amadi, *op. cit*. p. 148.

121 Sections 112 CPA and 7 (2) CPC

122 Section 78 (1), CPC.

123 Section 79 CPC.

In theory, when a search warrant is to be executed on a premises, the person executing the search warrant should first be searched by the occupier of the premises in order to ensure that he does not plant whatever is the subject of search. This is hardly practicable. The person executing the search warrant may search any person within the premises whom he reasonably believes is concealing on his person whatever is being searched for.[124]

In the other jurisdictions considered, it is only Ghana that tends to have the same provisions as Nigeria, as no search warrant is required before a premises can be searched. Even though no search warrant is required the commissioner has to be satisfied by information that there is reasonable cause to suspect that an uncustomed, prohibited or restricted goods or goods on which the duties and taxes have not been paid or secured by certificates or otherwise as required by law are harboured, kept or concealed in any premises, and then issue a written order signed by him authorizing an officer to enter and search those premises, by day or by night, and to seize and take away any of the goods.[125]

This requirement even though not a warrant, we submit is a kind of effective check on the officers operating in the field. For the commissioner to be satisfied before giving an authority can be said to be a kind of warrant save that it is not the type given by a magistrate. Another consideration is

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[124] Sections 112 (3), CPA; 81 (i), CPC.

[125] Section 244 of the Ghanaian Customs Act

the fact that unless there is a kind of delegation of this power, it will lead to delay in operations for the commissioner to be engage in given the authority to search.

Under section 174 of the Kenyan Act,[126] a proper officer may in the course of his duty or if he has reasonable ground to believe that there are on any premises uncustomed goods or documents relating to uncustomed goods, or plant utilized for the manufacture of excisable goods contrary to the Act, enter upon and search those premises by day or by night, and for that purpose the proper officer may use all reasonable force and may require the assistance of, and take with him, another officer or a police officer and such assistance shall be given.

There is however a discretion of obtaining a search warrant under the provision of section 176 of the Kenya Act. [127]

176 (1)

> Without prejudice to any other power under this Act, where officer declares on Oath before a Magistrate that he has reasonable grounds to believe that there are in any premises.
>
> (a) uncustomed goods or documents relating to uncustomed goods; or
>
> (b) giant which has been utilized for, or materials used in the manufacture of excisable goods contrary to this Act, then the magistrate may by warrant under his hand authorise the officer to enter upon and search, with such force as may be necessary and by day or by night, the premises and to seize and carry away any uncustomed goods, plant or document relating to uncustomed goods found therein.

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126 *Op. cit*.

127 Kenyan Customs Act.

> 2) An officer in possession of a search warrant may require a police officer to assist him in the execution of the warrant, and a police officer so required shall render assistance accordingly.

With the general power to search premises in section 174 of the Kenya Act, which does not require warrant, it is most unlikely that the officer may want to come under section 176 of the Act that require a search warrant issued by a magistrate.

In New Zealand, a District Court Judge, Justice of the Peace, Community Magistrate, or Registrar (not being constable) may issue a search warrant in the prescribed form if he or she is satisfied on application by a customs officer in writing made on oath, that there are reasonable grounds to believe that there is in or on any place or thing:

> (a) anything that there are reasonable grounds to believe may be evidence of ï
>
> i) the commission of an offence against this Act or regulations made under this Act; or
>
> ii) the unlawful exportation/importation of goods, or
>
> (b) anything that there are reasonable ground to believe is intended to be used for the purpose of ï
>
> i) Committing an offence against this Act or Regulations made under this Act; or
>
> ii) Unlawfully exporting or importing goods; or
>
> (c) Anything that is liable to seizure under this Act. [128]

Unlike the provision of the CEMA, the provision here does not give any express power to the officer to search a premise. The Act however under section 171 provides for emergency warrant.

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[128] Section 167 (1) (a) (b) (c) of the New Zealand Customs Act.

Section 171 (1) of the New Zealand Customs Act provides:

> In any case where a district court judge or justice or community magistrate, or any registrar (not being a constable) is satisfied, on application made by a customs officer, that circumstances exist that would justify the grant of a search warrant under section 167 of this Act, but the urgency of the situation requires that the search should begin before a warrant under that section could with all practicable diligence be obtained, the District Court Judge or Justice or Community Magistrate, or any registrar (not being a constable) may, orally or in writing, grant an emergency warrant to the customs officer making the application to search for and seize the thing that is believed to be in or on a particular place, premises, or thing.
>
> 2) Any application for an emergency warrant may be made orally, but otherwise every such application shall comply with the requirements of section 167 of this Act.[129]
>
> 7) Every emergency warrant shall remain valid for 6 hours from the time when the authorization is given, and shall then expire.
>
> 8) As soon as practicable after an emergency warrant has expired, the customs officer who applied for it, or if that officer is not able to do so, another customs officer, shall provide a written report, in the prescribed form, to the judge or justice or community magistrate or registrar who granted the emergency warrant setting out the manner in which the emergency warrant has been executed and the result obtained by the execution of the warrant.

The provisions of the New Zealand Act with respect to search warrants and emergency warrants with all the necessary safe guards, we submit is a better provision than that of Nigeria and Ghana where no search warrant is required.

The provisions in Nigeria and Ghana are not only against the basic rules of criminal justice but offer no check on the powers of the officers. It

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[129] That is the issuing of a search warrant in the prescribed form on an application by a customs officer in writing made on oath.

is clearly a breach of the requirement of the authority of a warrant for entry and search.[130]

Section 244 of the Ghana Act is like section 28 of the Nigerian Police Act that requires the directive of a superior authority. Section 244 of the Ghana Act requires the commissioner to be satisfied and issue a written order before a premises can be searched. The question then as raised by Amadi[131] is, under what circumstances can there be lawful entry and search without the sanction of a warrant or other statutory authority? In providing an answer to this question, Amadi[132]pointed out two instances.[133] He submitted that, the occupier of premises may permit a police officer entry upon a request by the police officer. While obtaining permission to enter, he has a duty at the same time to inform the occupier of the reasons for seeking entry. He must be there to carry out lawful business in connection with his duties as a policeman. The business has to do with his duty of prevention or detection of crimes. If it will involve the search of the premises, the occupier has a right to be informed. Any reason for requesting entry must be clear and unequivocal and direct to the point. It is similar to giving reasons when effecting an arrest.[134] It is only when the occupier or any other person acting with his authority permits, that the police can enter

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130 Sections 107 ï 111, CPA

131 Amadi, *op. cit*, p. 138.

132 *Ibid*.

133 Entry with occupierôs consent and entry on emergency.

134 *Bailey v. Wilson* (1968) Crim. LR 617.

the premises.[135] Further to this is the fact that the occupier has to also consent to a search if required.[136]

A police officer in an emergency in order to prevent a crime can enter a private premises. This is further hinged on the authority of his duty to maintain law and order.[137] If however a search will be conducted, it must be with permission or a search warrant.

Under the customs law of Brunei, a search warrant may be issued by a magistrate upon a written information upon oath before a premises can be searched.[138] Under section 98 of the Brunei Act however, whenever it appears to any senior officer of customs that there is reasonable cause to believe that in a dwelling-house, shop, or other building or place there are concealed or deposited any prohibited or uncustomed goods or goods liable to forfeiture under the Act or any regulation made there under or as to which an offence under the Act or such regulation has been committed, and if he has reasonable ground for believing that by reason of the delay in obtaining a warrant such goods are likely to be removed, such officer may exercise in, upon and in respect of such dwelling-house, shop, or other building or place all the powers mentioned in section 97 in as full and ample a manner as if he were authorized so to do by a warrant issued under that section.

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135 See chapter 7.1 *ante.*

136 *Mc Adle v. Wallace* (1964) Crim LR 467.

137 Section 4, Police Act.

138 Section 97 of the Act provides for the issuance of a search warrant before a search can be conducted in a dwelling-house, shop, or other building or place. This will be based upon a written information on oath, and after any enquiry he may think necessary.

Under the Indian Customs Act[139] there is also generally a provision for search of premises. The search however is subject to the provisions of the Code of Criminal Procedure, which provides for a search warrant before a premises can be searched.[140]

If the various Acts mentioned above are considered, it is only that of Nigeria and perhaps that of Ghana that does not provide for the issuance of a search warrant before a premises can be searched. That of Ghana however by providing that the commissioner has to be satisfied before a search can be conducted, has provided an effective check on the powers of the officers.

In Kenya, the discretions given to officers under section 176(1) of the Act to obtain search warrant is not a good development. It ought to have been a condition to a search as in the case of New Zealand, Brunei and India.

7.2.4 Evidence Obtained during (Unlawful) Search

The issue here relates to the admissibility of an evidence obtained from an unlawful search. For example, a police officer enters and searches a premises without a search warrant and recovers goods suspected to be stolen or a male customs officer who conducts a search on a female passenger, and

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139 Chapter XIII, 1962, section 105 (1) thereof, provides that an Assistant Commissioner of Customs or Deputy Commissioner of Customs or any other officer so empowered can authorize a search of a premises.

140 Section 105(2) *ibid.* provides for the application of the Code of Criminal Procedure, 1898, in relation to searches.

recovers an incriminating object. The question is whether the evidence can be tendered in court in view of the breach of the search procedures?

The position of the law in Nigeria is that such evidence obtained illegally is still admissible. Note that save for involuntary confession, illegally obtained evidence is admissible in court, if it is relevant to the fact in issue.

Section 6 of Evidence Act[141] provides:

> Evidence may be given in any suit or proceeding of the existence of non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others:
>
> (a) The court may exclude evidence of facts which: though relevant or deemed to be relevant to the issue, appear to it to be too remote to be material in all the circumstances of the case.

The position was clearly stated in the case of *Kuruma v. R.*[142] thus:

> The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue.

The above case is the position in Nigeria and have been adopted in the case of *Musa Sadau and Anor. v. State*.[143] Where it was held that, even if the procedure laid down in section 78 (1) of the CPC in executing a search warrant was not followed, an irregularity may or may not have occurred. Nonetheless, it held that the evidence which was obtained as a result of the

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141 Cap E 14, LFN 2004 as amended.

142 (1955) 1 AETR 239; see also *R. v. Senat and Sin*; (1968) 52 CR APP R 282.

143 (1968) N.M.L.R 208.

search was properly admitted by the trial court, because they were relevant to the fact in issue.

The only remedy may be that the aggrieved person may sue for damages in a civil action because the illegality is attached to the officer making the search and not the illegally obtained evidence. This appears to be the position in America. In *Olmstea v. U.S* [144], which was referred to by Joshua Alobo[145] the American Supreme Court was called upon to decide the validity of evidence obtained by means of telephone tapping in a criminal prosecution. The Supreme Court held that the evidence was admissible in law as valid. ñIt should be rightly observed that the fact that evidence obtained by means of illegal tapping of the telephone conversation had been held to be admissible does not mean that the act of invasion of a personôs privacy by unlawfully tampering with his telephone is by itself permissible in law. It constitutes unlawful act for which an aggrieved citizen may validly claim damagesò. It is however, not clear as in the case of the CEMA whether the exclusion from liability as provided under section 149 (3) will be relevant here. The section provides:

> No officer or police officer shall be liable to any prosecution or action at law on account of any stoppage or search in accordance with the provisions of this section.[146]

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144 (1928) 277 U.S

145 J. E. Alobo, *Exposition and Notable Principles on Fundamental Rights (Enforcement Procedure) Rules* 2009 (Abuja, Josim Publishing House, 2010) p. 116.

146 Section 150 (2) of the Act provides in the same vein that no officer or person acting under the direction of an officer in pursuance of this section shall be liable to any prosecution or action at law on account of any search made in accordance with the provisions of the section.

We submit here that this exclusion from liability can not be general, if the officer complies with the provisions strictly then there may be no liability. If however the action of the officer goes beyond the provisions then liability definitely will be attached to the action of the officer.

With regard to the evidence illegally obtained which is made admissible, we submit that it is an unfortunate rule. Such evidence ought to be held *void abnitio*. The issue of relevance should not arise. Our argument is further based on the an earlier decision in the case of *Entick v. Carrington*[147] where the breaking and entering of a dwelling house to search for seditious material on the strength of a warrant issued by a wrong authority was held to be illegal. Lord Camden C. J stated that ñby the laws of England every invasion of property, be it ever so minute, is a trespassò. Accordingly, even state necessity did not justify any such invasion. In view of this decision, how then should it be justified to use the product of an illegal action to hold somebody liable.

There should therefore be a rethink in this aspect of the law so that the intention of the constitution with regard to the privacy of the citizens will not be a mere exercise.[148]

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147 *Supra*.

148 Section 37, 1999 Constitution

7.3 Detention and Seizure of Goods

The CEMA provides for the power to seize or detain anything which is liable to forfeiture. The relevant section is 167 which provides as follows:

> (1) Any officer or police officer, or any other person authorized in that behalf by the Board may at any time seize or detain anything liable to forfeiture under the Customs and Excise Laws or which such officer, police officer or other person has reasonable grounds to believe is liable to forfeiture thereunder.
>
> (2) any thing seized or detained under the customs and excise laws shall forthwith be delivered into the care of the Board and, subject to the provisions of the third schedule to this Act, shall, pending the determination as to its forfeiture or disposal, be dealt with, and if condemned or deemed to have been condemned as forfeiture, shall be disposed of, in such manner as the Board may direct.

7.3.1 Seizure of Goods

These are goods, which in accordance with relevant provisions[149] must be forfeited to the federal government for contravention of such laws/ regulations. Section 167 (1) specifically provides that:

> Any officer or police officer, or any other person authorized in that behalf by the Board may at any time seize or detain anything liable to forfeiture under the Customs and Excise Laws or which such officer, police officer or other person has reasonable grounds to believe is liable to forfeiture thereunder.
>
> (2) any thing seized or detained under the customs and excise laws shall forthwith be delivered into the care of the Board and, subject to the provisions of the third schedule to this Act, shall, pending the determination as to its forfeiture or disposal, be dealt with, and if condemned or deemed to have been condemned as forfeiture, shall be disposed of, in such manner as the Board may direct. [150]

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[149] Sections 21 (6), 46, 54 (2) 63, 64 (3), 72 (2), 86 (3), 87 (3), 93 (2), 167 ï 169, 172 ï 174, and 186 of CEMA.

[150] The third schedule to CEMA provides for the process of disposal, as itemized in the paragraphs.

Paragraph 1 of the third schedule to CEMA provides for the giving of notice of seizure to any person who to its knowledge was at the time of the seizure the owner or one of the owners thereof. If however, the seizure was made in the presence of the owner then such notice is not required.[151] In practice, however, whether the seizure is made in the presence of the owner or not, officers go on to serve the notice of seizure. And where an officer in such circumstance fails to give notice the NCS frowns at it believing the officer has done wrong.

Paragraph 2 of the third schedule to CEMA provides for mode of notice and service:

> Notice under paragraph 1 of the schedule shall be given in writing and shall be deemed to have been duly served on the person concerned ï
>
> (a) If delivered to him personally; or
>
> (b) If addressed to him and left or forwarded by post to him at his usual or last known place of abode or business, or in the case of a body corporate, at their registered or principal office, or
>
> (c) where he has no address within Nigeria, or his address is unknown by publication of notice of seizure in the Federal Gazette.

The interpretation and effect of paragraph 2(c) of the third schedule to CEMA on the operations of the NCS needs some comment. The paragraph tends to suggest unavoidable circumstances where seizures could be made without a defendant. Where there is no defendant, action will automatically be limited to forfeiture of the offending goods. This is often referred to as

[151] Paragraph 1 (a) (b) (c) of the third schedule to CEMA.

ñAbandoned seizureò.[152] If we accept the provision of the paragraph as it is, there is no problem for if an address is unknown, the person can not be reached. The snag however is that especially in the seaports where there is import documentation, officers still record ñabandoned seizureò. We submit that this may not be the contemplation of the paragraph. The implication here is that since the goods have no owner, it will be difficult for any prosecution to take place.

Paragraph 3 of the third schedule to CEMA provides for the opportunity for any person claiming that anything seized as forfeited is not so liable, to within one month of the date of the notice of seizure or, if no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Board.

Paragraph 5 of the third schedule to CEMA [153] deals with condemnation and it provides that where no notice of claim is given, the thing in question shall be deemed to have been duly condemned as forfeiture. It is only where notice of claim is given that condemnation proceedings become relevant.[154]

In practice however, whether there is notice of claim or not the NCS will go to the court via exparte application seeking to condemn the items in the seizure. This we submit is a wrong application of the rules. The right

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[152] These are seized goods that have no owner/defendant

[153] Condemnation proceedings will be discussed in detail in chapter 8.3 *infra.*

[154] Paragraph 6 of the third schedule to CEMA

application should have been to go to court *via* motion on notice where there is a notice of claim, in a forfeiture proceeding.[155] The court of appeal decision in the case of *Celestine Opara v. NCSB*[156] becomes relevant. The appellantôs consignment of four Toyota pre-owned cars in a cargo were confiscated, seized and condemned by the NCS on the ground that one of the cars was overaged. The appellant had by a motion on notice sought for an order to set aside or discharge the *exparte* order made by Honourable Justice Iheozor Ejiofor in Suit No. FHC/L/CS/198/2006. The motion was considered by the Honourable Justice Abubakar who refused to grant the prayer. The Court of Appeal held that a claimant must be a party to and be served the originating process in every condemnation proceedings. That the decision arrived at in forfeiting the cars by the said order through the *exparte* proceedings was null and void and of no effect whatsoever.

An issue for consideration here is the question as to whether the NCS can apply the provision of section 167(1) and seize or detain any foreign aircraft. It has been the practice for the NCS to remove the offending goods and the airlines are left unpunished.[157] This is an unfortunate situation. We are however of the view that if section 169 of CEMA which deals with forfeiture of ships or aircrafts used in connection with goods liable to

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155 *Op. cit*.

156 (2011) 8 NWLR (Pt. 1248) 1.

157 See Customs Probes, South West Governorôs wife over alleged contraband. http: //www. the nation onlineng.com/dynamicpage.asp?id+ 33521 accessed on 24/3/2009
Note that the Airline that brought in the goods was not sanctioned. In fact the then C.G.C said it was too early to reveal the identity of the airline.

forfeiture should apply, then there is no reason why such an aircraft should not be seized. The courts however seems to have a different view.

In the unreported case of Air India[158], the customs officers went to the aircraft to carry out their routine duties. The officers discovered a total of fourteen cellophane bags containing suspected drugs scattered in the aircraft. The suspected drugs were tested in the presence of the ground engineer who represented the airline and they proved positive to heroin. The three-crew members found on board the aircraft were arrested and detained for the purpose of investigation and likely prosecution. The aircraft also could be liable to forfeiture for carrying prohibited goods in the manner stipulated by section 150 of the CEMA[159] as amended by Decree 10 of 1972. The airline was consequently informed of the detention of the aircraft. It was sad that the prosecution of the case did not reach its logical conclusion as it was marred by legal tussles bordering on international law, jurisprudence and above all, diplomatic manoeuvres.[160]

Air India on Monday the September 1, 1987 brought a civil action against the Board of Customs and Excise for the release of its aircraft. Honourable Justice Kolo of the Federal High Court gave an order for the release of the aircraft on Wednesday the September 3, 1987. The Customs Area Controller in charge of the Murtala Muhammed International Airport

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158 Refer to in Olugbesan, *op. cit.* p. 37.

159 Now section 169 of CEMA Cap. C 45, LFN, 2004.

160 Olugbesan, *op. cit*, p. 37.

then was ordered to show cause why she should not be committed to prison for contempt, when she delayed the release in the attempt to get clearance from the Headquarters in Abuja.

The matter however was not brought to its logical conclusion as a *nolle prose qui* was entered by the Attorney General of Federation under section 160 (1)(C) of the 1979 Constitution.[161] It is quite unfortunate that the opportunity presented by that situation was not brought to fruition to determine whether or not Air-India could forfeit the aircraft.

The trend since then is to evacuate the offensive items and the aircraft is left to go. This certainly is not the law and we await when the statute would be invoked to start dealing with culprits.

Under the New Zealand Act, section 726 provides for the seizure of goods that have contravened the relevant provisions of the Act. The provision is similar to that of CEMA save that unlike that of the CEMA notice of seizure must be given irrespective of whether it was made in the presence of the owner or not.[162] Failure to give the notice does not invalidate the seizure if reasonable steps were taken to give the notice.[163] Also, where no notice was given, and goods are not condemned, any person claiming an interest in the goods can within six months after the date on

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[161] Now section 174 (1)(c) of the 1999 Constitution.

[162] Section 227 (1), *ibid*.

[163] Section 227 (2), *ibid*.

which the goods were seized, apply to a district court for an order of release.[164]

Under the Kenya Act, section 199(1) provides that an officer or police officer has the power to seize anything that he has reasonable grounds to believe is liable to forfeiture under the Act. Just like in the case of CEMA but unlike that of New Zealand, where a thing has been seized in the presence of the owner, there is no need to give any notice of seizure.[165]

Where a notice of claim has been given to the commissioner, the commissioner may, within a period of two months from the receipt of the claim by notice in writing to the claimant, require him to institute proceedings for the recovery of the thing within two months of the date of the notice; or by himself institute proceedings for the condemnation of the thing.[166]

In Ghana, section 289 of the Ghana Customs Act provides for power of seizure as in section 167 of CEMA. Where the person to whom notice should be sent does not have an address in Ghana, or that personôs address is unknown, notice of seizure may be given by publication in the Gazette and at least one national newspaper.[167] While under the CEMA publication in

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164 Section 233 (2), *ibid*.

165 Section 200 (1), Kenya Act.

166 Section 202 (12) of the Act. Under paragraph (B) of schedule three to the CEMA, the proceedings is only instituted at the instance of the Board and there is no time frame of within 2 months as in Kenya

167 Section 289 (2), *ibid*.

the Gazette suffices, in Ghana there is additional requirement of publication in one national newspaper.

Section 289 (5) and (6) brings out some features which are not provided under CEMA.

289 (5):

> Where notice of claim is given within the relevant period, the Commissioner shall take court proceedings for forfeiture, and if the court finds that the thing was at the time of seizure liable to forfeiture, the court shall order it to be forfeited to the Republic.

The interesting thing which is not applicable in Nigeria is section 289 (6) which provides:-

> Despite subsection 5, where motor vehicles é or perishable goods have been seized, the commissioner may at any time direct that the goods be sold by public auction and the proceeds retained to abide the result of any claim in respect of the goods.

This provision we submit is an abuse of the court process. For there to be a claimant, and the commissioner having commenced court proceedings, the natural thing is to wait for the outcome of the proceeding. This seems to be the case with other goods. The exemption to motor vehicles and perishable goods defeats the good intention behind the court proceedings. Even if we accept the exemption as applicable to perishable

goods because of their nature to getting bad, the same cannot be said of motor vehicles.[168]

Section 290 of the Ghana Act, dealing with restoration of seizure after penalty has been incurred is another provision, which is not in the CEMA. It provides:

> Where a seizure is made or a fine or penalty incurred or inflicted, or a person committed to prison for a contravention of this Act, the Minister may restore the seizure whether forfeiture has taken place or not, or value proceeding, or reduce or remit the fine or penalty or release the person from prison before or after proceeding as on the terms and conditions as determined by the Minister.

The Minister here, who is often the Minister in-charge of the *Finance Ministry* is given the powers to alter the powers of the court. This provision it is, submitted, renders the orders of the court useless. It is a serious intervention by the executive arm of government on the judicial arm, and this ought not to be so. In the light of independence of the three arms of government, we do not recommend the inclusion of section 290 of the Ghana Act in the CEMA.

Under the Brunei Customs Act, the power of seizure is provided in section 104 and it is similar to that of Nigeria and Ghana. The only peculiarity is the provision of section 105, which provides:

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[168] Compare with paragraph 15 of Third Schedule to the CEMA which provides for power to deal with seizures before condemnation ï where anything has been seized as forfeited, the Board may at any time, at its discretion, and not withstanding that the thing has not yet been condemned or is not yet deemed to have the condemned as forfeited -

(b) If the thing seized is a living creature or is in the opinion of the Board of a perishable nature, sell or destroy it.

> When any conveyance, vessel or aircraft has been seized under this Act, a Senior Officer of customs may, at his discretion, temporarily return such conveyance, vessel or aircraft to the owner of the same on security being furnished to the satisfaction of such officer that the conveyance, vessel or aircraft shall be surrendered to him on demand.

This provision may lead to serious abuse and should not be encouraged. There is no proper definition of a senior officer here. Leaving this discretion to just any senior officer will affect the good intention of the provision. It is always better to deal with a seizure to its logical conclusion before affecting any final release. Any conditional release under whatever guise of security may encourage smuggling.

Seizure as an enforcement measure is believed to be a kind of deterrent to smugglers. The efficacy of it is seen in the various seizures made across the country by the operatives of the NCS. The question however is that if it is an effective enforcement measure intended to serve as deterrent, then why the increase in the level of smuggling.

Prodded by the presidency in 2005, the NCS threatened to enforce seizure by raiding supermarkets to rid them of contraband.[169] This generated reasoned submissions, anxiety, fear and outright anger and a simmering cocktail of opposition from the business community and even some highly placed Nigerians.

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[169] Deadline on contraband goods: waiting for customs men; http://www.sunnewsonline.com/web pages/ features/sunsplash/2005/may/28/sunsplansh-28-0 é accessed on 25/3/09

The extension of this enforcement machinery (seizure) to the buses on the highway is another worrisome trend. Customs officers pursue contraband goods to trunks of buses going from Lagos to Onitsha, Aba, Kano, Kaduna and other such places in the South-east and northern parts of the country. [170]

Using the power of search,[171] the vehicles are stopped on the high ways where the buses are impounded for having contraband. The passengers are discharged in the middle of the road. The question is, is it possible for the operators of the buses to check every bag that a passenger brings into the bus? Since this is impossible, they are often at the mercy of the passengers. Sometimes in the bid to make more money, the transporters could connive with the smugglers to beat the customs.

If the recommendation from the presidency[172] in reference to some seizures made by the NCS is anything to go by, then it means that the importance of seizure cannot be over-emphasized. In spite of such advantages, it could at times have some damaging effect. For instance the Dutch Customs officials seized a consignment of generic antiretroviral (ARV) drugs bound for Nigeria, raising the health risk to HIV positive

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170 *Ibid*.

171 The powers of search as discussed in detail in Chapters 7.2, *supra*

172 The Federal Government in 2005 commended the Customs Area Controller of Kano/Jigawa command of the NCS, Alhaji Ibrahim Muhammed Mera over a seizure of N2.5 billion worth of contraband goods. In a commendation letter dated 36th October, 2005 president Olusegun Obasanjo urged Mera to continue with the good work in the interest of the nationôs economic reforms. http://www. thisday_online.com/nview.php? id=34246 accessed on 25/3/2009

people in need of the life-prolonging medication.[173] The Dutch customs claimed that the drugs were counterfeit and violated patent rights.[174] The drugs were to be distributed by the Clinton Foundation, an implementing partner of the countryôs HIV/AIDS programme. It was however proved by the Nigerian government that the drugs were not counterfeit but rather second-line ARVs for patient who had developed resistance to first-line medicines.[175] The seizure was condemned by both local and international human rights group.

Finally, we submit that in so far as the smugglers continue to dare the various preventive measures thereby rendering it less effective, seizure as an enforcement measure will continue to be applied as a check on the illicit business.

7.3.2 Detention of Goods

This is provided for in section 167 of CEMA which provides:

> (1) Any officer or police officer, or any other person authorized in that behalf by the Board may at any time seize or detain anything liable to forfeiture under the Customs and Excise Laws or which such officer, police officer or other person has reasonable grounds to believe is liable to forfeiture thereunder.

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[173] Seizure of drug shipment threatens ARV access: http: //medilinkz.org/ news/news2.asp? news ID ï 26858 accessed on 25/3/2009

[174] A claim which was not established. UNITAID explained that the shipment did not contain counterfeit drugs, but 49 kg of abacavr sulfate tablets, a second-line ARV medicine manufactured by Indian Pharmaceutical Company aurobindo, which has been pre-qualified by the WHO, Oxfam international, Health Action International and Knowledge Ecology International described the seizure as ñ*unacceptable*ò and urged the EU to urgently review and modify its regulations governing generic medicines: A 2001 declaration by the WTO stipulates that intellectual property rules should not interfere with the ability of developing countries to protect and promote public health. http: //medilinkz.org/ news/news2.asp? news ID ï 26858 accessed on 25/3/2009

[175] *Ibid*.

> (2) any thing seized or detained under the customs and excise laws shall forthwith be delivered into the care of the Board and, subject to the provisions of the third schedule to this Act, shall, pending the determination as to its forfeiture or disposal, be dealt with, and if condemned or deemed to have been condemned as forfeiture, shall be disposed of, in such manner as the Board may direct.

Detention generally tends to create some controversies especially when it relates to detention of persons. Amadi[176] is of the view that detention of a person by the police in the course of their duty is a phenomenon, which the average citizen appears to regard as a matter of course[177]. This he concludes stems from the ignorance of the scope of police powers and the nature of the individual right to liberty. It seems that our criminal justice does not empower the police to simply detain any person even if he is alleged to have committed an offence[178]. The right procedure is to arrest and inform the suspect the reason(s) for his arrest.[179] In this regard we are of the view that as it is, it is often difficult to establish detention without first making an arrest. This is why if an arrest is made then it is the beginning of detention[180]. We submit further that detention here should not be automatic as is the practice, rather detention should depend on the nature of involvement of the person arrested, which can be deduced from the reason for his arrest.

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176 Amadi, *op. cit*, p. 180.

177 That is as a chosen action or a sequence of event.

178 The right procedure is to arrest the suspect and tell him the reason(s) for his arrest.

179 This is a common law rule which has been codified in section 5, CPA and section 35 (3), 1999 Constitution as amended.

180 *Christie v. Leachinsky, supra.*

To this end the 1999 Nigerian Constitution provides in section 35 (3) as follows:

> Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and ground for his arrest or detention.

Section 35 (6) of the 1999 Constitution further provides:

> Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person é

Although as stated it is difficult to talk about detention without arrest, it has been held that, there could be detention without arrest in which case it amounts to unlawful imprisonment.[181] Under the customs law arrest is often related to detention and seizure[182]. This is why the Ghana Customs Act provides for power of arrest and detention.

Section 238(1) of the Ghana Act provides:

> An officer may arrest and detain a person whom the officer reasonably suspects to be committing, or to have committed, or to be or to have been concerned in the commission of an evasion of or offence under this Act.

Under this provision, detention is specifically that of a person suspected of having committed a breach of the Act[183]. In New Zealand the

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[181] See *Emezue v. Okolo* (1978) 1 LRN 236; *Ateze v. Momo* (1958) NRNLR 127; *Christie v. Leachinsky, supra*.

The arrester can also be prosecuted under section 365 of the Criminal Code for deprivation of liberty, *Edo v. C.O.P* (1962) 1 All NLR 92.

[182] Section 167 (1) of CEMA.

[183] Having committed any of the offence relating to importation and exportation as provided in the Customs Act.

emphasis is detention of goods, section 175 C (1) New Zealand Act provides:

> A customs officer may seize and detain goods or documents that are presented or located in the course of exercising any power of inspection, search, or examination under this Act, if he or she has cause to suspect on reasonable grounds that the goods ï
>
> (a) are risk goods (within the meaning of the Biosecurity Act, 1993) for which no biosecurity clearance has been given under that Act; or
>
> (b) are evidence of the commission of 1 or more offences under 1 or more of the following enactments:
>
> (i) Section 130 of the animal products Act 1999;
>
> (ii) Section 98C of the crimes Act 1961.
>
> (iii) Section 232 or 233 of the Fisheries Act, 1996;
>
> (iv) Section 126(4) or 142 (1)(d) of the Immigration Act, 1987;
>
> (v) Section 37 or 43 of the Medicines Act, 1981;
>
> (vi) Section 29A, 30 or 31 of the Passports Act, 1992.

Under the customs laws of Brunei the emphasis also is on detention of goods. Section 62(1) of the Act provides:

> The proper officer of customs may detain in a customs warehouse any goods if he is in doubt whether such goods are dutiable or not.

Section 62 (2) of the Brunei Customs Act further provides:

> In every such case the proper officer of customs shall forthwith make a report to a senior officer of customs, who shall without delay, decide whether such goods are dutiable or not.

Under the CEMA which is similar to the provisions of New Zealand, any officer or police officer, or any other person authorized in that behalf by the Board, may at any time seize or detain any thing liable to forfeiture

under the customs and excise laws or which such officer, police officer or other person has reasonable grounds to believe is liable to forfeiture there under[184].

The issue for determination here is the use of the words ñandò in the New Zealand Act and ñorò under the CEMA. Going by the ordinary meaning of ñandò as conjunctive it presupposes that there ought to be a seizure, which is followed by a detention. The ñorò as used in the CEMA if construed to be disjunctive, which we believe it is, then there is an option of outright seizure or detention before seizure.

In practice, the tendency is for the officers to seize out rightly or to first detain where there is doubt, then to seize later after clarification of any doubt. There is need to be careful before seizure is made because if it is made, some legal requirement has to be met before it can be released[185]. Detention however does not have to go through such legal requirement before a release is effected.

Detention of goods as an enforcement measure often occurs when passengers arrives the country from foreign country through the airports or border posts. They are expected to satisfy some legal requirements. It may be by producing traveling documents and making payments for their goods if dutiable or to produce certain documents showing cause why they should

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[184] Section 167(1), CEMA

[185] The third schedule to the Act provides for the giving of notice and then condemnation proceedings, which will authorize the release of the goods. Detailed discussion on this is in chapter 8.3. *infra*.

not pay duty. Before the production of such evidence the goods may be put under detention[186]. One issue to contend with is that of wrongful detention of goods. The customs officer being concerned with the arrest of contraband,[187] must ascertain whether or not a particular item can be lawfully seized or detained in order not to infringe on the right of the ordinary citizen to property. In the case of *Ajenifuja v. Board of Customs and Excise,*[188] the court held that ñdiligenceò is the watchword. The word ñreasonableò time has often been abused in the detention of goods before a release is effected. Sometimes under the guise of ñfull investigationò, detention could continue for one year. Certainly this cannot be said to be a reasonable time on part of the Customs[189]. Apart from the general provision in section 167(1) of the CEMA in relation to seizure or detention of any goods liable to forfeiture, sections 23 and 35 specifically provides for the power to detain aircrafts and ships.

Section 23(1) of CEMA provides:

> Any officer or police officer, if it appears to him that an aircraft is intended or likely to depart for a destination outside Nigeria from any place other than a customs airport otherwise than as permitted in writing by the Board, or from a customs airport before customs clearance is given there from, may give such instructions and take such steps by way of detention of the aircraft or otherwise as appear to him necessary in order to prevent the flight.

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[186] Detention does not mean seizure or arrest of the owners. But failure to provide the necessary documents within a reasonable time could lead to seizure and the owner arrested.

[187] This refers to Illegal imports, smuggled goods and other prohibited or restricted goods.

[188] 1970 (2) All NLR 114

[189] See Guardian, Wednesday, January 28, 2009, p. 4 which reported the release by the NCS of a tanker vessel belonging to a Nigerian shipping company, Morlap Shipping Company, in compliance with a court order. The ship, Mt Morlap trader, was under customs detention for over a year. The application for stay of execution had earlier failed at the court. The vessel was used by the federal government to launch its cabotage policy six years ago.

23(2)

> Any person who contravenes any instructions given under subsection (1) of this section shall be liable to a fine of four hundred naira or to imprisonment for a term of six months, or to both; and if an aircraft flies in contravention of any such instruction or not with standing any steps taken to prevent the flight, the operator of the aircraft and the commander thereof shall, without prejudice to the liability of any other person under this subsection, each be similarly liable unless he proves that the flight took place without his consent or connivance.

This is another instance of where the fine so provided is grossly inadequate in todayôs socio-economic realities.

Section 35 (1) of CEMA provides:

> Where at the expiration of a period of twenty-one clear days from the date of making report under section 26 of this Act[190] of any ship, aircraft or vehicle or, where no such report was made, the date when it should properly have been made, or such longer period as the Board may allow, any goods are still on board the ship, aircraft or vehicle, the Board may authorize the detention of that ship, aircraft or vehicle until ï
>
> (a) any expenses properly incurred in watching and guarding the goods beyond the said period; and
>
> (b) where the goods are removed by virtue of any provisions of this Act from the ship, aircraft or vehicle to a government warehouse, the expenses of that removal, have been repaid to the Board.
>
> (2) where, in the case of any derelict or other ship or aircraft coming, driven or brought into Nigeria under legal process, by stress of weather or for safety, or in the case of any vehicle which suffers any mishap, it is necessary to station any officer in charge thereof, whether on board or otherwise, for the protection of the revenue, the proper officer may detain that ship, aircraft or vehicle until any expenses thereby incurred have been repaid to the board.

[190] The section provides for a report to be made in such form and manner and containing such particulars as the Board may direct of every ship and aircraft or vehicle to which the section applies and of all goods carried therein of every vehicle entering Nigeria by land and of all goods carried therein, and of all goods otherwise brought into Nigeria by land.

Apart from this specific provisions to detain ships, aircrafts and vehicles, the general provision in section 167 (1) of CEMA can also be invoked to detain and seize any ship or aircraft.

It should however be noted that the section have not been properly invoked so as to seize any aircraft or ship before. With respect to detention, it has been used effectively. As put by Olugbesan[191] on several occasion, the NCS has found itself embroiled in serious legal issues that eventually attracted broad examinations and crucial judicial pronouncements. On the other occasions, however, the NCS simply decides to pursue a matter as a test case for the purpose of ascertaining the position of the law. The relevant case here is the ñAir India caseò [192] which was earlier discussed.[193].

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[191] Olugbesan, *op. cit*., p. 37.

[192] On the 23rd of August 1987, Flight A1203 from Bombay and Nairobi was detained for carrying drugs.

[193] Seizure of goods as an enforcement measure, chapter 7.3.1 *supra.*

CHAPTER EIGHT

INSTITUTION OF PROCEEDINGS UNDER THE CUSTOMS AND EXCISE MANAGEMENT ACT

8.1 Introduction:

For any breach of the CEMA there are provisions for a kind of enforcement and subsequent prosecution as the case may be. Proceedings could be criminal or civil as the case may be. It is however often criminal proceedings that is mostly undertaken so as to curb the menace of smuggling. It is against this background that the officers are charged with the responsibility of arrest, detention and instituting criminal proceedings against offenders who break customs law as provided for in the CEMA.

Just like police officers the customs officers can institute proceeding in the magistrate courts and area courts as circumstances may warrant. To this end, section 181 of CEMA provides ï

181 (1)

Any offence under the customs and excise laws ï

(a) where it is punishable with imprisonment of a term of two years or more with or without a fine, shall be punishable either on summary conviction or on conviction on indictment.

(b) in any other case, shall be punishable on summary conviction.

2) notwithstanding, anything in any enactment, every magistrate in any part of Nigeria shall have jurisdiction for the summary trial of any offence under the customs and excise laws, and may impose any fine or term of imprisonment provided by the customs and excise laws for that offence.

While, the police are still exercising this power in the Magistrate Courts the same can not be said of customs. The effect of sub-section (2) of section 181 becomes doubtful in view of the provision of section 7 (1)(c) of the Federal High Court Act,[1] which removed the jurisdiction to try customs offences from the State High Courts and Magistrate Courts.

Prosecution therefore under this dispensation is done by the customs legal adviser or his assistants and they are law officers sent from the Federal Ministry of Justice. Section 180 (1) (2) of CEMA however permits any customs officer, provided he is a legal practitioner and with the consent of the C.G., to conduct criminal or other proceedings in respect of matters relating to the CEMA.[2]

The effect of section 181 of CEMA *vis-à-vis* the provision of section 7 (1) (c) of the Federal High Court Act needs some comment. Section 181 (2) is saying that notwithstanding anything in any enactment every Magistrate in Nigeria can try customs offences and that was the position until the Federal High Court Act removed the jurisdiction from the Magistrate.

In practice, prosecution now goes to the Federal High Court. We submit that the former regime where the cases go to the Magistrate first is preferable. The situation now is that all the customs cases including those

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1 Cap F12, LFN, 2004.

2 See *FRN v. Osahon* (2006) WRN 1; Decree 14 of 1979.

coming from the remote borders go to the Federal High Court and does not allow for quick dispensation of justice.

An analysis of section 7 (1) (c) of the Federal High Court Act and section 251 of the Constitution becomes relevant here.

Section 7 (1) (c) provides:

> 7 (1) The court shall to the exclusion of any other court have original jurisdiction to try *civil causes and matters*[3]
>
> (c) connected with or pertaining to customs and excise duties and export duties, including any claim by or against the Nigeria Customs Service or any member or officer thereof, arising from the performance of any duty imposed under any regulation relating to customs and excise duties and export duties.

Section 251 (1) (c) provides:

> 251 (1) Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the national assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in *civil causes and matters*. [4]
>
> (c) connected with or pertaining to customs and excise duties and export duties, including any claim by or against the Nigeria customs service or any member or officer thereof, arising from the performance of any duty imposed under any regulation relating to customs and excise duties and export duties.

The above provisions seem to be misapplied, for the exclusive jurisdiction is only related to civil causes and matters. It does not exclude the jurisdiction of the other courts to try criminal causes and matters. It is therefore, submitted that the practice where all the customs offences are tried at the Federal High Court did not mean that magistrate courts cannot entertain customs criminal causes. Even though the provision of section

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[3] Emphasis mine.

251(3), of the 1999 Constitution states that, the Federal High Court shall have and exercise Jurisdiction and powers in respect of criminal causes and matters in respect of which Jurisdiction is conferred by sub-section 1 above, it should be noted that the provisions of sub-section 1 expressly exclude the Jurisdiction of other Courts in civil causes and matters. This however, is not the case with sub-section 3 which did not exclude the Jurisdiction of other Courts in criminal causes and matters.[5]

The EFCC appears to have a better understanding of the above provisions, as its cases goes to the other courts. This however, may be because of section 19 (1) of the EFCC Act, which provides:

> The Federal High Court or High Court of a State or the Federal Capital Territory has jurisdiction to try offenders under this Act.

We conclude that since it is not reasonable for all customs offences to go to the Federal High Court, and since the exclusive jurisdiction given to the Federal High Court is on civil matters, the criminal matters may go to the other courts.

The CPC[6] also permits offences under any law other than the penal code to be tried by any court of competent jurisdiction.

Section 13 (1) CPC provides:

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4 Emphasis mine.

5 See *Ehindero v. FRN anor, supra.*

6 Cap. C42, LFN, 2004.

> Any offence under any law other than the panel code may be tried by any court given jurisdiction in that behalf in that law or by any court with greater powers.

Section 13 (2) further provides:

> When no court is so mentioned such offence may be tried by the High Court or any court constituted under this criminal procedure code.

The CEMA in section 181 (2) provides:

> Notwithstanding, anything in any enactment, every magistrate in any part of Nigeria shall have jurisdiction for the summary trial of any offence under the customs and excise laws, and may impose any fine or term of imprisonment provided by the customs and excise laws for that offence.

This means that customs offence can still be tried in the Magistrate courts.

Section 108 of the Brunei Act, provides that notwithstanding the provision of any written law to the contrary, a court of a Magistrate shall have jurisdiction to try any offence under the Act and to award the full punishment for any offence. This provision is fully in operation as all the cases go to the Magistrate Courts first.

India too recognizes the importance of customs offences going to the magistrate courts when section 138 of the Indian Customs Act provides for summary trials in the magistrate court. Another interesting feature under the Indian Act is the introduction of the commissioner appeals and the appellate tribunal where all matters relating to customs offences are

disposed before, if necessary the regular courts.[7] The appellate tribunal which is called the customs, excise appellate tribunal consists of judicial and technical members who sees to the quick dispensation of the matters on fair and equitable grounds.

New Zealand following the position of India also in section 244 of the New Zealand Act provides for the establishment of customs appeal authorities where cases can be disposed of before the regular courts. Appeals may be filed from the decisions of the appeal authorities to the High Court and Appeal Court respectively.[8]

There is no doubt therefore that under the CEMA, the NCS is empowered to initiate and control both civil and criminal proceedings, in respect of offences relating to its laws and such proceedings is brought in its name. Section 176 (2) of the Act provides:

> A court shall not, except with the consent of the person charged, proceed to hear any charge in respect of an offence under any provision of the customs and excise laws unless the continuation of such proceedings is sanctioned by the Board.

The implication here is that the offender has to consent to his trial. The use of the word ôunlessô in the afore-stated section, however, seems to suggest that where the proceedings is sanctioned by the Board, no consent is required.

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7 Sections 128A and 129 Customs Act of India, 1962.

8 Sections 272 and 273 New Zealand Customs and Excise Act, 1996.

The case of *Ifenacho v. Board of Customs and Excise*[9] attempted to illustrate this point. The accused came by boat from abroad and disembarked at Apapa. He went into the customs Baggage Hall with his non-dutiable baggage and said he had no cigarettes etc. He had left on board the dutiable goods and was found taking them away later. He was prosecuted by the Board on count one under section 66 (3)[10] of CEMA for failure to declare dutiable goods and on count three under section 145 (a),[11] that he was concerned in carrying them in a car knowingly and with intent to defraud government of the duty payable on them.

It was held:

(i) That the proceedings were instituted by order of the Board.

(ii) Apart from prosecution brought by or in the name of the Attorney General of the Republic, when a prosecution for a customs offence is brought by the police or someone else, the court cannot, except with the consent of the accused, proceed to hear the charge unless the Board sanctions the continuation of the proceedings, but where the proceedings are instituted by the order of the Board there is no further need for the Board to authorise the continuation of the proceedings.[12]

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9 (1966) 1 ANLR 153.

10 Act of 1958 now section 72 (3) of the 2004 Act.

11 Act of 1958 now section 164(a) of the 2004 Act.

12 See *Ebiri v. B.O.C.E* (1967) NMLR 35 SC. It was held that a criminal charge brought in the name of ï and signed by officer in the Department of Customs and Excise with rubber stamp of the department is sufficient to show that the proceeding was sanctioned by the Board by virtue of section 176 (2) CEMA.

Our contention with regard to the issue of whether consent is necessary under sub-section 2 of section 176 is that consent should not be necessary in line with the intention expressed in sub-section 4, to the effect that:

> Nothing in sub-section (2) of this section shall prevent the institution of proceedings for an offence under the customs and excise laws by or in the name of the Attorney General of the Federation in accordance with the provisions of the Constitution of the Federal Republic of Nigeria 1999 in any cases in which he thinks it proper that proceedings should be so instituted, or the continuation of proceedings so instituted.

For prosecution in the Federal High Court the legal seat officer[13] undertakes the preliminary investigation, makes the necessary arrest and obtains statement from the accused and potential witnesses. This will be the focus of our next discussion on criminal proceedings.

8.2 Criminal Proceedings

The role of the Police and the NCS in the prevention and detection of crime cannot be overemphasized. It is no wonder that section 8 of CEMA gives the same powers, authorities and privileges that are given by law to police officers.[14] Section 8 of CEMA provides:

> For the purpose of carrying out or enforcing the provisions of the customs and excise laws, all officers shall have the same powers, authorities and privileges as are given by law to police officers.

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[13] Legal seat is a unit within the enforcement section of the NCS.

[14] Olugbesan, *op. cit*. p. 61.

The police play very vital role in this regard. They detect, arrest, investigate and prosecute criminal cases by virtue of sections 4 and 23 of the Police Act. The police collect all the available information for use as evidence at the trial. The police obtain statements from potential witnesses, suspects and the actual offenders. This is simply referred to as institution of criminal proceedings.

Section 4 provides that:

> The police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of laws and regulations with which they are directly charged, and shall perform such military duties within or without Nigeria as may be required of them by or under the authority of this or any other Act.

And section 23 thereof also provides that:

> Subject to the provisions of sections 174 and 211 of the constitution of Nigeria, 1999 (which empowers the Attorney ï General of the Federation and of State to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria), any police officer may conduct in person all prosecutions before any court whether or not the information or complain is laid in his name.

By these two sections above, a police officer can institute criminal proceedings in all courts of law in Nigeria. In practice and until the case of *FRN v. Osahon*[15] police officers institute criminal proceedings only in the magistrates courts and area courts. Criminal prosecutions in the high courts were instituted by law officers.[16] The decision in *Osahon*ôs case amplified

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[15] *Supra*.

[16] State Counsels from the Federal Ministry of Justice.

sections 4 and 23 of the Police Act. It is however submitted that with regard to prosecution in the superior courts by the police, such an officer may or may not be a legal practitioner. Belgore JSC in the case held that it is desirable, though not compulsory that the Prosecuting Police Officer, ought to be legally qualified.[17] In *Osahon*ôs case, the respondents were arraigned before the Federal High Court, Lagos on a six count charge filed by the police. In the course of the proceedings, the respondent filed an application seeking to quash the charge on the ground that by virtue of section 174 (1) of the 1999 Constitution, it is only the Attorney General and officers of his department that can institute or undertake criminal proceeding against them on behalf of the government of the Federation in that court. The police contended that they have power under section 23 of the Police Act to prosecute the respondents before the Federal High Court. It was said that they did require the fiat of the Attorney General of the Federation to initiate and prosecute the charge. The Federal High Court in its ruling dismissed the application of the respondents and held that police officers had the power to prosecute the respondents on behalf of the government of the Federation. On appeal, the court allowed the appeal and held that the police officers presently prosecuting the respondents before the Federal High Court

lacked the competence under section 56 (1) of the Federal High Court Act to do so. On further appeal against the Court of Appealôs decision, the

[17] See also section 180 (1) (2) of CEMA, which empowers a customs officer who is a legal

Supreme Court allowed the appeal and held that, a police officer can by virtue of section 23 of the Police Act, section 56 of the Federal High Court Act, and section 174 of the 1999 Constitution prosecute and undertake criminal proceedings at the Federal High Court, if such an officer is a legal practitioner.

Section 56 (1) of the Federal High Court Acts provides:

> In the case of a prosecution by or on behalf of the government of federation or by any public officer in his official capacity, the government of the federation or that officer may be represented by a law officer, state counsel, or by any legal practitioner duly authorized in that behalf by or on behalf of the Attorney General of Federation.

Under the CEMA, section 186 legally empowers the NCS to compound proceedings in respect of offences against customs law. Also going by the provision of section 8 of CEMA, customs officers have equal powers as police officers.

Section 8 of CEMA provides

> For the purpose of carrying out or enforcing the provisions of the customs and excise laws all officers shall have the same powers, authorities and privileges as are given by law to police officers.

It then follows that all customs officers as police officers are charged with the arrest, detention and institution of criminal proceedings against offenders who break customs law as provided under the CEMA.

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practitioner.

The success of any customs case to a large extent depends on the preparation of a good case file. A case file in simple terms is a folder or cover for keeping relevant documents or papers, which are very vital to the case. Most of the cases in customs have to do with illegal importation, which often leads to the seizure of the goods, which is followed by prosecution.

If a case is reported or seizure is made the legal seat officer[18] will first of all open a fresh file jacket and write the seizure number or other relevant number in cases of non-seizure at the appropriate column at the back. For example, NCS/PHC 1/09/1 of 26/04/2009. The name of the defendant and sex is indicated. For example ñAB Defendantò with the letters ñMò for male and ñFò for female. Care is taken in the preparation of each document in the case file as the documents will be tendered in court.

A complete case file is made up of the following documents:

i) Index to the Case file

ii) Extract from the station diary

iii) Seizure Report (Form C. 220)

iv) Statements of Seizing Officers and that of Defendant

v) Notice of Seizure (Form C. 60)

vi) Application for Bail/Bail Bond

vii) A copy of government Warehouse Dispatch Note (BK. C 21)

[18] The legal seat officers often are not lawyers. This has always been an unfortunate situation.

viii) Investigation Report

ix) All other relevant documents in order of sequence.

8.2.1 Index to the Case File

This is to be attached to the inside cover of the case file jacket. For example:

	Documents	*Page*
i)	Extract from the Station Diary	1
ii)	Seizure Report	2
iii)	Notice of Seizure	3

The intention here is that it facilitates easy reference to the documents in the file.

8.2.2 Extract from the Station Diary

Whenever a seizure is reported at the station, all the particulars relating to the seizure will be entered in the station diary. Such particulars include names of the defendants, quantity and description of goods seized, place of seizure, time and date. At the end of the entry, the writer will sign and affix his or her index number.

The entry may include certificate of ownership where a suspect agrees to claim ownership. Consequently, the extract from the station diary in respect of a seizure contained in any case file is an exact true copy of the entry made in the station diary neatly copied out omitting nothing.

While copying out the extract, the plain sheets to be used should be ruled out like a page of the station diary itself and the entry relating to the relevant seizure copied out. The date is quoted at the top of the extract. For example ñExtract from the Station Diary of 27/4/2009ò.

8.2.3 Seizure Report

This is contained in a special form known as Form C. 220. It is numbered from 1 ï 13 with such useful and exhaustive information about a particular seizure. Information like seizure number, date, place, time, manner of seizure, station diary entry number, names of seizing officers, transfer of goods particulars, comments of the officer in charge and finally the superintendentôs report and recommendations.

8.2.4 Statements of Seizing Officers and that of Defendant

The seizing officerôs statement is the accurate and precise account of the manner in which the particular seizure was made as recorded by the seizing officers. They are not necessarily under caution. The statement must be signed with the officers index number and date affixed. The defendantôs statement is however made under caution on the prescribed form and must be signed or thumb printed by the defendant and duly dated. The importance of taking statements cannot be overemphasized. It should be noted that it is related to evidence procedure in respect of admissibility of the accused statements evidence in court. An officer in order to carry out his duties of

arrest, detention and taking of statements from offenders who break customs law must therefore study the judges rule thoroughly.[19]

The judges rule is based on the law that a confession is not admissible in evidence unless made freely and voluntarily,[20] and that it will not be deemed to have been made freely or voluntarily, if there was any degree of coercion or inducement from a person in authority. The onus of establishing that a confession or statement was made freely is on the officer taking such statement. When taking a statement, special care should be taken so as to avoid any allegation that the statement was taken under duress. Such an allegation is very easy to make but very difficult to rebut, particularly in case of persons in custody. It was as a result of this difficulty that the judges rule were formulated.

The first four rules were formulated in 1912 by the judges of the Kings Bench Division[21] in England at the request of the Home Secretary. The remaining ones were added in 1918[22] to deal with the doubts created as to the proper interpretation of the law. According to Leigh, the Rules ï

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19 There is no statutory authority in Nigeria for the application of these rules but officers are advised to apply it. See *R. v. Ugwuogo* (1943) 9 WACA 73 referred to in Omale, *op. cit*. pp. 19 ï 24. See Appendix VIII for the rules.

20 Section 27(2), Cap E14, Evidence Act LFN, 2004.

21 Now Queens Bench division.

22 Including the supplementary rules.

> é were formulated in an endeavour to give advice to the police who were confused by conflicting decisions concerning the propriety of police questioning originally four in number, the rules were increased to eight in 1930 and accompanied by administrative direction concerning good interrogation practice.[23]

As argued by Amadi[24] judges rules are not principles of law but they are operated within the ambit of law.[25] Even though they do not have the force of law, statements made in breach of the rules may be excluded at the discretion of the courts. The rules were revised in 1964 and still did not have any legal effects. In *Queen v. Omisade*,[26] it was held that a breach of the rules does not render a suspectôs statement inadmissible, unless in the mind of the court it is doubtful whether such statement was voluntarily made.

The same view was held in the English case of *R. v. Voisin*[27] where Lawrence J. stated that the rules:

> é are the administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.

We do not however agree with the above preposition. Since the rules are not different from the common law approach to interrogation of suspects,

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23 L H Leigh, Police Powers in England and Wales (1979), p. 145 referred to in G.O.S Amadi, *op. cit*. p. 209.

24 Amadi, *op. cit,* p. 210.

25 P. Devlin, ñ*The Criminal Prosecution in England*ò Rev. edn, 1960.
It seeks to regulate legitimate methods of inquiry.

26 (1964) NMLR 67.

27 (1918) 1 KB 531 at p. 539.

that whatever statement made should be voluntary, we submit that it ought to be given a prevailing effect and not left to the discretion of the courts.[28]

The objects of the rules therefore make it paramount for the officers to abide by them, thereby not giving room for allegation of duress. The object is classified into four as follows:

i) It is for the information and guidance of officers in carrying out their duties as customs officers.

ii) It standardizes the procedure of dealing with suspects and prisoners.

iii) It provides safeguards to the officers who act in accordance with it.

iv) It protects a prisoner from improper action and ensure that statements made by prisoners are voluntary.

From the above, the importance of the rules cannot be overemphasized; the wording of the caution must be strictly adhered to and no variations should be introduced. After the caution has been given, no question should be asked of the suspect except to clear any ambiguities. It is therefore advisable that officers should not use the caution haphazardly or too soon.

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[28] This is further hinged on the fact that the rules are preceded by a preamble containing a statement of legal principles.

The caution should only be administered only after the officer has made up his mind to arrest the suspect or that it is practically certain that proceedings will ensure. Any confessional statements must be counter-signed by a superior officer not below the rank of a Deputy Superintendent of Customs (DSC) after he might have invited the confessionist to confirm his confession.

Since the purpose of the rules is to guard against forcing a suspect to make a statement against his will, it is submitted that it means no harm and should therefore be given the necessary force of law.[29]

8.2.5 Notice of Seizure (Form C. 60)

The prescribed form is called form C. 60. it notifies the defendant that the goods involved are being seized under CEMA. It in fact gives notice to the defendant to show cause within one calendar month from the date of issue why the goods should not be seized. Failing to show cause, such goods shall be deemed forfeited. Particulars of the goods are entered and it should be signed by the officer issuing it and dated. The defendant will then acknowledge the receipt of the original on the duplicate copy.

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[29] In *Onugwa v. The State*; (1986) 2 Sc. 169 it was held that, provided it was voluntary, a confession made in the absence of caution was admissible in evidence. See also *R. v. Prayer* (1972) 1 WLR 260.

In practice notice is also given to the NPA or the Federal Airport Authority of Nigeria (FAAN) as the case may be.[30] Since the goods are mostly in their custody, it is important that they be informed about the seizure so that they will not release the goods under any guise.

The procedure however, where the notice is given especially to the owner or his agent seems not to comply with paragraph 1 of the third schedule to the CEMA. The paragraph provides:

> The Nigerian Customs Service Board (NCSB) shall give notice of the seizure of anything as forfeited and of the ground therefore to any person who to its knowledge was at the time of the seizure the owner or one of the owners thereof.

Provided that notice shall not be required to be given under this paragraph if that seizure was made in the presence of -

> (a) the person whose offence or suspected offence occasioned the seizure; or
>
> (b) the owner or any of the owners of the thing seized or any servant or agent of his; or
>
> (c) in the case of anything seized in any ship, aircraft or vehicle, the master of that ship, commander of that aircraft or person in-charge of that vehicle.

The practice by the NCS without regard to this provision is that, even where the situation falls under sub-paragraphs a-c of paragraph 1 of the third schedule, they go ahead to give notice. Officers, though not in compliance with the paragraph but for one reason or the other failed to give such notice, which was not necessary, have been disciplined in the past.

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[30] Notice could also be given to the Nigerian Aviation Handling Company (NAHCO) and in recent time the various concessionaires operating at the ports e.g. Ap Moller, Bua Ports and Terminals Ltd. and Ports Terminal Operations Ltd.

We submit that in view of the third schedule, notice of seizure is not required where it is made in the presence of the owner or his agent. The NCS should therefore apply the rules as provided and not creating unnecessary problems.

8.2.6 Application for Bail/Bail Bond

A suspect must be arraigned in court, as soon as an arrest is made, unless where it is practically impossible to do so. Section 36 (4) of the 1999 Constitution provides that any person charged with a criminal offence shall be entitled to a fair hearing in public within a reasonable time by a court or tribunal.[31]

Where it is practically impossible to arraign the person in court within the stipulated time, then bail must be granted. This is the crux of our discussion here and hence the need for an application for bail.

Bail by the customs is often very difficult thereby making suspects to spend longer days in detention. In *Customs Service Board v. P. Eleke & 2 Others*[32] where the accused persons had stayed in detention for a very long time, the charges were struck out when the case came up and the prosecution was not ready to call witnesses.

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[31] Reasonable time has in line with section 35(5) of the Constitution held to be within 24 and 48 hours respectively.

[32] Unreported Suit No. FHC/PH/9C/2005.

The CEMA never made any provisions with regard to the issue of bail. This lacuna clearly makes it difficult for bail to be granted before prosecution commences in court. The legal seat officer can not on his own grant bail. He can only recommend to the Customs Area Controller (CAC) upon an application made by a lawyer on behalf of the suspect. Some CACs because of no well-defined procedure, may want to seek for approval from the Headquarters, which often will take days.

Even where a particular CAC gives an approval, the kind of condition attached to it makes it difficult thereby amounting to no approval. There is often the request for not only producing a certificate of occupancy but depositing same. The Constitution did not specifically provide for the production of a certificate of occupancy before bail can be granted. The relevant constitutional provision with regard to bail is section 35(1)(c), (4)(a) (b) respectively.

35 (1) provides:-

> Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law.
>
> (c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
>
> 4) Any person who is arrested or detained in accordance with sub-section (1)(c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of.
>
> (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

> (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

The words ñupon such conditions as are reasonably necessaryò used in sub-section 4 (b) is not defined as the expression ña reasonable timeò which is defined to be within 24 or 48 hours as the case may be.

Since there is no provision in the CEMA with regard to bail, relying on section 35 (4)(b) the words ñupon such conditions as are reasonably necessaryò often have been construed to be the production of a certificate of occupancy. And when such a condition cannot be met by the surety, the tendency is to stay in detention for longer periods before trial.[33] If however the condition is satisfied bail may be granted.

Bail may be granted on self-recognizance of the suspect subject to an undertaking that he will appear to stand trial. It is rarely granted on personal recognizance, except where the person to be admitted to bail is of high social standing in the community and will likely not abscond.

Bail may also be granted by executing a bond for a fixed sum, that is bail bond and it is referred to as criminal form 25. It states the conditions under which the suspect is released to the surety. In default of appearance

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[33] See *Eda v. Commissioner of Police Bendel State* (1982) 3 NCLR 219 where it was held that if a suspect remains in Police custody after bail has been granted to him by the Police because he is unable to fulfill the conditions of bail, then his continued detention in Police custody is not in contravention of the constitutional provisions, since it is the duty of the suspect to comply with the conditions of bail.

the amount as bonded stands forfeited. The bond is signed by the suspect, the surety and the officer authorizing the release and it is to be properly dated.

Under the Police Act where a person is arrested for a serious offence, he shall be brought before the court as soon as practicable.[34] Even then there is provision for bail unlike the CEMA that is silent on the issue of bail.

Section 27 of the Police Act provides:

> When a person is arrested without a warrant, he shall be taken before a magistrate who has jurisdiction with respect to the offence with which he is charged or is empowered to deal with him under section 484 of the CPA as soon as practicable after he is taken into custody.
>
> Provided that any police officer for the time being in charge of a Police station may inquire into the case and
>
> (a) except when the case appears to such officer to be a serious nature, may release such person upon his entering into a recognizance, with or without sureties, for a reasonable amount to appear before a magistrate at the day, time and place mentioned in the recognizance; or
>
> (b) if it appears to such officer that such inquiry cannot be completed forthwith may release such person on his entering into recognizance, with or without sureties for a reasonable amount to appear at such police station and at such times as are named in the recognizance, unless he previously received notice in writing from the superior police officer in charge of that police station that his attendance is not required, and any such bond may be enforced as if it were a recognizance conditional for the appearance of the said person before a magistrate.

The above provisions make for a better access to bail unlike the CEMA that made no such provision. If going by the provision of section 8 of CEMA

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[34] In *Eda v. C.O.P supra.* it was held that this is inconsistent with sections 32 (4) and 32 (5) of the CFRN 1979, which provides that an accused person shall be charged to court within 24 hours of the alleged commission of the offence. The sections are now 35 (1) (c) 4 (a) (b) of the CFRN 1999.

that customs officers are to have the same powers as Police Officers, then this power to grant bail should by necessary implication be adopted by the customs and not to create barriers in granting bail.

It should be noted however that from the provision of the Police Act, it seems the police have no power to grant bail if it is a serious offence. *What then amounts to serious offence*? Does it depend on the imagination of the officer? Although the section does not state what makes an offence serious, the classification of offences under the CC indicates that a felony is a serious offence.[35] It is however submitted by Amadi[36] that not all felonies fall on the same footing of seriousness as in the stealing of a fowl.[37] and a testamentary instrument.[38] Stealing a testamentary instrument is more serious attracting a jail term for life while stealing a fowl is punishable with three years imprisonment.

Where it is intended to detain a suspect longer than 24 hours, then it becomes necessary to obtain a remand warrant from a magistrate. Where, however, there is no power to grant bail, then the suspect must be charged to court for it to decide the issue of bail.

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35 See *Emezue v. Okolo* (1978) 1 LRN 236.

36 Amadi, *op. cit*, p. 196.

37 Section 390, CC.

38 *Ibid*. section 390 (1) of CC.

From the discussion above, the issue of bail is very fundamental and the officers are advised to view it as such. Bail therefore should be seen as a right to the suspect.[39]

8.2.7 A Copy of Government Warehouse Dispatch Note (BK. C 21)

This is another very important document to be attached in the case file. As most of the cases have to do with the issue of goods, it becomes paramount to secure the goods in proper custody pending the final determination of the case. To this end the *dispatch note* is an evidence that the goods in contention is properly secured in the government warehouse. In our earlier discussion[40] on warehousing we stated that it is the process of securing the custody of goods on which duty is to be paid but has not been paid.

8.2.8 Investigation Report

There is no hard and fast rule about the mode of writing investigation report. The following leads are however suggested for the guidance of investigation officers.

i) Heading
ii) Facts of the case
iii) Action taken
iv) Investigation
v) Findings
vi) Recommendations.

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[39] See *Obakpa v. C.O.P* (1981) 2 NCLR 420; *Osuji & Anor. v. C.O.P* (1974) 4 ECSLR 445.

[40] For detailed discussion, see chapter 6.10 which deals with warehousing as a Preventive Measure

The essence of the report is to enable the next superior officer to know the facts of the case so as to direct appropriate action. It is also for the guidance of the customs legal adviser in giving the necessary advice over the case.

All the contents of a case file must be serially paginated in red ink and it is usually in four copies. The original file which must contain the original copies of the documents relevant to the case, goes to the customs Legal Adviser, who is represented by Assistant legal advisers in the Zones. The duplicate is sent to the enforcement, investigation and inspection headquarter Abuja. The triplicate is forwarded to the zonal office for their information. The quadruplicate is retained at the legal seat in the area command and it serves as the ñ*station copy*ò. In the case of ñ*Abandoned seizure*ò[41] both the original and quadruplicate copies are retained at the station.

8.3 Condemnation Proceedings

This is the order of a court forfeiting any particular seizure that was made. The practical application of this process by the NCS however deserves some comments. Paragraphs 3 to 10 of the third schedule to CEMA become very relevant. Paragraph 3 provides ï

[41] Abandoned seizure is a seizure made without a suspect. See detailed discussion and our view on it in chapter 7.3 *ante.*

> Any person claiming that anything seized as forfeited is not so liable shall, within one month of the date of the notice of seizure or, if no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Board.

Provided that the Board may, at its discretion, extend the period in which notice of a claim may be given.

Paragraph 4 provides:

> Any notice under paragraph 3 of this schedule shall specify the name and address of the claimant and, in the case of a claimant who is outside Nigeria, shall specify the name and address of a legal practitioner in Nigeria who is authorized to accept the service of processes and to act on behalf of the claimant and service of process upon a legal practitioner in Nigeria who is authorized to accept the service of process and to act on behalf of the claimant and service of process upon legal practitioner so specified shall be deemed to be proper service upon the claimant.

Paragraph 5 provides:

> If on the expiration of the relevant period aforesaid for the giving of notice of claim no such notice has been given to the Board, or if, in the case of any such notice given, any requirement of paragraph 4 is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.

If one reads paragraphs 3 ï 5, the necessary interpretation is that once there is no notice of claim from anybody on the expiration of the one month or as the Board may prescribe, the thing in question shall be deemed to have been duly condemned as forfeited.[42] The implication is that, there ought not to be any further condemnation proceedings.

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[42] Paragraph 5 of third schedule to the CEMA.

In practice, however, even where no such notice of claim is given, the NCS still goes to court by way of *exparte motion* to get the goods condemned. It is only where there is a notice of claim that such condemnation and/or forfeiture proceedings become relevant.[43]

In support of this contention, paragraph 6 provides:

> Where notice of claim is duly given in accordance with the foregoing provision of this schedule, the board shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture, the court shall condemn it as forfeited.

In this regard the proceedings shall not be *ex-parte* but motion on notice so that the claimant can have the opportunity to state his case.[44]

Where anything is condemned or deemed to have been condemned as forfeited then, without prejudice to any delivery by or sale of the thing by the Board under paragraph 15 of the schedule, the forfeiture shall have effect as from the date when the liability to forfeiture arose.[45]

It may be argued that the provision of paragraph 9 of the schedule may appear to have been made irrelevant by section 7(1) (c) of the Federal High Court Act, which removed the jurisdiction to try customs offences from other courts to the Federal High Court.

Paragraph 9 provides:

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[43] Forfeiture proceedings will be the discussed in chapter 8.4 *infra*.

[44] Paragraph 8 provides that proceedings for condemnation shall be civil proceedings and may be instituted in a court of summary jurisdiction. See *Celestine Opara v. NCSB supra.*

> Proceedings for condemnation of any thing instituted in a court of summary jurisdiction may be so instituted ï
>
> (a) in any such court having jurisdiction in the place where any offence in connection with that thing was committed or where any proceedings for such an offence are instituted.
>
> (b) In any such court having jurisdiction in the place where the claimant resides or if the claimant has specified a legal practitioner under paragraph 4 of the schedule, in the place where that legal practitioner has his office.
>
> (c) In any such court having jurisdiction in the place where that thing was found, detained or seized or to which it is first brought after having been found, detained or seized.

A careful study of the sub-paragraphs a ï c may however, make the paragraph relevant. The words ñin any such courtò used in the sub-paragraphs could be referring to any court having jurisdiction. Since it is the federal high court that has jurisdiction in customs matter, the reference there is to the Federal High Court.

The power given by paragraph 15 to deal with seizures before condemnation seems not to have been fully exploited in practice by the NCS.

Paragraphs 15 provides:

> Where anything has been seized as forfeited, the Board may at anytime, at its discretion, and not withstanding that the thing has not yet been condemned or is not yet deemed to have been condemned as forfeited -
>
> (a) deliver it up to any claimant upon his paying to the Board such sum as the board thinks proper, being a sum not exceeding that which, in its opinion, represents the value of the thing, including any duty chargeable thereon which has not been paid; or
>
> (b) if the thing seized is a living creature or is in the opinion of the Board of a perishable nature, sell or destroy it.

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[45] See paragraph 7 of the schedule, Schedule 15 gives power to the Board to deal with seizures before condemnation.

With regard to sub-paragraph (b), the NCS is fully applying the provision but the same cannot be said of paragraph (a). The contention of the NCS is that once a thing has been seized, it cannot be released unless condemnation process is applied and the goods are allocated by auction sales. This, we submit is a wrong application of the rules. Since the paragraph gives the power to release before condemnation, the NCS should use the opportunity to consider some genuine cases and deal with them as such.[46]

In Brunei, all goods seized shall be liable to forfeiture.[47] Where there is no prosecution with regard to goods seized under the Brunei Customs Act, such goods shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure.[48] If however, there is a claim, then it is the order of a court that can direct forfeiture.[49]

In Ghana, goods which are loaded on board an aircraft or ship in a port or place within Ghana and carried coastwise contrary to the Ghanaian Customs Act, or which having been carried coastwise are unloaded in a port or place contrary to the Act, shall be forfeited.[50] Anything, including aircraft, ships and vehicles, made use of in the importation, attempted importation, landing, removal, conveyance, exportation or attempted exportation of any uncustomed, prohibited or restricted goods, or any other

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[46] See comment in chapter 2.3.2 where we submitted that the concept of strict liability in smuggling offences is unfair; *B.O.C.E. v. Aro Olajide, supra*.
See also the issue of concealment in chapter 3.2.3, see section 186 (b) CEMA on power to compound proceedings by NCS.

[47] Section 116 of the Brunei Customs Act.

[48] Section 118 (1) *ibid.*

[49] Section 118 (4) *ibid.*

goods which may be forfeited under the Act, are liable to forfeiture[51] and an officer is empowered to seize it.[52] The powers to deal with the seizure is then automatically given to the commissioner.[53] Where however there is a notice of claim, it is only a court order in a proceedings that can permit forfeiture.

In Kenya, anything liable to forfeiture may be seized by an officer.[54] There is no direct provision as to what can be done with such goods. If however there is a notice of claim, then the commissioner can then apply for condemnation, which will give him the power to sell or otherwise dispose of the goods.[55]

Section 225 of the New Zealand Customs Act[56] listed a whole lot of goods that are subject to be forfeited to the crown. A customs officer or member of the Police will then consequent upon section 225 seize any of the forfeited goods or any other goods that he or she has reasonable cause to suspect are liable to forfeiture.[57] Where there is an application for an order disallowing the seizure, then only a district court can then decide the

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50 Section 191, Ghana Customs Act.

51 Section 288 (1), *ibid*.

52 Section 288 (2), *ibid*.

53 Section 288 (4), *ibid.* Item can be disposed of as directed by the Commissioner. Compare with section 31 (9) of CEMA which empowers the Board to sell any goods which are removed to a Government Warehouse and not cleared by the importer.

54 Section 199, Kenya Customs Act.

55 Section 202, *ibid.*

56 1996.

57 Section 226 (1), *ibid*.

matter.[58] If there is no such application, then automatically the goods are deemed to be condemned to the crown.[59] And the Chief Executive may direct disposal.[60]

In India, the Act provides for confiscation of any goods improperly imported.[61] And any goods attempted to be improperly exported[62] where any smuggled goods are sold by a person having reason to believe that the goods are smuggled goods, the sale proceeds shall be liable to confiscation.[63] Adjudication of confiscations and penalties are purely done by the customs.[64] On confiscation, such goods shall thereupon vest in the central government.[65] The Act did not expressly provide for how to dispose same save that the officer adjudging confiscation shall take hold of possession of the confiscated goods.[66]

One interesting section which is not in the other jurisdiction[67] is the provision of section 125 of the Indian Act which provides:

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58 Section 231, *ibid.*
59 Section 234, *ibid.*
60 Section 237, *ibid.*
61 Section 111 of the Indian Act.
62 Section 113, *ibid.*
63 Section 121, *ibid*
64 Section 122, *ibid.*
65 Section 126 (1), *ibid*.
66 Section 126 (2), *ibid*.
67 Ghana, New Zealand, Kenya, Nigeria and Brunei.

> Whenever confiscation of any goods is authorized by this Act, the officer adjudging it may é give an option to pay fine in lieu of confiscation.[68]

8.4 Forfeiture Proceedings

There seems to be no dividing line between condemnation proceedings and forfeiture proceedings. This is because the wordings ñcondemned as forfeitedò is used in paragraph 5 of the third schedule. It is against this background that the NCS even where there is no notice of claim, go to the court by exparte motion in a condemnation proceedings, wherein the goods are declared forfeited. This we submitted earlier[69] is unnecessary in view of the provisions of paragraph 5 that automatically makes the goods duly condemned and forfeited where their is no notice of claim.

It is our contention therefore that forfeiture proceedings becomes relevant where notice of claim is duly given as provided in paragraph 6 of the third schedule. The court shall then consider in the circumstance whether the thing seized is liable to forfeiture. If it is, then it shall condemn it as forfeited.[70]

This stance is further anchored on the provisions of section 167 of the Act which provides that any officer or police officer, or any other person authorised in that behalf by the Board, may at any time seize or detain anything liable to forfeiture under the customs and excise laws or which

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[68] This shall be in addition to any duty and charges payable on the goods. Section 125 (2) of the Indian Act.

[69] See chapter 8.3 *ante*.

such officer, police officer or other person has reasonable grounds to believe is liable to forfeiture. If anything liable to forfeiture has been seized and there is a notice of claim, the natural thing to do therefore is to seek for its forfeiture in a forfeiture proceeding. The essence is to perfect that forfeiture as provided,[71] and this becomes necessary because of the notice of claim.

This is clearly the situation in section 117 of the Brunei Customs Act where any order of the forfeiture or for the release of anything liable to forfeiture shall be made by the court and it must be proved to the satisfaction of the court that an offence had been committed.

In some jurisdiction like the Ireland, the difference between forfeiture and condemnation seems not to be there. The use of ñandò in section 9 of Ireland Customs Act[72] tends to be conjunctive thereby providing for no such difference. The section provides:

> Proceedings in any court of competent jurisdiction for the forfeiture and condemnation of goods may be brought in the name or at the suit of the Attorney General.

In Nigeria the words ñdeemed to have been duly condemned as forfeitedò used in paragraph 5 of the third schedule to the CEMA tends to be the same as the provision of section 9 of the Ireland Act. This however we submit may not be correct, in view of the provision of paragraph 6 of the

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70 Paragraph 6 of the Third Schedule to the CEMA

71 See Paragraph 6 of the Third Schedule to the CEMA

72 Section 9 of the Ireland Customs Act 1956. The emphasis is on the use of ñandò to qualify forfeiture and condemnation

third schedule that makes for an order of a court in a proceedings if there is a notice of claim.

Another issue that needs consideration is the effect of a conviction on things liable to forfeiture. This contemplates where there is a prosecution and conviction is secured but no order is made as to the things liable to forfeiture. The question is, does one need a further order to make the goods forfeited? Under section 47 of CEMA the penalty for improper importation is imprisonment for five years. Section 47 (1) provides:

> If any person ï
>
> (a) lands, or unloads in Nigeria, or removes from their place of importation or from any approved wharf, examination station, customs station or customs area ï
>
> i) any goods chargeable with duty which has not been paid; or
>
> ii) any goods imported contrary to any prohibition.
>
> He shall be sentenced to imprisonment for five years without the option of a fine.

If we rely on only this section, what then happens to the improperly imported goods? The practice tends to be conviction and then further order as to forfeiture is made. We are however saying that there is the need to be an express provision as in the case of Kenya. Section 201 of the Kenyan Act took care of such situation.

The section provides:

> Where a person is prosecuted for an offence effect of under this Act (sic) and anything is liable to forfeiture by reason of the commission of that offence, the conviction of that person of that offence shall, without further order, have effect as the condemnation of that thing.

The position in New Zealand in this regard relates to that of Kenya but raises a controversial situation. Section 236 (1) of the New Zealand Act provides that the conviction of any person for an offence has effect as a condemnation. The section provides:

> Subject to subsection (2) of this section, where this act provides that on the commission of any offence any goods are forfeited, the conviction of any person for that offence has effect as a condemnation, without suit or judgement, of any goods that have been seized in accordance with this Act and ï
>
> (a) in respect of which the offence was committed.
>
> (2) where the court imposes a sentence to which sub-section (1) of this section applies, the court may, if it thinks fit order the restoration of the goods forfeited to the person from whom the goods were sized and, where such an order is made, the conviction does not have effect as a condemnation of those goods.

The issue however is the provision of section 236 (2) to the effect that where the court imposes a sentence on any person on the conviction of that person for an offence under sub-section (1), the court may, if it thinks fit, order the restoration of the goods forfeited to the person from whom the goods were seized and, where such an order is made, the conviction does not have effect as a condemnation of those goods.

The other arm of the issue is whether forfeiture of the thing is a bar to other punishment of imprisonment for smuggling, which is considered a crime. Section 46 of CEMA only provides for the forfeiture of goods

improperly imported without reference to the person who committed the offence. If a charge is not brought under section 47 of CEMA, which specifically provides for penalty for improper importation, such can not become applicable under section 46, which provides

> where ï
>
> (a) except as provided by or under this Act, any imported goods being goods chargeable with a duty of customs, are without payment of that duty landed or unloaded in Nigeria, or removed from their place of importation or from any approved wharf, examination station or customs area
>
> those goods hall be forfeited.

In the case of *US v. Hosep Krikor Bajakajian,*[73] the issue was clearly considered. It was held that the concept of forfeiture as a criminal penalty which is embodied in the Organized Crime Control Act of 1970 differs from other existing forfeiture provisions under the federal statutes where the proceedings in *rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and forfeiture is no part of the punishment for the criminal offence.[74]

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[73] US 1998, see also *Austin v. U.S* 509 U.S.

[74] See those contained in the Customs Narcotics, and Revenue Laws, S. Rep. No. 91 ï 617, p. 79 (1969).

Under the Indian Customs Act,[75] it is stated clearly that confiscation shall not prevent the infliction of any punishment. The person affected thereby is liable under the provisions of the Act or under any other law.[76]

Even though it is not expressly stated as under the Indian Act, that confiscation shall not prevent the infliction of punishment, we submit that by necessary implication, that should be the position under the CEMA.

8.5 Compounding of Offences

This is the decision not to prosecute for one reason or the other.[77] It has been viewed as taking bribe to ignore crime.[78] Others see it as a legitimate way of dealing with the matter. This is based on the provisions of the CEMA that gives the NCS the power to compound offences. Section 186 of CEMA provides:

> The Board may:
>
> (a) Without prejudice to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney General of the Federation to institute, continue or discontinue criminal proceedings against any person in any court of law) and subject to such directions, whether general or special, as may be given by the Attorney ï General of the Federation, stay or compound any proceedings for an offence or for the condemnation of anything forfeited under the customs and excise laws; or

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75 *Op. cit*.

76 Section 127 Indian Customs Act.

77 Section 226 of the NCS Bill, 2012 refers to it as ñconcession settlementò wherein there is an agreement under which the customs service agrees to wave prosecution of a customs offence subject to undertakings by the person or persons charged with the offence.

78 Encarta Dictionary, *op. cit.* p. 204.

> (b) Without prejudice to the generality of section 5 of this Act[79] and subject to such directions, whether general or special, as may be given by the Minister, restore anything forfeited or seized under the customs and excise law.

This section only restricts the penalty to the forfeiture of the thing liable to forfeiture. The advantage here is that being an economic crime the emphasis tend to be on the gains/revenue from the item so forfeited. The problem however is that after forfeiture and the subsequent allocation, which often the amount paid is nothing, compared to the value of the goods, makes the advantage a ruse.

It is in this light, that the provisions of the EFCC Act on the same issue tend to be better. Section 14 of the Act provides:

> 2) Subject to the provisions of section 174 of the constitution of the Federal Republic of Nigeria (1999), which relates to the power of the Attorney-General of the Federation to institute, continue, take over or discontinue criminal proceedings against any person in any Court of law), the commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit not, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.
>
> 3) All moneys received by the commission under the provisions of sub-section (2) of this section shall be paid into the consolidated revenue fund of the federation.

An issue for determination here is whether the NCS can compound offences rather than go to court. This may look extra legal, but this is allowed by virtue of section 186 of CEMA. This section, should however, be invoked in extreme cases especially in cases of first offenders.[80]

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[79] The section that the Board is to be subject to the general control of the Minister.

[80] In advanced criminal justice jurisdiction, suspect might be considered as first time offenders whose punishment might be caution having confessed, and if however there is a conviction, the

Section 121 of the Brunei Act provides:

> 1) Any senior officer of customs may compound any offence, which is prescribed to be a compoundable offence, by accepting from the person reasonably suspected of having committed such offence a sum of money not exceeding 500 dollars.
>
> 2) In like manner, the proper officer of customs not being a senior officer of customs may compound any offence, which is prescribed to be compoundable by such officer, by accepting from the person reasonably suspected of having committed such offence a sum of money not exceeding 20 dollars.
>
> 3) On the payment of such money (sic) the person reasonably suspected of having committed an offence, if us custody (sic) shall be discharged, any properties seized shall be released and without prejudice to civil proceedings for the recovery of any duty which has not been paid, no further proceedings shall be taken against such person or property in respect of such offence.

This power given to any senior officer and any junior officer as the circumstance warrants can lead to abuse if not effectively checked. The intention may have been to derive the maximum gain by receiving the money mentioned. The release of the property seized in sub-section 3 of the section is another difficult provision. Although there is provision to recover any duty on it, the fact of releasing the property will only encourage commission of crime.[81]

In Kenya, it is the commissioner that reserves the power to compound an offence. Section 214(1) of the Kenyan Act provides:

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sentences.might be suspended. We do not have such in the Nigerian statute book, but rather such matters can be compounded.

[81] See section 236 (2) of the New Zealand Act which provides that where the court imposes a sentence on any person on the conviction of that person, the court may, if it thinks fit, order the restoration of the goods forfeited.

> The Commissioner may where he is satisfied commissioner (sic) that a person has committed an offence under this Act in respect of which a penalty of a fine, or in respect of which anything is liable to forfeiture, compound the offence and may order that person to pay such sum of money, not exceeding the amount of the fine to which he would have been liable if he had been prosecuted and convicted for the offence, as he may think fit, and he may order anything liable to forfeiture in connection therewith to be condemned.
>
> Provided that the commissioner shall not exercise his powers under this section unless the person in writing admits that he has committed the offence and request the commissioner to deal with the offence under this section.

This provision is similar to section 14 (2) of the EFCC Act which we stated earlier[82] is better than the provision of section 186 of the CEMA. The Kenya Act further provides for the consent of the suspect, which must be in writing before the commissioner can exercise the power. The consent, which is in form of accepting liability for the commission of the offence is a welcome development. It confirms the guilt of the suspect and further expresses a kind of plea to be pardoned.

Apart from the disadvantage of encouraging commission of crime, compounding offences if not abused, is in line with civilized criminal justice and should therefore be practised. The NCS apart from reducing the numerous litigations in court will stand to gain more in revenue if the penalty in compounding the offences can be made to be like that of the EFCC and Kenya.

8.6 Limitation of Time for Prosecution

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[82] *Op. cit.*

Generally speaking, when a person commits an offence, a cause of action arises against that person. The right therefore to prosecute the offender is a right in perpetuity; that is, the offender can be prosecuted at any time.

Under CEMA there is a deviation from this general principle, that the offender can be prosecuted at any time. The CEMA puts a time limit of seven years for any prosecution of any offence committed under it.[83]

Section 176 (3) provides:

> No proceedings shall be instituted except within seven years of the date of the commission of the offence.

The above provision presupposes that all prosecution under CEMA not instituted within the specified time period (seven years) shall become statute barred and thus the right of action would be extinguished.

There are some other instances where time limit is set for prosecution in Nigeria.

(i) Proceedings in respect of the offence of treason, must be instituted within two years of the alleged commission of the offence.[84]

(ii) Proceedings for the offence of sedition must be instituted within six months of the alleged commission of the offence.[85]

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[83] Section 250 (3) of the NCS bill, 2012, seeks to provide for no time limitation for prosecution.

[84] Section 43, CC.

[85] *Ibid*, section 52, (1).

(iii) Proceedings against any person alleged to have had unlawful carnal knowledge of a girl over 13 but under 16, and a person knowing a woman or girl to be an idiot or imbecile, who allegedly had or attempted to have unlawful carnal knowledge of her, must be instituted within two months of the commission of the offence.[86]

(iv) Prosecution against a public officer for an offence committed in the course of executing his duty must be instituted within three months of the commission of the offence.[87]

Criminal proceedings shall not be instituted under the Ghana Customs Act in respect of an offence after four years from the date of the offence.[88] While, in Kenya proceedings for an offence under the Customs Act may be commenced, and anything liable to forfeiture may be seized, within five years of the date of the offence.[89]

We submit in respect of the above provisions that, though it is not unique in view of the other instances of exceptions to the general principle of no time limit to prosecution, there should have been no need to create the

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86 *Ibid*, section 221.

87 Section 2 (a) Public Officers Protection Act, Cap. P 41 LFN 2004.
See *Egbe v. Alhaji & Others* (1990) 1 NWLR (Part 128) 546. A person relying on this section must establish that he is a public officer.
See *Apampa v. The State* (1982) All NLR (Pt 1) 122; *Aiyetan v. Nigerian Institute for Oil Palm Research* (1987) 6 SC 36.

88 Section 301, Ghana Act.

89 Section 207 Kenya Act.

seven, five and four years time limit in Nigeria, Kenya and Ghana respectively. This is because of the sophistication of the crime of smuggling there should be no bar to prosecution.

CHAPTER NINE

CONCLUSION

9.1 Summary of Findings

This thesis has examined the legal framework for combating smuggling under the CEMA. The CEMA is the principal enactment on the crime of smuggling in Nigeria. The role of the NCS as Federal Government agency charged with the administration of the Act is also considered.

The CEMA being an Act of 1958 have come a long way. It is in view of this and other changes by way of reform that the work proposed a rethink of the Act, so as to meet the changing trend.[1]

The various provisions of the Act with respect to the crime of smuggling became inadequate to cope with the sophistication of the new trend of smuggling in Nigeria.[2]

There is a consideration of the historical background of the NCS a background that has been fraught with series of reforms and which tend to be unending. The operation of the NCS is put in focus and the barrage of problems affecting its operations are also critically examined.

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1 See some of the changes made by Decree No. 77 of 1993.

2 For example, the penalties prescribed in sections 14, 18 and 77 of CEMA are grossly inadequate in todayôs socio-economic realities.

Smuggling is one of the serious areas that may lead to the breaches of the CEMA. It is old as man and is defined as the crime of taking, sending or bringing goods secretly and illegally into or out of a country.[3] The CEMA in the light of above makes several provisions which if breached will amount to smuggling.[4] The interesting provision of section 165 of CEMA which provides for capital punishment is also considered. The thesis also considers the situation where a smuggler armed with any firearm and causes injury to an officer, which leads to death and the attendant possible conflict in the power of prosecution vested in Nigerian police on murder cases.

No matter the level of sophistication, crime will manifest because it is a product of society. In this light the origin and concept of crime was considered, and the thesis reveals that crime ever existed since the dawn of history and is of diverse dimensions.[5] It was further established that apart from crimes of strict liability, the fundamental requirement for criminal liability is that a guilty mind (*mens rea*) must coincide in point of time with the prohibited act (*actus reus*).[6]

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3 Soares and Stevenson, *op. cit*.

4 See sections 46, 47, 63 and 64 of CEMA which deals with goods improperly imported and exported

5 It ranges from business crime, commercial crime, corporate crimes, crimes of capital, crimes of the powerful, crimes at the top, crimes of the suites, economic crimes, elite deviance, occupational crime, organizational deviance, white-collar crime and the crime of smuggling.

6 Jakeman, *supra*.

The nature of smuggling is considered and it is found to be a flourishing business in Nigeria, which is for all comers.[7] This, the thesis contends leads to a serious dimension in the crime of smuggling as it is being aided and abetted by Nigerians in high positions using such position to influence their way through. The various methods used by the smugglers is also discussed in the work.[8]

The mental attitude of the smuggler, which takes the form of intention, knowledge, recklessness and negligence is discussed in the work. Section 164 of CEMA makes knowledge and intention a very vital ingredient of the offence of smuggling. Going by the general notion of our criminal jurisprudence that guilt must be proved beyond reasonable doubt by the prosecution, if applied to the CEMA then the prosecution ought to prove the elements. This however, seems not to be the position under CEMA as section 190 provides that intention or knowledge need not be proved by the prosecution. The burden is in fact on the defendant to disprove. An amendment of this section to reverse the burden of proof therefore becomes of importance.

The other enactments[9] dealing on the crime of smuggling are put in focus and a comparative study is undertaken. The survey of the enactments

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7 The *Vanguard*, September 7, 1991. p. 5

8 Smuggling is carried out through concealments, use of false bottom containers, camouflage, false declaration, Bicycle carriers, motorcycle carries, tricycles and animals especially in the Northern part of the country.

9 Criminal Code, Penal Code (Northern States) Federal Provisions Act, NDLEA Act, and the EFCC Act.

becomes relevant so as to fully grasp the dynamics of the crime of smuggling. Under the CC and the PC there is the requirement of being armed before the offence of smuggling can be said to have taken place.[10] Under CEMA there is however no such requirement before the offence can be said to have taken place.[11]

The case of *Board of Customs and Excise v. Alhaji Ibrahim Barau*[12] is seriously analysed. The issue is whether lack of knowledge of a prohibition order is a defence or not. The Supreme Court stated that õlack of knowledge ought not to be a defenceö. We however subscribed to the dissenting view of Bello J.S.C. where he stated that: since knowledge of the law is expressly declared by the section to be an element of the offence, it therefore means that ignorance of the prohibition order is a defence.

Other smuggling offences like false declaration, under declaration and forgery of documents are also put in perspective. The thesis contends the punishment for forgery under the CEMA is not enough as compared to the ordinary criminal law[13] and a review is therefore advocated.

The Causes of smuggling as identified in the work includes the scarcity of good quality locally produced goods, preference for imported goods, liberalization of trade by neighbouring countries, evasion of correct

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10 Section 78, CC, *ibid,* and section 423, PC *ibid*.

11 Section 47 CEMA.

12 *Supra*.

13 Section 162 of CEMA provides for two years imprisonment or a fine of one thousand naira. Compare with section 364 of PC which provides for 14 years imprisonment.

payment of duty, inefficient enforcement machinery, corruption and lack of proper enlightenment of the public.

The study found that smuggling is indeed a high level assault on the nationôs economy. It is a complex phenomenon with many factors and measures encouraging and sustaining it. The identifiable effects include: revenue leakage, promotion of money laundering, killing of infant industries, negative social effects and the insecurity of life and property.

Relying on the old adage that ñprevention is better than cureò some policies were put in place so as to prevent smuggling. To this end the various preventive measures to wit pre-shipment inspection, destination inspection, administration of manifest, scanning, ASYCUDA, 100% physical examination, task force/Ad-Hoc duties, reconciliation, post clearance audit and warehousing were considered.

Where the preventive measures fail, then the next option is to apply the rules by way of enforcement. In this respect the various enforcement measures put in place in the bid to curb smuggling are discussed. These include: arrest of suspects, detention of goods, seizure of goods, search and then the relevant proceedings under the CEMA.

9.2 Recommendations/Reforms

These recommendations are anchored on the need to reform the principal enactment (CEMA) that seeks to enforce the crime of smuggling in Nigeria. In the appraisal of the CEMA, we have expressed some views and identified certain problems that not only make the CEMA inadequate to cope with the sophistication of the new trend of smuggling, but has also affected the performance of the NCS which is responsible for the administration of CEMA.

To this end and without prejudice to the views expressed in the chapters, we make the following recommendations with a view, perhaps to informing the government so as to find solutions to the general problems raised.

(i) The urgent need for the reform of the CEMA becomes very important since the restructuring of the NCS has been a continuous one, hence the need to meet the changing trend. The punishment often prescribed for the various offences is inadequate and does not serve as a deterrent. The penalty of two hundred naira in some sections[14] is grossly inadequate in todayôs socio-economic realities. To this end, an average penalty of ₦1,500,000 to ₦5,000,000 is recommended for the various offences, as in other and Anti-Corruption Acts like the EFCC.

[14] Sections 14 (1), 18(1) and 77 (1), CEMA.

(ii) A complete overhaul of CEMA is advocated. The earlier CEMA Reforms Bill[15] before the National Assembly merely seeks to subject the exercise of presidential and ministerial powers, over imports and exports to the approval of the National Assembly. The current Nigeria Customs Service (NCS) Bill 2012 before the National Assembly attempts to address some of the deficiencies of CEMA, 1958. It seeks to repeal the CEMA Act, Cap. C45 Laws of the Federation of Nigeria, 2004 and other Customs and Excise Laws; to establish the NCS; reform the administration and management of customs and excise in Nigeria and for other related matters.

(iii) The legal notices which seek to interpret CEMA also need a proper review to meet the changing trend.

(iv) The use of taskforce, special team or whatever name being called in the anti-smuggling operations of the NCS should be stopped. The FOU already charged with this responsibility should be strengthened to perform its traditional role of combating smuggling.

(v) In view of the fact that smuggling is a high level assault on Nigeriaôs national security, the officers need to be encouraged, rewarded and protected. They need to be properly equipped in order to effectively curb the activities of those that undermine and subvert the national security through smuggling.

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[15] A Bill sponsored by Hon. C.I.D Maduabum of the Nigerian House of Representatives.

(vi) The role of the Nigerian media in boosting the image of the Service becomes very important.[16] The NCS has been playing a crucial stability role in the economic development of the country and by extension, the political history of Nigeria. As a ñmilkable cowò, the Service expects nothing less than complete protection from the government, public confidence and co-operation in order to sustain the tempo of its efforts at combating smuggling.

(vii) All the so called reforms in the past, which seems unending had only led to gradual bureaucratic encapsulation of the Service. It has gone a long way in affecting the commitment and efficiency of the officers. What is needed is a holistic reform, which will follow the world best practice so as to make the NCS a modern functional customs service.[17]

(viii) The issue of autonomy and improved funding if achieved will set the Service on a foundation of fundamental transformation.[18] The present 7% funding from the federation account is grossly inadequate.[19] It should be based on the total collection both federation and non-federation. It is further suggested that the Service be entitled to not

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16 The National Assembly public hearing on the state of the NCS in May, 2009 made revelations that the Service is often given a bad name to hang it.

17 This was part of the terms of reference of the presidential task force on Nigeria customs reforms set up by the YarôAdua administration.

18 See Leadership, Saturday 09, May, 2009 where the Committee on Customs of the House of Representatives advised the Presidential Task force on customs reforms to pay greater attention to the autonomy of the NCS in order that it meets it objectives and improve performance
The Issue of Funding was reiterated by Elder Asu Beks, a Commentator on Maritime Affairs. See Daily Sun, Thursday May 21, 2009.

19 The NCS Bill 2012 in section 18 (1) (a) is proposing a funding of not less than 2.5 percent of the free-on-board value of imports.

less than 5% of the Free on Board (FOB) value of all imports and exports.

(ix) The Minister of Finance being the Chairman of the NCS Board tends to create an impression of ministerial control. This is not good enough for the NCS as a paramilitary outfit. At best there should be a specialized ministry in-charge of customs as in Ministry of Defence and Ministry of Police Affairs. We further recommend the creation of a Nigerian Customs Service Commission that will have a full time chairman like that of the Police Service Commission.[20] The establishment of a Customs Council is also advocated.

(x) If improved funding is achieved, it is recommended that adequate remuneration outside the purview of the public service as in Ghana Tanzania, Uganda be approved for the Service by the National Wages and Salaries Commission.

(xi) Integrity should be the watchword in the operations of the NCS. Integrity has been defined to be a positive set of attitudes which foster honest and ethical behaviour and work practices.[21] It is more than simply the absence of corruption; rather it involves developing and maintaining a positive set of attitudes and values, which give effect to an organisationôs aims, objectives, and the spirit of its integrity strategy. To this end, we recommend full adoption of the

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[20] A private bill for the establishment of a Customs Service Commission before the National Assembly has not gone beyond the first reading.

[21] Integrity Within Customs; Global facilitation partnership for transportation; http://www. gfptt.org/ entities/topic profile.aspxx?tld+42 bbdle2-66f3-40fe8a51-be2016a5 accessed on 23/12/2008

compendium of integrity best practices of the World Customs Organization.[22]

(xii) In achieving further automation in line with the customs best practice the NCS should now be able to migrate from the ASYCUDA++ to the ASYCUDA world, which is the highest version. In the alternative, as in Ghana, Nigeria should develop its own community network to suite its local circumstances.[23] We however submit that the robust system of modern clearance procedure earlier discussed[24] will go a long way to achieve the full automation in line with the customs best practice.

(xiii) The NCS being the administrator of the security of the Nigerian economy should be left alone to perform its role. The multiplicity and proliferation of agencies at the various entry and exit points should be addressed. There should be a kind of harmonization.

(xiv) If the effect of the anti-smuggling role of the NCS is to be felt, then there ought to be a holistic view on the treatment of seized items especially cars. To this end and in order to serve as a deterrent to the smugglers, all seized vehicles should be crushed. In the Philippines

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22 Referred to as the Arusha Declaration, it covers leadership and commitment, regulatory framework, transparency, automation, Reform and Modernization, Audit and Investigation, Code of Conduct, Human resources management, Morale and organization culture, relationship with the private sector.
In Africa, Morocco, Egypt and even Rwanda are in high level of compliance to the best practices than Nigeria.

23 In Ghana, the GCNET/GCMS proved worthwhile. The issue however in Nigeria, is not how to develop its own network, but is the readiness of government as in Ghana to support such a project by developing an infrastructure that will obviate a relatively weak infrastructure environment.

24 See Chapter 6.5.8 our discussion on the single window project.

smuggled cars are sentenced to be crushed.[25] The crushed vehicle can be recycled into other profitable ventures. The Rivers State metal recycling project is a very good example. Even though there is a loss of revenue, the government contended that it is a signal that government is serious about addressing smuggling.

(xv) If XIV above is considered too harsh then the option to pay fine in lieu of confiscation as in India[26] is recommended. This will be in addition to any duty payable on the goods.

(xvi) There should be a serious campaign for the highly placed in the society to stop smuggling. Senior military/security officers, even tribal leaders who ought to control smuggling are closely associated with the system. This, it is submitted has turned into an unstoppable nightmare for the government.

(xvii) Though raids of markets is a hard stance which has been objected to by the business community, we submit however that if it is carried out holistically and devoid of politics, it will bring positive effect especially to the textile industry.[27] The raid is capable of making the smugglers withdraw the goods from the markets and people will have no option than to buy the locally produced goods. This can be

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25 http:// www.ebloggy.com/blog.Php? Username=markclarkson & id=Id entry = 169 accessed on 6/1/2009.

26 Section 125, Indian Customs Act, 1962.

27 The removal of textile and other items via a circular ref. BD.12237/S.403/Vol. 1/206 of 19 Nov, 2010 from the Ministry of Finance, will however bring negative effect to the textile industry. (See Appendix IX)

achieved by the setting up of a special taskforce comprising the customs, the police and the military.

(xviii) There is need to be a declaration of an emergency in the textile industries so as to revamp the industry. Some of the measures intended includes establishment of a textile industry trust fund, textile development institutes, mergers/acquisition and recapitalization. The long awaited 70 billion naira textile industry intervention fund if paid will go a long way in achieving the above stated measures.[28] It becomes very important for there to be the ñpolitical willò to be able to achieve same.

(xix) In view of the importance of revenue from imports, which is a serious alternative to oil revenue, the government should encourage the NCS in its duty to collect revenue. The continuous bashing of the Service as corrupt affects its credibility. The Service on its part should come out of its shell and partake in the politics of recognition and respect. This will enhance its effectiveness in the discharge of its statutory functions.

(xx) Laudable government polices like the ETLS, JCC and COPAZ which tend to encourage smuggling should be reviewed so as to stop the abuse.[29] The creation of a semi regional center to effectively check the abuses should be considered for the West African sub-region[30]

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28 Daily Trust, Tuesday, Feb 10, 2009 Tell, Feb., 23, 2009.

29 See detail in Chapter 4.9 *ante.*

30 Just like that of the South East European Co-Operative Initiate Center (SECI)

The list of banned, prohibited and restricted items can further be reviewed so as to stem the tide of diversion and smuggling of the items into the country.[31]

(xxi) Finally, there is the need for the government to be honest and sincere in providing for its citizens. The citizens in the social contract having paid their taxes, look unto government to provide the necessaries of life If all the past agenda especially that of the present regime is achieved, the poverty line will be reduced and smuggling at that level will definitely stop.

9.3 Conclusion

This thesis is an examination of the legal framework for combating smuggling under the CEMA. It is a major attempt to analyse and critique the various sections of the Act dealing with smuggling. Smuggling which involves the illegal importation and exportation of goods to evade the correct payment of duty or undermine government policy on existing prohibition, has in the modern time become sophisticated that the provisions of the CEMA can no longer cope with the trend.

The panacea therefore lies in a total rethink of the CEMA. This calls for an amendment of the Act so as to meet with modern changes and realities of the time. A kind of an overhaul of the Act by way of law reform is seriously advocated. Since the series of reorganization in the NCS seems

[31] Circular BD 12237.S.403/Vol. 1/206 is commendable. (See Appendix IX)

unending, it becomes paramount to effect changes in the provisions that may have been affected by the reorganization.

Finally, in undertaking this study, we had ambition of creating the ground for the removal of all the bottlenecks in the administration of the CEMA. If this is achieved, the floodgate would be opened and more importantly, the problem of dearth of material,[32] which has hitherto led to the ignorance of many, including even stakeholders will be a thing of the past. This will bring tremendous changes in the NCS especially in its law and practice.[33]

Already, the 2012 Reforms Bill seeks to reflect some of the recommendations made in this thesis especially in the areas of samples, testing and laboratories,[34] use of consultants,[35] Exchange and storage of Data,[36] Electronic system and use of Information Technology,[37] prohibition of Mandatory pre-shipment and post-shipment inspections,[38] autonomous status of NCS,[39] prescription of tougher penalties and sanctions.[40]

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32 Especially in the areas of case laws so as to meet with the various changing trend in other jurisdictions as expressed in the thesis.

33 Omale, *op cit.,* p. 66.

34 Section 41, NCS Bill, 2012.

35 Section 42, *ibid.*

36 Section 25 (1), *ibid.*

37 Section 28 (1), *ibid.*

38 Section 43, *ibid.*

39 *Ibid.*

40 Section 189, *ibid.*

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APPENDIX I

HEADS OF CUSTOMS ADMINISTRATION IN NIGERIA (1891 – 2013)

1891	T. A. Wall	Director-General of Customs, Niger coast Protectorate.
1900	H. L. Searle	Collector of Customs and Post Master General, Southern Nigeria
1903 to 1913	C. E. H. Migeod	Customs Officer, Northern Nigeria.
1906	C. E. Dale	Financial Commissioner, Southern Nigeria.
1909	T. Burrowes	Comptroller of Customs, Southern Nigeria.
1914	T. Burrowes	Comptroller of Customs, Colony and Protectorate of Nigeria.
1921	J.D.M. Stewart	Comptroller of Customs, Colony and Protectorate of Nigeria.
1922	F. A. Clinch	Comptroller of Customs and Excise, Federation of Nigeria.
1929	W.K. Duncombe	Comptroller of Customs.
1931	E.C.F. Bird	Comptroller of Customs and Excise, Federation of Nigeria.
1939	A.E.V. Barton	Comptroller of Customs, Colony and Protectorate of Nigeria.
1944	J. Mc-Lagan	Comptroller of Customs, Colony and Protectorate of Nigeria.
1946	W. T. Martin	Comptroller of Customs, Colony and Protectorate of Nigeria.
1950	F. Bishop	Comptroller of Customs and Excise, Federation of Nigeria.
1954	F. Bishop	Comptroller of Customs and Excise, Federation of Nigeria.
1955	D. W. Miller	Comptroller of Customs and Excise, Federation of Nigeria.
1958	E. P. C. Langdon	Comptroller of Customs and Excise,

		Federation of Nigeria.
1959	E. P. C. Langdon	Chairman, Board of Customs and Excise, Federation of Nigeria.
1961	S. G. Quinton	Chairman, Board of Customs and Excise, 460 ation of Nigeria.
1964	A. Diyan	Chairman, Board of Customs and Excise, Federal Republic of Nigeria.
1968	H. E. Duke	Chairman, Board of Customs and Excise, Federal Republic of Nigeria.
1975	S. A. Musa	Director, Department of Customs & Excise, Federal Republic of Nigeria and Chairman, Board of Customs and Excise.
1976	Oyebode Oyeleye	Director, Department of Customs & Excise, Federal Republic of Nigeria and Chairman, Board of Customs and Excise.
1982	Abubakar Musa	Director, Department of Customs & Excise, Federal Republic of Nigeria and Chairman, Board of Customs and Excise.
1988	Dr. Bello Haliru Mohammed	Director, Department of Customs & Excise, Federal Republic of Nigeria (later became Comptroller General).
1994	Major-Gen. SOG Ango	Sole Administrator of Nigeria Customs Service.
1999	Alhaji Aliyu Ahmed Mustapha	Comptroller - General of Nigeria Customs Service.
2004	Elder Buba Gyang Jacob	Comptroller - General of Nigeria Customs Service.
2008	Ahmed Hamman Bello	Comptroller - General of Nigeria Customs Service.
2009	Dr. Nwadialo Benard Shaw	Comptroller - General of Nigeria Customs Service.
2009	Abdulahi Dikko Inde	Comptroller - General of Nigeria Customs Service

APPENDIX II

REVISED IMPORT PROHIBITION LIST (TRADE) [2008 – 2012]

1. Live or Dead Birds including Frozen Poultry H.S. Code 0105.1100 - 0105.9900, 0106.3100 - 0106.3900, 0207.1100 - 0207.3600 and 0210.9900.
2. Pork, Beef, HS Codes 0201.1000 ð 0204.5000, 0206.1000 - 0206.9000, 0210.1000 - 0210.2000.
3. Bird Eggs HS Code 0401.0000; excluding hatching eggs
4. Cassava HS Codes 0714.1000
5. Refined vegetable oil 1507.1000.00-1516.2000.29 but excluding refined linseed, castor and olive oil Crude vegetable oil are however NOT banned from importation
6. Cocoa butter, Powder and cakes HS. Codes 1802.0000 - 1803.2000, 1805.0010.00 - 1805.0090.00, 1806.1000 - 1806.2000 and 1804.0000.
7. Spaghetti/Noodles HS. Code 1902.1100 - 1902.3000.
8. Fruit Juice in retail Packs HS Code 2009.110012 - 2009.110013 - 2009.9000.99
9. Waters, including mineral waters and aerated Waters, containing added sugar or sweetening matter or flavoured, ice snow HS. Codes 2201.1000 - 2201.9000, other non-alcoholic beverages HS. Codes 2202.1000 - 2202.9000.99 (but excluding energy or health drinks - liquid dietary supplements e.g. Power Horse, Red Ginseng, etc) HS Code 2202.9000.91 and Beer and stout (Bottled, Canned or otherwise packed) HS Code 2203.0010.00 - 2203.0090.00.
10. Bagged Cement HS Code 2523.2900.22
11. Medicament falling under Headings 3003 & 3004 such as:
    a) Paracetamol tablets Syrups
    b) Cotrimozazole tablets and Syrups
    c) Metronidazole tablets and Syrups
    d) Chioroquine tablets and Syrups
    e) Haematinic formulations:
        (i) Ferrous sulphate and ferrous gluconate tablets

(ii) Folic acid tablets
(iii) Vitamin B Complex tablets (except modified release formulations).

f) Multivitamin tablets, capsules and syrups (except special formulations)

g) Aspirin tablets (except modified release formulations and soluble aspirin)

h) Magnesium trisilicate tablets and suspensions

i) Piperazine tablets and syrups

j) Levamisole tablets and syrups

k) Ointments penicillin/gentamycin

l) Pyrantel pamoate tablets and synips

m) Intravenous Fluids (Dextrose, Normal Saline etc.)

12. Waste pharmaceuticals HS Code 3006.9200

13. Soaps and Detergents HS Code 3401.1110 - 3402.9000 in retail packs

14. Mosquito repellant Coils HS Code 3808.9110.9 I

15. Sanitary Wares of Plastics HS Code 3922.1000 ð 3922.9000 and Domestic Articles and Wares of Plastic HS Code 3924.1000 ð 3924.9090.00 (but excluding Baby Feeding Bottles 3924.9020.00) and (flushing ceinstern and waterless toos toilets).

16. Toothpicks HS Code 3926.9090.91 and 4421.9090.00

17. Rethreaded and used Pneumatics tyres hut excluding used trucks tyres for rethreading of size 11.00 x 20 and above 4012.2010.00

18. Corrugated paper and Paper boards HS Code 4808.1000 and Cartons, boxes and cases made from Corrugated paper and Paper boards HS Code 4819.1000, Toilet paper, Cleansing or facial tissue HS Code 4818.1000 - 4818.9000 excluding baby diapers and incotinent pads for adult use 4818.4000.41 and Exercise Books HS 4820.2000.

19. Telephone Recharge Cards and Vouchers 4911.9990.91.

20. The following Textile Fabrics and articles thereof are banned from importation into Nigeria.

(a) African Prints (Printed Fabrics) e.g. Nigerian Wax, Hollandaise, English wax, Ankara and similar printed fabrics falling under the following HS Code.

i) 5208.5110.00 - 5208.5900, 5209.5100 - 5209.5900, 5212.5100 and 5212.2500.
ii) 5407.4400, 5407.5400, 5407.7400, 5407.8400, 5407.9400, 5408.2400 and 5408.3400.

iii) 5513.4100 - 5513.4900, 5514.4100 - 5514.4100 - 5514.4900, 5516.1400, 5516.2400, 5516.3400 and 55 14.4900.00

(b) Lace fabric and other embroidered fabrics falling under HS Codes 5801.2100 - 5801.9000, 5802.1100 - 5802.3000 and 5805.0000.00.

(c) Carpets and Rugs of all types falling under HS Code 5701.1000 - 5705.0000.

(d) Made up Garments and other textiles falling under HS Codes 6101.2000.00 - 6310.9000.99 but excluding the following:

i) Made-up lining articles HS Code 6111.8000 - 6117.9000 and 6211.1000 6217.9000.
ii) Insecticides treated mosquito nets (ITNs) and (LLITNs) U.S. Code 6304.9 100.92, 6304.9200.94, 6304.9300.96, 6304.9900.98
iii) Industrial gloves HS Code 6116.1000.11 ð 6116.9900.99 6116.1000.11; 6116.9200.92; 6116.9900.98
iv) Moulding cup Lycra HS Code 6212.9000
v) Mutilated rags HS Code 6310.1000.11, 6310.9000.91
vi) Jute bags HS Code 6305.1000.
vii) Braziers, pants, ties.

21. All types of footwears, bags and suitcases, HS Code 6401.1000.11 - 6405.9000.99 and 4202.1100.10-4202.9900.99, but excluding safety shoes used in oil industries, sports shoes, canvass shoes and all Completely Knocked Down (CKD), blanks and parts.

22. Hollow glass bottles of a capacity exceeding 150 mls (0.15 litres) of all kind used for packaging of beverages by Breweries and other beverages and drinks company HS Code 7010.9021.29 and 1010.9031.00

23. Used compressors HS Code 8414.3000, Used Air Conditioners HS. Codes 8415.1000.11 - 8415.9000.99 and used Fridges/Freezers HS. Code 8418.1000.11 - 8418.6900.

24. Used motor vehicles above 10 years from the Year of manufacture HS Code 8103.1000 - 8103.9000.

25. Furniture HS Code 9401.1000.00 - 9401.9000.99 and 9403.1000 - 9404.9000, but excluding Baby walkers, laboratory cabinets such as microscope table, fume cupboards, laboratory benches (9403), stadium chairs, height adjustment device, base sledge, seat frames and control mechanism, arm guide and headguides. Aslo excluded are; skeletal parts of furniture such as blanks, unhoistered or unfinished part of metal, plastics, veneer, chair shell etc.

26. Ball point pen and parts including refills (excluding tip).

APPENDIX III

ABSOLUTE PROHIBITION (OTHER THAN TRADE) [2008 – 2012]

1. Air Pistols
2. Airmail photographic printing paper
3. All counterfeit/pirated materials or articles including base or counterfeit coin of any country
4. Beads composed of inflammable celluloid or other similar substances
5. Blank invoices
6. Coupons for foreign football pools or other betting arrangements
7. Cowries
8. Exhausted tea or tea mixed with other substances. For the purposes of this item, ñexhausted teaò means any tea which has been deprived of its proper quality, strength or virtue by steeping, infusion, decoction or other means.
9. Implements appertaining to the reloading of cartridges.
10. Indecent or obscene prints, paintings, books, cards, engravings or any indecent or obscene articles.
11. Manilas
12. Matches made with white phosphorous
13. Materials of any description with a design which, considering the purpose for which any such material is intended to be used, is likely in the opinion of the President to create a breach of the peace or to offend the religious views of any class of persons in Nigeria.
14. Meat, vegetables or other provisions declared by a health officer to be unfit for human consumption.
15. Piece goods and all other textiles including wearing apparel, hardware of all kinds crockery and China or earthenware goods bearing inscriptions (whether in Roman or Arabic characters) from the Koran or from the traditions and commentaries on the Koran.

16. Pistols disguised in any form.

17. Second-hand clothing.

18. Silver or metal alloy coins not being legal tender in Nigeria.

19. Nuclear Industrial waste and other Toxic waste

20. Spirits

(1) Other than ï

(a) alcoholic bitters, liqueurs, cordials and mixtures admitted as such in his discretion by the Comptroller-General and which are not deemed to be injurious spirits within the meaning of any enactment or law relating to liquor or liquor licensing;

(b) brandy, i.e. a spirit

i) distilled in grape-growing countries from fermented grape juice and from no other materials; and

ii) stored in wood for a period of three years;

(c) drugs and medicinal spirits admitted as such in his discretion by the Comptroller-General;

(d) gin, i.e. a spirit -

i) produced by distillation from a mixed mash of cereal grains only saccharified by the diastase of malt and then flavoured by re-distillation with juniper berries and other vegetable ingredients and of a brand which has been notified as an approved brand by notice in the Gazette and in containers labeled with the name and address of the owner of the brand; or

(ii) produced by distillation at least three times in a pot-still from mixed mash or barley, rye and maize saccharified by the diastase of malt and then rectified by re-distillation in a pot-still after the addition of juniper berries and other vegetable materials;

(e) methylated or denatured spirit, i.e.

i) mineralized methylated spirit mixed as follows:- to every ninety parts by volume of spirits nine and one-half parts by volume of wood naphtha or Bitrex and one-half of one part by volume of crude pyridine and to every 455 litres of the mixture 1.7 litres of mineral naphtha or petroleum oil and not less than 0.7 grammes by weight of powdered aniline dye (methyl violet) and so in proportion for any quantity less than 455 litres;

ii) industrial methylated spirits imported under licence from the Comptroller-General and mixed as follows:-
to every ninety-five parts by volume of spirits five parts by volume of wood naphtha or Bitrex and also one-half of one part by volume of the mixture; and

iii) spirits denatured for a particular purpose in such manner as the Comptroller-General in any special circumstance may permit;

(f) Perfumed spirits

(g) rum, i.e. a spirit

(i) distilled direct from sugar-cane products in sugar-cane growing countries; and

(ii) Stored in wood for a period of three years.

(h) spirits imported for medical or scientific purposes, subject to such conditions as the Comptroller-General may prescribe;

(i) spirits totally unfit for use as potable spirits admitted to entry as such in the discretion by the Comptroller-General; and

(j) whisky, i.e. a spirit -

i) obtained by distillation from a mash or cereal grains saccharified by the diastase of malt; and

ii) stored in wood for a period of three years.

(2) Containing more than forty-eight and one-half per centuni of pure alcohol by volume except denatured, medicated and perfumed spirits, and such other spirits which the Comptroller-General, in his discretion, may allow to be imported subject to such conditions as he may see fit to impose.

(3) Weapons of any description which in the opinion of the Comptroller-General are designed for the discharge of any noxious liquid, gas or other similar substance and any ammunition containing or in the opinion of the Comptroller-General or adapted to contain any noxious liquid, gas or other similar substances.

APPENDIX IV

EXPORT PROHIBITION LIST [2008 – 2012]

1. Maize (K.S. 5010.1000.00 ð 5010.9000.00)
2. Unprocessed Rubber Latex and Lump (HS. 4001.1000.00 ð 4001.3000.00)
3. Raw Hide/Skin including Wet Blue and unprocessed Leather (HS. 4101.2000.00 ð 4106.9200.00)
4. .Timber, Rough/Sawn (HS. 4401.1000.00, 4403.1000.00 ð 4403.9000.00, 4407.500.00 - 4407.9900.00) excluding railway slippers. (4406.1000-9000) and furniture components.
5. Scrap Metal (Chapter 72 ð 81)
6. Artifacts & Antiquities
7. Wildlife Animal classified as endangered spices and their products e.g. Crocodile, Elephant, Lizard etc.
8. All goods imported.

APPENDIX V

EXEMPTION FROM IMPORT DUTY [2008 – 2012]

1. **Films**, film strips, microfilms, newsreel, slide and similar visual and auditory material of educational, scientific or cultural character imported by the United Nations, any of its specialized Agencies or an approved education or science organization.

2. **Fuel, lubricants, and similar products**, which the Minister is satisfied are necessary for and will be used solely in the operation of:

   1) aircraft of the armed forces of a foreign power; or

   2) civil aircraft registered in a country recognized by the Federal Republic of Nigeria.

3. **Goods imported for the President, Commander-in-Chief of the Armed Forces**: All goods imported for the official and personal use of the President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, or any person for the time being acting as the Head of the Federal Republic of Nigeria, during such period of time as he is so acting.

   Provided that the foregoing provisions of this paragraph shall not apply to goods which the Minister is satisfied are produced locally to the required standard and readily obtainable.

4. **Goods imported for Consular Officers**: All goods imported for the official and personal use of a Consular Officer or for the use of any member of the family of a consular Officer, where the government of the country he represents grants a like privilege to Nigerian Consular Officers in that country;

   For the purposes of this paragraph, the expression ñ*Consular Officer*ò

   (a) means a Consular Officer *de carriere* who is recognized as a Consular Officer by the Government of the country he represents and is a national of that country; and

   (b) includes in relation to any country which is declared by the President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria to be a country with the Government of which a convention making provision in that behalf has been conducted, a person who:

      [i] is employed by the government as a consulate otherwise than on domestic duties;

[ii] is a national of that country;
[iii] is not otherwise engaged in gainful occupation in Nigeria; and
[iv] If not a permanent employee of that Government, was not resident in Nigeria at the time when his employment at the Consulate began.

The provision of this paragraph shall be deemed to have had effect from the date from which any convention or agreement is entered into between the Government of the Federal Republic of Nigeria and the foreign government concerned;

Provided that where any vehicle imported into Nigeria under this paragraph has thereafter been exported from Nigeria, the vehicles shall not be re-imported into Nigeria without consent of the Federal Government.

5. **Diplomatic Privileged Importations:** The furniture and effects (which expression shall include a motor vehicle) of any person, not being a Nigerian who is an official of an organization declared by notice in the Gazette to be an organization of which the Government for one or more sovereign powers are members at the time that such person first takes up his post in Nigeria:

Provided that where any vehicle imported into Nigeria under this paragraph has thereafter been exported from Nigeria, the vehicle shall not be re-imported into Nigeria without the consent of the Federal Government.

6. **Goods** obtained free as technical assistance from donor international bodies/ countries.

7. **Passengers Baggage**:

(1) Personal and household effects, the property accompanying a passenger

(2) Personal and household effects, the property of a passenger landed at any Customs Port, Customs airport or Customs station within two months of the arrival of the passenger within such further period as the Minister may allow, to the extent permitted by the Minister and subject to any conditions imposed by it; and

(3) Personal and household effects excluding jewellery, photographic equipment, electronics and other luxury goods of a citizen of Nigeria who had been resident in a place outside the limits of the jurisdiction of Nigeria for not less than 9 months.

Provided that ñbaggageò shall not be interpreted to include any vehicle or any goods intended for sale, barter or exchange.

8. **Life Saving Appliances**

9. **Military Hardware and Uniforms**

(1) All hardware imported officially for the use of the Nigerian Army, the Nigerian Navy or the Nigerian Air force (other than alcoholic and non-alcoholic drinks, tobacco goods and products of food industry and as appropriate, any parts of such goods).

(2) Accoutrements and Uniforms, the property of officers of the Nigerian Army, the Nigerian Navy, the Nigerian Air Force, Nigerian Police, Nigeria Customs Service and other paramilitary services imported by such officers for their Personal Use on Duty as required by the regulations of their respective services.

Provided that the foregoing provisions of this paragraph shall not apply to goods, which the Minister is satisfied, are produced locally to the required standard and are readily obtainable.

10. Arms and Ammunition imported by the Nigeria Police Force, Nigeria Customs Service and other paramilitary services.

11 In this Schedule, except otherwise provided, Minister means the Minister charged with responsibility for matters relating to Finance.

APPENDIX VI

DESTINATION INSPECTION: 21 RESPONSIBILITIES OF BANKS [Jan. 1, 2006]

1) Banks shall formalize the documentation of all Form M processed by Importers and send the original copy to the Nigeria Customs Service while other copies shall be distributed in the approved manner.

2) In order to check Capital Flight and Round Tripping all Import Transactions financed through Telegraphic Transfer shall be indemnified by Financing Bank against possible diversion, copies of such indemnity shall be sent to Nigeria Customs Service for monitoring. The indemnity shall be discharged after confirmation of importation and clearance of goods.

3) Banks shall provide a mail delivery Bag/Box with two sets of keys for the delivery of copies of Payin Forms and Bank Receipts to the Area Commands:

4) The Bank official subscripting the Payin Forms and Receipts must endorse his full names and signature at the reverse of all Customs Revenue Receipts in the presence of the Area schedule officers.

5) Banks shall ensure that all remittances to the Central Bank of Nigeria (CBN) from their various Branches are channeled through one Designated Branch on Area by Area basis.

6) Banks shall obtain CBN Accounts Numbers for each Area Command from the Customs Area Accountant to enable them remit Customs Revenue collections into the relevant Accounts in CBN.

7) Banks shall provide Payin Form to every person intending to pay Customs Duty and other charges.

8) Banks shall open non-chequing/remittance Account for each type of Revenue collectable in each Area Command.

9) Authorized signatories from Designated Banks shall visit the Customs Area Commands to introduce themselves with a letter of introduction containing their specimen signatures and two passport photographs. They are also expected to deliver the keys for the If Bag/Box that will be used to dispatch Customs Revenue Receipts.

10) Remittances to the CBN are to be made on weekly basis, every Monday. The remittances are to be made with the Bankôs CBN Cheques, Remittances Schedule and form IMP 310.

11) The remittances are to be submitted to the Entries Office in CBN, Lagos or the Banking. Offices in CBN Branches outside Lagos.

12) Monthly Bank statements are to be prepared for each Area Command showing the Receipt Numbers, Date and Amount on the credit side while the total weekly transfer to CBN per Revenue type as in IMP 310 and Commission deducted will be on the debit side.

13) The monthly Bank statements are to be sent to the Customs Area Command latest by the 3rd day of the following month.

14) Banks shall ensure that Receipts issued on the last day of the month are sent to the Customs Area Commands that same day.

15) There shall be a monthly Bank reconciliation of Accounts between the Customs Area Commands and the Designated Banks.

16) All Banks collecting Customs Revenue must be fully computerized, adequately staffed and on-line.

17) Banks shall transfer the balances in all the respective Customs Accounts to the Federation Accounts and other Levy Accounts of the Federal Government of Nigeria (FGN) agencies in CBN on weekly basis.

18) Banks shall submit weekly, monthly, quarterly and annual schedule of Revenue collection to Nigeria Customs Service Headquarters and the office of the Accountant General of the Federation, Abuja.

19) If a particular month ends within a week, for example, on a Wednesday, the remittances to CBN shall be broken into two. One for the period Monday to Wednesday (month end) and the other for Thursday and Friday.

20) Customs Revenue Receipt and Payin Form issued to and received by a particular Area Command shall not be transferred to another Area Command or cancelled nor shall the information contained therein, e.g. SGD Number, From M Number etc., be altered.

21) Copies of IMP 310 used in making the remittance to CBN are to be sent to the Customs Area Commands on weekly basis, every Thursday, under lock and key.

APPENDIX VII

PARTICULARS TO BE SUPPLIED TO THE CENTRAL BANK BY ALL IMPORTERS [Jan. 1, 2006]

1. Name and address of Applicant: é é é é é é é é é é é é é é é ...
2. Name and address of Beneficiary: é é é é é é é é é é é é é é é
3. Method of payment: é
   (a) Revocable/irrevocable letter of Credit: _____
   (b) Expiry Date: _____
   (c) Bills for Collection: _____
   (d) Others: _____
4. The free on Board (f.o.b) value of the goods and the following:
   (a) Freight charges: _____
   (b) Ancillary charges such as commissions and interest charges _____
   (c) Name and amount of foreign currency _____
   (d) Total amount of all expenses involved. _____
5. Statements as to serial number of relative forms and amounts where part-payment has been made for the goods é é é é é é é é é é é .
6. Description of and quality of the goods. é é é é é é é é é é é ..
   (a) S.I.T.C Code_____
   (b) Means of shipment (sea/air/road/rail/parcel post, etc.) _____
   (c) Ultimate destination of goods _____
   (d) Import Licence No. (*where applicable*) _____
   (e) Country of Origin_____
   (f) Country of Supply_____

(g) Date of shipment_____

(h) Validity: _____

(i) Registration dates of orders (*where applicable*) _____

7. Declaration as to the accuracy of statements made under the foregoing paragraphs

APPENDIX VIII

Rule (1) When an officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any persons, whether suspected or not from whom he thinks that useful information can be obtained.

Rule (2) Whenever an officer has made up his mind to charge a person with crime, he should first caution him before asking any question or further questions.

The cautionary words run thus:

> I have decided to make a complaint against you before a court. Do you wish to make a statement? You are not obliged to say anything unless you wish to do so. But whatever you say will be taken down in writing and may be given in evidence.

Rule (3) Person in custody should not be questioned without the usual caution being first administered.[41]

Rule (4) If a prisoner wishes to volunteer any statement, the usual caution should be administered. The caution should end with the words ñbe given in evidenceò.[42]

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[41] See the usual cautionary words in Rule 2

[42] Usual cautionary word.

Rule (5) When such a person against whom an officer has decided to make a complaint makes a statement before there is time to caution him he must be cautioned as soon as possible, thereafter.

Rule (6) A person against whom an officer has decided to make a complaint and who makes a voluntary statement must not be cross examined and no question must be put to him except for the purpose of removing any ambiguity from what he had actually said.

Rule (7) When an officer has decided to make the same complaint against two or more persons and their statements are taken separately the officer must not read such statements to the other person or persons but each of such persons shall be given copies of such statement and nothing shall be said or done by the officer to invite a reply, provided that when such a person is an illiterate, the statement may be read over or interpreted to him by some other person other than the officer taking the statement and anything said to such reader by the person when the statement is read shall not be admissible in evidence against him. If such a person desires to make a statement in reply, caution must be administered.

Rule (8) Any statement made in accordance with these rules should whenever possible be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

Rule (9) Save as provided by the Evidence Act, no statement made to an officer by a person whom he has decided to make a complaint is admissible in evidence unless such statement is made in accordance with these rules.

The supplementary rules are stated thus:

Supplementary Rule 1: The caution should not be printed on the top of the sheet on which the statement is taken down, but should be written out as given in each case and the person making the statement invited to write his signature immediately beneath it.

Supplementary Rule 2: The statement should be written down as neatly as possible in the actual words used provided they are intelligible. They should not be translated into ñofficialò vocabulary, a course which may create a misleading impression as to the genuineness of the statement

Supplementary Rule 3: When a statement has been written down, the person making it should be invited to read it over and alter it if he wishes. The statement should in all cases be read over to him and he should be asked to sign it and initial each page and any alterations. The officer taking the statement should immediately below the statement and signature of the person making it, write and sign a note that the statement was taken by him, that he has read it over to the person making it and (if it be true) that it has been read over by that person. The note should be signed by any other person who was present at the taking of the statement.

Supplementary Rule 4: If the person making the statement would prefer to write it out himself and his degree of education is enough to enable him to do so, he should be encouraged to do so and be given the writing materials. The officer should first write out the cautions as described above and invite the person to sign beneath. The procedure set out in supplementary rule 3 should then be followed as far as practicable in particular he should append a note to the effect that the statement was written out in his presence and that he has read it to the person who wrote the statement.

Supplementary Rule 5: It may happen that the caution is administered during the taking of a statement. In such cases, the caution should be written in as a part of the statement at the time, which it was administered and the person making the statement invited to sign before the statement is proceeded with.

Supplementary Rule 6: When possible, the statement of a person under caution should be written on forms provided for that purpose. Note that officerôs notebooks should be used for taking statements only when no forms are available.

Supplementary Rule 7: A record should be kept by the officer concerned in his note book of the time at which the taking of the statement commenced and concluded indicating any intervals or refreshments. It is unnecessary to include these items as part of the statement.

Supplementary Rule 8: When a person has been invited to make a statement and he declines, no further invitation should be given to him unless the officer has occasion to interview him with a view to informing him of other material which has come into the officerôs possession in such case there would be no objection to the officer giving the cautionary words.

APPENDIX IX

Circular Ref. BD.12237/S.403/VOL. I/206 DATED: 19TH NOVEMBER, 2010, FROM FEDERAL MINISTRY OF FINANCE

REVISION OF SCHEDULE THREE – IMPORT PROHIBITION LIST (TRADE) OF THE 2008 – 2012, COMMON EXTERNAL TARIFF (CET)

This is to confirm that Mr. President has granted approval for the under-listed products to be removed from the import prohibition list (trade). The import duty rate and levy to be charged on the importation of each product is as follows:

S/N	Product	HS CODE	NEW IMPORT DUTY	NEW LEVY
1	Cassava	0714.1000	20%	15%
2	Toothpicks	3926.9090.91 and 4421.9090.00	20%	20%
3	Furniture	9401.1000.00 – 9401.9009.99 and 9403.1000 – 9404.9000	20%	20%
4	Textile fabrics and articles thereof [African prints (printed fabrics)] Lace and embroidered fabrics and made up garments	Appropriate H.S. Codes as contained in the 2008 – 2012 CET	20%	20%

2. Furthermore, Mr. President has approved an import duty rate of 10% plus 10% levy on Health and Energy drinks [e.g. Power Horse, Red Ginseng, etc., (H.S Code 2202.9000.91)] which had been excluded from import prohibition and the extension of the age of used motor vehicles (H.S Codes 8703.1000 – 8703.9000) to be imported into the country from 10 to 15 years from the year of manufacture.

3. Please, note that the above mentioned changes in the 2008 – 2012 CET take effect from the date of this circular.

Olusegun O. Aganga
Honourable Minister of Finance

Circular Ref. BD.12237/S.403/VOL. T/46 DATED: 27TH JANUARY, 2011, FROM FEDERAL MINISTRY OF FINANCE

CLARIFICATION ON SOME ASPECTS OF CIRCULAR NO. BD 122371/S.403/VOL.1/206 DATED 19TH NOVEMBER, 2010, ON THE REMVOAL OF SOME ITEMS FROM IMPORT PROHIBITION LIST

Further to my circular Ref. No. BD 122371/S.403/VOL.1/206, dated 19th November, 2010, on the above subject, please note that in addition to Government's policy of protecting the local industry and curtailing revenue leakages, the changes to the tariff structure are aimed at supporting the productivity and competitiveness of the domestic industry as well as extending the frontiers of free trade. In this respect, this Circular is aimed at clarifying the items exempted from the Import Prohibition List vide our circular under reference.

2. For the avoidance of doubt, the items affected by the above mentioned circular remain as follows:

(i) Cassava (raw, unprocessed)

(ii) Toothpick;

(iii) Furniture (excluding locally produced items), and;

(iv) Textile fabrics and articles (excluding locally produced items)

3. Accordingly, details of the items affected by the circular of 19th November, 2010 are contained in the following schedule

SCHEDULE OF ITEMS AFFECTED BY CIRCULAR NO. BD 12237/S. 403/ VOL. 1/206 OF 19TH NOVEMBER, 2010.

S/N	NAME OF PRODUCT	ITEMS RETAINED IN THE IMPORT PROHIBITION LIST	ITEMS REMOVED FROM IMPORT PROHIBITION LIST	TARIFF ON UNBANNED ITEMS	
				Duty	Levy
1	Cassava	Nil	Raw, unprocessed cassava 0714.1000.00	20%	15%
2	Furniture	i) 9401.3000.00 swivel seats with variable height adjustment; ii) 9403.1000.00: metal furniture of a kind used in offices; iii) 9403.2000.00: other metal furniture; iv) 9403.3000.00 wooden furniture of a kind used in offices;	i) 9401.2000.00: Motor vehicle seats ii) 9401.4000.00: Seats other than garden seats or camping equipment, convertible into beds	20% 20%	20% 20%

		v) 9403.4000.00 wooden furniture of a kind used in kitchen; vi) 9403.5000.00 wooden furniture of a kind used in the bedroom; vii) 9403.6000.00 Other wooden furniture viii) 9404.2100.00 mattress of cellular rubber or plastics, whether or note covered; ix) 9404.2900.00 mattress of other materials x) 9401.6900.00 Other with wooden frames; xi) 9401.7100.00 upholstered with metal frames xii) 9404.1000.00 mattress support xii) 9401.61000.00 upholstered seat with wooden frame. xiii) 9401.7900.00 other upholstered seat with metal frame			
3.	Toothpick	Nil	All kinds of toothpicks 3926.9090.91; 4421.9090.00	20%	20%
4.	Textile Fabrics and Articles thereof	African Prints (Printed Fabrics) falling under the following H.S. Codes: 5208.5110.00 – 5208.5900.00; 5209.5100.00 – 5209.5900.00; 5210.5110.00 – 5210.5900.00; 5211.5110.00 – 5211.5900.00; 5212.1500.00; 5212.2500.00; 5212.99100.00; 5407.4400.00; 5407.5400.00; 5407.7400.00; 5407.8400.00; 5407.9400.00; 5408.2400.00; 5408.3400.00; 5512.1910.00; 5512.2900.00 5513.4100.00 – 5513.4900.00; 5514.4100.00 – 5514.4900.00 5516.1400.00; 5516.2400.00 5516.3400.00; 5516.4400.00 5516.9400.00	i) Lace Fabrics and other embroidered fabrics under H.S. Code: 5801.2100.00-5801.9000.00 5802.1100.00–5802.3000.00 and 5805.0000.00 ii) Made-up garments and other Textiles falling under H.S. Codes 6101.2000.00 – 6310.9000.99	20% 20%	20% 20%

Implementing Agencies are hereby directed to ensure that only items indicated in the relevant column of the above schedule are allowed for importation into the country.

4. Furthermore, the extension of the age of imported used motor vehicles (H.S. Codes 8703.1000 – 8703.9000) from 10 to 15 years shall apply, subject to periodic reviews, while items of furniture under H.S. Codes 9401.9000.91 and 9403.9000.91, which are not under prohibition, still retain the current duty rate of 5%.

5. This circular supercedes our earlier Circular Ref. No. BD.12237/ S.403/Vol. 1/206 dated 19th November, 2010.

Olusegun O. Aganga
Honourable Minister.