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Nigeria and the Emerging Concept of Universal Civil Jurisdiction*.

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Abstract

There is a raging controversy amongst international law scholars and publicists on the propriety, scope and limit of instituting civil actions against former rulers and other alter-egos of states in the courts of other states. The paper reviews a host of municipal courts decisions and found that there is no rule permitting suits against states or their alter-egos abroad. In the light of this, the paper recommends an appropriate state practice for Nigeria especially in the light of two recent events: The trial of Abdussalami Abubakar and Samantar –former president of Nigeria and vice president of Somalia respectively-by the US federal courts and the travails of Charles Taylor whilst he was the guest of the Nigerian state.

Keywords: Universal Civil Jurisdiction, Jurisdictional Immunity, State Practice, Nigeria

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7.0 Introduction

The term jurisdiction for the purpose of public international law according to Malcom N. Shaw "concerns the power of the state to affect people, property and circumstances and reflects the basic principle of state sovereignty equality of states and non interference in domestic affairs"[1]. It is an exercise of authority which may alter or terminate legal relationships and obligations. Like governmental powers, jurisdiction may be achieved by legislative, executive or judicial actions referred to as prescriptive, enforcement and adjudicative jurisdictions respectively.

Universal Jurisdiction is a customary international law norm that permits states to provide forum for the prosecution or redress of certain conducts to which they have no discernable nexus. This is an exception to the traditional and general rule of customary international law which requires some links between any offence and the state seeking to exercise jurisdiction.[2]

Originally, universal jurisdiction was limited in application to trials for the offences of piracy *jure gentium*[3] and war crimes[4]. The practice of exercising universal jurisdiction beyond these spheres is said to have evolved to provide relief to victims of the violation of *jus cogens* norms. These are a limited

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1 *International Law*, 5th Edn. (Cambridge University Press, 2003)P.572.

2 The traditional basis for a state to assert jurisdiction are:

(a) The territorial principle, which permits a state to prosecute for offences committed upon its territory or by a sailor on board a ship or aircraft carrying its flag.

(b) The nationality principle, by virtue of which a state may assert jurisdiction over crimes committed by its nationals notwithstanding that the offences may have been committed in the territory of another state.

(c) The passive personality principle, under which a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state. There is no consensus on the validity of this basis of asserting jurisdiction as the 1886 Cutting Case, (reported in Moore J.B, *Digest of International Law*, Vol.11 (Washington, 1906), P.228 which established the principle has been much criticized. See Malcom N. Shaw,id P.589-591:, O' Connell, *International Law*, Vol.11 pp.901-2 it was at one time protested by the U.S cc *the dissenting judgment in the Lotus case* and the U.K, but the US has since asserted jurisdiction on that basis in the case of ***US v Yunis (No.2) 681.F.Supp.896 (1988).***

However, it is recognized by several treaties, such as 1979 Convention Against the Taking of Hostages; Art 9; 1973 Convention on the Prevention And Punishment of Crimes against Internationally Protected Persons, Art 3(1)c; 1984 Convention Against Torture, Art 5(1)c; and has been applied by a number of states.

(d) The Protective Principle, which permits states to exercise jurisdiction over aliens who have committed acts abroad which are deemed prejudicial to the interest of such states. This principle is centered upon immigration and various economic offences and exists partly in view of the insufficiency of most municipal laws as far as offences against the security and integrity of foreign states are concerned. See the decision in the case of ***Joyce v SD.P.P [1946] ac 347*** for U.K State practice asserting jurisdiction on the basis of protective principle.

The Universality principle was originally recognized in respect of piracy under international law (for piracy jure gentium) and war crimes at customary international law and later entrenched by such treaties as High Seas Convention 1958, and later Convention on the Law of the Sea 1982; the four Geneva 'Red Cross' Conventions 1949, Acts 49, 129 and 146 respectively e.t.c.

3 *See* e.g *In re Piracy Jure Gentium [1934]* AC 586; 7 AD, p.213. See also. Johnson D.H, 'Piracy in Modern International Law', 43 *Transactions of the Grotius Society*, 1957, p.63, and White G.E., 'The Marshall Court and International Law: The Piracy Cases', 83 AJIL, 1989, p.727. See also the Separate Opinion of Judge Guillaume in ***Congo v Belguim***, ICJ Reports, 2002, para.5.

4 See e.g Akehurst, "*Jurisdiction*…." **46 YBIL 145 at P.160**; Cowles A, 'Universality of Jurisdiction over War Crimes', **33 California Law Review, 1945, p. 177**; Brownlie, *Principles..id, P*p. 304-5; Bowett, "*Jurisdiction*, …"**(1982) BYIL 1 at P. 12**; Higgins, *Problems and Process…,(*Clarendon Press, Oxford, 1994*)* p. 56; Mann, "*Doctrine of Jurisdiction"*,(1964) **Recuiel des Cours,Vol.iii 1 at P. 93,** and Bassiouni, *Crimes against Humanity in* nternational Criminal Law, (Kluwer law Int., The Hague/London/Boston,1999) *P*. 510. See also the ***Eichmann case***, 36 ILR, p.p. 5 and 277 and the UN War Crimes Commission, 15 *Law Reports of Trials of War Criminals*, 1949, P. 26. However, cf. the Separate Opinion of Judge Guillaume in ***Congo v Belgium***, ICJ Reports, 2002, para. 12 (restricting universal jurisdiction to piracy) and the Joint Separate Opinion, id, para. 51 (universal jurisdiction may possibly exist with regard to the Geneva Conventions of 1949 on war crimes, etc.).

number of norms that purport to have binding force on all states from which no state may derogate even upon the authority or excuse of any other norm of customary international law[5].

In discussing universal jurisdiction a distinction is often made between the power of a state to prescribe, adjudicate and enforce its criminal law in relation to a crime occurring in a territory other than its own and otherwise not affecting its nationals, property or security and the power to determine a civil dispute having a foreign element between two or more parties, all or one of whom is not a state. The former relates to international law strictly whilst the latter is private international law concept.

Jus cogens norms are intended to cover conducts that are so universally and fundamentally abhorrent as to be self evidently deserving prohibition. But while the concept is widely acknowledged as a principle of international law, there is no universally accepted and recognized list of what these norms are.[6] Most states of the world however recognize genocide,[7] torture,[8] crimes against humanity[9] and other crimes in respect of which states have by treaty been obliged to prosecute, even absent any link with their territory other than presence of the offender[10]. What is also common to all the offences regarded as *jus cogens* virtue of international treaties is that the perpetrators of the offences is always a state and/or its official therefore raising the issue of immunity *ratione personae* or immunity *ratione matariae* and the futility of suing in the otherwise proper forum.

Where a state whose official is being tried in another state lacking nexus with the offence is a party to these treaties, it is bound as a party to accept the jurisdiction conferred by the treaties on another state[11]. This proposition can hardly be challenged given the binding nature of treaties.[12] It is however said that even where such state is not obligated or authorized by a treaty, the peremptory nature of the offence makes the state actor's acquiescence or consent unnecessary for the court of the state of trial to be properly seized of jurisdiction[13].

This analysis is proceeding from the background of the distinction between the approaches of public international law and private international law respectively to extra-territorial dimensions of crimes and of civil causes of actions. Crimes are local offences governed both as to the forum of prosecution and applicable law by the law of the state connected with the crime[14]. Universal adjudicatory jurisdiction for a criminal trial presupposes, in the absence of treaty prescribing an applicable law that the forum law also applies to determine element of the crime[15].

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5 See discussion infra of the Normative Hierarchy Theory.

6 For this reason, even the United Nation International Law Commission specifically refused to catalogue which norms are considered *jus cogens* norms. See the ***UN, I.L.C, Report Fifty-Seventh Session***,489 U.N. Doc. No. A/60/10/(2005).

7 Provided for as a basis of U.J by the four General Red Cross Conventions and virtually all enabling municipal U.J legislation.

8 Provided for by the Convention Against Torture and Degrading Treatment, by all enabling municipal U.J laws and is the basis of exercise of jurisdiction under the U.S.ATCA & TVPA

9 Provided for by Rome Statute which apart from establishing a tribunal and conferring adjudicative and prescriptive jurisdiction permits states to assert jurisdiction on U.J basis in such matters

10 Customary and treaty international law often requires such state either to prosecute or to extradite the suspect. See for example, S.5(2) of the ***Convention Against Torture and Other Cruel Inhuman And Degrading Treatment***.

11 See Art. 18 of ***The Convention On The Law of Treaties*** 1969 which obligates member states to a treaty not to do anything that could defeat the object of the treaty. See ***ILC Commentary*** P.202; Charme ***(1991) 25 Geo.Wash, J.I.L.E*.71**; Rogoff, ***(1980) 32 Maine L. R.263***.

12 See infra the postulate of the Normative Hierarchy Theory.

13 This proposition means that the norms of territorial sovereignty or sovereign equality must give way when customary or treaty international law confers universal jurisdiction on account of the *jus cogens* nature of the crime. This is known as the normative hierarchy theory.

14 See Note 2, supra for the recognized nexus between a state and an offence that may justify criminal jurisdiction.

15 See the case of ***Attorney-General of the Government of Israel v Eichmann*** 36 ILR, PP.5 and 277. The Supreme Court of Israel in upholding the Universal Jurisdiction as one of the basis for the trial of the accused for the crimes against the

More importantly, a criminal prosecution justifies a stronger claim of state jurisdiction or state responsibility at international law because it requires the fiat of some governmental authority. Whereas prosecution is undertaken in all municipal legal systems by the state, a civil action even if it relates to a *jus cogens* crime is commenced by a person or entity acting in private capacity. To that extent a civil action to recover damages for *jus cogens* crimes is strictly a private affair of the litigants facilitated by municipal legal systems.

Private International law distinguishes between the jurisdiction and the choice of law question. In common law jurisdictions, for example, choice of jurisdiction rules authorize courts to entertain civil actions instituted against any defendant present on their territory,[16] but in most cases this does not foreclose the application of foreign law unless the choice of law rules of the forum direct otherwise. States of the common law stock do not generally need any other permission than their conflict rules to entertain a private civil action to which they have no nexus. But their choice of law rules based usually as it is on the law of the place where the wrong occurred direct them to apply foreign law and not forum law to resolve the dispute in such action. For a state to apply its law to any cause of action having extra-territorial or foreign dimension, an international treaty must therefore also permit prescriptive jurisdiction to so do. Failing such, the cause of action is treated as foreign and foreign law including indemnity or other defences provided the defendant under it as opposed to forum law is applied to determine the dispute. In the case of ***Phillips v Eyre***[17], a Jamaican legislation indemnifying the defendant, Governor of Jamaica, was applied in England to defeat the plaintiffs claim for damages for false imprisonment and trespass to his person, which occurred in Jamaica[18]. This is because conflict rules in these states direct their courts to apply foreign law connected with a civil action for tort.

This essay reviews the different positions taken by states and *opinio juris* both on the issue whether universal civil jurisdiction is or has become a norm of international law and whether in an action seeking civil recovery for alleged violation of *jus cogens* rule the plea of sovereign immunity is overridden on account of the *jus cogens* character of the wrong. Nigeria has been involved in one case as a victim[19]and in another its courts as putative villains.[20]The essay reviews the response of the Nigerian state on both occasions and recommends appropriate practice or response in the event of future occurrence.

7.1 Municipal Laws Providing for Universal Civil Jurisdiction

A municipal statute providing for universal criminal jurisdiction permits a state to prosecute in its courts a person accused of committing *jus cogens* crime in a foreign territory. A municipal statute providing for universal civil jurisdiction not only permits a claimant to sue in the forum for civil recovery in respect of a *jus cogens* crime occurring abroad, but also to obtain redress under forum law. A typical example of such a statute is the U.S Alien Torts Act and Torture Victim Protection Act[21]

Jewish nation stated that International law was actually in need of the legislative and judicial organs of every state giving effect to criminal interdictions allowed by U.J treaties and bringing the criminal to trials. The accused was convicted under an Israeli law of 1951 for war crimes, crimes against the Jewish people and crimes against humanity. That Israeli law was enacted to fulfill her obligation under the four Geneva Red Cross Convention of 1949.

16 This is known as the writ rule

17 (1870-71) L.R.6 Q.B.1. Under present U.K law as well as in the U.S the *lex loci delicti commissi* i.e law of the place of the tort applies

18 A recourse to the normative hierarchy theory (discussed infra) would have meant that decision being reversed especially if counsel couches false imprisonment or trespass as torture or any of the other torts against the person that are now regarded as *jus cogens.*

19 See the Abubakar Abdussalami case in the U,S courts discussed infra

20 Namely, the several attempts to sue Charles Taylor in Nigeria in respect of his atrocities in Sierra Leone whilst he was the leader of Liberia.

21 Both statutes are discussed infra.

In a publication designed to counter a submission by the state of Canada[22] that there is no international law basis for universal civil jurisdiction, Amnesty International lists a significant number of states that have enacted national laws allegedly providing for universal civil jurisdiction. Of these states, only the U.S enacted what can be properly called a national law conferring universal civil jurisdiction.[23]
The other states either enacted national laws providing for civil recovery consequent upon a trial or conviction under a legislation providing for universal criminal jurisdiction,[24]or have separate criminal procedure laws providing for civil recovery in respect of all criminal trials or convictions including those relating to treaty or *jus cogens* crimes.[25]

Restitution is not the primary or principal purpose of a penal statute and a criminal trial does not set out to avail a victim of any offence full compensation. In fact the victim is not a party to the criminal trial. More importantly, the decision whether or not to prosecute a suspect for a crime is preceded by some investigation whereas an otherwise innocent *propositus* may be sued abroad under a national statute conferring universal civil jurisdiction since all the courts will look at is the statement of claim. It is no wonder that the U.S Government has often intervened to put an end to several ATCA and TVPA actions on grounds which include foreign policy or political question dimensions of such cases[26]

7.1.1 The U.S Alien Torts Claim Act (ATCA)[27] And Torture Victim Protection Act (TVPA)[28]

The First Congress of the U.S under the 1789 statute, the ATCA, established original district court jurisdiction over all causes where an alien sues for a tort committed in violation of the law of nations or a treaty of the United States. This piece of legislation, which legitimacy has surprisingly never been challenged by other states,[29] amounted to an important move in the attempt to exercise jurisdiction in the realm of international human rights violations based, oddly, on domestic statute permitting municipal court to exercise such competence.

Viewed as a mere jurisdiction conferring statute as opposed to one offering cause of action, the ATCA may not have done much harm to the concepts of territorial sovereignty, and sovereign equality of states. For, as stated earlier, private international law distinguishes between the jurisdiction and the law questions in any civil cause instituted in a country other than that where the facts occurred[30]. But it has been suggested that not only does the ATCA confer subject matter jurisdiction, it also enables the

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22 Filed in as amicus briefs in ***Presbyterian Church of Sudan v Talisman Energy Inc,*** No. 07-0016 CV, 2nd Cir., 8 May 2007, 2, 7-10. .

23 Namely the Alien Torts Act and Torture Victim Protection Act

24 ***Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain***and ***Sweden***, permit their courts to entertain civil claims in an *action civile* in criminal cases which are based on universal criminal jurisdiction. See the Brief of Amicus Curiae the E.Uropean Commission Supporting Neither Party, ***Sosa v Alvarez-Machain***, No. 03-339, U.S. Sup. Ct., 23 January 2004, 21 n. 48, citing Yves Donzallaz, La convention de Lugano du 16 septembre 1998 concernant la compétence judiciaire et l'exécution des décisions en matire civile et commerciale, Vol. III, No. 5203-5272 (1998).

25 This is a feature of criminal law of the civil law countries. For example, courts in the following countries can exercise jurisdiction in criminal cases over civil claims based on torts committed abroad: ***Argentina, Bolivia, China, Colombia, Costa Rica, Myanmar, Panama, Poland, Romania,Senegal*** and***Venezuela***.

26 See ***Belhas vYa'Alon***, 466 F. Supp. 2d 127 (D.D.C. 2006) and ***Matar vDichter***2007 WL 1276960 (S.D.N.Y.) May 2, 2007. The intervention is or has been selective

27 28 U.S.C. 1350 (1982) originally enacted as part of the Judiciary Act 1789

28 28 U.S.C 1350 note 2(a)

29 This may partly be due to the fact that the US judiciary and executive have managed to curtail its potential for encroaching upon foreign states sovereignty through the methods discussed infra.

30 The lex causea or applicable law is invariably based on the principle of locus regit actum, that is the law of the place where the wrong occurred . This means that the liability of the tortfeasor or the state sponsor is determined in accordance with its own law

American courts to apply its common law to determine liability[31]. This view is based on the argument that the content of the "law of nations" is not static as the courts must interpret international law as it exists at the time a plaintiff relies on the ATCA to find a cause of action.[32] This position was adopted in earlier decisions such as ***Filartiga v Pena-Irala,***[33] when the US Courts of Appeals for the Second Circuit interpreted this provision to permit jurisdiction over a private tort action by a Paraguayan national against a former Paraguayan police official for acts of torture perpetrated in that state, it being held that torture by a state official constituted a violation of international law.

The U.S Courts also held that acts of torture, execution and disappearance[34] and alleged acts of torture and summary execution[35] were outside official authority or not taken within any official mandate in either case so that ATCA actions were in both cases held maintainable in the US federal courts.

However, in its original postulation, ATCA was thought to confer jurisdiction on US courts for actions seeking recovery for violation of safe conducts, infringement of the rights of ambassadors and piracy.[36] Although the U.S Supreme Court agreed in a 2004 decision that there is the possibility that there may exist additional federal common law rights of action over which courts may exercise ATCA jurisdiction, the Court enjoined the federal courts to exercise "great caution" in recognizing any new private rights of action under the Alien Tort Statute.[37] The Supreme Court further enjoined that case-specific deference to the political branches should act as a limit on human rights litigation in federal courts.[38] Among the reasons cited by the Supreme Court for exercising caution were (1) a decision to create a private cause of action is one better left to legislative judgment; (2) creation of ATS causes of action can have significant collateral consequences on U.S foreign relations, a subject normally left to the discretion of the elected branches of government; and (3) the federal courts ***"have no congressional mandate to seek out and define new and debatable violations of the law of nations."***

The Court rightly distinguished between jurisdiction and cause of action stating that outside its original subject matter jurisdiction, the ATCA cannot on its own provide the U.S Courts with a cause of action.[39] One subject matter in respect of which a separate cause of action exists in the U.S courts is the tort of torture. The Torture Victim Protection Act was said to have been enacted in 1991 to fulfill the obligation of the U.S under treaty international law especially under the 1984 Torture Convention[40].

7.2. Is There International Law Basis For Universal Civil Jurisdiction?

Except for a few grey areas,[41] the right of a state to provide forum for the prosecution of an offender for a crime against humanity and other *jus cogens* norm is no longer in doubt. Its basis at

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31 This view contradicts the decision in ***Sosa v Alvarez-Machain,*** 542 U.S 692 (2004) discussed infra. Beyond the wrongs originally recognized as violation of the law of nations the court must require a U.S statute or treaty separately prescribing a U.S cause of action to justify an ATCA action.

32 630 F.2d 876, 881 (1980); 77 ILR, pp.169, 175

33 630 F.2d 876 (2d. Cir. 1980); 77 ILR, p.169. See also 577 F.Supp. 860 (1984); 77 ILR, p. 185, awarding punitive damages.

34 In re Estate of Ferdinand E. Marcos, Human Rights Litigation ("Hilao II"), 25 F.3d, 1467, 1471 (9th Cir. 1994)

35 ***Trajano v Marcos,*** 978 F.2d 493, 498 (9th Cir. 1992)

36 ***Sosa v Alvarez-Machain,*** 542 U.S 692 (2004).

37 Id at 728 and 731

38 Id at 2766 n.21

39 This Supreme Court view tallies with our earlier opinion that the law question being different from the jurisdiction question in international civil litigation, it is not enough for a municipal law to confer jurisdiction, if the intention really is to bypass the *lex locus delicti* (the law of the place of the tort) as the governing law for a tort.

40 But some *opinio juris* say that the U.S acted unilaterally and not in accord with international law. See discussion infra.

41 Namely, the categories of crimes covered and whether serving officials other than heads of state can be prosecuted in the courts of another state.

customary international law in respect of crimes against humanity and piracy is well established.[42]There is also no basis for challenging reparation or other consequential civil reliefs granted upon conviction by a court in the civil law tradition for these crimes if recovery is against individual or non state party offenders[43]. In an early international court case, the Permanent Court of International Justice called the obligation to make reparations for an unlawful act "a general principle of international law" and part of "a general conception of law"[44] This reflects the fact that all legal systems require those who cause harm through illegal or wrongful acts to take action to repair the harm they have caused. The Universal Declaration of Human Rights,[45] proclaims that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws." This guarantee would, of course, include remedies for criminal acts that violate guaranteed rights. The International Covenant on Civil and Political Rights contains a similar guarantee in its Article 2(3).
Article 14 of the Torture Convention relates to civil remedies for the tort of torture. It provides thus:

1. **Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.**

2. **Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.**

Opinions have been expressed severally that this article mandates states to exercise extra-territorial civil jurisdiction and that the TVPA was enacted by the U.S on the basis of this article.[46] Proponents relied on the drafting history of the convention especially the insertion and later deleting of the words "committed in any territory under its jurisdiction" in Article 14(1). They admit however that the draftsmen did not have universal jurisdiction in mind.
We submit that what may have informed the decision to delete reference to territory is the difference highlighted in this essay between crimes which are local both as to jurisdiction and punishment in all legal systems and civil wrongs which are not. Common law legal systems permit their courts to entertain extra-territorial tort action though they are to apply the *lex loci delicti.* To add the words *committed in any territory under its jurisdiction* might suggest that the common law legal systems have been violating international law.

At any rate, the article does not mandate state parties to create forum cause of action for torture occurring abroad. It only requires them to provide fair and adequate compensation for torture occurring in the territory of a state member if such does not already exist under national law. This is because states do not ordinarily exercise prescriptive jurisdiction over matters occurring abroad and not affecting their nationals or interests or security and there is nothing in the article to suggest an intention to depart from the general rule. It is therefore difficult to see how the article can be construed to confer extra-

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42 See Notes 3 and 4 supra.

43 All challenges to jurisdiction haven been surmounted at the stage of criminal prosecution.The position will be different if conviction is secured in spite of such defences as acts of state or immunity and reparation or civil recovery is against a state actor.

44 (Factory at Chorzów [*Germany v. Poland*], 1928 P.C.I.J. [ser. A], no. 17 at 29 [September 13]).

45 Article 8,

46 See the opinion of the majority in the 7th circuits of the U.S court of appeals in Abdulsalami Abubakar case. Similar opinion was expressed by Donald Francis Donovan and Anthea Roberts in their chapter titled "The Emerging Recognition of Universal Civil Jurisdiction" published in **The American Journal of International Law, Vol. 100, No. 1 (Jan., 2006), pp. 142-163** .

territorial prescriptive jurisdiction. This Article contrasts with Article 5 which provides in respect of criminal prosecution that

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (1) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;(2) When the alleged offender is a national of that State;(3) When the victim was a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.

Paragraph 1 confers prescriptive jurisdiction to authorize a state courts to exercise adjudicatory jurisdiction on the basis of the territorial, nationality and passive personality principles, while a state which asserts none of these interests is mandated to prescribe rules authorizing its courts to entertain criminal prosecution against alleged offenders present in its territory whenever such a state does not extradite the offender to any of the states that may otherwise entertain the action on the basis of any of these principles.

We submit in the alternative that Article 14 of the Torture Convention does no more than permit what the civil law jurisdictions have done by attaching reparation to criminal jurisdiction, so that member states may provide for consequential civil recovery or reparation whenever their courts prosecute a *jus cogens* crime with which commission they are not connected. This as we have shown is different from conferring power to create a forum civil cause of action.

It is instructive that even the U.S ratified the Convention subject to an understanding that the prescriptive jurisdiction conferred by Article 14 can only be exercised in respect of torture taking place within a territory under a state party' s jurisdiction[47], a test which the TVPA despite its additional requirement of exhaustion of local remedies did not satisfy[48].This view is corroborated by opinions expressed by respected quarters that the U.S acted unilaterally and not in accordance with international law in enacting the TVPA[49].

7.3. Sovereign Immunity and the Normative Hierarchy Theory

Related to the question of universal civil jurisdiction is the question of sovereign immunity in cases in respect of which forum courts have exercised extra-territorial jurisdiction. Virtually all the offences in respect of which treaties or customary international law permit states to exercise prescriptive jurisdiction involves official of states in whose territory the offences are committed. It is therefore understandable where either customary or treaty international law disregards the defence or plea of

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47 **136 CONG.R EC.$ 17,486, 517,492 (daily ed. Oct. 27, 1990), reprinted in Contemporary Practice of the United States, 85 AJIL 335, 337 (1991).**

48 The TVPA clearly prescribes a U.S action for damsges for torture taking place in a territory with which the U.S has no connection.

49 **See the amicus brief of the states of** Australia, Switzerland, and the United Kingdom in the ***Soza*** case where they opined that although international law recognizes universal criminal jurisdiction, it does not **"recognize universal civil jurisdiction for any category of cases at all, unless the relevant states have consented to it in a treaty or it has been accepted in customary international law."** Donald Francis Donovan and Anthea Roberts loc.cit**, note 47 P.146-147. A commentator describes the several assertion of jurisdiction under TVPA by U.S courts as "unilateral exercise of the function of the guardian of international values" See the Chatam House Discussion Group Session of 20th June, 2006 published online IL200606_doc - Powered by Google Docs.mht**

immunity or superior order[50]. The courts have recognized this to be so at both customary and treaty international law in respect of criminal but not civil proceedings.

There are two forms which civil actions may take. Firstly, the state sponsor of the wrong may be sued in the courts of another state.[51] Where this happens, the issue of immunity will arise. The position that immunity must give way where a state has been impleaded over the violation of *jus cogens* norm, as we will discuss in this essay, has not received the type of acceptance that will make it a rule of customary international law though there are substantial jurist opinions in its favour. The view has been rejected by both international and municipal courts especially of the common law stock[52] and its application has been consistently objected to by some powerful countries.[53] Again, the cases seem to suggest that a state official who enjoys immunity *ratione personae* cannot be impleaded outside of his state until he vacates the office.[54]

The second form, which is so far provided for under the United States of America legal system[55] is for victim of these offences to commence civil actions for recovery against the former officials of a state sponsor of these offences.[56] These officials would have ceased to enjoy immunity, having vacated the offices, but they were strictly agents or servants of a disclosed principal – the state sponsor itself – and there is no reason why the state sponsor should not be able to plead its immunity as a procedural bar since the activities under scrutiny are its own.[57] At any rate a former head of state and arguably, other top officials enjoy immunity *ratione matariae* for their official as opposed to private acts.[58]While it is easy to understand that a treaty binding on both an alleged state sponsor and the forum may obligate the forum to assume jurisdiction and the state sponsor to waive its immunity,[59] it is difficult to accept the view that by merely pleading facts which portray a tort as being one violating some *jus cogens* rule, the alleged state sponsor loses its right to plead immunity as a procedural bar to the forum action.

The normative hierarchy theory attempts to limit sovereignty directly or indirectly by denying a state both the plea of immunity and an adjudicatory jurisdiction which it is otherwise entitled to on the ground that a *jus cogens* norm was violated by it. The theory thus formulates a hierarchy of norms with sovereignty being inferior to universal jurisdiction when same is sought for the purpose of redressing any of the crimes or civil wrongs recognized as *jus cogens* because of their heinous nature. A statement of the theory in the simplest of language goes thus

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50 As was held to be the case in respect of the crime of Torture in the Pinochet case, discussed infra and under Art. 27 and 28 of the Convention establishing the International Criminal Court

51 As was the case in **Aladsani v U.K (2001)** 34 E.H.R.R 273. See also a host of U.S ATCA actions discussed infra.

52 In **Aladsani** case, a majority of 9 to 8 of the European Court of Human Rights held that the U.K did not violate Article 6 of the E.U Human Right Convention which obliged members to provide access to victim of torture by upholding Kuwaiti Plea of Immunity. U.S ATCA cases have also rejected the argument.

53 Notably the U.S and Israel. See discussion infra.

54 See the Case concerning the Arrest Warrant of 11 April 2000, ***Democratic Republic of Congo v Belgium*** *I.C.J. Report, 2002 P.3*

55 The European civil law states provide for civil recovery in a criminal trial as opposed to a civil cause of action

56 Provided for by a combination of the US ATCA and TVPA, discussed supra.

57 There is no doubt that a State can intervene in two third parties action to plead immunity if subject matter of a civil action relates to its property or its activities. This is a rule of customary international law codified in Article 6 of the United Nations Convention on Jurisdictional Immunities of States and Their Property which provide that "*A proceeding before a court of a state shall be considered to have been instituted against another state if that other state … (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interest or activities of that other state*"

58 It is the official involvement in a tort that makes it the subject of international law in the first instance. So it is impossible to argue that a U.J action was instituted in respect of a private act.

59 As is the case with torture under the 1984 Convention against Torture, Inhuman and Degrading Treatment.

> ***Because*** *jus cogens* ***by definition, is a set of rules from which states may not derogate, a state act in violation of such a rule will not be recognized as a sovereign act by the community of states, and the violating state therefore may not claim the right of sovereign immunity for its action.***[60]

According to another concurring view the theory merely enjoins a value oriented interpretation of international law norms such that peremptory norms, such as the norm conferring universal jurisdiction for human rights violations prevail over norms of less importance such as immunity[61]

Where a state has an Immunity legislation which does not deny a foreign sovereign the plea of immunity for the type of act complained of, or which does not expressly exempt that act from acts in respect of which the foreign sovereign may plead immunity, the proponent of the theory will simply enjoin the courts to imply waiver of immunity.[62] Where a national court applies customary international law, the theory simply says that the norm of universal jurisdiction for *jus cogens* crimes is superior to the norm of sovereign immunity.[63]

The proponents claim that international law has changed since the Nuremberg trials and the consequent recognition by treaties of universal jurisdiction to be exercised either by international tribunals or national courts in respect of *jus cogen* crimes.[64]

The theory is not only popular among scholars but is usually presented as the basis for state legislation discounting with traditional nexus as a basis for jurisdiction.[65] It was expressly adopted as the basis for its decision by the Greek Court in the case of ***Prefecture of Voiotia v Federal Republic of Germany***[66]. The fact of the case arose out of the Nazi occupation of southern Greece during World War II. During that period Nazi military troops committed war atrocities against the local inhabitants of the prefecture of Voiotia in 1944, particularly in the village of Distomo, including willful murder and destruction of personal property. Over fifty years later, the plaintiffs, mostly descendants of the victims, sued the Federal Republic of Germany in the Greek Court of First Instance of Leivadia for compensation for the material damage and mental suffering endured at the hands of the Nazis. On the preliminary matter of jurisdiction, the court of first instance invoked the normative hierarchy theory to rule that Germany was not immune from suit. The court found that, ***"according to the prevailing contemporary theory and practice of international law opinion,… the state cannot invoke immunity when the act***

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60 Adam C Belsky, Mark Merva & Naomi Roht-Arriaza *"*comment,Implied waiver under the FSIA: A Proposed Exception to Immunity for Violation of Peremptory Norms of International Law". **77 Col L. Rev 365 (1989) 381 at 390**

61 See Andrea Bianchi, *Denying State Immunity to Violators of Human Rights,* 46 AUS. J. PUB. & INT'L. L. 195, 197 (1994)

62 See for example, **In re Estate of Ferdinand E. Marcos, Human Rights Litigation** ("Hilao II"),25 F.3d, 1467, 1471 (9th cir. 1994); ***Trajano v Marcos,*** 978 F.2d 493, 498 (9th Cir. 1992)

63 See for example, ***Ferrini v Federal Republic of Germany*** (Cass.Sez.Un. 5044/04) ***Prefecture of Voiotia vFederal Republic of Germany*** No. 137/1997 (Ct. 1st Inst. Leivadia, Oct, 30, 1997)

64 Adam C Belsky, Mark Merva & Naomi Roht-Arriaza. Id at 385-389. This is only true with respect to criminal as opposed to universal civil jurisdiction

65 There are U.J Laws in such states as Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden. S.134 of the English Criminal Justice Act was the basis upon which Pinochet went through an extradition trial in the U.K . The ATCA has also been relied upon severally to found a U.S jurisdiction for alleged jus cogens violations. This claim may however not be true as most state legislation were enacted to fulfill obligations under treaties and not under customary international law. Municipal courts have also found it more convenient to try an offence with which their state has no nexus on the basis that the state sponsor is party to a treaty obligating the forum to prosecute. See the English House of Lords decision in ***R v Bow Street Magistrate ex-parte Pinochet***[2001] 1 A.C 347. Also in the Abdusalam Abubakar case, the 7th circuits of the U. S Court of Appeals preferred to found a cause of action on the TVPA which domesticates U.S obligation under the Torture Convention rather than on customary international law forming part of U.S common law.

66 No. 137/1997 (Ct. 1st Inst. Leivadia, Oct, 30, 1997) discussed in **Lee M Caplan**, id, Note 48, 768

attributed to it has been perpetrated in breach of a *jus cogens* ***rule."*** The rule of *jus cogens* that the court identified was contained in Articles 43 and 46 of the regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations). Article 43 obligates an occupying power to respect the laws in force in the occupied territory and to ensure public order and safety, while Article 46 obliges occupying powers to protect certain rights of the occupied, especially the rights to family honour, life, private property, and religious convictions. The court concluded that the demonstrated breach of this rule deprives a state of an immunity defence in domestic proceedings.

Also, In 2004, in the case of ***Ferrini v Federal Republic of Germany,***[67] the Italian Supreme Court was faced with the question of whether "immunity from jurisdiction can exist even in relation to actions which [..] take on the gravest connotations and which figure in customary international law as international crimes, since they undermine universal values which transcend the highest interest of single States"[68]. The action in question- forced labour- was considered to be a peremptory norm under international law which ranked higher than state immunity as a customary law rule. The court held, that the grant of immunity "would hinder the protection of values whose safeguards is to be considered essential to the whole international community"[69].

These two cases seem to support the Normative Hierachy Theory. But they can be explained away. The case of Prefecture of Voiotia could have more logically before a common law court turned upon the application of restrictive immunity since the Regulations in question did not prescribe universal jurisdiction but the atrocities complained of occurred in Greece where the action was also instituted[70]. Also in *Ferrini* the court distinguished two other cases[71] upholding the plea of immunity, saying that the criminal act in question had begun on Italian territory because Ferrini had been captured there before being deported to Germany[72]**.**

A significant minority of the European Court of Human Right however accepted the theory as the basis for finding a U.K jurisdiction against the state of Kuwait in the case of ***Aladsani v U.K.***[73] In that case, the European Court of Human Rights confirming the decision of the English House of Lords had denied a U.K jurisdiction to entertain a civil action for torture against the state of Kuwait on account of Kuwait's right to immunity and had distinguished the facts of Aladsani from those of ***Exparte Pinochet***

67 (Cass.Sez.Un. 5044/04). Reported in FOSTERING A EUROPEAN APPROACH TO ACCOUNTABILITY FOR GENOCIDE, CRIMES AGAINST HUMANITY,WAR CRIMES AND TORTURE Extraterritorial Jurisdiction and the European Union Final Report April 2007 available online at:http://www.redress.org/publications/LegalRemediesFinal.pdf (English)

68 Id at P.20

69 Id

70 See Art. 12 of the U.N Convention on Jurisdictional Immunities of States And Their Property, which provides:
Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

71 **Bouzari vIran, C38295,[2004]O .J.2 800,1 181, 95 (Ont.C t.A pp.J une3 0, 2004),a vailableat <http:// www.ontariocourts.on.ca/decisions/2004/june/bouzariC38.** and Aldsani v U.K 2001, 34 E.H.R.R 273, E.C.H.R. Both cases are discussed infra.

72 Ferrini v. Germany, supra note 64, 110.

73 2001, 34 E.H.R.R 273, E.C.H.R. The case was lost by a slim majority of 9 to 8 for and against denial of jurisdiction by the U.K courts on account of the immunity of the state of Kuwait.

and ***Furundzrja*** on the basis that the latter cases concerned criminal liability of an individual for act of torture.[74]

In his dissenting opinion Judge Ferrari Bravo[75] stated that the majority just denied a golden opportunity to issue a clear and forceful condemnation of all acts of torture. In his opinion all that the European Human Rights Court should have done was to uphold the House of Lords judgment in *Exparte Pinochet (No. 3)*[76] to the effect that the prohibition of torture is now *jus cogens* so that torture is a crime under international law and every state has a duty to contribute to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment[77]. In the other dissenting opinion the minority stated that the prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and derives the rule of sovereign immunity of all its legal effect in that sphere. The criminal or civil nature of the domestic proceedings is immaterial.

While courts and Judges in civil law jurisdictions may not have clearly rejected the theory, the same cannot be said of their common law counterparts, who have either approached the matter from the perspective of construing their state immunity legislation, which legislation do not recognize human rights or *jus cogens* exception to immunity or have demanded a treaty obligation binding on the state sponsor and the forum which are non existing in the respective cases that had come before them.

In the United Kingdom, the case which is perhaps the most celebrated of all the universal jurisdiction trials was decided in the late 90s. The Spanish authorities had requested from the United Kingdom for the extradition of Augusto Pinochet, the former dictator of Chile for trial for torture and conspiracy for torture in Spanish Courts. Pinochet had gone to the U.K for medical treatment. The Divisional Court had quashed a provisional warrant for Pinochet's warrant of arrest on the ground that he was entitled to immunity. In the case of **R v Bow Street Magistrates Ex Parte Pinochet**[78], the House of Lords reversed that decision. Lord Browne Wilkinson, observing that the charges had no connection with Spain and that it may well be thought that the trial of Pinochet in Spain for offences, all of which related to the state of Chile and most of which occurred in Chile is not calculated to achieve the best justice. He however felt obligated only to consider the legal issue before the English courts, which was whether Pinochet was entitled to successfully plead immunity as a procedural bar to an extradition proceeding against him as a former head of state of a sovereign nation.

His lordship found instructive, the fact that torture, when perpetrated as official policy has assumed a status of *jus cogens* in international law such that victims are not left to their fate especially as no relief can be expected for as long as the same totalitarian regime retains political power.

He opined that an international system was required for the redress of such class of torture, which requirement was satisfied by the Torture Convention. On the question of immunity, his lordship

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74 This distinction between criminal and civil proceedings relating to torture in the face of a claim of immunity is because the U.K courts in this and subsequent cases understand the Torture Convention to confer universal jurisdiction only in respect of criminal trial and not civil recovery, so the U.K has only domesticated its obligations in respect of criminal jurisdiction. Conversely the U.S has consistently rejected universal criminal jurisdiction whereas its enactment of the TVPA has been justified on the alleged basis of universal civil jurisdiction conferred by the Torture Convention. Strangely, Some U.S courts also distinguish between ATCA or TVPA actions against individual officials and against states sponsors of torture, a distinction which is very difficult to understand because it is much easier to impute a delict on a state than a crime especially in the light of the rule that a state could plead immunity if its activities are in issue in the courts of a foreign state.

75 Dissenting opinions was jointly presented by Judges Rozakis, Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, whilst Judge Ferrari Bravo delivered a separate opinion.

76 [2000] 1 A C 147

77 But this was not the ratio of the case. The House of Lords indeed said that in the absence of an obligation under the Torture Convention, Pinochet could have been entitled to a plea of immunity as a former head of state of Chile

78 [2000] 1 A. C, 147. House of Lords.

observed that at international law, a head of state is entitled to immunity *ratione personae* while in office and *ratione materiae* for all his official acts during the period he was in office, even after he must have left office.

Debunking one of the major bases of the normative hierarchy theory, his lordship said:

> ***it is not enough to say that it cannot be part of the functions of the head of state to commit a crime. Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity ratione matariae. The case needs to be analyzed more closely.***

His lordship then distinguished between *jus cogens* where the international community has established an international tribunal and has by the treaty establishing that international tribunal made a head of state, serving or former, subject to its jurisdiction and thus left to be prosecuted in national courts and other cases. In his lordship words:

> ***At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a world-wide jurisdiction. Further, it required all member states to ban and outlaw torture: article 2. How can it be for international law purposes an official function to do something which international law itself prohibits and criminalizes? Thirdly, an essential feature of the international crime of torture is that it must be committed "by or with the acquiescence of a public official or other person acting in an official capacity." As a result all defendants in torture cases will be state officials. Yet, if the former head of state has immunity, the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable. I find it impossible to accept that this was the intention.***

Also, the artificial distinction that some U.S courts have made between the head of state or the state itself on the one hand and other official on the other, for the purpose of a civil action for violation of *jus cogens* norms may not be right if his lordship view is anything to go by. For he said

> ***/I/f the implementation of the torture regime is to be a public function giving rise to immunity rationae materiae, this produces bizarre results. Immunity rationae materiae applies not only to ex-heads of state and the ex-ambassadors but to all state officials who have been involved in carrying out functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing an official who, for example, actually carried out the torture when a claim against a head of state would be precluded by the doctrine of immunity.***

The court therefore found that Pinochet could not plead immunity because Chile being a signatory to the Torture Convention had agreed with the other parties to the convention that all signatory states should try official torture even if such torture was committed in Chile.

The English courts therefore found their jurisdiction on the basis of their universal jurisdiction legislation and the denial of immunity on Chile's obligation under the Torture Convention.

Although this case has been severally cited to support normative hierarchy theory, it is obvious that immunity was not denied because of the heinous nature of the crime of torture,[79] but because a convention provided a universal system of prosecution for the offence by obligating state parties to exercise jurisdiction even absent a link to the crime and not to object to exercise of such jurisdiction,

[79] In fact, the House of Lords said official torture was *jus cogens* because of the convention and not otherwise.

respectively. Clearly, going by the ratio of that case Pinochet would have successfully pleaded immunity if either the United Kingdom or Chile had not been a party to the Torture Convention.

In the case of ***Holland v Lampen-wolfe,***[80] the English House of Lords held that since immunity derives from customary international law while U.K's obligation to provide forum for litigation derives from a treaty freely entered into by it,[81]

> ***/t/he United Kingdom cannot, by its own act of acceding to the convention and without the consent of the United States obtain a power of adjudication over the United States which international law denies it.***

Later in 2005, five years after Pinochet the High Court in England confirmed the state's endorsement of universal criminal jurisdiction when it pronounced its first conviction on a suspect tried in England for foreign *jus cogens* crimes. Zaydad, an Afghanistan's warlord was tried at the Old Bailey for conspiracy to commit acts of torture and hostage taking in Afghanistan between 1992 and 1996 during the civil war which engulfed the country after the withdrawal of the Soviet Union.

The prosecution's case, found proved by the jury, was that he was the war lord with power over a great expanse of land spreading south and east from Kabul almost to the borders of Pakistan. He abused that power by stopping travelers and traders on the roads he controlled. His men systematically terrorized thousands of people, making them hand over their money and goods at gun point. Where Zaydad and his men thought they could get a ransom they took people hostage. They put them in makeshift prisons, caves, shipping containers and within basements in his bases. There they would be tortured and forced to write letters to make their families pay ransoms. Many were killed.

However, in ***Aladsani v Kuwait***[82] a civil case, the plaintiff pleaded that the monarch of Kuwait ordered the perpetration of torture on him both in Kuwait and the United Kingdom. He had secured the order for service of the writ of summon outside the U.K on the monarch and the State of Kuwait. The English courts had held that the state of Kuwait could not be sued against its wish in the U.K as the pleaded facts did not convince the court that part of the alleged torture occurred in the U.K.[83] Counsel to the Plaintiff had argued that international law against torture is so fundamental that it is a *jus cogens* or compelling law, which overrides all other principles of international law including the well established principle of sovereign immunity. In rejecting that argument, the English Court of Appeal said that the draughtsman of the State Immunity Act if he had so wished could have exempted torture from the categories of wrongs in respect of which sovereign immunity could be claimed in the U.K.

Also in the case of ***Jones v Saudi Arabia***[84] as narrated by a learned writer[85]

Ron Jones stopped for a cigarette outside a bookstore in central Riyadh on March 15, 2001, when a trash can exploded. His wounds and one-night hospital visit, however, were probably the least painful part of the nightmarish chapter of his life that then unfolded. From his hospital bed, Saudi officials seized and imprisoned Jones on suspicion that he planted the bomb. Officials held the fifty-year-old British tax specialist in a Saudi prison for sixty-seven days, during which Jones says he was beaten on his hands, buttocks, and the soles of his feet with a cane and axe handle; deprived of sleep; cuffed and shackled; and threatened with execution. They punched me, kicked me, bounced me off the walls.

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80 (2000) 1 W.L.R 1573; [2000] 3 All E.R 833, HL.

81 Article 6 of The European Convention on Human Rights

82 (1996) 107 L.L.R. 536

83 If the Court had accepted this, jurisdiction against the state of Kuwait would have been justified on the basis of section 5 of the U.K State Immunity Act which provides that a foreign state cannot plead immunity in respect of personal injury caused a person in the U.K.

84 [2006] U.KHL 26 (appeal taken from E.W.C.A.).

85 See Stacy Humes-Schulz: "Limiting Sovereign Immunity in the Age of Human Rights" **(2008)** ***Harvard Human Rights Journal / Vol. 21 P.105***

Then the caning started. They caned the soles of my feet and then they started caning my hands, sometimes with pickaxe handle. They told me they had arrested my wife and son and that they were doing all this to them as well….After returning home to England, Jones, a British national, sued Saudi Arabia in British court, seeking damages for assault and battery, trespass to the person, false imprisonment, and torture.

Jones' action in the United Kingdom went on appeal to the House of Lords, thus giving the Lords another opportunity to review their stance on the alleged primacy of universal jurisdiction over sovereign immunity in respect of civil actions seeking remedy for violation of *jus cogens* norms.In the summer of 2006, the House of Lords decided that the principle of sovereign immunity remained an inviolable tenet of international law subject to no exceptions for grave international crimes, and dismissed Jones' suit against the Kingdom of Saudi Arabia and the police officers who tortured him.

The House of Lords relied both on Britain's Sovereign Immunity Act and the breadth of international decisions supporting a blanket sovereign immunity from civil suit.[86] Lord Bingham noted that the prohibition against torture is likely a *jus cogens* norm of international law, but said he found no compelling evidence to demonstrate that states allow allegations of torture to overcome the presumption of sovereign immunity.[87] Instead, the applicable law seemed to confirm that the principle of sovereign immunity remains impenetrable when a state faces civil suit in a foreign court. Lord Bingham extended sovereign immunity to the individual Saudi police officials accused of torture by arguing that these individuals are merely agents of the state, and therefore become folded into the cloak of immunity that protects Saudi Arabia[88].

It is true that some U.S precedents have been touted to support the view that the *jus cogens* nature of a crime makes it possible for a plaintiff to recover damages in a U.S court even in the face of a plea by the foreign state sponsor, of sovereign immunity. This position is however doubtful because there are U.S courts decisions positively establishing the exact opposite of the submission.[89] It was specifically held in the case of ***Denegri v Republic of Chile***[90] and a host of other cases where the issue had arisen directly[91] that human rights violation did not meet the FSIA exception because Congress do not intend violations of *jus cogens* norms to come within the waiver exceptions of the FSIA.

The U.S FSIA like the State Immunity legislation of the U.K does not exempt actions seeking recovery for violation of *jus cogens* norms from the categories of civil actions in respect of which a foreign state can plead immunity as a procedural bar. The most direct and conclusive U.S authority and which

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86 Id.

87 Id. At P.27

88 The writer argues forcefully that the House of Lords did not follow the precedent in Ex-Parte Pinochet as they should because in the latter case they did say that an act of state argument was not sustainable on account of a conduct that violates a jus cogens norm of international law-the central theme of normative hierarchy theory. But with due respect, the decision is only consistent with the Lords' earlier decision in Aladsani recognizing only criminal universal adjudicatory jurisdiction and not civil.

89 See, e.g ***Hwang Geum Joo v Japan,*** 332 F.3d 697 (D.C. Cir. 2003) (holding that Japan did not waive FSIA immunity by allegedly violating *jus cogens norms),* vacated by 124 S. Ct, 2835 (2004); **Siderman de Blake**, 965 F.2d at 718 (holding that *jus cogens* violations do not constitute an an exception to sovereign immunity guaranteed by FSIA).

90 1992 WL 91914, at 3-4 (D.D.D. Apr.6, 1992)

91 See e.g ***Princz v Fed. Republic of Germany,*** 26 F.3d 1166, 1173-74 (D.C. Cir. 1994) (rejecting an argument that the violation of *jus cogens* norms by the Nazis constituted a waiver of sovereign immunity for purposes of the FSIA). See also ***Saudi Arabia v Nelson*** 507 U.S 349, 351 (1993) (holding that claims of torture and illegal detention by a foreign government were precluded by the FSIA in the absence of an exception to sovereign immunity); ***Sampson v Fed. Republic of Germany***, 250 F. 3d 1145, 1150-51 (7th Cir. 2001) (holding that Germany did not impliedly waive sovereign immunity as a result of its violations of *jus cogens* in the treatment of slave laborers during World War II); ***Smith v Socialist People's Libyan Arab Jamahiriya,*** 101 F. 3d 239, 242-44 (2d Cir. 1996) (rejecting the idea of extending *jus cogens* violations to constitute an FSIA exception in accordance with congressional intent).

appeared to have settled the question is the case of ***Amerada Hass Shipping Corporation v Argentina Republic***[92] The Supreme Court unanimously held, overruling a majority decision of the Court of Appeals that since the Alien Tort Claims Act preceded the Foreign Sovereign Immunities Act, the legislature could have excepted actions commenced pursuant to the ATCA if it had wished to do so, when it spelled out in details, the general rule and exceptions to plea of sovereign immunity under the FSIA.

As demonstrated in the Pinochet case, both the forum and state sponsor of torture are under obligation to provide forum for prosecution and not to object to the exercise of jurisdiction by the forum respectively. This and not the alleged *jus cogens* character of the wrong makes or could make the plea of immunity and/or act of state irrelevant in a TVPA proceeding or any other proceeding where U.S jurisdiction was derived from identical treaty obligation. But the logic of that proposition breaks down in the face of a distinction between the foreign state and its alter ego that is very difficult to rationalize [93].This artificial distinction is not followed by the U.K courts as demonstrated in the case of *Jones v Saudi Arabia*,[94]

This confirms that the distinction under U.K law is between criminal trials in respect of which an ex head of state or other official may not plead immunity if his state is a party to the convention conferring universal jurisdiction and civil action in respect of which immunity may not be pleaded only if the State Immunity Act says so.

Some U.S District Courts have also rejected this artificial distinction which is contrary to both municipal and international law. State sponsors of torture unless prevented by international convention from doing so and even where they are not directly impleaded may certainly raise the plea of immunity as a procedural bar, since the activities under scrutiny are theirs.[95] It is also important to note that some recent U.S precedents show that such torts committed in violation of the law of nation in furtherance of state policy are not actionable in the United States of America.[96]

In the Canadian case of **Bouzari**[97]**,** Houshang Bouzari, an Iranian national who later applied for Canadian citizenship, sued the Islamic Republic of Iran in Canada for torture allegedly committed while

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92 830 F.2d 421 (1987); 79 ILR. P.8

93 The courts have managed to distinguish between actions against the state sponsor and actions against its officials. See discussion infra. See the decision of the majority of the.European Community Court in the ***Aladsani case*** **(2001)** 34 E.H.R.R 273. The U.S courts also held that the FSIA exclusively defines when a foreign state can be sued in the U.S but that ATCA and presumably TVPA actions against non state defendants are unaffected by the FSIA. See for example ***Samantar v Yousuf*** 28 U. S. C. §1604 (2010) and ***Smith v. Libya*** 101 F.3d239 (1996). Presumably customary international law as incorporated into common law governs the question of whether ex-heads of state or other individuals can plead sovereign immunity or acts of state as a defence or bar to U.S proceedings .But state officials or former officials can rely on the defence of acts of state in ATCA actions but not TVPA actions where the state sponsor is a party to the Torture Convention.. Even the decision of the 7th circuits of the U. S Court of Appeals in the Abubakar case recognized Head of State immunity both *ratione personae* and *ratione matariae* in a TVPA action and this is a clear departure from the **Ex Parte Pnochet (No. 3)** House of Lords decision (Supra, N. 38) which was however delivered in a criminal as opposed to a civil proceeding.

94 Id.

95 See Art. 6 of the U.N. Convention On Jurisdictional Immunities of States And Their Property, set out in Note 67 supra.

96 See ***Belhas v Ya'alon,*** No. 05-2167, 2006 U.S. Dist LEXIS 9004 1 (D.D.C.Dec. 14 2006) where a U.S.D.C court found that Mosha Ya'a lon who was sued under the US ATCA on behalf of the survivors of the 1996 shelling of U.N compound in Qana, Lebenon acted in official capacity and was therefore immune from suit. See also the decision of the U.S District Court for Southern District of New York in the case of ***Matar v Dichter*** 2007 WL 1276960 (S.D.N.Y) May 2, 2007 based on the political question rule and partly on the basis that the defendant enjoyed immunity as he acted in official capacity in perpetrating the heinous crimes alleged against him and the state of Israel. In both of these cases the US Courts did not accept the argument that immunity did not lie because jus cogens norms were violated. See also the most recent decision of the U.S Court of Appeals in 2007 U.S. App. Lexis 56227 reported online http://ilex.asil.org/details/?id=10888

97 Loc.cit, note 68

he was in Iran. The Court of Appeal for Ontario held that treaty and customary international law did not require Canada to apply a rule of universal jurisdiction to a civil action for torture committed abroad by a foreign state. In particular, the court held that Article 14 requires states parties to provide a civil remedy only for acts of torture committed within their territory. The court ultimately held that the action against Iran was barred by the doctrine of sovereign immunity, and Bouzari's request for leave to appeal to the Supreme Court of Canada was denied**.**

In the light of the foregoing it is safe to conclude at least in relation to the states of the common law stock that the theory of normative hierarchy has not received acceptance as for it to have become a rule of customary international law that could alter state practice on immunity. In fact it may take longer for the theory to receive such acceptance than it took the international community to accept restrictive immunity because some powerful nations of the world have vehemently objected at every opportunity to the exercise of universal jurisdiction over their officials on account of the theory[98].

7.4. What State Practice For Nigeria?

Under this sub-head, we will review the occasions when Nigeria has been involved either as a victim or villain of the exercise of universal civil jurisdiction, and whether or not Nigeria properly handled these situations. Finally, we will recommend a position for Nigeria.

7.4.1. Abdulsalami Abubakar Trial in U.S

Recently, In the case of ***Hafsat Abiola & 2 Others v Abdulsalami Abubakar,***[99] the Nigerian state was indirectly impleaded when a former member of its provisional ruling council and later its head of state was sued in the United States under the U. S Alien Torts Crime Act.[100] The plaintiffs in the case had complained that from 1993 to 1998, General Abubakar who was a high ranking member of the Provisional Ruling Council that governed Nigeria attempted to silence Chief Anthony Enahoro, Arthur Nwakwo, and Hafsat Abiola's parents, Chief M.K.O Abiola and Alhaja Kudirat Abiola all vocal advocates of democratic reform in Nigeria through a regular dose of imprisonment and torture. Abubakar allegedly had Chief Abiola imprisoned in 1994; imprisoned Enahoro, a diabetic, for four months in 1994 without providing him insulin or proper medical treatment; had Alhaja Kudirat Abiola assassinated in 1996; and caused Nwankwo to be arrested, detained and flogged over a period of more than two months in 1998.

In 1999, Abdulsalami, who by then had become Nigeria's head of state, instituted democratic elections in Nigeria, and the military regime came to an end. On February 22, 2001, the plaintiffs filed

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98 Notably the U S and Israel whose officials have severally been charged by European and U.S courts but such charges have almost always been withdrawn upon protests and pressures mounted by the two states. Incidentally, these officials were even charged for alleged war crimes committed against civilian populace of other countries and not American or Israeli nationals. One would have thought that such crimes harm the international community more and should attract universal opprobrium than the one committed by states officials against their nationals .Apart from Yalon and Dichter who escaped litigation in U.S, several serving and even former officials of Israel and the U.S have avoided trials in Belgium, Spain and Germany. Belgium had to water down its U.J legislation upon threat and pressure from the U.S. Indeeed a policy has been recommended which appear to have been adopted by the U.S not to ratify any U.J treaty permitting exercise of such jurisdiction in respect of war crimes, to protest any assertion of jurisdiction over an American official on the basis of any such U.J treaty or normative hierarchy theory and eventually to push the *jus cogens* rule into desuetude.. See *The Perils of Universal Jurisdiction* posted on line via *http/rpc.senate.gov/_files/Dec1806UniversalJursdctnMS.pdf.* One then wonders whether U.S courts have any moral right to try officials of other states based on the same U. J rule that the U.S so much despise

99 267 F. Supp. 2d 907, (N.D. III.2003); See ***Enaharo v Abubakar*** 408 F. 3d 877, (7th Cir. 2005) *for the Court of Appeals decision on the interlocutory appeal of Abubakar.*

100 28 U.S.C. §1350

this lawsuit in the United States, seeking damages under the ATCA. Abdulsalami defended the lawsuit by arguing that he was immune from suit under the Foreign Sovereign Immunities Act and that the Court lacked subject matter jurisdiction under the TVPA because plaintiffs had not exhausted their remedies abroad. The Court ruled that Abdulsalami was entitled to immunity for the acts he allegedly committed while he was head of state but lacked immunity for all other claims.[101] The Court rejected, however Abdulsalami's argument concerning subject matter jurisdiction.[102]On interlocutory appeal, the Seventh Circuit affirmed the District Court ruling on the sovereign immunity issue but reversed its ruling on subject matter jurisdiction. Citing the Supreme Court's intervening decision in ***Sosa v Alvarez-Machain,[103]*** the Supreme Circuit held that the TVPA, along with its attendant exhaustion requirement, provides the only cause of action for aliens seeking compensation for acts of torture abroad.[104]

The Court however remitted the case to the court of first instance to determine whether the plaintiffs had exhausted local remedies as required by the TVPA, a question which was answered in the positive after the court had listened to expert witnesses of both parties.[105]It was at this stage that the Nigerian state settled the matter out of court after offering a sum of money to the claimants.

Also in ***Samantar v Yousuf*[106],** Respondents, who were persecuted by the Somali government during the 1980's, filed a damages action alleging that petitioner, who then held high level government positions, exercised command and control over the military forces committing the abuses; that he knew or should have known of these acts; and that he aided and abetted in their commission. The District Court concluded that it lacked subject-matter jurisdiction and granted petitioner's motion to dismiss the suit, resting its decision on the Foreign Sovereign Immunities Act of 1976, which provides that a "foreign state shall be immune from the jurisdiction" of both federal and state courts except as provided in the Act[107]. The Fourth Circuit reversed, holding that the FSIA does not apply to officials of a foreign state.

The only question submitted to the Supreme Court was whether the U.S Foreign Sovereign Immunity Act governs official immunity. Counsel had relied on the history of the legislation and on its provision that a foreign sovereign includes its political subdivision agency or instrumentality. He also urged the Court to rely on presumption that the legislature will not depart from the common law. But the Supreme Court held[108] that reading the FSIA as a whole, there is nothing to suggest that "foreign state" should be read to include an official acting on behalf of that state. That the Act specifically delimits

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101 See ***Abiola v Abubakar,*** *267 F. Supp. 2d 907, 916-917 (N.D. III. 2003)*

102 *Id. At 910*

103 *542 U.S 692 (2004)*

104 See ***Enaharo v Abubakar,*** 408 F. 3d 877, 885 (7th Cir. 2005)

105 The Nigerian State was later to settle the matter out of court thus aborting trial on the merit. This is rather unfortunate as a trial on the merit would easily have shown that Abubakar was not personally responsible for Abiola's travail, but rather the government which he served; for he had no personal motive and whatever act were attributable to him were official acts covered by immunity. These acts were by Nigerian Law, acts of state and no personal liability could lie on their perpetrator as such persons have been fully indemnified by legislation, if indeed official and or authorized acts are covered, it is difficult to see a better example of official involvement than Abubakar's.

106 28 U. S. C. §1604 (June,2010)

107 28 U. S. C. §1604

108 Confirming the Court of Appeals decision in this case, reported in 552 F. 3d, at 381 (holding the FSIA does not govern the immunity of individual foreign officials), and in Enahoro v. Abubakar, 408 F. 3d 877, 881–882 (CA7 2005) (same), and rejecting another line of consistent Court of appeals decision including Chuidian v. Philippine Nat. Bank, 912 F. 2d 1095, 1103 (CA9 1990) (concluding that a suit against an individual official for acts committed in his official capacity must be analyzed under the FSIA), In re Terrorist Attacks on September 11, 2001, 538 F. 3d 71, 83 (CA2 2008) (same), Keller v. Central Bank of Nigeria, 277 F. 3d 811, 815 (CA6 2002) (same), Byrd v. Corporacion Forestal v Industrial de Olancho S. A., 182 F. 3d 380, 388 (CA5 1999) (same), and El-Fadl v. Central Bank of Jordan, 75 F. 3d 668, 671 (CADC 1996) (same)

what counts as an "agency or instrumentality" [109]. That the textual clues in the "agency or instrumentality" definition—"any entity" matching three specified characteristics[110]—cut against reading it to include a foreign official."Entity" typically refers to an organization; and the required statutory characteristics—e.g., "separate legal person,"[111]—apply awkwardly, if at all, to individuals. That Section 1603(a)'s "foreign state"definition is also inapplicable. The list set out there, even if illustrative rather than exclusive, does not suggest that officials are included, since the listed defendants are all entities. That this conclusion is also supported by the fact that the U.S Congress expressly mentioned officials elsewhere in the FSIA when it wished to count their acts as equivalent to those of the foreign state. Moreover, that other FSIA provisions[112]point away from reading "foreign state" to include foreign officials.

The Court also held that FSIA's history and purposes also do not support petitioner's argument that the Act governs his immunity claim. That there is little reason to presume that when Congress codified state immunity, it intended to codify, sub silentio, official immunity. That the canon of construction that statutes should be interpreted consistently with the common law does not help decide the question whether, when a statute's coverage is ambiguous, Congress intended it to govern a particular field. That State and official immunities may not be coextensive,and historically, the Government has suggested common-law immunity for individual officials even when the foreign state did not qualify. That though a foreign state's immunity may, in some circumstances,extend to an individual for official acts, it does not follow that Congress intended to codify that immunity in the FSIA. Official immunity was simply not the problem that Congress was addressing when enacting that Act. The Court's construction of the Act should not be affected by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law. This case, where respondents have sued petitioner in his personal capacity and seek damages from his own pockets, is governed by the common law because it is not a claim against a foreign state as defined by the FSIA.
Finally the Supreme Court held that whether petitioner may be entitled to common-law immunity and whether he may have other valid defences are matters to be addressed by the court of first instance.

7.4.2. <u>The Charles Taylor Affair</u>

The offer of asylum to former Liberian President and warlord, Charles Taylor created real opportunity to test the waters with regard to the practice that Nigeria state will adopt on the subject of universal jurisdiction for civil actions. Several Nigerian victims of Taylor's alleged brutality attempted to sue him but were unable to do so because of his status as a guest of the Nigerian State[113]. Eventually some Nigerian survivors of Charles Taylor sponsored human right abuses succeeded in obtaining leave from a federal high court to challenge Taylor's continuous enjoyment of the status of asylum in Nigeria. The Federal Government of Nigeria however appealed the decision upon grounds including the contention that the decision to grant asylum to Taylor was a political decision that is unsuitable for judicial review[114]. The case had not been determined by the Court of Appeal as at the time Charles Taylor was handed over to the International Criminal Court.

[109] §1603(b)
[110]
[111] §1603(b)(1)
[112] For example,§1608(a)
[113] Taylor was granted asylum in Nigeria in furtherance of the peace plan for Liberia by the states of ECOWAS
[114] See Press Release of the Open Society Justice Initiative dated 2nd November,2005

While Taylor enjoyed asylum in Nigeria there were several attempts to serve the summons of the International Criminal Court sitting in Liberia, which the government of Nigeria stalled.

7.4.3. What Response Was Appropriate on the Two Occasions?

7.4.3.1. The U.S Trial of Abdulsalami

As stated earlier, Abdulsalami Abubakar and Nigeria sought to dismiss the ATCA suit at the interlocutory stage on the ground of immunity and the defence of act of state. These defences are based on the argument that Nigeria sponsored the acts complained of and that Nigeria or its officials could not be sued for those acts outside its territory. Both the District Court and the 7th Circuits of the Court of Appeals however held that Abubakar could be personally sued for parts of the wrongs that occurred before he became the head of state of Nigeria. The bulk of plaintiff counsel argument upon which these rulings were based was that the torts complained of were violations of *jus cogens* norm and that immunity cannot be pleaded in a foreign action seeking redress for such wrongdoings. Arguments such as these are based on the controversial normative hierarchy theory[115], discussed in previous paragraphs of this essay.

It is clear in light of the discussion herein that Nigeria surrendered too early when it promoted or endorsed the settlement of the suit against Abdulsalami Abubakar. Nigeria employed only the legal tool and did not even wait to see it to logical conclusion when it settled the case against Abdusalami out of court when the court still had to determine the personal involvement of Abdusalami.

For, it is obvious that the U.S courts ought not to have denied Abdulsalami Abubakar immunity even in respect of the part of the plaintiffs' claims relating to the period before he became head of the Nigerian state.

Firstly, if the basis of the TVPA is the Torture Convention, there is no justification for its application to deny immunity enjoyed by Abdulsalami as a former Nigeria official because Nigeria has not ratified the Convention.

Secondly, it is not only heads of state that could plead immunity *ratione matariae* in respect of official conducts that they put up whilst they were in government. Article 39(2) of the Vienna Convention on Diplomatic Immunity expressly permits an ambassador to do so and this at least indicates as the House of Lords has held in the ***Ex Parte Pinochet (NO.3)*** case[116] that other senior officials of Government are equally covered by the plea.

Thirdly, the Court of Appeals having rejected plaintiffs' claim that the alleged tort was committed in private capacity should have arrived at the same conclusion as it did in the cases involving the former

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[115] See Lee M Caplan, (2003), 97 AJIL 741, 769. The writer relying on the Greek case of ***Prefecture of Voiotia vFederal Republic of Germany*** No. 137/1997 (Ct. 1st Inst. Leivadia, Oct, 30, 1997) listed the several ramifications of the normative hierarchy theory thus:

(a)When a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law); (b) Acts of the state in breach of peremptory international law cannot qualify as sovereign acts of state. In such cases the defendant state is not considered as acting within its capacity as sovereign; (c) Acts contrary to peremptory international law are null and void and cannot give rise to lawful rights, such as immunity (in application of the general principle of law *ex iniuria ius non oritur****); (d) the recognition of immunity for an act contrary to peremptory international law would amount to complicity of the national court to the promotion of an act strongly condemned by the international public order; (e) The invocation of immunity for acts committed in breach of a peremptory norm of international law would constitute abuse of right; and finally (f) Given that the principle of territorial sovereignty, as a fundamental rule of the international legal order, supersedes the principle of immunity, a state in breach of the former when in illegal occupation of foreign territory, cannot possibl[y] invoke the principle of immunity for acts committed during such illegal military occupation.***

[116] [2000] 1 A. C, 147

Israeli officials that an action seeking reliefs for torture allegedly committed by the third most powerful man in the then government of Nigeria for political end is an official act which is entitled to immunity in a civil proceeding in the United States

In ***Matar v Dichter,***[117] the U.S executive in its statement of interest argued that to allow Dichter to be impleaded in U.S courts would have the effect of bringing U.S sovereign immunity law into conflict with customary international law which would recognize immunity for individual foreign officials under these circumstances and thereby inviting reciprocation in foreign jurisdiction. Dichter was sued by victims of bombings in Lebanon directed at civilian targets where the Hamas Terrorists Organization members were believed to be in hiding and Dichter was at the material time the head of the Israeli Security Agency. The same position was taken by the U.S executive in ***Belhas v Ya'alon***[118] . In both cases the U.S courts declined jurisdiction.

In ***Samantar v Yousuf*** [119]however, the U.S executive said it could not support immunity for the former vice president of Somalia because it does not recognize any present government in Somalia that could make a case for Samantar with respect to the capacity in which he acted. Predictably, the U.S Court of Appeals and her Supreme Court held that the FSIA did not apply and that the question of whether or not a former government official was entitled to immunity should be answered by the common law. This decision begs the question because the FSIA like all other state legislation on immunity proceeds from the assumption that the general rule is that a state cannot be sued in a foreign territory and merely established exceptions to that general rule. The exceptions may not have spared a thought for torture or other *jus cogens* crime, but did mention tort committed in U.S territory[120]. If tort committed on U.S territory is excepted, should it not follow that tort committed in foreign territory is not excepted from immunity claim? Is a civil claim for alleged torture striped of all the usual exaggerations and pontifications for effect, not an action in tort? If it is not, what then is it?. We submit that torture is tort causing personal injury, given another name for effect.

The U.S Supreme Court said actions against officials are not covered because state is defined to include agency, instrumentality and political subdivisions all of which in turn refer to juristic entities and not natural persons. But we are not concerned with what the word "state" includes but what it means in the context of commission of civil wrongs. The simple question to ask is whether a state can commit a tort other than through its human alter ego. International law agrees that the state can and do commit torts or delict through its officials but never-the-less insist that the proper place to seek civil redress for such wrongs is the courts of the state actor. The FSIA may not have defined what state means in the context of wrongs that can only be committed by natural persons, but without standing logic on its head, state can only mean its human alter egos for that purpose. The House of Lords decision in ***Jones v Saudi Arabia***[121] is clearly more logical than that of the U.S Supreme Court on this account.

The U.S Supreme Court also buttressed its holding with examples of instances when the U.S executive had suggested immunity to individual officers in circumstances where their states may not be immune[122]. But with respect, it is better to rely on judicial rather than executive precedents on the matter. Executive decisions on grant or denial of immunity are governed by many more considerations than legal and it is not even illegal for this to be so. The Vienna Convention on Diplomatic Relations for

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[117] 2007 WL 1276960 (S.D.N.Y) May 2, 2007
[118] 466 F. Supp. 2d 127 (D.D.C. 2006)
[119] 28 U. S. C. §1604

[120] S,1605(a) (5)

[121] [2006] U.KHL 26
[122] See, e.g.,***Greenspan v. Crosbie***, No. 74 Civ. 4734 (GLG), 1976 WL 841 (SDNY, Nov. 23, 1976)

example, recognize that states may grant a more generous regime of immunity to some other states on the basis of agreement[123], but this does not detract from the position that no state can be denied the minimum standard prescribed in the treaty[124]. We submit that this provision could only logically have codified the customary international law on immunity as it applies to diplomatic immunity.

Finally, if Abdulsalami Abubakar was rightly excused for the wrongs committed whilst he was head of government, it would mean that Abacha would have also been excused for the wrongs committed before Abdulsalami Abubakar became head of state whilst he, a No. 3 who at best carried out instruction or was merely guilty by association is sueable in the U.S. This runs contrary to the whole idea behind the exercise of universal jurisdiction as explained by the courts and its proponents who said that universal jurisdiction should override immunity even of heads of government of sponsoring states because

> ***Immunity rationae materiae applies not only to ex-heads of state and the ex-ambassadors but to all state officials who have been involved in carrying out functions of the state. Such immunity is necessary in order to prevent state immunity being circumvented by prosecuting or suing an official who, for example, actually carried out the torture when a claim against a head of state would be precluded by the doctrine of immunity.[125]***

It is obvious that the U.S has not accepted this theory and its consequential thump down for immunity in the face of an allegation of violation of *jus cogens* norm[126]. Having not done so, its courts could not upon any excuse create a non existing distinction between immunity *ratione matariae* for heads of states and for the top officials of the government of the state sponsor.

It is unfortunate that Nigeria did not do enough to attract the intervention of the U.S executive in this case as the state of Israel was able to do in the *Matar case*. Unlike Somalia Nigeria's government was recognized by the U.S. Nigeria however neither poses the type of threat nor attracts the type of interest that some countries do to the U.S hence, the U.S should not have been expected without Nigeria's prompting to intervene one way or the other in a suit that put Nigeria's sovereignty on the line in the U.S.

7.4.3.2. <u>The Enforcement Of Judgment Question</u>

Claimants who rush to the U.S to sue former rulers may also need to enforce the U.S judgment in Nigeria if the former rulers have no assets in the U.S. Should Nigerian or any other commonwealth courts recognize or enforce such judgments?

At common law, one of the requirements for enforcement of foreign judgment is that the foreign court must have been seized of jurisdiction in the international sense as known to the law of the registering court. Clearly jurisdiction exercised unilaterally in violation of international law, will not meet this requirement. Also, most commonwealth countries including Nigeria enacted equivalent of the U.K Foreign Judgments (Reciprocal Enforcement) Act 1933[127]. Like the other statutes, the Nigeria

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[123] Art 47(2)(b) VCDR 1961

[124] See ***Holland v Lampen-Wolfe*** (2000) 1 W.L.R 1573; [2000] 3 All E.R 833, HL especially the golden words of the U.K House of Lords, that:

> ***The United Kingdom cannot, by its own act …and without the consent of the United States obtain a power of adjudication over the United States which international law denies it.***

[125] See *Exparte Pinuchet (No.3),* (Supra)

[126] See the cases cited in note 92 of this Essay.

[127] See for example, Singapore, Reciprocal Enforcement of Foreign Judgments Act 1959; Malaysia, Reciprocal

statute provides for registration of foreign judgment, but permits the setting aside of such registration on grounds which include[128]

> **if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.**

Presumably, it is not a bar to setting aside the registration of a foreign judgment that the issue of immunity was raised and resolved by the original court. The rule is that the registering court is not to concern itself with the merits or otherwise of the foreign judgment except the specific grounds or issues upon which the registration may be refused or set aside. It is therefore the Nigerian view or perspective of this issue that should determine whether or not to set aside the judgment.

On a sad note however, the Nigeria Court of Appeal did not realize this point in the case of ***Teleglobe America Inc. v 21st Century Technologies Ltd[129],*** where a judgment debtor had objected to the registration of an American judgment on the ground that it was not properly served with the process of the U.S court in line with Nigerian Law, a ground which admittedly was wrongly couched[130]. The High Court had upheld this objection but on appeal, the Court of Appeal had overruled the trial court on the equally wrong ground that the Nigeria court cannot address the issue of service as that had been resolved by the U.S Court. However the Foreign Judgment (Reciprocal Enforcement) Act 1961 under which the Application was wrongly brought, argued and granted[131]permits the court to set aside registration on ground that the U.S court had no jurisdiction. Clearly, it was open to the judgment debtor to raise issues which Nigerian rules on enforcement of foreign judgment permits it to raise irrespective of whether American opinion had been expressed on the issue. Both at common law and under the statute[132], the jurisdiction of the foreign court must have been based on either voluntary submission or

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Enforcement of Judgments Act, 1958; Hong Kong, Foreign Judgments (Reciprocal Enforcement) Ordinance,1960; Ghana, Part V of the Courts Act,1993 (Act 459) ; Nigeria, Foreign Judgment (Reciprocal Enforcement) Act 1961, Cap. F35, LFN, 2004.

[128] S.6(3) (c)

[129] (2008) 9 CLRN 32

[130] The ground ought to be that the U.S Circuit did not have jurisdiction because the defendant was neither resident nor present in U.S nor did he voluntarily submit to U.S court's jurisdiction.

[131] The Act cannot apply because Nigeria has no bilateral agreement with U.S and the Minister has not extended the Act to U.S judgments under S.3(1). Judgments from U.S can only be enforced by common law action in Nigeria as in most other commonwealth countries. The Supreme Court in ***Macaulay v RZB of Australia*** (2003) 18 NWLR (pt. 852) 282 however laid the foundation for confusion when it construed S.10A of the Act to permit registration under the Act within 12 months of the foreign judgment even absent the Ministerial order under S.3(1). Respectfully, we submit that S.10A cannot apply until the Minister has made the order required in S.3(1). It will only apply if the Minister makes the order but postpones its coming into effect. .

[132] See S.6(2)(a), (b), and (c) together with S.63(3) of the Act . The Nigeria court will *inter alia* not set aside registration under S.6(2) (a),

> (iii if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
> (iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business, in the country of that court; or
> (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

proper service[133] and the fact that the issue was raised and resolved in the case at least proves that submission was not voluntary. The real issue is whether assumed jurisdiction by service abroad (service in Nigeria) of the court's writ, in the absence of voluntary submission is a basis of jurisdiction recognized by Nigeria enforcement or registration of judgments rules[134].

7.4.3.3. Charles Taylor And Nigeria

Had Taylor been in Nigeria in other circumstances the several Nigerian victims of his alleged atrocities would have sued him for some of the atrocities which occurred whilst he was the Liberian leader. This would have given Nigerian courts opportunity to pronounce on their adjudicatory jurisdiction given Taylor's status as a former Liberian leader as well as the applicable law to such actions.

Nigeria has not ratified the Torture Convention which Article 14 is alleged to provide for adjudicatory universal civil jurisdiction[135]. Even when she does, that will not be a licence for her to prescribe a forum cause of action for official torture occurring abroad. But the Nigerian Private International Law, like that of other states of the common law legal systems distinguishes between choice of law and choice of jurisdiction. Nigeria does not need to enact any law to permit suit against Taylor or any other foreigner who is present in Nigeria. However the applicable law to the action will be determined by the double liability rule formulated in the old English case of ***Phillips v Eyre*** which rule requires the courts to have regards to all defences, indemnity and other excuses allowed the tortfeasor under the *lex locus delicti*.

Should Taylor upon being sued raise the plea of immunity *ratione matariae*, the Nigerian Courts in tandem with the practice of the U.K and of other common law jurisdiction including, as we have shown in this essay, the U.S, should only have rejected the plea if the state of Liberia waives it[136].
As regards the request for Taylor to be handed over to the Ad hoc Tribunal at Sierra Leone, Nigeria ratified the Convention establishing the International Criminal Court, Article 27 of which Convention denies immunity to any person who would have been entitled to plead either immunity *ratione personae* or *ratione matariae* against prosecution at the International Criminal Court. Article 28 denies a suspect the defence of complying with superior orders. As a state member, Nigeria is under obligation to respect these provisions[137]. It thus follows that the status of a suspect as a former head or top official of the government should not prevent Nigeria from handing him over to the Court.

Given the circumstances under which Taylor was taken to Nigeria and the need to sustain the fragile peace in Liberia, the decision of Nigeria not to release Taylor to the prosecutor in Sierra Leone at that time was politically justified. However, when the heat from the United States became unbearable it does not appear that the initial decoy of allowing Taylor to relocate in the guise that he had escaped was well thought out, especially because the other state members of ECOWAS were not consulted. In the end, Nigeria expectedly got so bullied by the U.S, a state which has not even ratified the Rome Statute and does not accept similar treatment for its own officials, that she had to hand over Taylor within 24

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[133] Which for this purpose is service on them while they were on American territory

[134] See ***Crosvenor Casinos v Ghassan Halaout*** [2009] 2 CLRN 62; ***Shona- Jason Nig Ltd v Omega Air Ltd*** [2005] 10 CLRN 15 where the Court of Appeal correctly, in our view, answered this question in the negative.

[135] See the Status Table of State Menbers of the Convention,

[136] As was the case in Marco's and Pinochet cases. The position will be different if Taylor is standing trial before a criminal court or tribunal exercising universal criminal jurisdiction. See the Pinochet case, supra.

[137] See Art 87-89 of the Convention.

hours after she had lied to the whole world that Taylor had escaped[138]. The lesson in all this no doubt is that only negative consequences could flow from harbouring war criminals and grave violators of human rights like Charles Taylor, the late Siad Muhammad Barre of Somalia and Yormie Johnson of Liberia. Asylum offers should henceforth be dispensed more judiciously if Nigeria is not to become a haven for international outlaws[139].

7.5. **Conclusion**

We have found from the foregoing that there is no rule of international law mandating a state to create a forum cause of action in respect of any type of civil wrong occurring abroad or to deny immunity to other states or their serving or former officials on the ground of violation of *jus cogens* rule. Countries which enact statutes to create such forum cause of action act unilaterally and should not expect other states to accept their exercise of jurisdiction. The choice of jurisdiction rules in private international law however permit Nigerian courts to entertain any *in personam* action against a defendant who is not otherwise immune from suits in Nigeria once he is served with the writ when present on Nigerian territory. International law confers immunity *ratione personae* and immunity *ratione matariae* in respect of all foreign suits against a country's officials complaining about their official conduct. It is difficult to justify the institution of civil action against Nigerian present or former state officials for alleged civil wrongs alleged to have been committed in official capacity in foreign states. Nigeria should protest future occurrence with all the strength it can muster.

Nigeria should neither make her territory a haven for notorious former heads or other officials of other states nor offer her forum for flagrantly violating other states' sovereignty. If Nigeria is ever to permit any proceeding against a head or former head of another country in respect of his official misdeed it should have a clear justification for that under treaty or customary international law. Such justification may be found on ground of express waiver by the foreign state or prior submission arising from treaty obligation.

[138] See Reuben Abati's Piece, "Nigeria and the Charles Taylor affair" published online31/03/2006 at Nigerian Village Square.mht

[139] See Feb, 2004 of World Press Release (Vol 51 No.2),published on line at Worldpress_org.mht