



Received: 19 October 2015  
Accepted: 20 May 2016  
Published: 20 June 2016

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## POLITICS & INTERNATIONAL RELATIONS | RESEARCH ARTICLE

# A critical examination of the British municipal court rulings on cases of international immunity: Revisiting the imperatives of politics of international law

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**Abstract:** The interpretation or ruling on international immunity cases are often surrounded by controversies, sometimes leading to inconsistencies. The British municipal court rulings on international immunity cases are not exception, and in fact are embodiments of inconsistencies. The judgements have been consistently inconsistent. The rulings are not just characterized by controversies; they swim in controversies. Perhaps, these inconsistencies have not been more visible than in cases involving granting of sovereign immunity to political subdivisions or federating units. This was the case in the municipal court decision to deny a serving Governor of a state in Nigeria immunity from jurisdiction. The contention of this paper is that these inconsistencies are, primarily or fundamentally, due to susceptibility of British municipal courts to British national interest, and thus, not primarily due to controversial nature of international law. The paper therefore interrogates the interface between international politics and international law.

**Subjects:** Law; Politics & International Relations; Social Sciences

**Keywords:** politics; court rulings; international politics; international law; international immunity; Britain; Nigeria



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### PUBLIC INTEREST STATEMENT

We are now living in a world where the judgements of courts are not purely based on rule of law but on dictates of politics. The relevance of this paper is demonstrated by its focus on the impact of politics on international law of immunity. The paper critically examines the legality, consistency and enforceability of international law using some case illustrations concerning the British court rulings on international immunity. It discusses the origin, development, classification and meaning of international law of immunity. The paper further identifies and explains various types of international immunity. Also, the paper differentiates between domestic immunity and international immunity. Finally, the paper acknowledges controversial nature of international law on immunity; demonstrates the inconsistency of the British municipal court rulings on international immunity; and as well, recognizes the impact of national interest to the rulings of British municipal courts on immunity cases.

## 1. Introduction

International law evolved as customary law which originates largely in the practices and customs of the state over 500 years ago (Igwe, 2002). This suggests that the initial source of international law is the customs in terms of international and diplomatic relations of states, thus, the name, customary international law. Overtime, what has been governing the relations between independent states becomes codified into law through the instrumentalities of treaties, conventions, charters, declarations, etc. (Allott, 1999; Brownlie, 2008; Garcia, 2015; Schreuer, n.d.; Tully, 2010; William, 2011).

So much is the development of international law today it can be classified into two, namely, public international law and private international law (Igwe, 2002). Public international law is the law of nation which guides the conduct of states in international society, while private international law guides the conduct of people (i.e. individuals, group, firms, etc.) in the international society, especially in the areas of trade, contractual agreement, professions, etc. (Cassese, 1985; Freyne, 2010; Marti, 2002). The incorporation of private international law changed the definition or meaning of modern international law which are mere law of nations “jus gentium” or laws between nations, “jus inter gentes”. Thus, defining international law as law of nations or as Laski (1952) puts it “the body of rules which govern the relations between states, and its binding force depends upon their consent to observe the rules it imposes” is no longer adequate or sufficient. In this regards, Aniche (2009) defines international law as “these rules of conduct that govern state and non-state actors in the international society”.

But classifying international law as public international law and private international law introduces more difficulty. For while it explains the rules bordering on relations between/among two or more states, and two or more individual, respectively; it does not explain rules bordering on relations between sates and non-state actors like individuals, firms, non-governmental organizations, religious organizations, etc. Therefore the classification is inexhaustive, inadequate and incomprehensive. However, delineating the classification of international law that will be adequate or exhaustive is not one of the objectives of this paper, and therefore, should not detain us here. For purpose of this study, we shall define international politics from the prism of realist perspective as the struggle for power and realization of national interest by states in the international system.

## 2. The problematique

The predominant view among scholars especially of liberal persuasion is that international law is barely affected by political considerations thereby asserting the legality of international law and down playing the role of politics in shaping the outcome of international ruling. Yet international law is confronted with the problems of non-enforcement, lack of coercive apparatus for enforcing laws, the optional clause, the ideological divide of cold war era, controversies, inconsistent rulings and non-adherence to precedents. Thus, instances abound where states flaunt international law with impunity while selecting the aspect of the law to obey.

This state of affairs has led to a situation where weak nations are not adequately protected by international law. The result is frequent invasion of the weak by the stronger example being the United States invasion of Iraq. The implication of this ominous for weak nations like Nigeria. The attempt to situate international law within the context of international politics or even international economic relations (i.e. global economic system) is by no means novel or original. In other words, literature is replete with the proclivity for scholars, of mainly realist perspective to emphasize the import of political consideration in shaping not just the outcomes or the contents of international law, but also the rulings of international courts or tribunals as well as municipal court on cases bordering on international law.

Nonetheless, the issue of international law of immunity has over the years provoked some scholarly debates. Even Bianchi (1999) stated that there has been a debate of appropriateness of municipal courts to prosecute crimes of international law including ones pertaining to international

immunity. But Foakes (2011) entered this debate by noting that international courts do not have the capacity to prosecute all international crimes committed anywhere in the world. Bianchi (1999) interrogated the appropriateness of exclusion of violation of human rights from international law of sovereign immunity, and as such, pointed to the fact majority of the Judicial Committee of House of Lords alluded to international law of crime against humanity such as torture for which Pinochet was being tried but failed to draw the inevitable conclusion that no immunity can be granted their violators. Thus, Finke (2011) argued that given the differing practice in different countries, sovereign immunity is a principle not a rule. But practically, the idea that sovereign immunity must yield to fundamental human rights violations was first applied by the US District Court in the *Princz* case.

However, the point of departure of this paper is merely to situate international law on immunity within the context of national economic and political interest in the relations among nations. By so doing to capture or underscore the inconsistencies of the British municipal courts' rulings on international immunity cases deriving from their susceptibility to British national interest with some case illustrations. From the foregoing, therefore, we interrogate if the inconsistency of the British municipal court rulings on international immunity cases derive, primarily, from their susceptibility to British national interest. In order to address this; we divide this paper into eight sections which include Introduction; The *Problematique*; Theoretical Discourse; Origin and Development of Immunity in International law; Domestic and International Immunities; Pinochet's Immunity Case and the Inconsistency of British Municipal Court Rulings; Alamiyeseigha's Immunity Case and the Debate of Nigerian Lawyers; and Synopsis and Conclusion.

### 3. Theoretical discourse

This paper is essentially anchored on realist paradigm of Hans Morgenthau. Realists believe that the actions of states can best be understood by identifying their national interests, and defining these national interests in terms of powers. So, for core-realists the permanent national interest of state is national survival or national security interest or national self-preservation. This interest is, therefore, an objective reality, in other words, it exists irrespective of whether or not it is perceived by decision-makers. The unit level of analysis, for realists therefore is the state. The nation-state is, *ipso facto*, regarded as the sole or the principal actor in the international system. The analysts of international relations, therefore, requires an understanding of pressures that emanate from the states domestic and external environment which shape the action of the government (Asobie, 2001; Ejiofor, 1981).

In relations among states, realists assume that states are continuously making calculations of the relationship between means and ends. States are not guided primarily in their relations with one another by considerations of morality or law or by sensitivity to public opinion or conforming to resolutions made in international organizations (Asobie, 2001; Ejiofor, 1981). Following from the above is that there is no universal moral principle; so when statesmen make reference to such principles they are merely trying to legitimize their actions which are motivated by other considerations or more specifically their national interest (Morgenthau, 1971).

Realists, also, assume that the international society is anarchical underscoring the Hobbesian philosophical foundation of the state of nature and the Machiavellian philosophical postulations. But more importantly realist paradigm focuses on "what is" rather than on "what ought to be" (Aniche, 2009; Ejiofor, 1981; Igwe, 2002). Realists paradigm, therefore, posits that international politics (and by extension international law) is a self-help system (Burchill & Linklater, 2001).

### 4. Origin and development of immunity in international law

The rules of state immunity are rules of customary international law, that is, they originate in the practices and customs of states. The first comprehensive multilateral treaty to be conducted on the matter was the European Convention on States Immunity, which was adopted in 1972 and came into force on June 11, 1976. Thus, the origin of state immunity can be traced back to the beginning of modern international law doctrine of sovereign quality of state. Therefore, sovereign immunity

was predicated on the principle of *par in parem, non habet imperium*—since the states are equal, they cannot therefore exercise power over one another. It was then agreed upon among the Council of European countries (Okeke & Aniche, 2010).

However, around the world there continued to be differences in practice of states, and it was this diversity and the consequent in the law that prompted the decision of UN General Assembly (UNGA) in 1977 to include the topic of state immunity in the work programme of the International Law Commission (ILC). Despite these controversies, Ad hoc Committee was reconvened under General Assembly Resolution 58/74 in 2003 with a mandate to formulate a preamble and final clauses, and with a view to completing a convention. The committee then succeeded in reaching agreement on a finalized version of the 1991 Draft Articles on jurisdictional immunities of states (Okeke & Aniche, 2010).

In the case of diplomatic and consular immunities, the notion that a diplomatic agent should be immune from aggression of any kind in the execution of his or her duties is very ancient. Even as far back as the during the years of Peloponnesian War, states sent emissaries to adversaries to broker peace or lay the condition under which war can be declared or not declared. So, this unwritten code was made into law in 1780, when England adopted Diplomatic Privileges Act. This Act granted total immunity from both criminal persecution as well as civil suit (Okeke & Aniche, 2010).

In the 19th century, the Congress of Vienna of 1851 reasserted the right of diplomats at the international plane and they have been largely respected since then as European model has spread throughout the world. But despite this, by 1970, the United States adopted England's Diplomatic Privileges Act almost verbatim. However, before the adoption, United States and other members of United Nations met in Vienna in 1961 to discuss the role of diplomatic immunity in the modern world, and to draft a new international treaty regarding diplomatic relations. It is this document, the Vienna Convention of 1961, which spell out the mechanics of diplomatic immunity and its related privileges. Both United States and British signed the 1961 Vienna Convention, but the US went a step further and ratified its own Diplomatic Relation Act of 1978. By 1963, April 24 to be precise, another Vienna Convention was convened, but this time on Consular Relations, stipulating various consular privileges and immunity (Okeke & Aniche, 2010; Tully, 2010).

#### **4.1. Domestic and international immunities**

Ordinarily, immunity means to be immune from jurisdiction of municipal courts. In other words, it defines the conditions under which actor (i.e. states or its agencies/representatives) are entitled to immunity from jurisdiction or authority of the municipal courts. Thus, there are two major aspects of immunity, namely, domestic (constitutional) immunity and international immunity. Domestic immunity derives from the municipal laws or the constitution of a state which immunizes the state functionaries like the executives or parliamentarians from the jurisdiction of the municipal courts of their states both in civil and/or criminal matter, and not from the municipal courts of other states (Okeke & Aniche, 2010).

There are, thus two main types of domestic/constitutional immunity, namely, executive immunity and parliamentary immunity. In Britain, parliamentarians are entitled to parliamentary immunity in British courts which enables them to carry out their functions or constitutional duties without fear or any form of intimidation. Whilst, in Nigeria, the executive like the President, the Vice President, the Governors and Deputy Governors of states constituting the Nigerian Federation currently enjoy executive immunity in civil and criminal matters in Nigerian courts which enable them to perform their constitutional duties without the encumbrances of litigations. In other words, this type of immunity confers upon them by Nigerian constitution immunizes them from the jurisdiction of Nigerian courts in that civil or criminal proceedings cannot be brought against them during their term of office. This means that they can still be held liable to their actions and inactions while in the office after they must have completed their tenure. It does not therefore make them to be above the law; rather it is only to ensure that they are able to discharge their duties effectively without distractions of courts proceedings that may be brought against them while in office (Okeke & Aniche, 2010).

However, the aspect of immunity that will concern us here is international immunity. International immunity derives from international law which immunizes the states and their representatives/functionaries like the heads of states and government, diplomats and consuls from the jurisdiction of the municipal courts of the other or receiving states in civil and criminal matters. The privilege accruing from international immunity is based on principle of reciprocity and ensures that states and heads of states and other state functionaries are unimpeded in exercise of their functions (Umozurike, 2005). Umozurike (2005) identified four types of international immunity which include sovereign immunity, diplomatic immunity, consular immunity and immunity of international organizations and their agents.

#### 4.1.1. Sovereign immunity

Sovereign immunity is also referred to as state immunity. Sovereign immunity is a principle originally derived from the old notion that the “king can do no wrong” and holding that states are immune from the jurisdiction of municipal courts of other states, is recognized by virtually every state. However, despite the principle’s universality its application differs from state to state. Some states extend state immunity as a matter of comity, while others have codified the doctrine in their jurisdictional statutes (Berger & Sun, 2011). State immunity developed as an undisputed or incontestable principle of customary international law, and the law of nation-states based upon core aspects of sovereignty applicable in common law, civil law and other judicial systems (McNamara, 2006). Similarly, Knuchel (2011) stated that customary international rules on foreign sovereign immunity emerge primarily from the practice of individual states.

Therefore, sovereign immunity is the international law rule that foreign states are entitled to immunity from the jurisdiction of the municipal courts of other states. The doctrine of state immunity, *ipso facto*, bars a national court from adjudicating or enforcing claims against foreign states. More concisely, sovereign immunity means that a state cannot be subjected into law of another state. The basis of international immunity according to Umozurike (2005) was the equality of sovereign who could not therefore exercise power over one another—*par in parem non habet imperium*.

It also connotes immunity in two things. One, immunity from jurisdiction which means a state property shall not stand as defendant in the courts of another state. Two, immunity from execution, which means that a state property shall not be subjected to the compulsory execution of judgement or pre-judgement preservation measures rendered by the courts of another state (Adjovi, 2015; Akande, 2004; Fox, 2008; Phillip, 2011; Warbrick, 2004). So, under the international law, states are entitled to immunity from jurisdictions of other states in respect of matters which are considered to be public acts of the states. Early international law deemed all acts of a state to be public acts thereby ensuring complete or absolute immunity of all states.

However, as states began to involve themselves more and more in trading and other commercial activities, the defects of the absolute immunity approach became more and more apparent particularly for private businessmen who had entered into agreement with states or state entities. The primary difficulty becomes the identification of what constitutes a public act of a state in the international law of state immunity. Thus, international law has not been able to devise a mechanism for distinguishing private acts of a state from public acts of a state. This unfortunate situation introduced controversy, double standard and diversity in the domestic laws of states (Gaukrodger, 2010; McNamara, 2006; Okeke & Aniche, 2010).

But more importantly it divided the doctrine of state immunity into two main doctrines, namely, the doctrine of absolute immunity and the doctrine of restrictive immunity. The doctrine of absolute immunity is a nineteenth century approach to sovereign immunity which stipulates that states may stand as a plaintiff, but not as a defendant in the domestic court of another states. The problem becomes that if states were granted absolute immunity private persons who have economic business dealings with states would suffer significant disadvantages (Bianchi, 1999; Cassese, 2002; De Sena & de Vittor, 2005; Shaw, 2005; Umozurike, 2005; Watts, 1994).

The doctrine of restrictive immunity, on the other hand, is a twentieth century approach to sovereign immunity which stipulates that states acts are divided into acts by sovereign authority “*acta jure imperii*”, that is, the government activities of the state and acts by management authority “*acta jure gestionis*”, that is, the commercial acts of the state. So, states may be immune from suits due to the governmental functions, but not the commercial acts. But the doctrine of absolute immunity remains the dominant practice among many countries (Bergsmo & Yan, 2012; Bianchi, 1994; Fox, 2009; Orakhelashvili, 2002; Reimann, 1995; Van Panhuys, 1964; Yashiro, 1968). For e.g. China affords foreign states absolute immunity, while the United States has adopted a more restrictive approach that immunizes foreign states from suit in connection with sovereign acts but leaves them subject to suit in connection with commercial acts (Berger & Sun, 2011).

There are, however, two main principles of state immunity, namely, principle of *ratione personae* and principle of *ratione materiae*. The principle of *ratione personae*, that is, status immunity, confers immunity on serving government officials (i.e. the head of state/government) on both official and private acts. Whilst, the principle of *ratione materiae*, that is, functional immunity, which exists for official acts, done while in office by former government officials (Akande & Shah, 2011; Caplan, 2003; Foakes, 2011; Murphy, 2003; Shaw, 2005; Tomonori, 2001). Foakes (2011) further noted that it is obvious that serving heads of state and other very high-ranking state officials entitled to personal immunity may not be prosecuted for international crimes without the consent of their home state but becomes unclear once they have left office. The paucity of state practice means that precise rules on any exceptions to functional immunity are yet to be developed.

#### 4.1.2. Diplomatic immunity

Diplomatic Immunity is a principle of international law by which certain foreign government officials or diplomats like ambassadors/nuncios/high commissioners, charge d'affaires, envoys, entire diplomatic mission/agents are not subjected to the jurisdiction of local courts and other authorities of the host states for both their official and to a large extent their personal activities in order to perform their functions without let or hindrances. Thus, Wikipedia defines diplomatic immunity as a form of legal immunity held between governments which assures that diplomats are given safe passage and are considered not susceptible to law suits or prosecution under the host country's laws (although, they can be expelled *persona non grata*). Diplomatic immunity can be, however, waived by a diplomat's home country in a case of serious crime unconnected with diplomatic roles (see also Aniche, 2009).

Diplomatic immunity has, also, been defined as a principle of international law that provides foreign diplomats with protection from legal action in the country in which they work (see, Okeke & Aniche, 2010). However, diplomatic immunity according to Umozurike (2005) is based on three principal theories, namely, the extraterritoriality theory, the “representative character” theory and the functional theory. The extraterritoriality theory states that the diplomatic premises should be regarded as the extension of the territory of the sending state abroad, and thus, under her jurisdiction. The “representative character” theory is based on the ground that the diplomatic mission personifies the sending state. Finally, the functional theory stipulates that immunities and privileges are necessary for the mission to perform its function effectively. Diplomats are not exempted from observing the law, but are rather immune from the jurisdiction of the courts.

As such, diplomatic immunity is provided in Articles 29, 31, 30, 32, 34, 35, 36, and 37 of Vienna Convention. For e.g. Article 29 states: “the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention ...” Article 30 (1): “The private residence of a diplomatic agent shall enjoy the same inviolability”. Article 31 (1): A diplomatic agent shall enjoy immunity from criminal jurisdiction except in the cases of (a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purpose of the mission, (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as private person and not on behalf of the state, (c) an action relating to any professional or commercial activity exercised by the

diplomatic agent in receiving state outside his official function; (2) a diplomatic agent is not obliged to give evidence as a witness; (3) no measure of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article and provided that the measures concerned cannot be taken without infringing the inviolability of his residence; (4) the immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state (see, Okeke & Aniche, 2010).

Article 32 (1): The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state; (2) waiver must always be expressed; (3) the initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim; (4) waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of execution of judgement, for which a separate waiver shall be necessary. Article 36 (2): "Personal baggage of a diplomatic agent shall be exempted from inspection" (Dinstein, 1966; Michaels, 1971; Okeke & Aniche, 2010).

#### 4.1.3. Consular immunity

International law requires that the law enforcement authorities extend certain privileges and immunities to members of foreign diplomatic missions and consular posts. Consular immunity, therefore, is a principle of international law that provides consular officers with protection from legal action in the country in which they work. Consular officers include: (a) consuls-general (b) consuls (c) vice-consuls (d) consular agents (Umozurike, 2005).

The consular immunity is provided by Articles 31, 32, 33, 40, 41, 43, and 45 of 1963 Vienna Convention on Consular Relations or Practices. Article 31: Inviolability of the consular premise. Article 33: Inviolability of consular archives and documents. Article 44: Protection of consular offices. This provides that the receiving state shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom and dignity. Article 41: Personal inviolability of consular officers (1) consular officers shall not be liable to arrest or detention pending trial, except in the case of grave crime and pursuant to a decision by the competent judicial authority; (2) except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction of their personal freedom save in execution of a judicial decision of final effect; (3) if criminal proceedings are instituted against a consular officers, he must appear before the competent authority. Nevertheless, the proceedings shall be conducted with respect due to him by reason of his official position (see, Okeke & Aniche, 2010).

Article 43: Consular officers and consular employees shall not be amenable to jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions; (2) the provisions of paragraph 1 of this Article shall not, however apply in respect of civil action ... Article 45: Waiver of privileges and immunities (1) the sending state may waiver with regard to a member of the consular post any of the privileges and immunities provided by Article 41, 43 and 44; (2) the waiver shall in all cases be expressed, except as provided in paragraphs 3 of this Article, and shall be communicated to the consular employee (3) the initiation of proceedings by a consular officer in matter he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter claim directly connected with the principal claim; (4) the waiver of immunity from jurisdiction for the purpose of civil or administrative proceeding shall not be deemed to imply the waiver of immunity from the measures of execution resulting from judicial decision in respect of such measures; a separate waiver shall be necessary (Okeke & Aniche, 2010; Whomersley, 1992).

#### 4.1.4. *Immunity of international organizations and their agents*

This aspect of international immunity developed principally with the League of Nations and the International Labour Organization and is based on the need to carry out their duties without interference (Umzurike, 2005).

As an e.g. Article 105 (2) of the UN Charter gives the representative of the members and the officials of the organization such privileges and immunities as are necessary for exercise of their functions. These were elaborated in the Convention of the Privileges and Immunities of the United Nations (UN) 1946 and apply generally to international organizations. Even at that the United States which hosts the UN did not accede to it until 1970, but the Headquarters Agreement between the UN and the US entered into force in 1974. The immunities granted to representatives or agents include immunity from arrest, seizure of baggage, libel in respect of word spoken in the performance of duty, inviolability of papers, exemption from alien registration, freedom from direct taxes, diplomatic status for high ranking officials and special immunities for others (Umzurike, 2005).

#### 4.2. *Pinochet's immunity case and the inconsistency of British municipal court rulings*

At this juncture, we are going to examine a number of landmark cases involving plea of sovereign immunity. In the case of General Augusto Neto Pinochet (Ex parte Pinochet, No. 3), on October 17, 1998 while visiting the United Kingdom for medical treatment, he was arrested in London hospital on account of Spanish provisional warrant for the murders of Spanish citizens in Chile while he was President between September 1973 and March 11, 1990. Five days later, Pinochet was served with a second provisional arrest warrant from the Spanish judge, Baltasar Garzon, charging him with systematic torture, murder, illegal detention, and forced disappearances. He was subsequently placed under house arrest by the British authority and charge in London High Court based on the principle of universal jurisdiction claiming jurisdiction over such international crime such as torture and murder committed outside its territory (Cassese, 2003a, 2003b; Okeke & Aniche, 2010).

The Spanish authority filed extradition proceedings against Pinochet based on the principle of double criminality that the crime involved is a crime in both states and on the principle of specialty that Pinochet would be tried and punished in Spain only for the offence for which extradition is being sought, if eventually granted. The extradition proceeding initiated by the Spanish authority in the London High Court was based on the principle of universal jurisdiction. Therefore, General Augusto Neto Pinochet would be immune from prosecution either in Britain or Spain as a former Head of State if: (a) Pinochet was Head of State at all time of alleged offences (i.e. the principle of *ratione materiae* or functional immunity) (b) the offences count as official acts of the state (still, the principle of *ratione materiae* or functional immunity) (c) the offence did not involve violence (d) the 1978 State Immunity Act is not subject to any overriding considerations; and (e) Chile has not waived its state immunity for such offences. Thus, two major international law principles, that is, principle of universal jurisdiction and principle of sovereignty immunity were in contention (see, Okeke & Aniche, 2010).

The London High Court basing their ruling on the above mentioned criteria or principles bordering on the state immunity decided that all the five criteria were fulfilled. Therefore, the ruling was that General Augusto Neto Pinochet should neither be extradited to Spain nor tried in Britain over these charges, because the state immunity covers him. The ruling was affirmed by the three high court judges (McGregor, 2007; Okeke & Aniche, 2010).

However, the case was subsequently heard by the Judicial Committee of the House of Lords (the Privy Council) and the highest court of appeal in criminal matters by then in United Kingdom on two separate occasions. The ruling was as well based on the principle of universal jurisdiction and the principle of sovereign immunity. The two international law principle were, in this case, contending. The Judicial Committee of House of Lords, that is, the Privy Council held by six votes to one that General Pinochet was not entitled to immunity in extradition proceeding (being criminal proceedings) with regard to charges of torture and conspiracy to torture where the alleged acts took place after the relevant states (Chile, Spain and United Kingdom) has become parties to the convention

against Torture (Shaw, 2005). The Privy Council, thus, upheld the principle of universal jurisdiction on the ground of crime against humanity and overturned the ruling of the High Court. General Augusto Neto Pinochet was however not extradited to Spain, but was eventually released in March 2000 on the weight of medical grounds by the Home Secretary, Jack Straw when he accepted a medical certificate signed by three doctors that General Augusto Neto Pinochet was medically unfit to withstand trial (Orakhelashvili, 2007; Umozurike, 2005).

Perhaps, the controversies and inconsistencies surrounding the Pinochet case will become obvious when we examine similar cases. For instance, the English Court of Appeal in *Al-Adsani v. Government of Kuwait* held that the State Immunity Act provided for immunity for states apart from specific listed express exceptions, and there was no room for implied exceptions to the general rule even where the violation of a norm of *jus cogens* (such as the prohibition of torture) was involved. The court, thus, rejected an argument that the term “immunity” in domestic legislation, that is, domestic immunity meant immunity from sovereign acts that were in accordance with international law excluding torture for which immunity could not be claimed (Shaw, 2005).

Also, in *Holland v. Lampen-Wolfe*, the Judicial Committee of the House of Lords held that recognition of sovereign immunity did not involve a violation of the rights of due process contained in Article 6 of the European Convention on Human Rights since it was argued that immunity derives from customary international law while the obligations under Article 6 derive from a treaty freely entered into by the United Kingdom. Accordingly, the 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 (Shaw, 2005).

The two contending principles as we mentioned above are the principle of universal jurisdiction and the principle of sovereign immunity. The principle of universal jurisdiction which sees torture as international crime comes under the treaty or convention entered freely by states whereas the principle of sovereign immunity comes under customary international law. Thus, the principle of sovereign immunity, *ipso facto*, takes precedence over the principle of universal jurisdiction. But this controversy existing between these two contending principles is easily resolved by a specific principle of *ratione materiae* which states that a former government functionary is liable to an act of torture, that is, proven to have fallen within the private acts of the said former government functionary (see, Okeke & Aniche, 2010).

The onus is, therefore, on the municipal court based on the weight of evidence to determine whether the said acts of torture fall under the private acts or the official acts. This was the second item on the criteria of the British High Court. But while the British High Court was able to resolve that Pinochet offences like torture fall under official acts, the Judicial Committee of House of Lords insists that they fall under private acts. This is the basis on which the Privy Council overturned the decision of the British High Court (Black-Branch, 2000). Even Bianchi (1999) observed that this is the first judgment delivered by a municipal court in which a former head of state of a foreign state is held accountable at law for acts of torture committed while in office.

The point being made here is that the review of related cases such as *Al-Adsani v. Government of Kuwait* and *Holland v. Lampen-wolfe* shows that there are inconsistencies and controversies surrounding these rulings in relation to *Ex parte Pinochet* (No. 3) leading to conflicting judgments. In fact, the political imperatives of these cases cannot be gainsaid. In case of *Ex parte Pinochet* (No. 3), both Chile and Spain are of strategic importance to British interest. For example, Pinochet allowed British planes to refuel in Chile during the Falklands war, and thus, cemented an alliance with the United Kingdom (UK) and then with Prime Minister Margaret Thatcher, and has on many occasions visited Margaret Thatcher for tea discussion.

Spain, on its own part, is a member of European Union (EU) just like UK, and has enjoyed much longer years of diplomatic relations or association with UK than Chile. As member of EU, Spain and

UK have a lot in common in terms of trade, culture, politics, geography, etc. for instance, EU of which Spain is a member occupies the first position in the top five states UK imports from and exports to with 52.6 and 56.3%, respectively. Chile does not feature in the top five countries. Chile does not also feature in the top five countries EU imports from or exports to (see, Okeke & Aniche, 2010).

Perhaps, the import of the above is that (i) Spain is strategically dearer to British national interest than Chile, and (ii) this interest is more subsisting than that between UK and Chile. But Chile had as well played a role of a friend in need, which is a friend indeed to UK. The inference that can be drawn from the above argument is that as all these complex web of interest played out, it brought a reasonable degree of influence on the British municipal courts accounting for or resulting to the conflicting court rulings of the British High Court and the Privy Council which ultimately amounts to inconsistencies of judgements in the annals of the British municipal court rulings on the related cases in the international law of immunity. But expectedly the case was eventually resolved through diplomatic channel when the British Home Secretary intervened (see, Okeke & Aniche, 2010).

#### **4.3. Alamiyeseigha's immunity case and the debate of the Nigerian lawyers**

Chief D. S. P. Alamiyeseigha, the former Governor of Bayelsa State, was arrested sometimes towards the end of 2005 in London over money laundering charges. At the time of his arrest he was still the Governor of Bayelsa State under the Nigerian Federation. He was subsequently charged to London Metropolitan Court by Scotland Yard. But before his arrest a sum amounting to 1.8 million pounds was allegedly recovered from his London resident by Scotland Yard, hence breaking the offence of money laundering according to British law (see, Okeke & Aniche, 2010).

The immunity case of D. S. P. Alamiyeseigha divided the Nigeria lawyers into two, namely those who argued that Alamiyeseigha should be entitled to immunity and those who argued that he should not be entitled to immunity. Prominent among the lawyers in the first category was Prof. Itse Sagay and prominent among the lawyer in the second category was Chief Gani Fawehimni. The basis of Prof Itse Sagay's argument was that D. S. P. Alamiyeseigha being the Governor of Bayelsa State at the time of his arrest is entitled to immunity. According to him, the British authority or government should apologize to the Nigerian government, and indeed the people of Bayelsa State for violating the Governor's private resident and save Nigeria further embarrassment or damages. He based his argument on the principle of sovereign immunity (see, Okeke & Aniche, 2010).

The core of his argument, therefore, is that Alamiyeseigha being the Governor of a state in Nigerian Federation should be entitled to state immunity. In other words, in a Federation like Nigeria, in which the constituent unit (like Bayelsa State) and the central government are coordinate and independent; the governors and their deputies are entitled to state immunity just as the president and vice president are entitled to state immunity. So for him, the British Police erred by searching Alamiyeseigha's resident in London in the first place (see, Okeke & Aniche, 2010).

On the other hand, Chief Gani Fawehimni disagreed with Prof. Itse Sagay on the ground that D. S. P. Alamiyeseigha is neither entitled to state immunity nor entitled to diplomatic immunity. In his argument, D. S. P. Alamiyeseigha, though the Governor of Bayelsa State at the time of his arrest is not entitled to state immunity, because state governments in Nigeria are not regarded as state actors in international law. According to him, the president is the repository of Nigeria's sovereignty, because the federating states in Nigeria by agreeing to enter into a Nigerian Federation, *ipso facto*, surrendered their sovereignty to the Federation. To this extent the President of Nigeria is the only person that is entitled to sovereign immunity, and that even this privilege or immunity can be waived or removed permanently by Nigerians (i.e. the legislature) through impeachment that removes him from power (see, Okeke & Aniche, 2010).

Furthermore, Gani Fawehimni argued that Alamiyeseigha is as well not entitled to diplomatic immunity, because he is not a diplomat and at the time of his arrest he was not representing Nigeria on any official duty or diplomatic function. To buttress his point, he pointed out that Alamiyeseigha

was not in possession of diplomatic passport. More so, Gani Fawehimni argued that domestic (constitutional) immunity should not be taken to mean sovereign or diplomatic immunity, because it covers only the Governor's activities within Nigeria. In other words, that the constitutional immunity can only immune the governor from the jurisdiction of Nigerian courts not British courts or any other court outside Nigeria (see, Okeke & Aniche, 2010).

Meanwhile, the British authority or specifically the police (i.e. the prosecuting counsel) was insisting that D. S. P. Alamiyeseigha breached the British money laundering law, and as such should be prosecuted. Therefore, that he is not entitled to any form of immunity (see, Okeke & Aniche, 2010).

### 5. Synopsis and conclusion

The case of General Augusto Neto Pinochet and Chief D. S. P. Alamiyeseigha are related in certain respects in that, one, both the argument surrounding the two are on the basis of the principle of sovereign immunity, and two, that the two were arrested in London. But that is as far as their cases related, because while the former is a former Head of State of Chile, the latter is a serving Governor of a state in Nigeria. Two, while the former is based on the principle of universal jurisdiction and *ratione materiae* (functional immunity); the latter is based on the principle of *ratione personae* (status immunity). Finally, the former was arrested at the instance of Spain on the offence of torture, murder, etc. while the latter was arrested on money laundering charges (see, Okeke & Aniche, 2010).

The money laundering charges made against D. S. P. Alamiyeseigha demonstrated another inconsistency of the British municipal courts and authorities. For instance, Umozurike (2005) noted that while some states grant state immunity to political subdivisions such as province, region, etc. others do not. As such there is no consistent practice in that it varies from time to time even within the same state. France denies state immunity to federating units or political subdivisions but United States of America and United Kingdom accord it. For e.g. UK recognized the immunity of the Sultan of Jahore, but a British Magistrate Court rejected the claim made by Agent-General of Eastern Nigeria ruling that he is not an agent of the Federal Government of Nigeria.

For Shaw (2005) the State Immunity Act states that the constituent state or component units of a federation are not entitled to state immunity, however, section 14 (5) provides that the act may be made applicable to the "constituent territories of a federal state by specific Order-in-Council". Where no such order is made any such "constituent territory" would be entitled to immunity only if it conformed with section 14 (2) being a separate entity acting in the exercise of sovereign authority and in circumstances in which the state would be immune.

Therefore, the thrust of the argument is that, whilst, political subdivisions can be denied sovereign immunity by other states (perhaps as a matter of choice) it is inconceivable to deny the same to the federating states of a federal state like Bayelsa State in Nigeria. The implication of the above situation is that the British authority has instituted a case against the people of Bayelsa State and as such it behoves upon the Bayelsa State Attorney-General to provide defence for the case of arrested governor (see, Okeke & Aniche, 2010). In line with the above argument, the Article 2 (1) b of the International Law Convention (ILC) Draft Articles includes within its definition of state "constituent units of a federal state".

However, the D. S. P. Alamiyeseigha's case was complicated by the fact that the Nigerian state remained apparently silent throughout the case suggesting implied (as against expressed) waiving of immunity. The point is that the silence was only on the surface, underneath, it was alleged that the arrest of D. S. P. Alamiyeseigha in London was at the instance of the Federal Republic of Nigeria. This became more obvious as events unfold (see, Okeke & Aniche, 2010).

Therefore, that Alamiyeseigha's money laundering charges had political undertone cannot be gainsaid, and it was in the national interest of United Kingdom to collaborate with Nigeria. It is within this political context that the inconsistency of the British municipal court rulings in

international immunity cases derives, not primarily from the controversial nature of international law, but from their susceptibility to the British national interest. It is, in fact, the political context of nature of international law where states struggle to realize their national interests that makes it controversial such that controversies just like inconsistencies are by-products of the intense political struggle of states to realize their national interests.

#### Acknowledgement

I seize this opportunity to appreciate the contribution of my long-time associate and mentor, Dr V. O. S. Okeke, towards completion of this paper by way of funding, information, reviewing, editing, proofreading, moderation, supervision, advice and mentorship. I remain grateful to him for providing me with the intellectual stimulus that enabled me to embark upon researching on this topic. Also, I wish to thank my institution or employer, Federal University Otuoke for providing me with enabling and conducive working environment under which I completed this paper. Finally, I would want to acknowledge various authors whose works I cited in this paper. In spite of this, I take the full responsibility for any error or misjudgement in this paper.

#### Funding

The author is grateful to Dr V. O. S. Okeke for the financial support.

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#### Citation information

Cite this article as: A critical examination of the British municipal court rulings on cases of international immunity: Revisiting the imperatives of politics of international law, Ernest Tooichi Aniche, *Cogent Social Sciences* (2016), 2: 1198523.

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