TRANSNATIONAL CRIMINAL PROCESS AND CONSTITUTIONAL IMMUNITY: THE WEST AFRICAN EXPERIENCE

By

O. A. Onadeko, Esq, Deputy Director-General and Head of Nigeria Law School, Lagos, and N. Tijani, Deputy Director (Academics), Nigerian Law School, Lagos Campus

1. INTRODUCTION

The principle of State sovereignty in International Law allows a State to develop its own legal process to be regulated by its domestic laws. Such legal process includes criminal process. Hence, within the ambit of State sovereignty, some conducts may be identified as crimes for which certain legal machinery may be put in place for the trial and punishment of any one found to have committed any of the legally recognized crimes.

The concern of the global community has given rise to the development of International Criminal Law. This, in effect, identifies certain conducts as international crimes which though may be committed by a citizen within the territory of his state, will be viewed as of international concern. Such international crimes may be tried and punished through the criminal process put in place by the global community. An instance of such transnational criminal process is the trial of a nationale of a sovereign State by the International Criminal Court. This is also regarded as transnational criminal process.

As noted earlier, a sovereign State is in absolute control of its legal process. In countries governed by constitutional governments, the Constitution is the supreme document and any provision of any document whether domestic or international that goes contrary to the Constitution is regarded as null and void and of no effect[1].

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[1] Section 1 Constitution of the Federal Republic of Nigeria, 1999

Such Constitutions may contain specific immunity clauses for the protection of certain officials of government against prosecution for crimes either domestically or internationally.

An instance of such immunity clause is Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 which gives the President and Vice-President, the State Governor and the Deputy Governor complete immunity from all Court processes as long as they hold such offices. The Section provides:

> (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section:
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> (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office.
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> (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
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> (c) no process of any Court requiring or compelling the appearance of a person to whom this section applies, shall applied for or issued.
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> Provided that in ascertaining whether any period of limitation has expired for the purpose of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of Section (1) of this Section shall not apply to civil proceedings in which such a person is only a nominal party.

(3) This Section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office is a reference to the period during which the person holding such office is required to perform the functions of the office".

Constitutional Immunity may be appraised from the perspective of how it stands against International Criminal Law and how it stands against the criminal process of another sovereign state.

The application of the concept in Nigeria will be examined with emphasis on the need for modification in its application.

2. CONSTITUTIONAL IMMUNITY AND INTERNATIONAL LAW

While rationalizing the genesis of the International Criminal Court, Dr. Popoola[2] writes:

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[2] A.O. Popoola, "The International Criminal Court's Regime and Crimes Against Humanity" in D.A. Guobadia and P.T. Akper (ED) An Introduction to the Rome Statute of the International Criminal Court NIALS 2005 p. 115 at 116 - 117

> "Today's wars are mainly civil wars - wars between opposing groups of citizens of the same country. And these civil wars often last longer, leaving the population more traumatized, and destroying countries more thoroughly than wars fought between nations. For example, during the last two decades, nearly five million people lost their lives in just three war-torn countries - Afghanistan, Democratic Republic of Congo and Sudan. In the Balkans, fierce ethnic fighting cost the lives of almost 250,000 people, while prolonged guerilla warfare in Colombia has left 100,000 dead".

Instances of this nature compelled the International Community to rise up to the occasion by identifying certain crimes as international crimes which may be punished by an international or transnational legal process.

This became necessary because most of the violators of such crimes are usually in control of the domestic legal process, thereby leaving their executive excesses, extra judicial killings and dehumanization of the citizens unpunished.

To check such impunity, the following crimes have been identified as international crimes:

(a) The Crime of genocide;
(b) Crimes against humanity;
(c) War crimes; and
(d) The crimes of aggression[3].

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[3] See Article 5, The International Criminal Court Statute (the Rome Statute).

To try these crimes, the International Criminal Court (ICC) was established by the International Criminal Court statute (The Rome Statute). It is important to mention that, until this Rome statute was adopted, there was no accepted code of international crimes[4].

However, by the principles of complementarity contained in Article 1 of the Rome statute, the ICC can only assume jurisdiction to try an offender when the State of the offender which has jurisdiction over the case is unwilling or unable genuinely to carry out the investigation or prosecution or when its decision not to prosecute the accused resulted from the unwillingness or inability of the State genuinely to prosecute[5].

Under Article 27 of the Rome Statute, a Head of State or other official of government who commit a crime within the jurisdiction of the ICC will lose his or her immunity and can be prosecuted by the ICC. This provision (Article 27) indeed poses a Constitutional question for a country such as Nigeria whose constitution confers immunity on her President, Vice-President, Governor and Deputy Governor against issuance of any legal process or criminal prosecution for an act carried out while carrying out their responsibilities in that regard[6].

This question comes to glare where such official of government is expected to be surrendered by his state to the jurisdiction of the ICC. As noted earlier, Section 308(1) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 provide for such immunity. However, against this Constitutional provision, Article 27 of the Rome statute provides that a Head of State or other official of government who commits a crime within the

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4 A.O. Popoola, op. cit. 130.

5 See Article 17(1) of the Rome Statute.

6 See Section 308, 1999 Constitution.
(2001) 16 N.W.L.R. (Pt. 740) 670

jurisdiction of the ICC will lose his or her immunity and can be prosecuted by the ICC. The provisions of the statute are applicable to everyone regardless of any distinction based on official capacity[7].

It is clear from the purport of the Article, that an individual whose country is a State party to the Rome statute, can no longer absolve himself of criminal responsibility under the Rome statute by claiming immunity against prosecution by the ICC.

Since the major challenge of International Law is enforcement, there may be need for Nigeria and other State parties with such immunity clause in their domestic laws to either amend, or add a proviso to the clause that will accommodate the jurisdiction of the ICC to try any officials of government who may violate any of the crimes within the jurisdiction of ICC.

A National Court may also assume jurisdiction to try a nationale of another country for any international crime, notwithstanding the immunity clause contained in the domestic law of his home country. The *Pinochet case* was the "first" in many ways - the first time a former Head of State was arrested for crimes against humanity, the first time that the immunity of a Head of State for International crimes was removed by an English Court (a show of great strength and enterprise by Spanish, French, Dutch and Belgian domestic Courts). It was also the first time the House of Lords had to hold a re-hearing because of the forgetfulness of one of its members[8].

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7 M.T. Ladan, "An Overview of the Rome Statute of the International Criminal Court" in D.A. Guobadia and P/T Akper (ED) An Introduction to the Rome Statute of the International Criminal Court, NIALS 2005, p. 26 at 60.

8 C. de Than & E. Shorts, International Criminal Law and Human Rights (1st Edition, London Sweet & Maxwell. 2003, page 53

The Second House of Lords decision in the United Kingdom *Pinochet case,* found that a former Head of State was not entitled to immunity for violations of international criminal law and serious human rights violations. Previously, a Head of State clearly did have such immunity, at least for his official acts and "torture" had sometimes been held to be capable of classification as an "official act[9]."

Shortly after the first *Pinochet case*; and before the second *Pinochet case* where the decision in the first was reversed by the House of Lords, the Belgian national court took a far reaching decision in the extent to which a state immunity can cover the official act of the Head of State.

In early November, 1998, six Chilean exiles living in Belgium brought charges against Pinochet for international crimes including murder, torture and hostage taking.

The investigating Magistrate held that the alleged crime could not possibly be official acts performed in the normal exercise of the functions of the Head of State, whose tasks consist of protecting his citizens and not subjecting them to international crimes of the most serious nature. Thus, *Pinochet* could not claim any immunity.

The position of the law in *Pinochet's case* must be contrasted with the constitutional immunity of a serving official of a State. Indeed, a serving official of a State will be covered by State immunity while in office.

For example In *Democratic Republic of the Congo v. Belgium*[10], a warrant for arrest issued by Belgium against Abdoulaye Yerodia, the Congo's Minister of Foreign Affairs, for crimes against humanity was found

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9 Ibid page 53; (2000) 1 A.C. 142.

10 I.C.J. Reports 2002.

to be unlawful by themajority of the Judges of the ICJ. The ground for the decision was simply that current State officials are immune from criminal trials abroad regardless of the severity of the charges. The ICJ refused to extend the "precedent" of *Pinochet* to serving officials. Since the purpose of State immunity as applied to Foreign Ministers is to "ensure the effective performance of their functions on behalf of their respective States", the threat of potential arrest while abroad would impede these functions and was not to be permitted under customary international law[11].

It is clear from the foregoing that constitutional immunity only covers officials of government against transnational criminal processes while serving in that capacity. Such immunity will however not avail them of any such process after leaving office for international crimes committed while serving in that capacity.

3. CONSTITUTIONAL IMMUNITY AND CRIMINAL PROCESS OF ANOTHER SOVEREIGN STATE

Sometime in 2006, robust constitutional arguments took the centre stage in Nigeria as to whether a serving State Governor in Nigeria may be arrested and subjected to the criminal process of another sovereign State.

Specifically, two State Governors: Mr. Joshua Dariye of Plateau State and Diepreye Alamieyeseigha of Bayelsa State were arrested and tried in London while serving' as Governors of their respective States in Nigeria for violating the Money Laundering Laws of the United Kingdom. The debate then centered on whether the immunity conferred on these Governors by the Constitution of the Federal Republic of Nigeria, 1999 has transboarder effect on criminal acts carried out within the territorial jurisdiction of another

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11 Ibid page 59

sovereign State. I shall dwell on the facts of the cases and the decisions of the courts of trial.

4. IN DIEPREYE ALAMIEYESEIGHA v. CROWN PROSECUTION SERVICE[12]

The Claimant was the Governor of Bayelsa State in Nigeria. He was charged by the Crown Prosecution Service (CPS) with three offences. In the first charge, he was alleged to have received £420,000 into a bank account held at HSBC in London on or about the 14th day of December, 2001 contrary to Section 93(c)(1)(A) of the Criminal Justice Act, 1988 as amended. The money, it was alleged, represented the proceeds of a corrupt payment received from an oil and property merchant in Nigeria. In the second charge, the Claimant was alleged to have laundered the sum of £475,724 contrary to Section 93(c)(1)(A) of the Criminal Justice Act, 1988 as amended by paying into the account of a firm of Solicitors (Nedd & Co.) on or about the 22nd March, 2003, for use when purchasing a property at 68 - 70 Regents Park Road, London, N3. The CPS alleged first that there was a clear association between the receipt of these funds by the Claimant and the grant of valuable contracts awarded by Bayelsa State; and second that the Claimant abused his position as Governor to benefit personally from the award of contracts with Bayelsa State. The third charge related to a cash sum of £920,000 which was found at the Claimant's home on 15th September, 2005. Again, the CPS alleged that this sum represents the proceeds of criminal conduct contrary to Section 327(1) of the Proceeds of Crime Act, 2002.

[12] Case No. CO/9133/2005 decided on 25th November, 2005; (2005) EWHC 2704

The Claimant later brought an application to quash the decision to prosecute him on the ground that he was entitled to State immunity. But the CPS contended that Bayelsa State is merely a constituent part of the Federal State[13] which was not entitled to State immunity and the Claimant, who can have no better claim to State immunity than Bayelsa State, was also not entitled to it.

The Crown Court held that Bayelsa State cannot be regarded as a State whose Governor is entitled to State immunity from prosecution in respect of transborder crimes.

5. Also in JAMES IBORI'S CASE [14]

In May, 2010, Mr. Ibori was arrested in the UAE on an International Warrant obtained by the Metropolitan Police in England. He was extradited to the United Kingdom in April, 2011 and arraigned on 23 counts of Money Laundering, Forgery and Fraud. On February, 27, 2012 as his trial was set to begin, Ibori pleaded guilty to seven counts of money laundering, one count of conspiracy to commit forgery, one count of obtaining property by deception, and one count of conspiracy to defraud.

On April 18, 2012, he was sentenced to 13(thirteen) years imprisonment by the Southwark Crown Court in London by Hon. Justice Anthony Pitts.

It is noteworthy that the arrest and subsequent conviction were after he had concluded his term of office as Governor of Delta State in Nigeria.

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[13] Nigerian is a Federal State made up of 36 States and the Federal Capital Territory. Each State within the Nigeria State is a Unit and is expected to be independent in certain areas but dependent on the Central Government in respect of foreign affairs and other subjects state in the Exclusive Legislative List. See Sections 2,3,4 and the Second Schedule to the Constitution.

[14] Unreported.

However, from the facts after his conviction, it was shown that the metropolitan police had started investigation before the expiration of his term of office. His Lawyer Bhadesh Gahil, fidiciary agent, Daniel Benedict McCann, Corporate Financier Lambetus De Boer and his wife were all convicted.[15]

It is submitted that if he had been arrested, even before the expiration of his term of office, following the *Alamieyeseigha's case*, he would have been subject to the jurisdiction of the United Kingdom Courts.

6. CHARLES TAYLOR

From 1997 to 2003, Charles Taylor was the President of Liberia.

He was tried by the Special Court for Sierra Leone at the Hague on eleven counts charge of war crimes, crimes against humanity and other violations of international humanitarian law committed in Sierra Leone from November 30, 1996 to January 18, 2002[16] Mr. Taylor was alleged to be responsible for crimes which included murdering and mutilating civilians, (including cutting off their limbs), using women and girls as sex slaves and abducting children, adults and forcing them to perform forced labour or become fighters during the conflict in Sierra Leone.

Mr. Taylor was found guilty of the offences and sentenced to fifty years imprisonment. It is noteworthy that even before the end of his regime, he had been formally indicted by the Special Court for Sierra Leone in 2003. While he was in exile in Nigeria, he was extradited for trial at the Hague.

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[15] Mr. Ibori was arrested in December 2007 by the Economic and Financial Crimes Commission (EFCC) on charges of theft of public funds, abuse of office and money laundering. On December 17, 2009, a Federal High Court sitting in Asaba, Delta State Presided over by Hon. Justice Awolulehin discharged and acquitted him of all 170 charges. See en.wikipedia.org/wiki/JamesIbori visited on 2/10/2012.

[16] Of the eleven counts, five were on war crimes, five counts of crimes against humanity and one count of violation of International Humanitarian Law.

7. CONSTITTUONAL IMMUNITY AND CRIMINAL PROCESS IN NIGERIA

Constitutional immunity relates to lawful exemption from prosecution in the performance of the duties required of the functionaries of government especially with respect to the performance of their respective function.[17]

JUSTIFICATION FOR EXECUTIVE IMMUNITY

The justification for executive immunity clause in the Nigerian Constitution is to prevent the President, Vice President, Governor or Deputy Governor from being inhibited in the performance of his executive functions by fear of civil or criminal litigation during his tenure of office.[18] This privilege prevails only during the incumbency of the office involved. It is also inapplicable where the cause of action is against the executive as a nominal party.

The provision for executive immunity is not peculiar to or an innovation in the 1999 Constitution.[19]

Other countries in Africa have similar provisions for executive immunity. In Zambia and Botswana, the immunity of the President covers only acts done in his private capacity.

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[17] See: Yakubu J.A. Constitutional Law in Nigeria (2003) Ibadan, Demyaxas Law Books at Page 245. In Nigeria, there are Legislative, Executive and Judicial immunities. Section 3 of the Legislative Houses (Powers and Privileges) Act Cap. L12 Laws of the Federation of Nigeria, 2004 gives immunity to any member of a Legislative House in respect of works spoken before House or Committee of the House or in respect of words written in a report to that House or to any Committee thereof or in any petition, bill, resolution motion or question brought or introduced by him. Judicial immunity relates to the immunity of a judge from civil liability arising from the performance of judicial duties. This paper will deal only with Executive immunity

[18] See Obih v. Mbakwe (1984) 1 SCNLR 192 at 211; Alameiyeseigha v Yeiwa (2002) 7 NWLR (Pt. 767) 581 at 599-600.

[19] Similar provisions can be found in Section 161 of the 1963 Constitution and Section 267 of the 1979 Constitution. The case of Obih v Mbakwe (Supra) was decided under the 1979 Constitution.

In Tanzania under the 1962 and 1965 Constitutions, the President is amenable to civil action in his personal capacity.[20]

In the case of Alamieyeseigha v. Yeiwa[21], the appellant was an Executive Governor of Bayelsa State. Before becoming the Governor, he was an Air Force Officer. He retired voluntarily from the Air Force in 1992. The first three Respondents applied for an order of mandamus at the Federal High Court, Abuja, Nigeria in January, 2000 to compel the 4th Respondent (the Chief of Air Staff) to either dismiss him from the Nigeria Air Force or Court Martial him for an alleged examination malpractice committed by him at the Command and Staff College in 1991.

The Respondents obtained the leave of Court by a motion exparte. When the substantive application came up for hearing, the Respondents to the application did not appear in Court. Consequently the substantive motion was granted. Meanwhile, the Appellant who was directly affected by the orders was not made a party to the action and was not served with any process. Immediately, the Appellant became aware of the orders, he filed a motion at the Federal High Court praying to have the order set aside on the ground of fraud and misrepresentation, lack of jurisdiction of the court and lack of *locus standi* on the part of the first three Respondents. The Respondents filed a preliminary objection against the appellant's motion on the ground that the Federal High Court was funtus officicio to review its own order and that the appellant lacked locus standi to challenge the order, since he was not amenable to Judicial Proceedings by virtue of Section 308 of the 1999 Constitution. In his considered ruling, Auta, J. upheld the

[20] Section 9, 1962 Constitution and section 11, 1965 Constitution. See also Nwabueze B. O. Presidentalism in Commonwealth Africa (London) (1974). C. Hurst & Co. Pages 118-121.
[21] Supra.

preliminary objection. The Appellant appealed to the Court of Appeal. The Court allowed the Appeal, holding inter-alia:

> "The immunity conferred on the appellant is to prohibit the issuance of any court process, civil or criminal in any way whatsoever against the appellant while he acts in the office to which he is elected... The intendment of the section under reference is to bar any proceedings civil or criminal which will have the effect of interfering with the running of the office to which the appellant was elected... It clearly does not matter whether the appellant was a party or not, it is the interference and the effect of the order sought that the Constitution prohibits[22].

The Court of Appeal established the following principles:

(1) That what Section 308 provides in favour of the persons enumerated in Subsection (3) thereof so long as the hold the offices stipulated, is an immunity from civil or criminal proceedings instituted or continued against them. Immunity from arrest or imprisonment during that period either in pursuance of the process of any court or otherwise or the application for or issue of the process of any court requiring or compelling the appearance of a person to whom the section applies.

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22 Ibid at Pages 599 - 600.

(2) The immunity granted terminates when the person who enjoys the immunity ceases to hold the office by which he enjoys immunity. In effect, the constitutional provision concerned could be classified as procedural, making the immunity merely inchoate or in suspense during the beneficiary's incumbency in the office.

(3) That any waiver of the immunity by the person holding the office is ineffective, as the immunity is not that of a person holding the office but of the particular state or office which he represents during the tenure of his office.

In Tinubu v. I..M.B. Securities Plc[23] the Respondent had filed a suit at the High Court of Lagos State claiming against the Appellant the sum of ₦2.5 million for breach of contract. While an interlocutory appeal was pending, the Appellant became the Governor of Lagos State. The Respondent relying on Section 308 of the 1999 Constitution applied that the matter be adjourned sine die. The Appellant opposed the application contending that he was ready to waive his immunity. The Court of Appeal held that the Governor could not waive his immunity. It was further held that nothing stopped the Governor from instituting an action against other persons for reliefs in his personal capacity.

[23] (2001) 45 WRN 1; (2000) 8 NWLR (Pt. 714) 192.The Supreme Court decision is reported in (2001) 8 M.J.S.C. 1; (2001) 9 - 10 S.C. 49. See also Media Tech.(Nig) Ltd. v.Lam Adesina (2004) 44 W.R.N. 19.

EXECUTIVE IMMUNITY AND POLICE INVESTIGATION

Although Section 308(1)(b) and (c) of the Constitution provides that the President, Vice President, Governor or Deputy Governor cannot be arrested or imprisoned during his period of office; and that no process of any Court requiring or compelling his appearance may be applied for or issued, the Supreme Court has held in the case of Fawehinmi v. I.G.P. & Ors[24], that it does not preclude police investigation and the immunity is only limited to proceedings before a Court or Tribunal[25].

EXECUTIVE IMMUNITY AND ELECTION PETITIONS

The election of a serving President, Vice President, Governor or Deputy Governor may be challenged in a Court of Law or Election Tribunal set up under the appropriate Electoral Act. In such cases, the immunity provided under Section 308 is inapplicable. It is put in "abeyance".

By extension, the person will be subject to police investigation if it relates to his qualification for election. Subpoena may be issued and to that he must respond.

In the case of Alliance for Democracy v. Fayose (No.1)[26], the Court of Appeal held that:

> "As held in the judgment supra it is hereby ordered that having regard to the decision of the Supreme Court in the case of Obih v. Mbakwe(1984) 1 SCNLR 192 and Tinubu v. I.M.B.

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[24] (2002)7 NWLR (Pt.767)606.

[25] Supra at Page 691 Para. H.

[26] (2004)26WRN34at46-47 (2004) 8NWLR (Pt.876) 639. See also Obih v. Mbadiwe(Supra) where the Supreme Court held that election petitions are 'sui generis'. Bello, J.S.C. (as he then was) held that "election petitions were special proceedings completely divorced and separated from civil proceedings within the context of Section 267 of the Constitution (now Section 308, 1999 Constitution) and consequently a Governor was not immune from legal proceedings against him in respect of an election petition".

Securities Ltd. (2001) 16 NWLR (Pt. 740) 670 the provisions of Section 308 of the 1999 Constitution of the Federal Republic of Nigeria are not applicable to confer immunity on a State Governor in an election petition involving his election to preclude the issuance of subpoena on him? Or put in another way; the immunity provided by the provisions of Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 on a State Governor is put in abeyance when his election is being disputed before an election Tribunal as to make him amenable to being compelled by a subpoena to tender document(s) or give evidence before the election Tribunal".

THE PRESENT POSITION

From the above analysis, it will be appreciated that the Courts tend to be helpless in the face of the clear provisions of Section 308 of the 1999 Constitution. The attempt by the Court in Fawehinmi v. I.G.P.[27] to exclude investigation of such persons will be of little effect because of the police structure, investigatory limitations of the police and the overwhelming powers of the persons to be investigated. The challenges of putting together a formidable case for future prosecution cannot also be overlooked.

If a serving President, Vice President, Governor or Deputy Governor is re-elected and serves a term of eight years, necessary evidence to try him for offences committed during his tenure may have been tampered with or even obliterated.

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27 Supra.

It is the view here that this has given impetus to corruption and recklessness on the part of some State Governors in Nigeria. There is now a growing agitation for the removal or review of the immunity clause.

It is submitted that the argument for its retention is that it will enable the executive to focus on the task of governance. This argument cannot stand in the face of corruption and abuse of public trust by persons conferred with immunity. Conferment of immunity in the circumstances will negatively affect the economy by encouraging corruption. A transparent leader needs not be fearful of any allegation.

It is desirable to consider the position in the U.S. which has partially or fully removed the immunity clause. Their situation may well form the thrust for re-consideration of our extant immunity provision in Nigeria.

EXECUTIVE IMMUNITY: LESSONS FROM THE UNITED STATES

In the U.S.A., there is no express provision granting immunity to the president. In *United States v. Nixon*[28], the U.S. Supreme Court held that the President amenable to produce evidence for use in a criminal case despite the general immunity.

A more relevant case for consideration in Nigeria is the case of *Jones v. Clinton*[29]. In that case the former U.S. President Bill Clinton was sued while he was still the American President. He filed motions asking the District Court to dismiss the case on grounds of Presidential immunity and

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28 418 U.S. 683 (1974) referred to in Mowoe K.M. Constitutional Law in Nigeria (2008) Mathouse Press Limited Page 170 and mentioned in Clinton v. Jones 520 U.S. 681 (1997).

29 520 U.S. 681 (1997). According to Wikipedia, this case was a landmark United States Supreme Court case establishing that a sitting President of the United States has no immunity from civil law litigation against him, for acts done before taking office and unrelated to the office, en wikpedia.org/wiki/Clinton v Jones visited on 28/9/2012.

to prohibit Jones from re-filing the suit until the expiration of his term of office.

Judge Susan Webber Wright of the U.S. District Court for the Eastern District of Ankansas rejected the Presidential immunity argument but deferred the case until the conclusion of his term[30]. Both parties appealed to the Eight Circuit. The Court, Per Bowman, J. ruled in favour of Jones finding that "the President, like all other government officials is subject to the same laws that apply to all other members of our society[31]". The court had identified the sole issue as: whether the President is entitled to immunity for the duration of his presidency when sued for his unofficial acts.

President Clinton appealed to the U.S. Supreme Court, filing petition for *Writ of Certiorari*. The Supreme Court by majority, confirmed the decision of the Court of Appeal[32]. The Court held that the constitution does not grant a sitting President immunity from civil litigation except under unusual circumstances. The Court ruled that separation of powers does not mandate Federal Courts to delay all private civil law suits against the President until the end of his term of office. A qualified Presidential immunity from judicial process was granted. This was on the ground that the U.S. Constitution does not automatically confer the President of the United States immunity from civil law suits based upon his private conduct, unrelated to his official duties as President.

This decision is commended to courts in Nigeria in the interpretation of Section 308 of the Constitution. If the interpretation of the U.S. Supreme Court was applied in the decision of *I.M.B. Securities Plc v. Tinubu,* the case would have gone on to completion rather than being put in abeyance.

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30 Available at http: //Laws.findlaw.com/us/000/95 – 1853 html.

31 *Jones v. Clinton* 72 F. 3d 1354 available at scholar google.com/scholar_case visited on 28/9/2012.

32 520 U.S. 681 (1977).

The U.S. court would not contemplate any delay which might irreparably work against the Plaintiff.

CONCLUSION

Although constitutional immunity is enjoyed by Heads of Government in Nigeria and the West African sub-region, they are now subject to International Criminal Law.

As shown on this paper, sovereign equality of States prevent the Head of State of a country from being prosecuted in a foreign Court or before an International Criminal Tribunal or Court. However, such heads of government may lose the immunity under Article 27 of the Rome Statute. Furthermore, if he is the head of one of the federating states in a federation like Nigeria, he can be subjected to the jurisdiction of foreign courts. The immunity enjoyed by the Executives locally will be inoperative.

We have examined the application of the doctrine in Nigeria and recommend that the U.S. model should be considered for possible adoption because it gives partial immunity to the executive, depending on the circumstance rather than a blanket application. There is the need for a balance between allowing the an individual elected to office to concentrate on governance and the right of private persons in unofficial acts committed before assumption of office.

It is hoped that a shift from the blanket immunity for any act of an official, covered by the provision of Section 308 of the Nigerian Constitution will be in the right direction. Even if a total repeal is considered way-off, an amendment in the form of a qualified immunity is desirable for better accountability.