BLURRING THE LINES OF SOVEREIGN IMMUNITY FOR THE INTERNATIONAL PROTECTION OF CIVIL AND ECONOMIC RIGHTS

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Abstract

More than a century ago, the law of nations drew a red line which no nation was allowed to cross. This line was called sovereign immunity. The rules were pretty straightforward – "no sovereign state", in the words of Lord Denning "should be impleaded in the courts of another sovereign state against its will". "Why has the whole civilized world concurred in this construction?", Justice Marshall pondered as far back as 1812 and concluded that "a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation". This proposition was "absolutely" true in 1812. But how true is it in 2014? This question was the compass that guided this scholarly expedition. In the course of this journey, it was found that as years went by two broad theories of sovereign immunity snowballed into existence – the absolute theory of sovereign immunity and the restrictive theory of sovereign immunity. The former held sway at a time when no sovereign state engaged in commercial activities, thus its relevance is unsurprisingly historical and has given way to the latter therefore changing the rules of international law. Now, the actions of a sovereign are divided into acta jure imperii (acts pursuant to sovereign authority) and acta jure gestionis (acts of a commercial nature). The implication being that acta jure gestionis blurs the red line of sovereign immunity in favour of the protection of contractual rights. Beyond the protection of contractual rights, the recent case of ***Louis Emovbira Williams v Federal Government of Nigeria*** *reveal that human rights can be violated in the course of commercial transactions. This paper, adopting the doctrinal research methodology thus raised a poser: is there any principle of international law which could be used to blur the red line of sovereign immunity for the international protection of human rights? The principle of jus cogens was identified as a useful tool in this regard. Conclusively, this paper noted that it is comforting that international law has given the much needed priority to contractual rights and human rights through the development of acta jure gestionis and jus cogens respectively. The paper berthed by recommending more financial-based consequences for the violations of human rights.*

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Introduction: Meaning of Sovereign Immunity

The legendary Lord Denning MR, in the landmark case of *Trendtex v Central Bank of Nigeria*[2] gave a "general picture" of sovereign immunity as follows:

> The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world.

On a similar note, Lord Atkin in *Compania Naviera Vascongado v S.S. Cristina (The Cristina)*[3] explaining the doctrine of sovereign immunity held that:

> The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to a legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.

Delivering his opinion in *Rahimtoola v Nizam of Hyderabad*[4], Lord Reid opined that "[t]he principle of sovereign immunity is not founded on any technical rules of law: it is founded on

[2] (1977) 1 QB 529
[3] [1938] A.C. 485, 490
[4] [1958] A.C. 379

broad considerations of public policy, international law and comity". In obvious agreement with the position of Lord Reid, Lord Denning concurred as follows:

> I think we should go back and look for the principles which lie behind the doctrine of sovereign immunity. Search as you will among the accepted sources of international law and you will search in vain for any set of propositions. There is no agreed principle except this: that each State ought to have proper respect for the dignity and independence of other States. Beyond that principle there is no common ground. It is left to each State to apply the principle in its own way, and each has applied it differently**. *Some have adopted a rule of absolute immunity*** which, if carried to its logical extreme, is in danger of becoming an instrument of injustice. ***Others have adopted a rule of immunity for public acts but not for private acts***, which has turned out to be a most elusive test. (Italics supplied for emphasis)

The "rule of absolute immunity" adopted by some countries, and the "rule of immunity for public acts but not for private acts" adopted by others represent what jurists describe as the theories of sovereign immunity.

Theories of Sovereign Immunity

In his presentation titled: *Sovereign Immunity and Enforcement*, Chidi Ejiofor[5] highlighted the two established theories of sovereign immunity. The first, absolute immunity, he summarized: "confers immunity on all actions of a State or State agency regardless of the purpose or nature of the transaction". The second, restrictive immunity, he said: "confers immunity only on sovereign acts of a State – *acta jure imperii*, while acts of a State in respect to commercial transactions – *acta jure gestionis* – are not covered by immunity but governed by private law in the same way as a private person would not enjoy immunity". A more detailed consideration of these theories will be helpful for a better appreciation of the present discourse.

Absolute Theory of Sovereign Immunity

> *A century ago no sovereign state engaged in commercial activities. It kept to the traditional functions of a sovereign – to maintain law and order – to conduct foreign affairs – and to see to the defence of the country. It was in those days that England – with most other countries – adopted the rule of absolute immunity.*
>
> *Lord Denning M.R*

In *State Immunity in International Law*[6], Xiaodong Yang provides useful insights into the meaning and history of the absolute theory of sovereign immunity. He wrote, absolute immunity:

> …means that a sovereign or sovereign State was absolutely immune from legal proceedings in foreign national courts, whatever the character of the legal relationship involved, and whatever the type and nature of the legal proceeding. That is to say, States enjoyed immunity even in respect of commercial or other private law

[5] C. Ejiofor, 'Sovereign Immunity and Enforcement' <https://www.templars-law.com> accessed 23rd January 2024.
[6] X. Yang, *State Immunity in International Law*, (Cambridge University Press, 2012) 7

> dealings, and their property, even if used exclusively for commercial purposes, was not subject to judicial enforcement measures.

One of the earliest cases where the theory of absolute sovereign immunity was espoused, was *The Schooner Exchange Case*[7]. Here, Justice Marshall "[i]n exploring an unbeaten path, with few, if any, aids from precedents or written law", reasoned that:

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him…Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation…

The theory of absolute immunity, in the words of Xiaodong[8], "may sound outrageous in today's globalized world, where States and their entities and enterprises routinely engage in commercial,

[7] 11 U.S. 116 (1812)
[8] X. Yang, (n6)

trading, and other private law activities, and commonly own, possess or dispose of commercial property in foreign countries". However, he continued:

> [A]t a time when State trading activities were rare and State presence in foreign countries were limited to a few diplomatic or military missions, that was a natural response in view of the fact that a State would normally be engaged in nothing but public or governmental activity in the territory of another State. Besides, absolute immunity was never truly absolute: it could be waived by the Defendant State, and courts regularly did assume jurisdiction in cases involving local immovable property pursuant to the ancient principle of *lex rei sitae.*
>
> Absolute immunity was granted in an age when the distinction between sovereign and non-sovereign activities was less manifest, given that State functions were at that time confined to the traditional spheres of, say, legislation, administration, national defence, and the conduct State-to-State political relations and that, as a result, it was possible and natural to regard 'State' activities as synonymous with 'sovereign' activities.

Undoubtedly, times have changed. Globalization and digitalization have modified the way persons, organizations and nations interact. Gone are the days when sovereign States only concerned themselves with internal administration and national defence. No responsible and

responsive government in this 21st century limits its options of catering for the welfare of its citizens to only resources within its territory. Hence, the need to engage in commercial relations with other States or entities in those other States was not only necessary but inevitable. So:

> The growing participation of States in international economic activities fundamentally transformed the functions of State and that transformation resulted in a vastly different conception of the State. With the steadily increasing volume of commercial and other dealings between States and foreign private persons on an equal footing, came…the evolution of the doctrine of restrictive immunity[9]…

Restrictive Theory of Sovereign Immunity

> *In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state – or creates its own legal entities – which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by the doctrine of restrictive immunity.*
>
> Lord Denning M.R

[99] X.Yang (n6)

The exact point the international community bade farewell to the absolute immunity doctrine is still uncertain. Chief Justice Marshall in *Bank of United States v Planters' Bank of Georgia*[10] held that:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Similarly, in *Ohio v Helvering*[11], the court held that "if a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function…when a state enters the marketplace seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader…". In *New York v United States*[12], the court recognized that "there is a constitutional line between the State as government and the State as trader".

[10] 22 U.S. 904 (1824)
[11] 292 U.S. 360 (1934)
[12] 326 U.S. 572 (1946)

In 1951, Sir Hersch Lauterpacht through his article titled *The Problem of Jurisdictional Immunities of Foreign States* argued that many European countries had abandoned the doctrine of absolute immunity and adopted that of restrictive immunity.

The famous 1952 *Tate Letter,* written by Jack. B. Tate (1902-1968) to Attorney General Philip Perlman gave great impetus to the general acceptance and application of the restrictive immunity doctrine in the UK. The *Transnational Litigation Blog*, in commemoration of the 70th anniversary of this "more than a piece of legal history" recalled[13]:

> Seventy years ago, this week, Department of State Legal Adviser Jack Tate wrote to the Attorney General Philip Perlman to announce a sea change in State's litigation practice vis-à-vis foreign sovereign immunity. The so called "Tate Letter" informed the Department of Justice that State would shift from the "classical" approach to sovereign immunity to what's known as the "restrictive" approach. As Tate explained, the classical approach permits suits against a foreign sovereign in domestic courts only if the sovereign has consented to the suit. The restrictive approach, in contrast, distinguishes between actions a foreign sovereign takes pursuant to its sovereign authority (acta jure imperii) and the acts of a commercial, or private, nature (acta jure gestionis). The restrictive approach affords jurisdictional

[13] Transnational Litigation Blog, 'Throwback Thursday: The Tate Letter and Foreign Sovereign Immunity' <https://tlblog.org/throwback-thursday-the-tate-letter-and-foreign-sovereign-immunity/> accessed 24th January 2024.

> immunity to sovereigns from suits arising out of acts in the first category but withholds it in suits arising from acts that fall into the second.

Thus, the position of international law on sovereign immunity is as captured in *Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies*[14] where it was held that:

> …a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market; or if it has a state department which charters ships on the Baltic Exchange: it thereby enters into the market places of the world: and international comity requires that it should abide by the rules of the market.

This position consolidates the opinion of the court in *Rahimtoola v Nizam of Hyderabad*[15]which put it succinctly:

> If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the

[14] [1975] EWCA Civ J0715-1.
[15] Supra

> dignity of a foreign sovereign to have the merits of such dispute canvassed in the domestic courts of another country: but, if the dispute concerns, for instance, commercial transactions of a foreign government (whether carried on by its own departments or agencies) or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.

Restrictive Immunity Theory: Any Application to Non-Commercial Disputes?

Flowing from our analysis thus far, it would appear that the doctrine of restrictive immunity which holds that *acta jure gestionis* defeats claims of sovereign immunity applies primarily to commercial transactions. The bulk of cases cited above where the *acta jure gestionis* principle held sway had commercial or contractual backgrounds. The Federal Republic of Nigeria, as a sovereign state, has been involved in quite a number of cases where the sovereign immunity doctrine was pleaded.

In *Trendtex v Central Bank of Nigeria*[16], the CBN issued an irrevocable letter of credit to guarantee payment of several shipments of cement ordered by the Ministry of Defence. The CBN, acting under the directives of the new military regime, refused to make payments under the letter of credit. The plaintiff sued for breach and repudiation of the letter of credit. CBN contended that it was entitled to sovereign immunity. The English Court of Appeal held *inter alia*, that in line

[16] Supra

with the contemporary trends in international law, sovereign immunity should not extend to commercial transactions.

Similarly, in *Ipitrade Int'l S.A. v Federal Republic of Nigeria*[17], the both parties entered into a contract for the sale/purchase of cement. It was expressly agreed that any dispute arising out of the contract would be submitted to arbitration by the International Chamber of Commerce, Paris, France. Various disputes arose and on 12th May 1976, Ipitrade filed a demand for arbitration with the Secretariat of the Court of Arbitration of the International Chamber of Commerce. Thereafter, an arbitration proceeding was conducted in which the Federal Republic of Nigeria refused to participate, relying on sovereign immunity. It was held that Nigeria's agreement to arbitrate constituted an express waiver of sovereign immunity.

Another case, which though was finally resolved in favour of Nigeria[18], but the defence of sovereign immunity failed was the commercial-related dispute involving *P&ID v Nigeria*. The facts[19] of this case were as follows; on the 11th of January 2010, P&ID, an engineering and project management company registered in the British Virgin Islands with a Nigerian office entered into a written Gas Supply and Processing Agreement (The Agreement) with the Ministry of Petroleum Resources of the Federal Republic of Nigeria. The Agreement stipulated that Nigeria would make available for a term of 20 years, specified quantity of wet gas. In return, P&ID was to provide a specified quantity of the lean gas (which was derived after processing the wet gas). Nigeria never supplied this wet gas. P&ID wrote to Nigeria, alleging that Nigeria had repudiated the Agreement. It relied on Clause 20 of the Agreement to commence arbitral proceedings against Nigeria.

[17] 465 F.Supp. 824 (D.D.C. 1978)
[18] The Court held that it could not enforce the arbitration agreement on grounds of public policy and corruption.
[19] I.K. Chime, 'The Impact of Sovereign Immunity on the Enforcement of International Arbitration Awards Against States – the Case of P&ID v Federal Government of Nigeria' (8) (4) (2020) *International Journal of Innovative Legal and Political Studies* 120

The arbitral tribunal found that Nigeria repudiated its obligations under the GSPA. In its Final Award, the Tribunal ordered Nigeria to pay P&ID the sum of $6,597,000,000 together with interest at the rate of 7%. P&ID sought to confirm the arbitral award against Nigeria at the United States District Court for the District of Colombia, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The government of Nigeria moved to dismiss the relief sought for lack of jurisdiction under the Foreign Sovereign Immunities Act which allows courts to hear cases against foreign states only in limited circumstances. The Government's contention was based on the ground that P&ID was pursuing its sovereign assets, which it could not surrender to a private claimant under sovereign immunity. However, P&ID claimed it was pursing only Nigeria's commercial assets. The position of Nigeria on sovereign immunity was rejected.

Another interesting case which involved, but went beyond, commercial disputes was the matter between *Louis Emovbira Willams v Federal Government Nigeria*. A UK online publication[20] summarized the facts as follows:

> "Mr. Williams, a British-Nigerian citizen, had sued the Nigerian government in the foreign court to report the abuse and fraud he suffered at the hands of Nigerian authorities, including the repressive secret police, State Security Service, following a business deal that fell through.

[20] Peoples Gazette, 'UK Court Rejects Tinubu's Sovereign Immunity Appeal; Allows SSS Victim Emovbira Williams to Seize $21 Million from Nigeria's Account with JP Morgan' <https//gazettengr.com/uk-court-rejects-tinubus-sovereign-immunity-appeal-allows-sss-victim-emovbira-williams-to-seize-21-millon-from-nigerias-account-with-jp-morgan/> accessed 24th January 2024.

In his allegations, Mr. Williams, who argued that his torture and financial losses followed a multimillion-dollar deal with Nigeria, disclosed that he guaranteed the payment of $6.5 million in 1986 for the importation of foodstuff to Nigeria from England into the account of a UK trustee, per the instructions of the Nigerian government. The deal went sour after the Federal Government refused to fulfil part of the bargain by failing to refund Mr. Williams. Upon travelling to Nigeria, he was arrested, tried by a military tribunal for economic sabotage charges and sentenced to 10 years imprisonment in 1986.

Mr. Williams escaped from Nigerian prison in 1989, three years after his sentence and fled to London. In August 1993, then-military head of state Ibrahim Babangida gave him a presidential pardon absolving him of all the charges and ordered that he be fully compensated for the scammed funds.

Still, Mr. Williams' money was withheld as the CBN, for years, refused to heed the directive that approved the payment of the owed funds, even after the West African nation returned to civilian rule in 1999.

Mr. Williams filed the matter before Ms. Moulder at the Queen's Bench Division of the High Court of Justice and on November 9, 2018, he got the legal authorisation to

> withdraw the funds from Nigeria's savings account with JP Morgan in the United States…
>
> …In an attempt to wriggle its way out of making the payment, the CBN countered the ruling that Nigeria was a sovereign state and was not subject to the orders of other nations.
>
> Justice Bright ruled out Nigeria's immunity plea as too weak to stand, asserting that Mr. Williams' business deal with the Nigerian government involved funds that got transferred to a trustee who is a UK citizen in a UK bank.

Although the primary basis for the court ignoring the plea of sovereign immunity by the Nigerian government was due to the commercial nature of the transactions. However, the facts of this case disclose, albeit allegedly, violations of human rights even though the alleged human rights violations were apparently not in issue before the court.

How potent will the plea of sovereign immunity be in a case where the cause of action rests squarely or primarily on violations of human rights? Put differently, beyond commercial or contractual rights, will the doctrine of restrictive immunity also protect human rights? Is there any principle of international law which protects human rights from the defence of sovereign immunity the same way the principle of *acta jure gestionis*, protects commercial/contractual rights from sovereign immunity? A scholarly search revealed that the principle of *jus cogens* is to human rights what the principle of *acta jure gestionis* is to contractual rights in the international scene.

Blurring the Lines of Sovereign Immunity in Favour of *Jus Cogens*

The literal meaning of the concept of *jus cogens* is 'compelling law'. *Jus cogens* is a mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted[21]. *Jus cogens* norms owe their validity to a norm of customary international law which is reflected by Article 53 of the Vienna Convention which provides that *jus cogens* is 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

That a rule is *jus cogens* primarily means that states cannot derogate from it either by consent or by treaty. The idea of *jus cogens* is said to be based on the hope that international law can be driven by justice and values other than mere satisfaction of selfish interests of States. Norms of *jus cogens* are, as it were, elite, or the highest ranking norms, from which no derogations are permitted, even by agreement between the State parties[22]. At its roots *jus cogens* draws upon elements of natural law and the two do share some overt similarities[23]. Notably:

> After World War II, the doctrine of *jus cogens* emerged. *Jus cogens* is a special subset of customary international law. Normal customary international law, like a treaty, is based on the consent of the participating party nations…*Jus cogens* norms are also referred to as peremptory norms, and they are peremptory because they "prevail over and invalidate international agreements and other rules of international law in conflict with them[24]"

[21] B.A. Garner, *Black's Law Dictionary* (Ninth Edition) West Publishing Company 937.
[22] S. Matsumoto, Jus Cogens and the Right to Self-Determination – Falsifiability of Tests (2020) *Policy Center for the New South*.
[23] S. Conglu, 'Jus Cogens: The History, Challenges and Hope of a Giant on Stilts' (2015) (1) *Plymouth Law and Criminal Justice Review*. 47.
[24] T.A. Johnson, 'A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity under the Federal Sovereign Immunities Act' (19) (2) (1995) *Maryland Journal of International Law* 273.

There are several cases where the principle of *jus cogens* has been used to blur the lines of sovereign immunity. For instance, in *Bosnia and Herzegovina v Serbia and Montenegro*, the question before the International Court of Justice was whether Serbia could be held responsible for genocide on the basis of atrocities committed in Bosnia and Herzegovina following the 1992 break-up of the former Yugoslavia. The case represented the first time that a court had adjudicated whether a sovereign state could be held responsible for genocide since the Convention on the Prevention and Punishment of the Crime of Genocide was unanimously approved by the General Assembly of the United Nations[25]. The ICJ in this case held that the norm prohibiting genocide is assuredly *jus cogens*.

Another case is *Republic of Nicaragua v The United States of America*. In this case, Nicaragua, amongst other things, alleged that some attacks were carried out by the United States military with the aim to overthrow the Government of Nicaragua. Attacks against Nicaragua included the mining of Nicaraguan ports and attacks on ports, oil installations and a naval base. Nicaragua alleged that aircrafts belonging to the United States flew over Nicaraguan territory to gather intelligence, supply to the contras in the fields and to intimidate the population. One of the main issues was whether the United States breached the customary international law regarding the use of force. The court held that the United State was in breach of a *jus cogens* norm and Nicaragua was entitled to compensation.

Also, in *Alvarez-Machain v United States*[26] the plaintiff, a Mexican national was abducted in Mexico and brought to the United States to face prosecution for the murder of a U.S. DEA agent.

[25] R. Hamilton and R.J. Goldstone, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia (2008) (21) *Leiden Journal of International Law*. 95

[26] 331 F. 3d 604 (9th Cir. 2003)

After his acquittal on those charges, he brought this action asserting, *inter alia*, claims under the ATCA for arbitrary arrest and detention. One of the individual defendants in the case, Jose Francisco Sosa; a former Mexican policeman (and one of those who abducted Alvarez-Machain), argued for a narrow reading of the phrase "law of nations" in the ATCA. "He argued that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently 'universal' and 'obligatory' to be actionable as violations of the 'law of nations' under the ATCA"

The court rejected that argument. It noted that "although a strict categorical approach may have surface appeal for its apparent ease of application, it is far from certain which norms would qualify for *jus cogens* status". The court went on to hold that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention" and that such a prohibition is "codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions".

Conclusion

Digitalization and globalization increasingly demonstrates with each passing day that the lines of national boundaries are in fact imaginary. Their impacts have greatly changed the way humans trade and communicate between and among themselves. 'Law cannot remain immutable. This paper is of the view that in a changing society, law should march in tune with the changed ideas and ideologies[27]"

Thus it is comforting to note that international law is giving the much needed priority to contractual rights and human rights through the development of *acta jure gestionis* and *jus cogens* principles

[27] S. Durgalakshmi and R. Ammu, 'Law as an Instrument of Social Change and for Empowerment of the Masses' (5) (12) 2015 *Indian Journal of Applied Research,* 130.

respectively. This is the only way the global community can encourage humans to explore the endless opportunities (business and otherwise) the world has to offer. If States are allowed to hide under sovereign immunity to breach contractual rights and human rights, its resultant effect will be counterproductive in today's world where the private sectors drive the economy of a forward-looking nation.

Recommendation

While it is acknowledged that the existence of principles such as *acta jure gestionis* and *jus cogens* are steps in the right direction, it is recommended that more bold steps need be taken to punish States which violate human rights with more financial-based consequences. Each time claims of violations of human rights are proved before international courts, countries should be ordered to compensate the victims with huge financial sums as damages with certain economic sanctions to be suffered by the rights-breaching country in case of default. This would send a strong signal across the globe that human rights stand above any country and is a pre-condition for a civilized world.

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