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## Stop Letting Them Get Away with Murder: The Need To Limit the Use of Head of State Immunity as a Defense for War Crimes and Crimes Against Humanity

*“Powerful leaders like Charles Taylor have for too long lived comfortably above the law. Taylor’s conviction sends a powerful message that even those in the highest-level positions can be held to account for grave crimes.”*<sup>1</sup>

### I. INTRODUCTION

On April 26, 2012, the Special Court for Sierra Leone (SCSL) found Charles Taylor—the sitting head of state of Liberia—guilty of eleven counts of crimes against humanity, war crimes, and other serious violations of international humanitarian law.<sup>2</sup> This marked the first time in the history of international law that an international court convicted a leader who was a sitting head of state at the time of his indictment.<sup>3</sup> To date, only four sitting heads of state have been the subject of an international court’s attention: the International

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1. Robyn Dixon, *Former Prosecutor Hails Charles Taylor’s Guilty Verdict for War Crimes*, L.A. TIMES: WORLD NOW (Apr. 26, 2012, 9:11 AM), [http://latimesblogs.latimes.com/world\\_now/2012/04/former-prosecutor-hails-charles-taylor-guilty-verdict-for-war-crimes.html](http://latimesblogs.latimes.com/world_now/2012/04/former-prosecutor-hails-charles-taylor-guilty-verdict-for-war-crimes.html), archived at <http://perma.cc/MRC3-5SRC> (quoting Elise Keppler of Human Rights Watch’s International Justice Program).

2. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Sentencing Judgement, ¶ 6994 (Special Ct. for Sierra Leone May 30, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf>, archived at <http://perma.cc/9QFP-6MWG> (detailing Taylor’s convictions); *The Prosecutor vs. Charles Ghankay Taylor*, SPECIAL CT. FOR SIERRA LEONE, <http://www.rscsl.org/Taylor.html> (last visited Mar. 26, 2015), archived at <http://perma.cc/5BMR-WJ7L> [hereinafter *Taylor Timeline*] (explaining crimes and trial of Charles Taylor).

3. See Ben Brumfield, *Charles Taylor Sentenced to 50 Years for War Crimes*, CNN (May 31, 2012), <http://www.cnn.com/2012/05/30/world/africa/netherlands-taylor-sentencing/index.html>, archived at <http://perma.cc/ZMS2-8AH2> (reporting sentencing of Charles Taylor). Although Brumfield refers to Taylor as the first former head of state convicted since the Nuremberg trials, for the purpose of this Note, a sitting head of state is defined as any head of state indicted, tried, or subjected to an arrest warrant of an international criminal court or tribunal while he or she is serving as a head of state. See *id.* (referring to Taylor as former head of state). Therefore, because Taylor was indicted before he stepped down, he is considered the first sitting head of state that an international criminal court indicted. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement, ¶ 9 (Special Ct. for Sierra Leone May 30, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf>, archived at <http://perma.cc/9QFP-6MWG> (noting dates of Taylor’s indictment and resignation); see also Brumfield, *supra* (noting no other conviction since conviction of former head of state during Nuremberg). Slobodan Milošević, then President of Yugoslavia, became the first sitting head of state that an international court charged. Christiane Amanpour et al., *Milošević Indictment Makes History*, CNN (May 27, 1999) <http://www.cnn.com/WORLD/europe/9905/27/kosovo.milosevic.04/>, archived at <http://perma.cc/EV5Y-UZP6> (commenting on crimes and indictment of Milošević). Milošević died before the trial could be completed and therefore was never convicted. See Nicole L. Camier, Note, *Controlling the Wrath of Self-Representation: The ICTY’s Crucial Trial of Radovan Karadzic*, 44 VAL. U. L. REV. 957, 973-74 (2010).

Criminal Tribunal for the former Yugoslavia (ICTY) indicted Slobodan Milošević, then President of Yugoslavia, in November 2001 for war crimes; the International Criminal Court (ICC) issued arrest warrants in 2009 and 2010 for Omar Al-Bashir, the President of Sudan, for ten counts of crimes against humanity, war crimes, and genocide; the SCSL convicted Charles Taylor and sentenced him to fifty years in prison on May 30, 2012; and the ICC confirmed charges for Uhuru Kenyatta, the current President of Kenya, in January 2012, although the ICC ultimately dismissed the charges due to lack of evidence.<sup>4</sup>

These four cases mark a divergence from the way courts have typically addressed head of state immunity.<sup>5</sup> Historically, heads of state, both sitting and former, enjoyed absolute immunity because there was no distinction made between immunity afforded to a head of state and the immunity afforded to a sovereign.<sup>6</sup> Over time, however, international law slowly evolved to allow the prosecution of former heads of state for certain acts, particularly war crimes and crimes against humanity.<sup>7</sup> International courts holding current and former heads of state accountable, as well as the weakening of head of state immunity generally, have received both criticism and praise.<sup>8</sup>

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4. See Amanpour, *supra* note 3 (describing Milošević's sentencing); *Darfur, Sudan*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx) (last visited Mar. 14, 2015), archived at <http://perma.cc/5XCE-AB2J> (detailing Bashir's arrest warrants); *The Prosecutor v. Uhuru Muigai Kenyatta*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx) (last visited Sept. 25, 2013), archived at <http://perma.cc/DRN3-LE8X> (discussing charges against Kenyatta); *Taylor Timeline*, *supra* note 2 (indicating convictions for Taylor).

5. See *infra* Part II.B (discussing history of head of state immunity theory).

6. See Mark A. Summers, *Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that Are Not Parties to the Statute of the International Criminal Court*, 31 BROOK. J. INT'L L. 463, 463 (2006) (detailing historical attitude toward head of state immunity). Former French King Louis XIV's famous quotation—"L'état, c'est moi," meaning I am the state—was an accurate statement of the condition of international law until the mid-twentieth century. See *id.* at 463-64.

7. See Daniel M. Singerman, Comment, *It's Still Good to Be the King: An Argument for Maintaining the Status Quo in Foreign Head of State Immunity*, 21 EMORY INT'L L. REV. 413, 430-32 (2007) (explaining progression of head of state immunity law over time).

8. See, e.g., Rachel Bohlen, Note, *Questioning Authority: A Case for the International Criminal Court's Prosecution of the Current Sudanese President, Omar Al-Bashir*, 42 GEO. WASH. INT'L L. REV. 687, 689 (2010) (noting political concerns of trying sitting heads of state); Singerman, *supra* note 7, at 456-57 (noting some support greater accountability for human rights violations); Philippe Sands, *International Justice Is Needed – Even if it Takes 100 More Years To Perfect it*, GUARDIAN (May 16, 2012), <http://www.theguardian.com/law/2012/may/16/international-justice-needed-expert-view>, archived at <http://perma.cc/9L3R-6H6U> (expressing hope ICC will continue to prosecute offenders). See generally Ulf Laessing & Khalid Abdelaziz, *Sudan's Bashir, Wanted by the ICC, Says He Will Travel to U.N.*, REUTERS (Sept. 22, 2013), <http://www.reuters.com/article/2013/09/22/us-sudan-bashir-idUSBRE98L01420130922>, archived at <http://perma.cc/E79K-HTS2> (noting Sudan's dismissal of ICC arrest warrants); George Monbiot, *Imperialism Didn't End. These Days it's Known as International Law*, GUARDIAN (Apr. 30, 2012), <http://www.theguardian.com/commentisfree/2012/apr/30/imperialism-didnt-end-international-law>, archived at <http://perma.cc/852H-H4JN> (detailing inequality between rich and poor countries in international criminal sphere).

This Note will explore the emerging issue of sitting head of state immunity.<sup>9</sup> Part II.A discusses sovereign and diplomatic immunity, from which head of state immunity has evolved.<sup>10</sup> Part II.B discusses various theories of head of state immunity in international law.<sup>11</sup> Part II.C details one of the most famous instances where a head of state faced prosecution.<sup>12</sup> Part II.D describes the ratification of the Rome Statute, a treaty establishing a permanent international court and international criminal laws, and how it changed the scope of head of state immunity.<sup>13</sup> Part II.E reviews the four instances where an international court has pursued charges against sitting heads of state.<sup>14</sup> Part III.A then explores the arguments for and against continuing to narrow the legal concept of head of state immunity.<sup>15</sup> Part III.B further argues that despite some of the potential political ramifications, allowing international courts to indict sitting heads of state is ultimately a positive trend.<sup>16</sup>

## II. HISTORY

### A. *Head of State Immunity Evolved from Concepts of Sovereign and Diplomatic Immunity*

#### 1. *Sovereign Immunity*

In the early twentieth century, sovereign states were afforded absolute immunity from other nations' courts.<sup>17</sup> National courts refused to exercise jurisdiction over another sovereign nation.<sup>18</sup> As a result of this deference to sovereign authority, there was no clear limit on a sovereign's power to perform acts at both a national and international level.<sup>19</sup> This deference was extended to

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9. See *infra* Part II (discussing evolution of head of state immunity and trials of sitting heads of state)

10. See *infra* Part II.A (evaluating concepts of diplomatic and sovereign immunity).

11. See *infra* Part II.B (describing absolute, restrictive, and normative hierarchy theories).

12. See *infra* Part II.C (summarizing trial of General Augusto Pinochet).

13. See *infra* Part II.D (introducing Rome Statute and ICC).

14. See *infra* Part II.E (outlining cases of Milošević, Al-Bashir, Taylor, and Kenyatta).

15. See *infra* Part III (analyzing progression of head of state immunity theory).

16. See *infra* Part III.B (arguing prosecution of sitting heads of state should continue).

17. See Summers, *supra* note 6, at 466-67 (describing historical immunity of sovereign nations); see also *infra* Part II.B.1 (detailing how absolute immunity applies to heads of state specifically).

18. See Kaitlin R. O'Donnell, Note, *Certain Criminal Proceedings in France (Republic of Congo v. France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?*, 26 B.U. INT'L L.J. 375, 376 (2008) (indicating courts' refusal to subject nations to another nation's jurisdiction).

19. See Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 N.C. J. INT'L L. & COM. REG. 375, 390 (2013) (describing deference to sovereign authority). This lack of external control contributed in part to the events of World War II. See *id.* at 391. Without an external body to control sovereign action, Adolf Hitler was able to justify the crimes he committed because war-making was "one of the most basic and traditional roles of sovereigns." See *id.*; see also S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) (implying sovereigns only bound by international law by consent or international custom).

heads of state, viewed as interchangeable with the sovereign itself.<sup>20</sup> Thus, regardless of the nature of the violation, courts refused to bring a sovereign or its head of state to trial without the consent of the head of state himself.<sup>21</sup>

Due to globalization, however, international law began to transition toward a less restrictive version of immunity over the course of the twentieth century; this allowed courts to slowly begin trying sovereigns and heads of state for actions taken in a private capacity, as opposed to in their official capacity.<sup>22</sup> As nations slowly began to engage in commercial activities, a need arose for a method of enforcing commercial agreements between nations in courts.<sup>23</sup> To balance their autonomy with ongoing globalization, nations began easing sovereign immunity by removing immunities for activities considered “purely commercial.”<sup>24</sup> In 1999, Kofi Annan, then Secretary General of the United Nations, best summarized this change, stating, “[s]tate sovereignty . . . is being redefined by the force[] of globalization . . . .”<sup>25</sup> Holding sovereigns accountable for commercial actions led to greater accountability for heads of state, no longer completely immune from trial.<sup>26</sup>

This form of immunity is often referred to as functional immunity, or immunity *ratione materiae*.<sup>27</sup> Immunity *ratione materiae* attaches to official acts, but it does not protect sovereigns from acts done outside of their official capacity.<sup>28</sup> Although immunity *ratione materiae* is granted to individuals, the

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20. See O'Donnell, *supra* note 18, at 376 (noting interchangeable nature of sovereign and its head of state). Sometimes, judges even used the head of state's name to refer to the sovereign itself. See Summers, *supra* note 6, at 467 n.20 (describing Justice Marshall's use of “Napoleon,” “prince,” or “he” in place of “France”). See generally *Schooner Exch. v. McFaddon*, 11 U.S. 116 *passim* (1812) (treating words Napoleon and France interchangeably).

21. See Stacy Humes-Schulz, Note, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 109 (2008) (describing immunity as “absolute bar to proceedings against a foreign state”).

22. See Summers, *supra* note 6, at 463, 467-68 (explaining how changes in twentieth century allowed for court prosecution as never before seen).

23. See *id.* (illustrating need for contract enforcement by sovereigns).

24. See *id.* at 468 (considering narrowed scope of immunity for certain activities). The United States continues to enforce this form of “restricted immunity.” See 28 U.S.C. §§ 1604, 1605(a)(2) (2012) (stating sovereigns immune from U.S. jurisdiction unless case based on commercial activity). While the statute is subject to international agreements to which the United States is a party and other exceptions exist for actions concerning issues of property and terrorism, the exceptions remain relatively limited compared to other sections codified in the United States Code. See 28 U.S.C. §§ 1605-07 (2012) (listing exceptions to sovereign immunity); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 451 (1987) (stating most nations now follow restricted immunity model of sovereign immunity); *infra* Part II.B.2 (describing how restricted immunity affects prosecution of heads of state).

25. Press Release, Office of the Secretary General, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136 (Sept. 20, 1999), available at <http://www.un.org/press/en/1999/19990920.sgsm7136.html>, archived at <http://perma.cc/25ZX-6BGJ> (addressing U.N. General Assembly, discussing evolution of state sovereignty).

26. See *infra* Part II.B.2 (describing effects of restrictive immunity on criminal liability for heads of state).

27. See Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 AM. J. INT'L L. 731, 736 (2012) (explaining immunity *ratione materiae* as attaching to certain types of acts).

28. See *id.* (detailing scope of immunity *ratione materiae*); see also Lucas Buzzard, Comment,  *Holding*

theory behind granting immunity is that government officials, including heads of state, act on behalf of the sovereign when committing official acts, and thus, their acts *are* those of the sovereign.<sup>29</sup> Immunity *ratione materiae*, therefore, protects not only the individual but also the sovereign from being sued indirectly for acts completed on its behalf.<sup>30</sup> Despite slowly increasing accountability of sovereigns, however, countries such as the United States continue to treat triable acts as exceptions, making immunity a rebuttable presumption.<sup>31</sup>

## 2. Diplomatic Immunity

Diplomats, like the sovereign itself, enjoy a high level of protection from prosecution, but only for as long as their nation considers them to be diplomats.<sup>32</sup> Diplomats receive absolute immunity from criminal prosecution and civil suits, unless the action relates to their private property or falls outside the scope of their official functions.<sup>33</sup> This form of immunity is described in international law as immunity *ratione personae*, which means immunity attaches to the office, rather than the officeholder.<sup>34</sup> As a result, *ratione*

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*an Arsonist's Feet to the Fire? – The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir*, 24 AM. U. INT'L L. REV. 897, 915 (2009) (stating immunity *ratione materiae* attaches only to acts committed in official capacity).

29. See Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 413 (2004) (characterizing acts of state officials as those of state).

30. See *id.* (explaining immunity *ratione materiae* “prevents circumvention” of sovereign immunity); Wuerth, *supra* note 27, at 736 (stating immunity *ratione materiae* protects states and officials). For this reason, this theory continues to protect individuals, even as former officials, for any official act performed while in office. See Akande, *supra* note 29, at 412. For example, Chile argued that immunity *ratione materiae* protected General Pinochet, its former dictator, arrested for human rights violations. See *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC (HL) 147,192 (appeal taken from Eng.) (claiming Pinochet's immunity belongs to Chile and thus he still controls); *infra* Part IIC (discussing importance of Pinochet's arrest).

31. See 28 U.S.C. § 1604 (2012) (acknowledging sovereign immunity unless requirements of §§ 1605-07 met).

32. See Michael A. Tunks, Note, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 654 (2002) (indicating states may waive diplomats' immunity). *But see* Singerman, *supra* note 7, at 425 (stating waiver of diplomatic immunity usually reserved for only grave actions).

33. See Vienna Convention on Diplomatic Relations art. 31, ¶ 1, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention] (codifying diplomatic immunity). Although diplomats are considered immune in other countries, they do not receive the same protection from prosecution in their country of origin. See *id.* at art. 31, ¶ 4.

34. See Wuerth, *supra* note 27, at 736 (explaining *ratione personae* as attaching to official office). Historically, this form of immunity was absolute, protecting all acts committed while in office. See *id.* at 740-41 (expounding on history of immunity *ratione personae*). The ratification of the Rome Statute for the International Criminal Court and the progression of international human rights law, however, have contributed to the decline of immunity *ratione personae* as a defense for state officials. See *id.* at 741 (suggesting progression toward less immunity under immunity *ratione personae* theory); see also Rome Statute for the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf>, archived at <http://perma.cc/FJ74-C2RE> [hereinafter Rome

*personae* only protects a diplomat until he or she is removed from the position.<sup>35</sup>

### B. *The Progression of Immunity Theory for Heads of State*

#### 1. *Absolute Immunity*

Initially, heads of state were treated the same as the sovereign they ruled; they were immune from prosecution for any act they committed, regardless of the gravity of the violation.<sup>36</sup> The rationale behind absolute immunity was that the sovereign and its head of state were indistinguishable, and thus, the head of state deserved the same level of immunity as the sovereign.<sup>37</sup> Absolute immunity is linked to a sovereign's right to govern its own affairs, and proponents of absolute immunity argue that it gives nations the ability to govern the actions of those within its borders or, in the case of heads of state, those acting on the sovereign's behalf.<sup>38</sup>

There are advantages and disadvantages to the theory of absolute immunity for heads of state.<sup>39</sup> Proponents of absolute immunity believe heads of state should not be prosecuted for crimes because fear of prosecution will limit their ability to run a functional country.<sup>40</sup> Proponents also believe absolute immunity will prevent other countries from using the legal system as a means of disrupting a country's relations with others out of vengeance.<sup>41</sup>

While absolute immunity could potentially help leaders avoid frivolous suits, opponents of the theory believe it poses a daunting barrier for those with valid claims.<sup>42</sup> Absolute immunity theory does not differentiate between civil or criminal actions, and thus provides little recourse for those seeking justice, even if they are seeking it for the most grave human rights violations.<sup>43</sup> Due in

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Statute] (eliminating immunity of all state officials for actions violating treaty); *infra* Part II.D (explaining significance of Rome Statute).

35. See Wuerth, *supra* note 27, at 736 (describing immunity *ratione personae*'s length of protection).

36. See O'Donnell, *supra* note 18, at 376 (acknowledging heads of state faced no liability for their actions). Furthermore, under the absolute immunity theory, protection extends to former heads of state, even after leaving their position. See *id.* at 382 (characterizing absolute immunity as "interminabl[e]").

37. See O'Donnell, *supra* note 18, at 381 (explaining rationale supporting absolute immunity).

38. See Scott Grosscup, Note, *The Trial of Slobodan Milošević: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 365-66 (2004) (highlighting rationale for applying absolute immunity to sitting heads of state); see also *Kahan v. Pakistan Fed'n* [1951] 2 KB 1003, 1013 (Eng.). "[T]he foreign sovereign is entitled to immunity from civil proceedings in the courts of any other country, unless, upon being sued, he actively elects to waive his privilege and to submit to the jurisdiction." *Id.*

39. See *infra* notes 40-44 and accompanying text (describing opponent and proponent arguments for absolute immunity).

40. See O'Donnell, *supra* note 18, at 382, 416 (summarizing concerns regarding ability of nations to function).

41. See *id.* at 382-83 (outlining fears of vengeful acts of other countries).

42. See *id.* at 382 (recognizing difficulties human rights victims face due to absolute immunity).

43. See *id.* (summarizing drawbacks of absolute immunity).

part to these concerns, international law has largely abandoned absolute immunity theory and shifted to a less imposing form of immunity.<sup>44</sup>

## 2. Restrictive Immunity

As the concept of the sovereign and its head of state existing as a single entity began to fade, so did the theory that a head of state should be absolutely immune from all acts committed while in power.<sup>45</sup> Instead, similar to diplomatic immunity, a distinction between official acts related to state activity—*de jure imperii*—and private commercial acts—*de jure gestonis*—emerged.<sup>46</sup> Despite this development, countries, still hesitant to indict sitting heads of state, generally applied a restrictive immunity theory to former heads of state while continuing to observe absolute immunity for sitting heads.<sup>47</sup>

Proponents of restrictive immunity theory believe it allows for some level of individual accountability while still respecting a nation's authority.<sup>48</sup> They argue that the distinction between private and commercial acts supports the belief that human rights violations should not fall under official acts and thus would not be covered by immunity.<sup>49</sup> Alternatively, opponents of the theory argue that the line between public and private acts can often be difficult to distinguish, which causes confusion in the law.<sup>50</sup>

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44. See O'Donnell, *supra* note 18, at 381 (noting declining popularity of absolute immunity).

45. See *id.* at 381 (marking continuing separation of sovereign and its head of state); see also *supra* note 6 and accompanying text (describing historic association of head of state with country he ruled).

46. See O'Donnell, *supra* note 18, at 381 (mentioning development of distinctions between official and commercial acts); Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds that a Former Head of State Is Not Immune for Torture*, 14 TEMP. INT'L & COMP. L.J. 263, 275-76 (2000) (defining differences between official and commercial acts of states). Acts *de jure imperii* consisted of acts a nation commonly performed, such as war and foreign relations. See Pierson, *supra*, at 276. Importantly, restrictive immunity still protected these acts. See *id.* Restrictive immunity, however, no longer protected acts *de jure gestonis*, which included trade and other actions taken by an individual as opposed to a nation. See *id.*

47. See Tunks, *supra* note 32, at 661-62 (noting some courts' deference to sitting heads of state). But see *infra* Part II.D (removing immunity from current and past heads of state under international law).

48. See O'Donnell, *supra* note 18, at 381, 383 (justifying restrictive immunity as recognizing individual liability while not offending state's dignity).

49. See Michael P. Davis, *Accountability and World Leadership: Impugning Sovereign Immunity*, 99 U. ILL. L. REV. 1357, 1372 (1999) (suggesting restrictive immunity implies other infringements of immunity acceptable); O'Donnell, *supra* note 18, at 383 (noting potential for expansion of immunity exceptions to include human rights violations).

50. See Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 758 (2003) (maintaining difficulty restrictive immunity theory poses on distinguishing conduct); O'Donnell, *supra* note 18, at 383 (observing difficulty distinguishing between official and commercial acts). The difficulty in determining what qualifies as a private or public act has led courts in some nations to go beyond what is required by international law. See Caplan, *supra*, at 758 (describing situations involving difficulty distinguishing commercial acts from official acts).

### 3. Normative Hierarchy Theory

Recently, human rights activists and others concerned by the lack of accountability of heads of state for serious crimes have advocated for the normative hierarchy theory.<sup>51</sup> This theory does not distinguish between commercial and public acts and asserts that heads of state should lose their immunity if they violate a peremptory international norm.<sup>52</sup> Proponents of this theory argue that *jus cogens* norms rank higher than head of state immunity, and thus, head of state immunity should “yield in order to vindicate a *jus cogens* norm.”<sup>53</sup>

While normative hierarchy theory makes it possible to hold heads of state accountable for human rights violations, it necessitates a shift from a *jus cogens* prohibition to the creation of procedural rules that will induce enforcement of human rights violations by heads of state in their own legal system.<sup>54</sup> Currently, there is not a clear consensus among nations as to which of these theories should control actions taken against heads of state; nations like the United Kingdom have slowly begun to charge state officials, such as General Augusto Pinochet.<sup>55</sup>

#### C. The Ramifications of the Trial of General Augusto Pinochet

When the British House of Lords arrested General Augusto Pinochet for acts of torture in 1998, it marked a divergence from the norm of granting absolute immunity to former dictators, helping set the stage for the Rome Statute and the creation of the ICC.<sup>56</sup> For the first time, under the principle of universal jurisdiction, a nation arrested a former head of state for crimes he committed in

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51. See O'Donnell, *supra* note 18, at 381 (providing motivation for using normative hierarchy theory to approach question of immunity).

52. See *id.* (distinguishing normative hierarchy theory from restrictive immunity theory). In international law, these norms are referred to as *jus cogens*. See *id.* *Jus cogens* norms “enjoy[] a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.” Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, ¶ 153 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (discussing *jus cogens* norms). These norms are intended to deter individuals from committing acts universally condemned. See *id.* ¶¶ 153-56; see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (listing various sources possibly used as determining universal condemnation).

53. See O'Donnell, *supra* note 18, at 382 (clarifying immunity’s position in hierarchy of international values); see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-63 (4th ed. 2003) (opining *jus cogens* norms so important they can invalidate treaties or customs).

54. See O'Donnell, *supra* note 18, at 381-83 (discussing procedural changes needed to try heads of state based on normative hierarchy theory).

55. See *id.* at 383-84 (stating no consensus among nations on which theory should control prosecution of heads of state); see also *infra* Part II.C (discussing trial of General Augusto Pinochet).

56. See Gilbert Sison, Note, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L.Q. 1583, 1583 (2000) (explaining shift in head of state immunity doctrine after Pinochet); see also Melinda White, Notes and Comments, *Pinochet, Universal Jurisdiction, and Impunity*, 7 SW. J.L. & TRADE AM. 209, 209 (2000) (referring to Pinochet case as “landmark decision”).



another country.<sup>57</sup>

In September of 1973, General Augusto Pinochet, then Commander-in-Chief of the Chilean army, led a military coup to seize control of the country from then President Salvador Allende.<sup>58</sup> Subsequently elected president by a military junta, Pinochet served as president for the next seventeen years.<sup>59</sup> During Pinochet's reign, his regime allegedly committed numerous human rights violations, including curtailing civil liberties, as well as perpetrating acts of torture and murder.<sup>60</sup> Pinochet stepped down in 1990 after losing the first democratic election since he took power.<sup>61</sup>

Prior to leaving office, the regime issued an order granting amnesty for all crimes committed by the Pinochet regime from September 1973 through March 1978, making it difficult for Pinochet to be prosecuted in Chile.<sup>62</sup> This did not, however, prevent Spain from issuing an arrest warrant after years of investigating Pinochet's actions while in office.<sup>63</sup> On October 16, 1998,

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57. See Gideon Long, *Legal Legacy of Pinochet's UK Arrest*, BBC NEWS (Oct. 16, 2008), <http://news.bbc.co.uk/2/hi/americas/7671164.stm>, archived at <http://perma.cc/268J-4254> (asserting importance of Pinochet's arrest in development of head of state immunity). Universal jurisdiction is a legal concept that gives states jurisdiction to punish individuals for "offenses recognized by the community of nations as of universal concern." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (defining universal jurisdiction). The concept is grounded in the belief that some crimes are so atrocious that perpetrators should be tried, regardless of where they committed the crime. See Monica Hans, Comment, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish This Goal?*, 15 TRANSNAT'L LAW. 357, 361 (2002) (explaining rationale behind universal jurisdiction). Once a crime is deemed of universal concern, any state may bring charges against someone accused of that crime, even if the country has no tie to the act, perpetrator, or victim. See *id.* at 360-61 (noting scope of universal jurisdiction).

58. See Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2133 (1999) (explaining Pinochet's position prior to coup); Sison, *supra* note 56, at 1588-89 (summarizing coup led by Pinochet).

59. See Bradley & Goldsmith, *supra* note 58, at 2133 (recalling Pinochet's path to presidency).

60. See Sison, *supra* note 56, at 1589 (describing Pinochet's actions after taking power). Much of the violence occurred during the first few months of Pinochet's regime, with an estimated 13,500 arrested and 1,500 killed between September and December of 1973. See *id.* The Rettig Commission and its successor body, convened in order to investigate the abuses of the Pinochet regime, found that 3,197 people were killed during Pinochet's reign. See Pierson, *supra* note 46, at 264-65 (excerpting Rettig report findings). Tens of thousands of others were arrested and tortured in detention camps during the same period of time. See Robert C. Power, *Pinochet and the Uncertain Globalization of Criminal Law*, 39 GEO. WASH. INT'L L. REV. 89, 95-96 (2007) (discussing tortures in military prisons and internment camps); Sison, *supra* note 56, at 1589 (citing detention camps in Chile).

61. See Sison, *supra* note 56, at 1590 (detailing Pinochet's relinquishment of office).

62. See Power, *supra* note 60, at 97-99 (discussing amnesty law); Sison, *supra* note 56, at 1590-91 (highlighting difficulty of prosecution of Pinochet for human rights violation); Jamison G. White, Note, *Nowhere To Run, Nowhere To Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 132-33 (1999) (describing Pinochet's attempted self-protection with amnesty laws).

63. See, e.g., Power, *supra* note 60, at 105-06 (summarizing Spain's investigation and ultimate issuance of Pinochet's arrest warrant); Sison, *supra* note 56, at 1592-95 (discussing charges filed against Pinochet in Spanish courts); Wuerth, *supra* note 27, at 735 (explaining allegations giving rise to issuance of arrest warrant for Pinochet).

pursuant to Spain's arrest warrant, British officials arrested Pinochet in a London hospital where he spent time recovering from back surgery.<sup>64</sup>

Claiming immunity, Pinochet filed a motion to dismiss the arrest warrant, but in November of 1998, the House of Lords—in a close decision—decided Pinochet lacked immunity for the offenses charged.<sup>65</sup> Due to concerns over the impartiality of one of the Lords, a second panel was convened, which ultimately agreed with the first: Pinochet was not entitled to immunity for the alleged crimes listed in the arrest warrant.<sup>66</sup> Ultimately, he was not extradited to Spain, but allowed to return to Chile due to his poor health.<sup>67</sup> He died before ever facing conviction.<sup>68</sup> Nonetheless, his trial showed the increasing willingness of countries to hold heads of state accountable for their actions, and some believe it may have contributed to the creation of the ICC.<sup>69</sup>

#### D. Ratification of the Rome Statute and the Creation of the ICC

The Rome Statute is a multilateral treaty, established in 1998, which created the ICC, the first permanent international criminal court.<sup>70</sup> It was created to ensure that “the most serious crimes of concern to the international

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64. See Bradley & Goldsmith, *supra* note 58, at 2133 (explaining basis for Pinochet's arrest in London); see also Sison, *supra* note 56, at 1592-93 (summarizing events leading to arrest). This unprecedented action led to strong reactions, both in the United Kingdom and abroad. See Power, *supra* note 60, at 107-08 (detailing responses to Pinochet's arrest). Chile's then-sitting President condemned the action, expressing fury at Spain's attempt to interfere in Chile's affairs. See *id.* Opinions remained divided in the United Kingdom; some approved of the arrest, but others argued it was inappropriate. See *id.* at 108.

65. See *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC (HL) 147 (appeal taken from Eng.); see also Power, *supra* note 60, at 108-09 (summarizing initial court proceedings); White, *supra* note 56, at 149 (claiming court decided Pinochet had no immunity as former head of state). The House of Lords looked at the State Immunity Act of 1978, the Diplomatic Privileges Act of 1964, and the Vienna Convention, determining that although the United Kingdom granted absolute immunity to sitting heads, it only protected official acts. See *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC (HL) 147 (appeal taken from Eng.) (discussing State Immunity act of 1978); Diplomatic Privileges Act 1964, c. 81, § 2, sch. 1, art. 29 (Eng.). The Act states, “[t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.” *Id.*; see also Diplomatic Privileges Act 1964, c. 81, § 2, sch. 1, art. 39(2) (Eng.) (stating those formerly immune remain immune for past acts committed in formal capacity); State Immunity Act 1978, c. 33, § 20(1) (Eng.) (clarifying Diplomatic Privileges Act of 1964 also applies to heads of state).

66. See *R. v. Bartle, ex parte Pinochet*, [1999] 38 L.L.M. 581 (HL) (appeal taken from Eng.) (holding Pinochet not immune to prosecution in United Kingdom); see also White, *supra* note 56, at 161-67 (summarizing court's decision).

67. See Power, *supra* note 60, at 112 (describing decision not to extradite Pinochet).

68. See Charles N. Brower & Diane Brown, *From Pinochet in the House of Lords to the Chevron/Ecuador Lago Agrio Dispute: The Hottest Topics in International Dispute Resolution*, 26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 1, 7 (2013) (describing Pinochet's death prior to conviction in Chile).

69. See Long, *supra* note 57 (noting some lawyers believe Pinochet case contributed to establishment of ICC).

70. See Rome Statute, *supra* note 34; see also Robert J. Lundin III, Note, *International Justice: Who Should Be Held Responsible for the Kidnapping of Thirteen Japanese Citizens*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 699, 718 (2003) (describing establishment of ICC).

community . . . do not go unpunished.”<sup>71</sup> The treaty covers both procedural concerns, such as the creation and composition of the ICC, as well as substantive areas, such as defining illegal behavior that the court has jurisdiction over.<sup>72</sup> Perhaps most importantly, the Rome Statute went further than national courts by eradicating any form of immunity for heads of state, stating:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>73</sup>

Although a total of 122 countries ratified the Rome Statute, the United States is not among the list of ratifying nations.<sup>74</sup> Despite actively negotiating the Rome Statute, the United States now stands as an impediment to its legitimacy and the overall authority of the ICC.<sup>75</sup> Countries that approve of the Rome

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71. Rome Statute, *supra* note 34, at pmb1. Prior to the ratification of the Rome Statute, a treaty did exist, specifically condemning genocide as an international crime, but through this earlier treaty, disputes were to be brought in the International Court of Justice (ICJ), the judicial branch of the United Nations, and not specifically the ICC. See Convention on the Prevention and Punishment of the Crime of Genocide, pmb1., art. 9, Dec. 9, 1948, 78 U.N.T.S. 277 (labeling genocide as international crime and ICJ as enforcement mechanism); *The Court*, INT'L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Sept. 4, 2015), archived at <http://perma.cc/8ZF3-WWKR> (introducing ICJ).

72. See *id.* at art. 1-4, 34-52 (establishing ICC and its scope); *Id.* at art. 5-9 (defining crimes subject to ICC prosecution).

73. *Id.* at art. 27; see also Wuerth, *supra* note 27, at 741 (noting national courts' reluctance to lift *ratione personae* immunity or try sitting heads of state).

74. See *States Parties to the Rome Statute*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Jan. 7, 2015), archived at <http://perma.cc/4SH6-T89Z> (listing countries ratified Rome Statute).

75. See Michael P. Hatchell, Notes and Comments, *Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J. INT'L & COMP. L. 183, 211 (2005) (describing role of United States in treaty negotiations). The United States not only refuses to ratify the Rome Statute, but it has also threatened other countries considering ratification. See Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES (Apr. 12, 2002), <http://www.nytimes.com/2002/04/12/international/12COUR.html?pagewanted=print>, archived at <http://perma.cc/V59K-8XW4> (highlighting congressional disapproval of Rome Statute); *UN Chief Says Palestine Will Join Int'l Court on April 1*, N.Y. TIMES (Jan. 7, 2015), <http://www.nytimes.com/aponline/2015/01/07/world/middleeast/ap-un-palestinians-israel-court.html> (noting United States opposition to Palestine ratifying Rome Statute). The United States, worried that Palestine will use its recent choice to join the ICC to pursue Israel for war crimes, has implied that it would cut financial support provided to them. See *id.* (noting Obama's intent to review aid package after ratification). Despite threats, the Rome Statute will go into effect in Palestine on April 1, 2015, and Palestine has indicated its intent to pursue war crime charges; Palestinian Ambassador Riyad Mansour stated “[this] is a very

Statute and the ICC argue that an international court is vital to ensure that those who violate basic human rights are held accountable for their actions.<sup>76</sup> Those who oppose the Rome Statute and the ICC, led by the United States, fear that an international criminal court poses a threat to their nations' sovereignty.<sup>77</sup> They also fear the possibility that the court could ultimately lead to politically motivated prosecutions.<sup>78</sup> Although the support of the United States, a world leader, would help the ICC, the ICC nevertheless has taken strides to make heads of state accountable by indicating its willingness to enforce Article 27 of the Rome Statute and indict sitting heads of state for their alleged crimes.<sup>79</sup>

*E. Four Cases Seeking To Hold Sitting Heads of State Accountable for Human Rights Violations*

*1. The ICTY Indicts Slobodan Milošević*

Until the indictment of Slobodan Milošević, an international legal body had never indicted a sitting head of state.<sup>80</sup> In 1991, Milošević, then president of Serbia, invaded Croatia, and his forces are believed to have massacred over 200 Croatian hospital patients.<sup>81</sup> Additionally, when the Republic of Bosnia and Herzegovina voted for independence from Yugoslavia in 1992, Serbians responded violently, violating numerous humanitarian laws and allegedly carrying out multiple mass killings.<sup>82</sup>

In 1999, the ICTY indicted Milošević on four counts of crimes against humanity for deportation, murder, and persecutions on political, racial, and

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significant step . . . It is an option that we are seeking in order to seek justice for all the victims that have been killed by Israel, the occupying power." See *Palestinians Submit Documents to Join ICC*, N.Y. TIMES, Jan. 2, 2015, [http://www.nytimes.com/aponline/2015/01/02/world/middleeast/ap-un-united-nations-palestinians.html?\\_r=0](http://www.nytimes.com/aponline/2015/01/02/world/middleeast/ap-un-united-nations-palestinians.html?_r=0) (quoting Ambassador Mansour); *UN Chief Says Palestine Will Join Int'l Court on April 1*, *supra* (providing date Rome Treaty enters into force).

76. See Hans, *supra* note 57, at 401-02 (noting arguments from proponents of Rome Statute).

77. See *id.* at 402-03 (highlighting fears of those who opposed creation of ICC). The United States in particular is concerned by the ICC's potential to have jurisdiction over its citizens, even though it did not ratify the treaty. See *id.* at 402. The United States argues that the criminal tribunals, unlike the ICC, all rely on a state's approval of jurisdiction. See *id.*

78. See *id.* at 402-03 (discussing countries' hesitance of allowing trials of leaders in foreign forum). President George W. Bush worried that the ICC would be used to prosecute American soldiers stationed in various parts of the world. See *id.*

79. See *infra* Part II.E (describing four instances where ICC exercised authority over sitting heads of state).

80. See Brower & Brown, *supra* note 68, at 12 (recognizing Milošević's conviction as first time any sitting head of state indicted); see also Amanpour et al., *supra* note 3 (noting Milošević first sitting head of state charged with war crimes).

81. See Grosscup, *supra* note 38, at 358 (describing Croatian invasion by Serbian forces under Milošević). Milošević justified his invasion by claiming it was done to protect Serbians living in Croatia. See *id.*

82. See *id.* at 358-59. These acts were committed in areas that the United Nations already proclaimed as "safe areas." See *id.* at 359.

religious grounds.<sup>83</sup> His trial faced a high level of scrutiny, with Yugoslavia condemning the tribunal as an “international inquisitorial court used by the United States to obliterate enemies . . . [and] to destroy [Yugoslavia’s] sovereignty.”<sup>84</sup> Opponents also pointed to the prosecutor’s refusal to investigate claims that NATO was responsible for carrying out multiple attacks on civilian populations in Yugoslavia during the same time as Milošević’s alleged crimes occurred.<sup>85</sup> Unfortunately, Milošević died before the trial could be completed, angering both sides.<sup>86</sup>

## 2. ICC Issues Two Arrest Warrants for Omar Al-Bashir

In 2003, tensions between rebels and the Sudanese Government in Darfur, an area in what is now Southern Sudan, reached its peak.<sup>87</sup> In response, the Sudanese Government, led by President Omar Al-Bashir, enlisted the help of a group of nomadic Arab tribes, known as the Janjaweed—who, along with Sudanese military air forces—began systematically attacking African farmers in the Darfur region.<sup>88</sup> These actions led to the destruction of over 400 villages, killing an estimated 400,000 people and displacing another estimated 2.5 million.<sup>89</sup> In response, for the first time in its history, the ICC issued an arrest warrant for sitting head of state Al-Bashir, alleging there were reasonable grounds to believe Al-Bashir was responsible for war crimes and crimes of aggression.<sup>90</sup> Later, the ICC issued a second warrant, adding genocide to Al-

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83. See *Prosecutor v. Milošević*, Case No. IT-99-37, Indictment, ¶¶ 90-100 (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1999) (detailing Milošević’s charges for crimes against humanity).

84. See Amanpour et al., *supra* note 3 (describing Yugoslavian officials’ objection to ICTY). Yugoslavian officials also stated they would refuse to recognize the ICTY’s jurisdiction. See *id.* Some opponents even argue that the ICTY’s true purpose was to bolster the strength of NATO, pointing, as evidence, to the supposedly lenient treatment of officials deemed to possess intelligence important to the United States. See JOHN LAUGHLAND, *TRAVESTY: THE TRIAL OF SLOBODAN MILOŠEVIĆ AND THE CORRUPTION OF INTERNATIONAL JUSTICE* 2, 21 (2007) (describing ICTY’s website linking to NATO’s and treatment of Kosovo’s Prime Minister Ramush Haradinaj).

85. See LAUGHLAND, *supra* note 84, at 30 (describing actions of NATO and ICTY’s refusal to investigate NATO). Yugoslavia argued that President Clinton and then NATO supreme commander General Wesley Clark, should also be facing charges “for their criminal bombing” of Yugoslavia. Amanpour et al., *supra* note 3.

86. See Molly Moore & Daniel Williams, *Milošević Found Dead in Prison*, WASH. POST (Mar. 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/11/AR2006031100525.html>, archived at <http://perma.cc/37ZL-9AEU> (describing reactions to Milošević’s sudden death). Many people expressed frustration that Milošević’s death meant he would never be held legally accountable for his crimes. See *id.* Supporters of Milošević, in contrast, accused the ICTY of being responsible for his death, going as far as to claim that “[i]n The Hague, Serbs are not treated like human beings.” *Id.*

87. See Buzzard, *supra* note 28, at 905-06 (describing situation in Darfur).

88. See *Genocide in Darfur*, UNITED HUM. RTS. COUNCIL, <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm> (last visited Mar. 18, 2015), archived at <http://perma.cc/Y438-VFQE> (outlining acts committed by Janjaweed). Janjaweed means “devils on horseback” in Arabic. See *id.*

89. See *id.* (detailing results of Janjaweed and Sudanese Government actions).

90. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest, 7-8 (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>, archived at <http://perma.cc/7387-YYML> (noting alleged crimes of Omar Al-Bashir); see also Rome Statute, *supra* note 34, at art. 7(1)(a-b,d), 8(2)(e)(i,v) (defining

Bashir's list of crimes.<sup>91</sup>

The Sudanese Government vehemently opposed the warrants' issuance, claiming they amounted to "an attempt at regime change."<sup>92</sup> Proponents, on the other hand, praised the move, stating it would help victims of the regime living in refugee camps by making them feel less helpless.<sup>93</sup> Unfortunately, because the court does not have a police force or military, it relies on countries that recognize the court's jurisdiction to arrest Al-Bashir if he enters their country.<sup>94</sup> To date, Al-Bashir continues to serve as the President of Sudan and has not faced arrest.<sup>95</sup>

### 3. *The Trial and Conviction of Charles Taylor*

On June 4, 2003, the ICC indicted Charles Taylor for war crimes in connection to his actions in Sierra Leone.<sup>96</sup> Shortly thereafter, Taylor went into exile in Nigeria and remained there until his arrest on March 29, 2006.<sup>97</sup> The SCLC charged Taylor with eleven counts of crimes against humanity for assisting and encouraging rebel groups in Sierra Leone to carry out those

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crimes Al-Bashir charged with).

91. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest, 8 (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>, archived at <http://perma.cc/892H-582G> (alleging Al-Bashir's responsibility for genocide of Fur, Masalit, and Zaghawa ethnic groups in Sudan); see also Rome Statute, *supra* note 34, at art. 6 (defining genocide as committing acts with intent to destroy national, ethnic, racial, or religious groups).

92. See Marlise Simons & Neil MacFarquhar, *Court Issues Arrest Warrant for Sudan's Leader*, N.Y. TIMES (Mar. 4, 2009), <http://www.nytimes.com/2009/03/05/world/africa/05court.html?ref=omarhassanalbashir> (describing objection of Sudan's ambassador to United Nations of first arrest warrant). This argument is similar to the concern of the United States and other opponents of the Rome Statute who believe the agreement may lead to politically motivated trials. See LAUGLAND, *supra* note 84, at 5 (citing trials including Slobodan Milošević's trial as "inherently political"); Hans, *supra* note 57, at 401-03 (discussing fears of political trials).

93. See Simons & MacFarquhar, *supra* note 92 (describing praise of warrant by human rights groups).

94. See *id.* (noting ICC's lack of warrant enforcement mechanisms); Marlise Simons, *International Court Adds Genocide to Charges Against Sudan Leader*, N.Y. TIMES (July 12, 2010), [http://www.nytimes.com/2010/07/13/world/africa/13hague.html?ref=omarhassanalbashir&\\_r=0](http://www.nytimes.com/2010/07/13/world/africa/13hague.html?ref=omarhassanalbashir&_r=0) (noting countries recognize ICC warning Al-Bashir will arrest him upon entering their country). For this reason, Al-Bashir has avoided traveling to many areas of the world, only traveling to countries still willing to meet with him. See *id.*

95. See Laessing & Abdelaziz, *supra* note 8 (explaining Al-Bashir's travels to other countries despite ICC arrest warrants); see also Mohamed Osman, *Sudan's President Omar Al-Bashir Wins Re-Election with 94 Percent of Vote*, HUFFINGTON POST: THE WORLD POST (June 27, 2015, 5:59 AM), [http://www.huffingtonpost.com/2015/04/27/sudan-president-al-bashir-re-election\\_n\\_7151202.html](http://www.huffingtonpost.com/2015/04/27/sudan-president-al-bashir-re-election_n_7151202.html), archived at <http://perma.cc/4MGJ-UB9D> (highlighting Al-Bashir's recent re-election).

96. See Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶¶ 9-10 (Special Ct. for Sierra Leone May 30, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>, archived at <http://perma.cc/LR3A-XTQJ> (noting date of indictment and warrant unsealed). At the time, Taylor was the sitting President of Liberia. See *id.* (acknowledging Taylor stepped down from presidency after issuance of indictment and warrant).

97. See *id.* (referring to Taylor's arrest); Heidi M. Spalholz, Note, *Saddam Hussein and the IST on Trial: The Case for the ICC*, 13 BUFF. HUM. RTS. L. REV. 255, 269 (2007) (describing Taylor's arrest and transfer to Special Court for Sierra Leone).

crimes.<sup>98</sup> Taylor's defense argued that although the acts in question took place, Taylor did not participate in the war in Sierra Leone.<sup>99</sup> During trial, Taylor's defense also argued that the trial was politically motivated, claiming the prosecution of Taylor was "selective and vindictive in nature."<sup>100</sup> Despite Taylor's concerns regarding the motivation for his arrest, he was convicted of all counts on April 26, 2012.<sup>101</sup> Taylor subsequently appealed his decision and lost.<sup>102</sup> He is currently serving a fifty-year sentence for his crimes, making him both the first head of state to be convicted since the Nuremberg trials and the first leader indicted and convicted while serving as the sitting head of state.<sup>103</sup>

#### 4. *The Difficulty of Obtaining Evidence and the Dismissal of Charges Against Uhuru Muigai Kenyatta*

The trial of Uhuru Muigai Kenyatta, currently President of Kenya, further eroded the theory of head of state immunity: while all three heads of state mentioned previously were sitting heads of state at the time of their indictments, Kenyatta was the first to be on trial while serving as president of his country.<sup>104</sup> Kenyatta was accused of crimes against humanity as an indirect cop perpetrator, responsible for acts including murder, deportation, rape, and other inhumane acts.<sup>105</sup> Kenyatta's trial faced many obstacles, including the

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98. See *Taylor*, Case No. SCSL-03-01-T, ¶¶ 12-13. Specifically, Taylor was charged with: murder; rape; sexual slavery; other inhumane acts, and enslavement under Article 2 of the Rome Statute; terrorism; violence to life, health, and physical or mental well-being of persons, in particular murder; outrages upon personal dignity; violence to life, health, and physical or mental well-being of persons, in particular cruel treatment and pillage under Article 3 Common to the Geneva Conventions; and conscripting or enlisting child soldiers under Article 4 of the Rome Statute. See *id.* ¶ 12.

99. See *id.* ¶¶ 15-17 (stating defense's argument). Taylor's defense argued that he did not have the financial capabilities or motivation for involvement in the war in Sierra Leone, and he instead used diplomatic efforts in an attempt to foster peace in the country. See *id.* ¶17.

100. See *id.* ¶ 73 (describing defense's belief in political motivations behind trial). Taylor's defense argued that although evidence existed of other African leaders, such as Muammar al-Gaddafi, assisting rebels in Sierra Leone, Taylor is the only one who was indicted. See *id.* The Court rejected Taylor's claim, stating the defense failed to establish the two prongs of the test for determining selective prosecution: that there was an unlawful or improper motivation for the prosecution and that other "similarly situated persons were not prosecuted." See *id.* ¶¶ 79-84. Thus, the Court dismissed Taylor's argument. See *id.* ¶ 83.

101. See *id.* ¶ 6994 (providing court's disposition); *Taylor Timeline*, *supra* note 2 (noting date of conviction).

102. See *Charles Taylor Prosecutors Urge Court To Reject War Crimes Conviction Appeal*, *GUARDIAN* (Jan. 22, 2013), <http://www.theguardian.com/world/2013/jan/22/charles-taylor-war-crimes>, archived at <http://perma.cc/UJ6J-DRFP> (describing prosecution's request of denial); Chris Morris, *Charles Taylor War Crimes Convictions Upheld*, *BBC NEWS* (Sept. 26, 2013), <http://www.bbc.com/news/world-africa-24279323>, archived at <http://perma.cc/6XBM-UH6B> (noting court's rejection of Taylor's appeal).

103. See *Brumfield*, *supra* note 3 (detailing significance of Taylor's conviction); see also *supra* notes 81 & 90 and accompanying text (stating to date, Milošević and Al-Bashir have not been convicted).

104. See Nicholas Kulish & Marlise Simons, *Setbacks Rise in Prosecuting the President of Kenya*, *N.Y. TIMES* (July 19, 2013), <http://www.nytimes.com/2013/07/20/world/africa/dwindling-witness-list-threatens-case-against-kenyan-president.html?ref=omarhassanalbashir> (referencing Kenyatta as "sitting president").

105. See *Prosecutor v. Muthaura*, Case No. ICC-01/09-02/11, Decision on Confirmation of Charges, ¶¶ 428-30 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>, archived at <http://perma.cc/Q7CJ->

key witnesses' refusal to testify, causing the prosecution to seek a delay.<sup>106</sup> The African Union spoke out against the case, stating the ICC does not have the authority to charge sitting heads of state like Kenyatta.<sup>107</sup> The ICC dropped charges against Kenyatta in January 2015 due to lack of evidence because of failed efforts in obtaining important pieces of evidence, such as bank statements from the Kenyan government.<sup>108</sup>

### III. ANALYSIS

#### A. Adopting the Normative Hierarchy Theory Should Be Encouraged

Sovereigns should be encouraged to adopt a less constricting form of head of state immunity in place of absolute immunity.<sup>109</sup> International law has long respected the immunity of sovereigns, extending immunity for heads of state and allowing them latitude to decide many issues that affect heads of state directly without the interference of other sovereigns.<sup>110</sup> Although proponents of absolute immunity fear that a lower standard could prevent leaders from effectively leading their country, their authority as leaders allows for crimes

<sup>9</sup>GKC (confirming charges for Kenyatta).

<sup>106</sup>. See Faith Karimi, *ICC Prosecutor: Evidence Insufficient To Try Kenyan President Uhuru Kenyatta*, CNN (Dec. 20, 2013), <http://www.cnn.com/2013/12/20/world/africa/kenya-president-icc/>, archived at <http://perma.cc/SX38-8B7H> (outlining case setbacks).

<sup>107</sup>. See Aaron Maasho & Edmund Blair *African Union: ICC Should Not Prosecute Sitting Heads of State*, HUFFINGTON POST: THE WORLD POST (Jan. 23, 2014, 6:58 PM), [http://www.huffingtonpost.com/2013/10/12/african-union-icc\\_n\\_4088415.html](http://www.huffingtonpost.com/2013/10/12/african-union-icc_n_4088415.html), archived at <http://perma.cc/KZ2W-TBXG> (stating African Union's objection to Kenyatta trial). Africa has grown increasingly frustrated by the ICC due to the fact that everyone the ICC charged to date derived from an African nation. See *id.*; see also *Situations and Cases*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited May 30, 2015), archived at <http://perma.cc/9QQ9-5F7T> (listing nine countries investigated by ICC, all African).

<sup>108</sup>. See Mike Pflanz, *Uhuru Kenyatta's ICC Prosecution Close To Collapse as Lawyers Demand Acquittal*, TELEGRAPH (Oct. 8, 2014, 4:38 PM), <http://www.telegraph.co.uk/news/worldnews/africaandindian-ocean/kenya/11149256/Uhuru-Kenyatta-ICC-prosecution-close-to-collapse-as-lawyers-demand-acquittal.html> (expounding on Kenya's obstruction of prosecution); see also Faith Karimi & Lillian Leposo, *ICC Withdraws Charges Against Kenyan President Uhuru Kenyatta*, CNN (Dec. 5, 2014), <http://www.cnn.com/2014/12/05/world/africa/kenya-president-charges-dropped>, archived at <http://perma.cc/FPV4-VFPZ>; *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC NEWS, (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30347019?print=true>, archived at <http://perma.cc/VV7K-2JYD> (discussing dismissal of all charges). A lawyer representing the alleged victims of Kenyatta noted the victims' disappointment regarding the outcome, highlighting one of the primary difficulties prosecutors face in charging sitting heads of state. See *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, *supra*. He recognized there was a "well-organised and systematic effort to undermine the ICC justice process and much of the blame for that can be laid with President Kenyatta's government." *Id.*

<sup>109</sup>. See *supra* Part II.B.3 (summarizing normative hierarchy theory of immunity); *infra* Part III.A (arguing for greater accountability of sitting heads of state).

<sup>110</sup>. See *supra* Part II.A.1 (discussing sovereign immunity); see also *Schooner Exch. v. McFaddon*, 11 U.S. 116, 136-37 (1812) (opining importance of sovereigns practicing exclusive jurisdiction "within its own territory"); Caplan, *supra* note 50, at 745-46 (discussing *Schooner* as example illustrating accepted international principles).



whose potential damage is far greater than those of a regular citizen.<sup>111</sup> Opponents of the absolute immunity theory, many of whom do not support the elimination of all forms of immunity, have the stronger argument; it is possible to still protect a state's sovereignty without giving leaders free reign to act with impunity.<sup>112</sup> While the ICC and many sovereigns have moved away from absolute immunity for heads of state, it would be beneficial to society for all countries to follow suit.<sup>113</sup>

While restrictive immunity theory allows courts to charge heads of state for certain types of crimes, it is unclear whether war crimes and crimes against humanity abrogate immunity under this theory.<sup>114</sup> Proponents of restrictive immunity argue that the international community has begun to view human rights violations as private acts and not protected by immunity, but others are not as certain.<sup>115</sup> This failure of nations to reach a consensus on which crimes should abrogate immunity illustrates why sovereigns should move toward adopting the normative hierarchy theory.<sup>116</sup>

Although normative hierarchy theory is not a perfect solution, it nevertheless seems to offer the most protection to citizens of sovereigns whose heads of state commit human rights violations.<sup>117</sup> Focusing on *jus cogens* norms bridges the gap between proponents of absolute immunity theory and restrictive immunity theory; it eases fears about frivolous lawsuits by ensuring only acts universally condemned are triable and human rights violations are among triable acts without completely disregarding the concept of head of state immunity.<sup>118</sup> While a shift toward normative hierarchy theory necessitates the creation of procedural rules and thus risks sovereigns disagreeing on what constitutes a *jus cogens* norm, a shift will serve to help bridge gaps between absolute and restrictive immunity theories, creating a path of lesser resistance

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111. See *supra* notes 40-41 and accompanying text (detailing proponents' arguments for absolute immunity). For example, under the absolute immunity theory, a leader could not be prosecuted for genocide, despite agreement by the international community that it is an illegal act that should be prevented; this is because absolute immunity does not distinguish between civil and criminal acts. See *supra* note 43 and accompanying text (recognizing failure to differentiate between civil and criminal acts as drawback of absolute immunity); see also Convention on the Prevention and Punishment of the Crime of Genocide, pmbl., Dec. 9, 1948, 78 U.N.T.S. 277 (classifying genocide as international crime).

112. See *supra* notes 42-43 and accompanying text (describing drawbacks of absolute immunity theory).

113. See *supra* note 44 and accompanying text (noting movement away from absolute immunity theory); *supra* note 73 and accompanying text (showing ICC's abolishment of all forms of head of state immunity).

114. See *supra* notes 45-46 and accompanying text (detailing restrictive immunity's differentiation of private and commercial acts); *supra* note 50 and accompanying text (noting concern regarding where line between immune and non-immune acts lies).

115. See *supra* notes 49-50 and accompanying text (questioning whether heads of state are immune for human rights violations under restrictive immunity theory).

116. See *supra* Part II.B.2 (explaining restrictive immunity and difficulty of defining acts covered).

117. See *supra* notes 51-52 and accompanying text (describing shift to focus on *jus cogens* norms).

118. See *supra* Parts II.B.1-2 (discussing absolute and restrictive immunity theories and their reception by international community).

for nations looking to cooperate with global trends.<sup>119</sup>

*B. The ICC and International Tribunals Should Continue Prosecuting Sitting Heads of State but Should Proceed with Caution*

While the ICC and international tribunals should exercise caution in their decisions to indict sitting heads of state, they should continue to hold heads of state accountable to ensure the safety of individuals worldwide.<sup>120</sup> Many groups expressed concerns that prosecuting sitting heads of state presents numerous sovereignty and political problems.<sup>121</sup> The United States in particular expressed concern that politically motivated trials could occur, using this argument to refuse to ratify the Rome Statute.<sup>122</sup> Charles Taylor's lawyers offered a similar argument during his trial, describing his prosecution as politically motivated and vindictive.<sup>123</sup> Recently, the African Union spoke out against the ICC, arguing that the court has focused exclusively on African heads of state, ignoring heads of state from other continents.<sup>124</sup>

Although the ICC should address concerns surrounding seemingly selective prosecutorial procedure, it should nonetheless continue to hold those who commit crimes detailed in the Rome Statute accountable, even if they are sitting heads of state.<sup>125</sup> In the ten years since its creation, the ICC only investigated situations of human rights violations in nine countries.<sup>126</sup> Of those, only two of the twenty-two cases related to sitting heads of state.<sup>127</sup>

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119. See *supra* note 54 and accompanying text (mentioning need for procedural rules to implement normative hierarchy theory). While some may argue it is difficult to determine what crimes violate *jus cogens* norms, courts have shown it is possible to review international treaties, general practice of nations, the works of jurists, and judicial decisions to determine whether an act is universally condemned. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (noting relevant sources for determining universal agreement). In *Filartiga*, the Second Circuit looked at various sources to determine if torture was universally condemned. See *id.* Furthermore, trials such as that of General Pinochet show that sovereigns have the ability to carefully examine whether immunity exists on a case-by-case basis to ensure the fair treatment of heads of state. See *supra* Part II.C (reviewing trial of General Augusto Pinochet).

120. See *infra* Part III.B (arguing for continued ICC involvement despite concerns).

121. See generally *supra* notes 77-78, 84-85, 92, 100, 107 and accompanying text (detailing arguments of opponents of ICC jurisdiction and opponents of prosecuting sitting heads of state).

122. See *supra* note 78 and accompanying text. Shortly after the Rome Statute went into effect, some congressmen went as far as to pressure the Security Council to give assurances that it would write into future peacekeeping resolutions a statement that Americans who take part in such resolutions were absolutely immune from the ICC's jurisdiction. See Crossette, *supra* note 75 (discussing opinions of Congress after Rome Statute went into effect). Furthermore, Pierre-Richard Prosper, United States Ambassador for War Crimes at the time, stated that the United States had "no obligation to the court." *Id.*

123. See *supra* note 100 and accompanying text (addressing opinions of Taylor's lawyers).

124. See *supra* note 107 (noting African Union's disappointment with ICC).

125. See *supra* Part II.D (noting concerns of those in opposition of ICC).

126. See *Situations and Cases, supra* note 107 (listing situations ICC investigated).

127. See *supra* Parts II.E.2, II.E.4 (discussing cases of Omar Al-Bashir and Uhuru Muigai Kenyatta). Only four heads of state have been indicted by any international court; tribunals tried the cases involving Milošević and Taylor. See *supra* Part II.E (examining cases of Milošević, Al-Bashir, Taylor, and Kenyatta). Of these four men, only Taylor faced conviction. See *supra* Part II.E.3 (summarizing trial of Charles Taylor).

These cases are thoroughly researched and investigated prior to indictments; the careful procedural measures provide time for the court to ensure that the trial is not frivolous and that the complaint is not only a politically motivated attack.<sup>128</sup>

Finally, the risk of politically motivated trials does not outweigh the need for an impartial court to try cases involving heads of state.<sup>129</sup> A recurring argument of countries that fear the loss of sovereignty is that they are already capable of effectively trying cases within their borders.<sup>130</sup> When, however, crimes involve heads of state, particularly sitting heads of state, it seems unlikely that a country will ever be able to effectively try its own leader.<sup>131</sup> Due to the impediments a nation faces when trying its own head of state, independent courts, such as the ICC and international tribunals, are necessary to ensure heads of state are held accountable for actions taken against their own citizens.<sup>132</sup> While this leaves open the risk of political prosecutions, the care shown by the ICC and international tribunals in investigating claims sufficiently lessens this risk.<sup>133</sup> Thus, although the ICC must continue to approach cases against sitting heads of state cautiously, and prosecutors may face significant evidentiary hurdles, the trend of charging sitting heads of state should be encouraged.<sup>134</sup>

#### IV. CONCLUSION

It is likely that the concept of trying a sitting head of state for war crimes will always remain controversial. Countries value their sovereignty and many see the prosecution of heads of state as a violation of that right, but in the last decade, the indictments of leaders like Pinochet, Milošević, Al-Bashir, Taylor,

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128. See *supra* Part I.E.2 (noting caution used in issuing arrest warrants). Although there was ample evidence that President Omar Al-Bashir committed crimes in the Darfur region of Sudan, the court initially rejected the prosecutor's request to include genocide in the list of crimes in the first arrest warrant. See *supra* note 90 and accompanying text (discussing first arrest warrant issued to President Omar Al-Bashir). The ICC eventually added genocide to the charges in the second arrest warrant, but only after the prosecution could produce enough evidence to support the claim. See *supra* note 91 and accompanying text (detailing second arrest warrant).

129. See *supra* note 77 and accompanying text (noting fears of political trials); *supra* Part I.E (demonstrating various difficulties in trying heads of state).

130. See *supra* note 77 and accompanying text (emphasizing fears of those who support utter sovereignty).

131. See *supra* note 95 (demonstrating Omar Al-Bashir's lack of arrest and continued position as President). Despite the fact that the ICC issued two arrest warrants, Omar Al-Bashir continues to serve as president of Sudan, proving the judicial system in Sudan will not take action against him. See *supra* note 95.

132. See, e.g., *supra* note 62 and accompanying text (explaining Pinochet's attempt to grant himself immunity prior to leaving office); *supra* note 71 (stating aim of ICC as preventing serious crimes going unpunished); *supra* note 95 (highlighting unwillingness of Sudan in trying Al-Bashir).

133. See *supra* note 128 and accompanying text (discussing ICC's refusal to add genocide to first Al-Bashir warrant due to lack of evidence).

134. See *supra* notes 106 & 108 and accompanying text (detailing pitfalls of Kenyatta case). Kenyatta's evidentiary hurdles ultimately doomed his trials. *Id.*

and Kenyatta suggest that countries are slowly becoming more willing to hold leaders accountable for their actions while in office. The creation of the ICC has aided in this pursuit. While there will always be risks associated with trying sitting heads of state, protecting the rights of members of society outweighs these risks. Despite the dismissal of charges against President Kenyatta due to lack of evidence, his indictment indicates that sitting heads of state are no longer immune from prosecution. One can only hope that, eventually, the ICC will gain enough authority to enforce human rights at all levels of government. Only then will the world progress toward establishing greater justice.

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