CERTAIN CRIMINAL PROCEEDINGS IN FRANCE (REPUBLIC OF CONGO V. FRANCE) AND HEAD OF STATE IMMUNITY: HOW IMPENETRABLE SHOULD THE IMMUNITY VEIL REMAIN?

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"The history of the world is the world's court of justice."

— Freidrich von Schiller

I. Introduction

The potential scope of a head of state's immunity has become a controversial issue in an era in which war crimes, crimes against humanity, genocide, apartheid, aircraft seizure, hostage-taking, and torture have become the focus of increased media coverage. Although such acts are increasingly viewed as crimes permitting any country to assert universal jurisdiction over the perpetrator,[1] there is a tension between the international community's desire to publicly condemn such acts by holding the perpetrator responsible and such traditional international law concepts as state sovereign immunity. This Note contends that the commencement of investigations for international crimes during a head of state's tenure is a positive development in international law that promotes transparency of governmental action. Such investigations also reflect an important transition in international law from anachronistic conceptions of inter-state relations and immunity to a valuation of human rights norms.

This Note will assess the current state of international law regarding head of state immunity. It will consider the advantages and disadvantages of differing immunity theories such as absolute, restrictive and the normative hierarchy theory of immunity in the particular context of international crimes. It will examine the increasing role of national authorities in human rights litigation. Finally, it will propose that the transparency created by state investigations is a positive development in international law that benefits the international community, both on a national level, by alerting a domestic population to its leaders' acts, and an international level, by raising awareness of human rights litigants' claims.

Traditionally, international law identified a head of state with the state itself.[2] This meant that each state, through its courts, declined to exercise its territorial jurisdiction over a person holding a chief executive position.[3] Under the original view of head of state immunity, heads of state were not criminally accountable for their actions because one sovereign could not be subject to another sovereign's jurisdiction, and because the effective functioning of interstate relations required transborder movement.[4] Eventually, the identification of the state with its chief executive

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[1] *See* Ian Brownlie, Principles of Public International Law 308 (5th ed. 1998); *see also* Hazel Fox, The Law of State Immunity 435 (2002).

[2] Jerrold L. Mallory, Note, *Resolving the Confusion Over Head-of-State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169, 170 (1986).

[3] *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, 743 & n.17 (2003).

[4] Brownlie, *supra* note 1, at 327-28; *see, e.g.,* The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812). Viewed as the source of American foreign sovereign immunity jurisprudence, Justice Marshall determined that state immunity is based

faded, in part because in the nineteenth and twentieth centuries many states increasingly participated in commercial affairs.[5] Beginning with the postwar era, the doctrine of head of state immunity underwent a transformation and came to resemble more closely the doctrine of diplomatic immunity.[6] Absolute immunity became restrictive immunity. International lawyers distinguished between acts *jure imperii*, official acts of state, to which they continued to afford immunity, and acts *jure gestionis*, commercial or private acts, to which they sometimes did not.[7] This transformation has led to controversial assertions of both criminal and civil jurisdiction over heads of state such as Augosto Pinochet,[8] Slobodan Milosevic,[9] Abdulaye Yerodia Ndombasi,[10] Ariel Sharon,[11] Jiang Zemin[12] and Robert Gabriel Mugabe,[13] with varying results.

An incumbent head of state should continue to enjoy absolute immunity for crimes allegedly committed. No incumbent head of state may be touched for any reason; in office, heads of state are entitled to absolute immunity. The purpose of this blanket immunity during a head of state's tenure ensures the fulfillment of official duties while in office. This form of absolute immunity also removes the danger of a chief executive being drawn into foreign courts wherever he may travel while in office. Finally, it offers a bright-line rule for contemporary international law, in which the distinction between official and private acts is frequently unclear. Once the head of state leaves office, however, he should no longer be entitled to such impenetrable immunity that would have extended to both official and private acts. Rather, he should be entitled to a form of restrictive immunity, whereby he would have no immunity for any act

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upon international comity among nations. *Id.* at 137. Justice Marshall also drew a distinction between an armed public vessel (such as the *Schooner Exchange*, which was entitled to immunity) and a private merchant vessel (which would not be entitled to immunity), planting the seeds for a restrictive theory of foreign sovereign immunity. *Id.* at 142-45.

[5] *See* Kerry Creque O'Neill, Note, *A New Customary Law of Head of State Immunity?: Hirohito and Pinochet*, 38 STAN. J. INT'L L. 289, 292 (2002).

[6] *See* ANTONIO CASSESE, INTERNATIONAL LAW 114-117 (2d ed. 2005).

[7] O'Neill, *supra* note 5, at 292; *see also* Caplan, *supra* note 3, at 758.

[8] Regina v. Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (U.K.) [hereinafter *Ex Parte* Pinochet No. 3].

[9] Prosecutor v. Milosevic, Case No. IT-01-51-I, Indictment (Nov. 22, 2001), *available at* http://www.un.org/icty/indictment/english/mil-ii011122e.htm.

[10] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14, 2002) [hereinafter Arrest Warrant].

[11] H.S.A. v. S.A., Decision Related to the Indictment of Ariel Sharon, Amos Yaron and Others, 42 I.L.M. 596 (Feb. 12, 2003) [hereinafter Indictment of Ariel Sharon].

[12] Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004).

[13] Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

that was not an official act of state.[14] Thus, any state, under the principal of universal jurisdiction, should be able to hold a head of state accountable for international crimes upon completion of his tenure in office. A head of state should not be able to authorize such heinous crimes as genocide, torture, or crimes against humanity and remain forever shielded by an impenetrable veil of immunity.

This proposed theory of absolute immunity for an incumbent head of state but restrictive immunity for a former head of state will be analyzed and defended through an examination of *Certain Criminal Proceedings in France (Republic of Congo v. France)*,[15] a case presently pending before the International Court of Justice (ICJ). Congo brought the case based on France's assertion of universal jurisdiction over several Congolese officials.[16] In 2001, a French investigating magistrate filed suit against the Republic of Congo in a French domestic court asserting universal jurisdiction for "crimes against humanity and torture allegedly committed in the Congo against individuals having Congolese nationality,"[17] expressly naming as responsible Denis Sassou Nguesso, President of the Republic of the Congo, General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration, General Norbert Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard.[18] In 2002, an investigating judge of the Meaux Tribunal de Grande Instance initiated an investigation against those persons named in the complaint, with a focus on President Sassou Nguesso.[19]

In response to the investigation, the Congo instituted proceedings against France on two grounds: first, that a state may not, "in breach of the principle of sovereign equality among all Members of the United Nations laid down in Article 2, paragraph 1 . . . exercise its authority on another state's territory[20] by unilaterally attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign state for crimes allegedly committed"[21] as official acts of state; and second, that in issuing

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[14] Additional questions that also must be addressed but which lie beyond the scope of this Note include: What acts legitimately fall within the *jure imperii* of a state? Is torture ever an official act of state, particularly when performed in an effort to secure allegedly critical national intelligence?

[15] Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. 102 (Provisional Measure Order of June 17), *available at* http://icj-cij.org/common/print.php?pr=65&p1=3&p2=1&case=129&p3=6 [hereinafter Certain Criminal Proceedings in France].

[16] *Id.* at 105.

[17] *Id.* at 104.

[18] *Id*.

[19] *Id*.

[20] *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J., (ser. A) No. 10 (Sept. 7), 18.

[21] Certain Criminal Proceedings in France, *supra* note 15, at 103.

a warrant for the arrest of the President of the Republic of the Congo, France violated the immunity of a foreign head of state.[22]

For purposes of analysis, this Note assumes that universal jurisdiction may properly be asserted based on the allegations, and that, in this particular case, France successfully established universal jurisdiction under the first issue. Part II examines the significance and evolution of the doctrine of head of state immunity and clarifies its relationship to sovereign and diplomatic immunity. It also discusses the different theories of immunity for a head of state, including, respectively, absolute, restrictive, and normative hierarchy theory.[23] Finally, Part II examines postwar developments including universal jurisdiction, the principle of individual accountability for serious human rights atrocities, and recent state practice regarding the immunity of heads of state. Part III sets forth the facts and the respective parties' allegations in *Certain Criminal Proceedings in France*. It closely examines the majority and separate opinions issued by the ICJ in response to the Congo's request for provisional measures. Through an analysis of the opinions, it critiques the Congo's argument that provisional measures are necessary to avoid a risk of irreparable prejudice to the Congelese sitting head of state. Part IV considers the significance of the ICJ's denial of provisional measures for national authorities. It argues that the ICJ's denial of provisional measures to the Congo illustrates an important shift that has been occurring in international law[24]—from upholding a head of state's immunity because the executive is one and the same as the state, to promoting governmental transparency, remedies for human rights violations, and individual accountability. Further, it considers the challenges inherent in gathering evidence from a foreign state and in applying such evidence successfully against a head of state. Finally, Part V concludes, offering a proposed theory of head of state immunity and reflecting on the role of the international community itself – through international, national, or hybrid bodies – in preventing the commission of international crimes.

Throughout, competing policies must be kept in mind. If criminal proceedings were brought against a head of state for acts that purportedly constituted official acts of state, the proceedings likely would require extensive investigation of state policies and actions. Such investigations might promote transparency of governmental actions, not only by warn-

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[22] *Id.*

[23] Although this Note discusses the normative hierarchy theory as though it is a third theory of head of state immunity, it can be understood as a variation of the restrictive theory of immunity.

[24] Although this Note posits that the denial of provisional measures in this decision illustrates an ongoing shift in international law, the author recognizes that the denial of provisional measures may be for a number of reasons that are beyond the scope of this Note. The author also recognizes that this shift in international law (inferred from the denial of provisional measures) did not begin with this particular case.

ing a country's populace to the possible illegal acts of its leaders, but also by raising awareness of national or international crimes on a global stage. On the other hand, if immunity is upheld, those individuals who instituted criminal proceedings may never have an effective opportunity to vindicate their rights in a judicial forum.

These issues raise several questions which will be considered in this Note: What crimes do or should trump a head of state's immunity? What is the best forum in which to try a head of state for international crimes? Although international tribunals may provide a more impartial forum and set powerful international precedent, concerns arise regarding their available resources and efficiency. Additionally, not all countries recognize the legitimacy of such tribunals.[25] It is questionable how strong a precedent these tribunals can establish when their authority is often contested. Finally, should there be an international law that permits the capture of an incumbent head of state wherever he may travel in the course of his duties? This Note will address these issues and questions in the context of the *Certain Criminal Proceedings in France*.[26]

II. The Evolution of Head of State Immunity

A. *Absolute, Restrictive, and Normative Hierarchy Theories of Immunity*

Historically, heads of state were not subject to jurisdiction in the courts of another state for their actions because of two fundamental concepts. The first is the theoretical identification of the sovereign with the sovereignty of the state according to the maxim, *par in parem non habet imperium*, which means "an equal has no power over an equal."[27] Because

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[25] *See* Laura A. Dickinson, Notes and Comments, *The Promise of Hybrid Courts*, 97 Am. J. Int'l L. 295, 301, 302 (2003) ("In the adjudication of serious violations of international humanitarian and human rights law, both purely domestic trials on the one hand and purely international processes on the other may face problems of perceived legitimacy. . . . [B]road acceptance of purely international processes may be difficult to establish."). In her article, Dickinson analyzes the emergence of hybrid domestic-international courts, which apply a blend of international and domestic law and have foreign judges working with domestic judges. *See generally id.* In acknowledging the advantages of such hybrid courts, including their ability to catalyze the establishment of rule of law institutions and to foster the development of human rights norms, Dickinson also recognizes several inherent problems. These include legitimacy (i.e. juridical decisions that are acceptable to various populations), capacity-building (i.e. a lack of human resources, specifically local populations, available to learn necessary juridical skills), and norm penetration (i.e. the development of substantive norms criminalizing mass atrocities and other crimes in transitional countries). *Id.*

[26] Certain Criminal Proceedings in France, *supra* note 15.

[27] Black's Law Dictionary 1673 (7th ed. 1999); *see also* Caplan, *supra* note 3, at 748.

states traditionally were regarded as judicially equal, one sovereign monarch could not be subject to the jurisdiction of another sovereign monarch.[28] The second concept is the comparatively minimal amount of transborder movement needed for interstate relations to function effectively.[29] For these reasons, government leaders understood for centuries that they could act in the name of their state largely as they wished. International law applied only to states. Because of an executive's identification with the state, which could not be hailed into a foreign court, state sovereignty effectively shielded an executive from individual responsibility as well. This theory, known as "absolute immunity," regarded immunity as a fundamental state right because of the principle of sovereign equality.[30]

Absolute immunity has been largely discarded by modern international law.[31] As the fictional identity between state and ruler faded,[32] particularly as states became participants in trade and commercial affairs,[33] the restrictive theory of immunity emerged. The restrictive theory evolved from an exception to the principle of state jurisdiction, "when the forum state suspends its right of adjudicatory jurisdiction as a practical courtesy to facilitate interstate relations."[34] A distinction arose between *jure imperii* (official acts of state subject to immunity) and *jure gestionis* (acts of a commercial or private nature not subject to immunity).[35] Restrictive immunity was justified by the belief that judicial review of a foreign state's commercial or private actions did not offend a state's dignity.[36]

In addition to the absolute and restrictive immunity theories, a new theory of head of state immunity recently has emerged. This theory, "normative hierarchy," has been animated by modern international human rights law and international criminal law and their emphasis on accountability for serious violations of international law.[37] Under this

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[28] *See* GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 173 (2005).

[29] *Id.* at 173; *see also* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 265 (2003) ("The second category is predicated on the notion that any activity of a Head of State or government, or diplomatic agent or senior member of cabinet, must be immune from jurisdiction. This is to avoid foreign States either infringing sovereign prerogatives of States or interfering with the official functions of a foreign State agent under the pretext of dealing with an exclusively private act.").

[30] Caplan, *supra* note 3, at 748.

[31] *Id.*

[32] *See id*.

[33] O'Neill, *supra* note 5, at 292.

[34] Caplan, *supra* note 3, at 748.

[35] Jodi Horowitz, Comment, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others *ex parte* Pinochet*: Universal Jurisdiction and Sovereign Immunity for* Jus Cogens *Violations*, 23 FORDHAM INT'L L.J. 489, 504 (1999).

[36] Caplan, *supra* note 3, at 758.

[37] *See id.* at 741-42.

theory, a state will lose its jurisdictional immunity if it violates peremptory international law norms,[38] known as *jus cogens*.[39] The idea is that a state's immunity ranks lower in the hierarchy of international law norms because it is not a *jus cogens* norm: it should therefore yield in order to vindicate a *jus cogens* norm.[40] Judge Al-Khasawneh, dissenting from the majority opinion in the *Arrest Warrant* case, described the normative hierarchy theory, stating: "[t]he effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore, when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail."[41]

Absolute immunity, restrictive immunity, and normative hierarchy immunity are three legal theories that aid in understanding a head of state's accountability for crimes. Each theory presents its advantages and disadvantages. For instance, human rights litigants must confront overwhelming barriers under the absolute immunity theory[42] because a head of state's immunity, traditionally, will apply interminably, even after the official leaves office.[43] However, those who support the absolutist view contend that it is wrong to allow the prosecution of heads of state for crimes enabled by a governmental regime when the state itself is immune under sovereign immunity.[44] They also claim that permitting such prosecution will disable the efficient functioning of states and their respective leaders because other nations will bring vengeful suits to disrupt a state's internal and external relations.[45] The defect with the first position is that it anachronistically views a head of state as embodying the state itself.

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[38] *Id.*

[39] MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-63 (4th ed. 2003) ("*Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis.").

[40] Caplan, *supra* note 3, at 742.

[41] Arrest Warrant (dissenting opinion of Judge Al-Khasawneh), *supra* note 10, at 98, *available at* http://www.icj-cij.org/docket/files/121/8140.pdf.

[42] Caplan, *supra* note 3, at 751.

[43] CASSESE, *supra* note 29, at 266 ("[Absolute immunity] does not cease at the end of the discharge of official functions by the State agent (the reason being that the act is legally attributed to the State, hence any legal liability for it may only be incurred by the State.").

[44] *See* Hari M. Osofsky, Note, *Foreign Sovereign Immunity from Severe Human Rights Violations: New Directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35, 40 (1998).

[45] O'Neill, *supra* note 5, at 292 (citing James Bone, *Republicans to Block War Crimes Treaty*, TIMES, Jan. 2, 2001, at 17; *Clinton Courts Trouble*, DAILY TELEGRAPH, Jan. 3, 2001, at 25; Kevin Whitelaw, *On a Matter of Justice*, U.S. NEWS & WORLD REP., July 10, 2000, at 33).

Thus, if the state itself has immunity, the ruler, as the physical embodiment of the state, also should. The problem with the second argument is that it is highly speculative. Additionally, it suggests a troubling view of international criminal law as a potential threat to world order while overlooking its possible benefits, including the promotion of transparency of government actions.[46]

Restrictive immunity presents the problem of where the line between public and private state conduct should be drawn.[47] Those who favor the restrictive view contend that the international legal community has begun to recognize individual accountability, regardless of a person's political position, for persons who commit serious crimes in violation of international law.[48] They also claim that "[a] human rights exception to immunity may be no more problematic than the commercial exception now broadly recognized at customary international law."[49] Although both views disagree over the extent of a ruler's immunity, both share a general consensus "that heads of state should enjoy at least some of the privileges of immunity,"[50] while recognizing the importance of providing a remedy for those who have suffered serious human rights violations.

The normative hierarchy theory, at first glance, appears to be the ideal of the three. It removes a formidable obstacle in the path of human rights victims seeking redress who, under the absolute theory and possibly under restrictive immunity, would be prevented from holding a head of state accountable.[51] Under this theory, once a head of state violates a *jus cogens* norm, he cannot shield himself from the courts through state immunity.

However, while presenting less of a challenge for human rights litigants, the normative hierarchy theory still raises problems. It requires shifting from a *jus cogens* prohibition of certain conduct to the creation of a procedural rule that will effectively compel enforcement of that prohibition in foreign national courts. Lord Hoffmann wrote in *Jones v. Saudi*

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[46] For an interesting discussion on the benefits of the U.S.'s criminal law system in the face of national security threats, *see generally* Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, FOREIGN AFF., May-June 2008, *available at* http://www.foreignaffairs.org/20080501facomment87302-p0/kenneth-roth/after-guantnamo.html.

[47] Caplan, *supra* note 3, at 758. A common example in international textbooks that demonstrates this problem is where a state purchases 10,000 boots for its army. Objectively, the purchase of boots from a company does not appear to be a sovereign act of state. However, if viewed from a subjective perspective, focusing on the actual purpose of the boots' purchase, the action appears to be a sovereign act of state – supplying its military.

[48] *See id*.

[49] Michael P. Davis, *Accountability and World Leadership: Impugning Sovereign Immunity,* 99 U. ILL. L. REV. 1357, 1372 (1999).

[50] *See* O'Neill, *supra* note 5, at 293.

[51] *See generally* Caplan, *supra* note 3.

Arabia, "[t]o produce a conflict with . . . immunity, it is therefore necessary to show that the [substantive *jus cogens* prohibition] has generated an ancillary procedural rule which, by way of exception to . . . immunity, entitles or perhaps requires states to assume . . . jurisdiction over other states in cases in which torture is alleged."[52] It is easy to say that when a *jus cogens* norm has been violated, the perpetrator should be held responsible. But to bring alleged perpetrators of international crimes to justice, states need laws or some type of judge-made legal regulation punishing those crimes, as well as legal provisions authorizing courts to prosecute and punish the perpetrators. Thus, establishing legislation that will mandate the implementation of such accountability and ensuring that, once written, those laws are enforced, is an entirely different challenge, particularly in countries that have political systems pervaded by layers of internal corruption.

There is no consensus on which of these views best reconciles the tensions between holding an individual accountable for international crimes and respecting the state's official authority vested in the figure of the head of state. Conventionally, however, there has been a movement away from an absolute theory of immunity, opening the door to a head of state's possible accountability for international crimes.

B. *Modern Understandings of Head of State Immunity: Why Does International Law Continue to Uphold the Doctrine?*

The shift away from absolute immunity has created a head of state doctrine that parallels the doctrine of diplomatic immunity both in theory and in practice. Diplomatic immunity provides a form of restrictive immunity to the official agents of a diplomatic staff.[53] The agent is "absolutely immune from criminal prosecution" and "civil suits except when the action relates to their private property or their private commercial activities outside the scope of their official functions."[54] Once the agent leaves office, the immunity ceases with respect to private acts under immunity *ratione personae*, or personal immunity, but continues for official acts.[55] The limited shield of immunity *ratione materiae*, or functional immunity, afforded to official acts derives from the belief that the "ambassador's actions are attributed to his government, rather than to

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[52] Jones v. Saudi Arabia, [2006] UKHL 26, at 22 (an appeal from Eng. & Wales) (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf.

[53] *See* Vienna Convention on Diplomatic Relations, art. 29-38, Apr. 18, 1961, 23 U.S.T. 3227, 3240-45, 500 U.N.T.S. 95, 110-18 [hereinafter Vienna Convention].

[54] Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651, 653-54 (2002).

[55] BROWNLIE, *supra* note 1, at 361; Vienna Convention, *supra* note 53, art. 39(2).

personal choice."[56] Because the right derives from national sovereignty and is not personal, the government may waive the right if, for example, a diplomat's actions violate his appropriate job responsibilities and duties.[57]

Customary international law's recognition of diplomats' privileges and immunities has "not been controversial, and [has] been almost universally respected in state practice."[58] This makes the codified law governing diplomatic immunity an appealing comparison for those seeking to define the expansiveness or limitations of head of state immunity.[59] However, while the parameters of diplomatic immunity are relatively certain and well-defined, those surrounding head of state immunity remain uncertain.[60] It "is often argued that the immunity protects the exercise of the functions of heads of state just like diplomatic immunity protects the exercise of diplomatic functions, [but] the scope of the rule exceeds" such rationale.[61]

Because heads of state have significantly more responsibility than diplomats, their immunity should be even greater than that afforded to diplomats.[62] As Arthur Watts stated, the head of state is "the representative *par excellence* of his State."[63] Additionally, the Legal Bureau of the Canadian Ministry of Foreign Affairs distinguished between diplomatic and executive responsibilities, stating:

> it might . . . be said that even greater respect is owed to the dignity of the visiting sovereign or Head of State, since his own diplomatic envoys in the host state are clearly inferior to him. Applying these principles to the visit of a Head of State, it is clear that the Government of Canada must, in accordance with international law and practice, afford to the Head of State and to his family and suite *at least* the privileges, immunity and inviolability provided for in the Vienna Convention on Diplomatic Relations.[64]

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[56] Tunks, *supra* note 54, at 293 (citing Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829, 838 (2000)).

[57] *See id*; *see also* O'Neill, *supra* note 5, at 654.

[58] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, ch. 6, subch. A, introductory note (1987).

[59] O'Neill, *supra* note 5, at 294.

[60] *See* ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW 178 (2008).

[61] *Id.*

[62] *See id.*

[63] *Id.*

[64] *Id.* at 178-79 (citing to Memorandum of 31 January 1981, reproduced in 10 CANADIAN YEARBOOK OF INTERNATIONAL LAW 324, 325 (1981)).

Along with this formal difference in status, a head of state's broader scope of protection may be justified by the executive's increased "exposure . . . to media attention and the related risk of frivolous claims."[65]

A final difference justifying a different scope of immunity for heads of state that is still reflected in recent decisions[66] is the "arguably somewhat archaic . . . relic of the personal sovereignty with which a head of state was once endowed" and the "remnants of the majestic dignity that once attached to kings and princes."[67] In *Marcos and Marcos v. Federal Department of Police*, the Swiss court acknowledged this rationale, stating "customary international law grants such privileges *ratione personae* to Heads of State as much to take account of their functions and *symbolic embodiment of sovereignty* as by reason of their *representative character* in inter-State relations."[68] Additionally, *Oppenheim's International Law* states that the maxim *par in parem non habet imperium* must be seen to underlie the rule,[69] suggesting that the scope of immunity is intertwined with the manifestation of the state in the person of the head of state. This anachronistic view of the purpose of head of state immunity is critiqued in Part III.F of this Note.

C. *Rise of Universal Jurisdiction and Weakening of Head of State Immunity*

The concept of a head of state being held individually accountable for international crimes dates back to the Nuremberg trials. Article 7 of the London Charter governing the International Military Tribunal for Nuremberg asserts that immunity will not be granted to heads of state and other officials for international crimes: "The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment."[70] Article 6 of the Tokyo Charter,[71] Article 7 of the International Criminal Tribunal for the former Yugoslavia

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[65] *Id.* at 179 (noting that the principle of inviolability and head of state immunity from criminal jurisdiction applies regardless of a head of state's official or private purpose of a visit in another state, whereas a diplomatic agent is only protected for official functions, not from the jurisdiction of states in whose territory he stays for purely private purposes).

[66] Both the concurring and dissenting opinions in *Certain Criminal Proceedings in France* argued this position, with Judge de Cara's dissent taking the more emphatic view.

[67] *See* VAN ALEBEEK, *supra* note 60, at 180.

[68] Marcos and Marcos v. Fed. Dep't of Police (1989, Switz. Fed. Tribunal) 102 I.L.R. 198 (emphasis added).

[69] *See* 1 ROBERT JENNINGS & ARTHUR WATTS, OPPPENHEIM'S INTERNATIONAL LAW 1090-91 (9th ed. 1993).

[70] Charter of the International Military Tribunal, *in* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 12 (International Military Tribunal, Nuremberg 1947).

(ICTY),[72] and Article 6 of the International Criminal Tribunal for Rwanda (ICTR)[73] all express the same principle of criminal responsibility for international crimes.

Following the devastating effects of World War II, many states have determined that certain crimes are so egregious and opposed to the fundamental interests of humanity that they are crimes of universal jurisdiction.[74] Under the universal principle, jurisdiction may be asserted "in any forum that obtains physical jurisdiction over the person of the perpetrator of certain offenses considered particularly heinous or harmful to humankind, such as genocide, war crimes, slavery, piracy, and the like."[75] Although customary international law requires the trial and punishment of those who commit certain international crimes, many states do not adhere to their responsibility to prosecute, even when they are parties to a governing treaty requiring them to do so.[76] Thus, most crimes of international law, if adjudicated, are held before national courts or ad hoc tribunals such as the ICTY and ICTR.[77]

Although such statutes as those of the ICTY and ICTR[78] explicitly state that a head of state lacks immunity for international crimes, there is no universal agreement on the degree of immunity that attaches to the status of head of state. There is no applicable standard that can be viewed as customary international law.[79] In addition, while these new tribunals have set important precedent for prosecuting international crimes in international tribunals, a negative implication of their existence is that individual states no longer view it as an obligation to prosecute crimes of universal jurisdiction in national courts.[80] Those states that assume this duty often decide questions of jurisdiction and immunity on the basis of treaties or statutes that defer to traditional conceptions of head of state immunity, in contrast to Nuremberg's broader assertions of individual accountability.[81] Finally, where international tribunals have

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[71] *See* Charter of the International Military Tribunal for the Far East, *reprinted in* HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 571-77 (1993).

[72] *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 505-08 (2d. ed. 1999).

[73] *See id.*

[74] *See* CASSESE, *supra* note 6, at 451-52.

[75] Adam Isaac Hasson, Note, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law*, 25 B.C. INT'L & COMP. L. REV. 125, 136 (2002).

[76] O'Neill, *supra* note 5, at 296.

[77] *Id.*

[78] It is important to note that the ICTY and ICTR Statutes can abrogate the traditional head of state immunity because those tribunals derive their authority from the Security Council acting under Chapter VII of the U.N. Charter.

[79] O'Neill, *supra* note 5, at 291.

[80] *Id.* at 297.

[81] *Id*. at 298.

attempted to assert jurisdiction over a head of state, it has often led to attacks on their legitimacy. For instance, the arrest and trial of Slobodan Milosevic strengthened the perceived effectiveness of the ICTY. However, such legitimacy was tainted by Milosevic's refusal to recognize the ICTY's jurisdiction, and the reality that the Yugoslav decision to arrest and extradite Milosevic was largely driven by a desire to obtain substantial U.S. and international aid.[82]

While courts around the world have not proved to be as willing to subject a general perpetrator of international crimes to their jurisdiction, they have increasingly become more willing to subject heads of state to their jurisdiction. In the assertion of such jurisdiction, recent state practice has drawn a distinction between former heads of state and current heads of state. Such state practice suggests that while a former head of state could potentially be held liable for crimes perpetrated during his tenure in either a national or international forum, there is little to no support for the proposition that a sitting head of state may be held responsible in such forums.

D. *Recent State Practice of Immunity for Former and Incumbent Heads of State*

The first significant case supporting the denial of head of state immunity for international crimes is that of former Chilean dictator Augusto Pinochet. After British authorities arrested Pinochet on an international arrest warrant for crimes of "torture, hostage-taking, and conspiracy to commit these offences and murder,"[83] Pinochet attempted to resist extradition based on his status as a former head of state.[84] The House of Lords issued a decision holding that "a former head of state had no immunity in relation to acts of official torture made crimes in the [United Kingdom] by section 134(I) of the Criminal Justice Act 1988 or of acts of hostage-taking made criminal by the Taking of Hostages Act 1982."[85] This decision was significant because it found that acts performed by state officials under the color of state law are not necessarily state acts when

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[82] *Id.* at 297 n.48 ("Milosevic's claim of illegitimate jurisdiction is weakened by the fact that he himself signed the Dayton Peace Accords in 1995, committing Yugoslavia to cooperate with the International Criminal Tribunal. *Mr. Milosevic in the Hague*, N.Y. TIMES, June 29, 2001, at A22. For the proposition that Yugoslavia arrested and extradited Milosevic in response to U.S. and international financial pressures, see Carlotta Gall, *Yugoslavs Act on Hague Trial for Milosevic*, N.Y. TIMES, June 24, 2001, at A1.").

[83] NINA H.B. JORGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 225 (Ian Brownlie ed., 2000).

[84] *See* Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2136 (1999).

[85] JORGENSEN, *supra* note 83, at 225.

the conduct violates international law.[86] This decision was set aside, however, when a link was discovered between a presiding Lord and a member of Amnesty International, an organization that had intervened in opposition to Pinochet.[87] A rehearing began in January 1999.[88]

In the rehearing, the core issue to be determined was whether the acts of torture allegedly committed by Pinochet were acts done by him in an official capacity.[89] There were two basic approaches to this issue. The first approach was that "immunity was absolute, and although a line should be drawn between public and private acts, it was impossible to draw lines between different degrees of criminality."[90] The second approach, adopted by the majority, was that immunity from a foreign court's jurisdiction, granted for official state acts, did not shield a head of state from criminal proceedings for international crimes committed during the head of state's tenure.[91] The Lords determined that "the commission of a crime which is an international crime against humanity and *jus cogens* is [not] an act done in an official capacity on behalf of the state."[92]

The majority found that it would be anomalous for immunity to exist after the entry into force of the Torture Convention[93] since head of state immunity extended to all officials involved in discharging functions of the State. Under the Convention, torture could only be committed by a public official. If only a public official could commit torture, but such official still possessed head of state immunity, the Torture Convention would lack any teeth. "Article I of the Torture Convention confines the definition of torture to acts committed by public officials or other persons acting in an official capacity, which, according to their Lordships, includes heads of state."[94] In a narrow holding, the Lords decided that, since torture committed outside the United Kingdom was not a crime under United Kingdom law until passage of 134(1) of the 1988 Act, Pinochet could not be

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[86] 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, 323 (2000); *see also* Regina v. Bow Street Metropolitan Stipendiary Magistrate, *Ex parte* Pinochet Ugarte (No.1), [1999] 1 A.C. 61, 109 (H.L.) (U.K.) ("[I]nternational law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.").

[87] Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 431-32 (2000).

[88] JORGENSEN, *supra* note 83, at 225.

[89] *See id.* at 225-26; *see also* Pierson, *supra* note 86, at 268, 304-06.

[90] *Id*. at 226.

[91] *See id*.

[92] *Ex Parte* Pinochet No. 3, *supra* note 9, at 203; *see also* O'Neill, *supra* note 5, 309.

[93] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

[94] JORGENSEN, *supra* note 83, at 226.

liable for torture crimes committed *before* 1988 and was entitled to immunity.[95] However, Pinochet had no immunity in respect of authorizing or organizing torture *after* December 8, 1988, when section 134(1) of the Criminal Justice Act 1988 came into effect.[96]

Lords Hutton and Phillips argued that the Convention did not define torture as constituting an official function of a head of state.[97] The others in the majority focused on the seeming contradiction in the Convention's obligation to hold perpetrators of torture accountable for their actions, including heads of state, while also recognizing those same officials' immunity *ratione materiae*.[98] Language in Lord Browne-Wilkinson's opinion aptly summarizes this argument:

> How can it be for international law purposes an official function to do something which international law itself prohibits and criminalizes. . . ? [I]f the implementation of a torture regime is a public function giving rise to immunity *ratione materiae*, this produces bizarre results . . . Under the convention the international crime of torture can only be committed by an official or someone acting in an official capacity. [State officials] would all be entitled to immunity . . . [Thus] one of the main objectives of the Torture Convention – to provide a system under which there is no safe haven for torturers – will have been frustrated.[99]

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[95] *See Ex Parte* Pinochet No. 3, *supra* note 9, at 171, 189; *see also* O'Neill, *supra* note 5, at 309 (citing Jamison White, *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, 153 (1999)) ("by allowing the growing list of international crimes to serve as a weathervane for which a Head of State's actions can be deemed official or public, the majority has created a slippery slope upon which a Head of State will slowly lose his power.")).

[96] JORGENSEN, *supra* note 83, at 225-226.

[97] *Id.* at 226.

[98] *Id*.

[99] *Ex Parte* Pinochet No. 3, *supra* note 9, at 205. The Law Lords did not consider the question of whether customary international law prohibited torture even prior to the passage of the Convention or the United Kingdon's adoption of the treaty. Similar reasoning concerning customary international law's condemnation of torture was presented in Filártiga v. Peña-Irala, 577 F. Supp. 860 (D.C.N.Y. 1984). In its decision, the federal court stated: "In order to take the international condemnation of torture seriously this court must adopt a remedy appropriate to the ends and reflective of the nature of the condemnation. Torture is viewed with universal abhorrence; the prohibition of torture by international consensus and express international accords is clear and unambiguous . . . If the courts of the United States are to adhere to the consensus of the community of humankind, any remedy they fashion must recognize that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe." *Id.* at 863. The decision significantly set the precedent for a federal court to punish a non-American citizen for tortious acts

The Law Lords in the majority, apart from Lord Hope, adopted December 8, 1988 as the date on which Pinochet lost his immunity, which was also the date on which the UK ratified the Torture Convention.[100] The *Pinochet* decision is significant because it marks the first time that a court did not uphold a former head of state's immunity for criminal acts against international law, as well as the first time that a foreign court subjected a former head of state to a foreign court's jurisdiction for such international law violations.[101] However, the precedent is problematic. The common denominator of the majority judgments was the Torture Convention. The Lords' reliance on the Torture Convention seriously limits the scope of the *Pinochet* decision. First, while the Torture Convention grants universal jurisdiction for crimes of torture, it is important to note that not all violations of international law have a corresponding convention that grants such broad jurisdiction.[102] Second, the Convention defines torture in the context of explicit state official action, a "peculiarity that is not applicable to all crimes against international law."[103] Finally, the precedential weight of the *Pinochet* decisions is limited to those countries who have signed onto the Torture Convention.[104]

Along with the *Pinochet* precedent, an additional case supporting the proposition that a former head of state lacks immunity for international crimes is that of Slobodan Milosevic. On May 27, 1999, the ICTY, established by the Security Council under Chapter VII of the U.N. Charter, indicted former President Milosevic for crimes against humanity and violations of international law.[105] The Security Council's Chapter VII powers allow the United Nations to intervene in the affairs of a sovereign state to restore international peace and security.[106] The ICTY is a tribunal established by the Security Council, and it operates independently from and irrespective of the former Yugoslav governments.[107] The ICTY's independent operation from the former Yugoslav government

committed outside the United States that violated the customary international law or any treaties to which the United States was a party.

[100] *Id.*

[101] Pierson, *supra* note 86, at 310.

[102] VAN ALEBEEK, *supra* note 60, at 237.

[103] *Id.* ("The fact that, for example, there is no convention allowing state parties to exercise universal jurisdiction over the crime of genocide means that the opinions of Lords Hope and Philips are no precedent in proceedings concerning the prosecution of (former) foreign state officials for this crime. Moreover, the fact that non-state actors can commit genocide means that the opinions of Lord Saville and Browne-Wilkinson are no precedent either.").

[104] *Id.*

[105] Johan G. Lammers, *Challenging the Establishment of the ICTY Before the Dutch Courts:* The Case of Slobodan Milosevic v. The Netherlands, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 107, 107-08 (Erika de Wet et al. eds., 2003).

[106] U.N. Charter, ch. 7, art. 39.

[107] *See* Lammers, *supra* note 105, at 107-08.

explains Milosevic's refusal to recognize the legitimacy of the ICTY's assertion of jurisdiction over him, a former head of the Yugoslav government.[108]

The ICTY committed to denying head of state immunity claims and charged Milosevic with personal responsibility for ordering, planning, instigating, executing, and aiding and abetting the persecution, deportation and murder of Kosovo Albanians from January 1999 to June 1999.[109] The Tribunal "rejected Milosevic's claims of immunity due to his status as the former President of Yugoslavia, stating that Article 7 of the ICTY, which rejected head of state immunity, reflected an accepted principle of customary international law."[110] Although Milosevic's trial ended without a verdict because he died during the proceedings, his trial was the first instance of a head of state being tried for war crimes, and it "brought wartime adversaries into the opposing sides of a courtroom, with one head of state testifying against another."[111]

The ICTY's assertion of jurisdiction over Milosevic raises two possible conclusions. On the one hand, it could suggest that even though Article 7, rejecting head of state immunity for international crimes, represents customary international law, it was the Security Council's Chapter VII authority, which created the ICTY for purposes of restoring international peace, that enabled the overriding of Milosevic's head of state immunity. On the other hand, the ICTY's jurisdiction over Milosevic could be indicative of a broader assertion, namely, that under customary international law, a head of state has no immunity for international crimes committed under his or her authority.[112]

While the *Pinochet* and *Milosevic* decisions have established important precedent regarding a former head of state's immunity status for international crimes, other courts, both domestic and international, have been less willing to deny such immunity for incumbent state officials. In *Arrest Warrant*,[113] the ICJ considered whether the issue and circulation of an

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[108] *See id.*

[109] Prosecutor v. Milosevic, Case No. IT-01-51-I.

[110] *See* Hasson, *supra* note 75, at 153.

[111] *See* Scott Grosscup, Note, *The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 377 (2004) (citing Marlise Simons, *Croat Leader Says Milosevic Made "Rivers of Blood*," N.Y. TIMES, Oct. 2, 2002, at A7.).

[112] This latter assertion seems unlikely. For a practice to be considered customary international law, there must be widespread and consistent state practice, coupled with *opinio juris*, or acceptance of a practice as obligatory. The *Pinochet* case was the first precedent supporting abrogation of head of state immunity. However, the House of Lords decided there was no head of state immunity based on the Convention Against Torture rather than custom. It therefore seems unlikely that the ICTY's jurisdiction over Milosevic was based on customary international law, given that one of the few precedents at the time supporting abrogation of immunity was *Pinochet*.

[113] Arrest Warrant, *supra* note 10.

arrest warrant by Belgian judicial authorities against Yerodia Ndombasi, an incumbent Minister for Foreign Affairs of the Congo, for crimes against humanity and grave breaches of the 1949 Geneva Conventions[114] were contrary to international law. The Court ultimately determined that in issuing the arrest warrant, Belgium failed to respect Yerodia's immunity from criminal jurisdiction and the inviolability which he enjoyed as an incumbent Minister for Foreign Affairs under international law.[115] The case is significant for the ICJ's recognition of four qualifications to a head of state's immunity: 1) when a head of state's own country exercises jurisdiction over him in accordance with domestic law;[116] 2) when a head of state's own country waives his immunity;[117] 3) when a court tries a former head of state for acts committed before or after his period in office, or acts performed during the executive's tenure in a private capacity, provided that a state has jurisdiction under international law;[118] and 4) if an international criminal court validly abrogates such immunity.[119]

In addition to these four exceptions, *Arrest Warrant* is important because it contributes to an ongoing debate: whether the nature of crimes against international law establishes sufficient interest in all states such that universal jurisdiction can be exercised *in absentia* – when the alleged perpetrator is not physically present in the forum. This is a broader version of universal jurisdiction under which a state "may prosecute persons accused of international crimes regardless of their nationality, the place of commission of the crime, the nationality of the victim, and even of whether or not the accused is in custody or at any rate present in the forum State."[120] Because many legal systems do not permit trials *in absentia*, the accused's presence on the territory has become, for many states, a prerequisite for the initiation of trial proceedings.[121] There is increasing support for the requirement that an alleged perpetrator be on a forum's state soil for purposes of prosecution.[122]

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[114] Tunks, *supra* note 54, at 663.

[115] Arrest Warrant, *supra* note 10, at 29.

[116] *Id.* at 25.

[117] *Id*.

[118] *Id.*

[119] *Id*. at 25-26. By "validly," it is meant that an international criminal court may abrogate immunity when it has jurisdiction over the matter before it. *Id.* at 26 ("Examples include the [ICTY] and the [ICTR], established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities 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.'"). *Id.* at 26-27.

[120] CASSESE, *supra* note 29, at 286.

[121] *Id.*

[122] VAN ALEBEEK, *supra* note 60, at 212.

The benefit of such broad universal jurisdiction is that it allows national authorities to begin criminal investigations of, and to collect evidence against, persons suspected of serious international crimes as soon as the authorities have information concerning the alleged offense.[123] In *Arrest Warrant*, Judge Guillaume took a more limited view of universal jurisdiction, stating "at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos."[124] Concurring Judges Higgins, Kooijmans and Buergenthal and dissenting Judge Van den Wyngaert, however, took a more liberal position regarding the assertion of universal jurisdiction over heads of state for international crimes.[125] The concurring judges first cautioned that "reliance on state practice to determine the limits of international law may . . . be deceiving since states are not required to use the jurisdiction allowed by international law,"[126] but may instead rely on national laws. These judges "concluded that international law does not impose a precondition of presence on the forum's territory to the exercise of universal jurisdiction"[127] over a head of state, favoring instead broad universal jurisdiction.[128] Despite conflicting positions, the ICJ has never directly answered the question as to whether states should abide by broad or narrow universal jurisdiction.[129] Significantly, *Certain Criminal Proceedings in France* places this question before the Court yet again.

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[123] CASSESE, *supra* note 29, at 286-287.

[124] VAN ALEBEEK, *supra* note 60, at 213 (quoting Arrest Warrant, *supra* note 10, at 43 (separate opinion of Judge Guillaume)).

[125] *Id.*

[126] *Id.*

[127] *Id.* at 213-14.

[128] *Id*.

[129] It appears as though many states are not yet ready to adopt a view of broad universal jurisdiction, given the recent internationally pressured re-writing of a Belgian statute that had previously permitted the broad assertion of universal jurisdiction over heads of state for human rights abuses. *See* Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003). The original Belgian statute was significant because it was "the broadest in the crimes it covered and in its lack of any required link between suspect, victims, or events, on the one hand, and Belgium, on the other." *Id.* at 889. Had the Belgian statute remained in effect, or had other states chosen to adopt similar statutes, it could have opened a type of hunting season on former and current heads of state for charges of international crimes, despite claims of immunity. This danger was averted, however, when the ICJ and Belgian Cour de Cassation rejected a challenge to an incumbent head of state's immunity in *Arrest Warrant*. It also was averted when U.S. Secretary of State Colin Powell strongly warned Belgium against upholding several Iraqi families' requests for investigations against such U.S. officials as former President Bush and Vice President Dick Cheney. *Id.* at 890.

In 2003, Belgium issued a lawsuit against incumbent Israeli Prime Minister Ariel Sharon, alleging that he participated in the slaughter of Palestinian refugees in 1982 by a Lebanese Christian militia in the Sabra and Chatilla refugee camps in Lebanon.[130] In examining whether Sharon's head of state immunity prevented him from being held accountable, the Court considered Article IV of the Genocide Convention and Article 27.2 of the Rome Statute, which provide that a head of state's immunity cannot shield him from criminal responsibility.[131] Nonetheless, the Court determined that "domestic law would contravene the principle of customary international criminal law on jurisdictional immunity if it were to be interpreted as having as its purpose to set aside the immunity sanctioned by [customary law]."[132]

Arrest Warrant and the indictment against Ariel Sharon suggest that the doctrine of immunity for current heads of state is still alive and active, even with respect to the most serious international crimes. State practice supports this assertion regarding incumbent heads of state. In March, 2001, France's Cour de Cassation recognized Libyan head of state Muammar el-Qaddafi's immunity in a suit alleging Qaddafi's responsibility for the bombing of a French DC-10 aircraft, resulting in 170 people's death.[133] The decision reversed the lower court, which had denied recognition of the sitting head of state's immunity.[134] In 1999, Spain's National Court decided against prosecuting sitting head of state Fidel Castro.[135] Similarly, while the United States has denied *former* heads of state their immunity,[136] it has never abolished a *sitting* head of government's immunity.[137]

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[130] Tunks, *supra* note 54, at 660; *see also* Belgium Drops War Crimes Cases, Deutsche Welle, http://www.dw-world.de/dw/article/0,,978973,00.html (last visited March 7, 2008).

[131] *See* Indictment of Ariel Sharon, *supra* note 12, at 599-600.

[132] *Id*. at 600.

[133] Tunks, *supra* note 54, at 662-63.

[134] *Id*. at 663.

[135] Amber Fitzgerald, *The Pinochet Case: Head of State Immunity Within the United States*, 22 WHITTIER L. REV. 987, 1012-13 (2001).

[136] Tunks, supra note 54, at 663 (citing *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1471 (9th Cir. 1994)).

[137] *Id.* (citing Tachiona, 169 F. Supp. 2d at 259, 288, 296-97 (allegations of torture, terrorism, and rape against incumbent President Mugabe were dismissed because his official status provided immunity from U.S. jurisdiction and attacks on his person); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (sitting British Prime Minister Margaret Thatcher found immune from suit in the United States). *See* Ye, 383 F.3d at 620 (upholding former President of China Zemin's immunity despite claims of genocide and torture); Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003) (affirmed former Head of State Abubakar's functional immunity for official acts committed while in office against claims of torture and murder).

The conclusion that may be drawn from the preceding precedent is that while international law has expressed a willingness to prosecute those who are *former* heads of state for international crimes, or to recognize a limit on their immunity when the official's state either waives immunity or asserts jurisdiction over him, international law is not ready to accept limitations on the immunity of *incumbent* heads of state for the same crimes. Despite uncertainty over the parameters of immunity for a sitting head of state, the ICJ's response in *Certain Criminal Proceedings in France* to the Congo's request for provisional measures suggests that international courts, while upholding absolute immunity for incumbent officials, are becoming more adamant about promoting transparency in the context of government action, particularly when it concerns possible violations of international law. By allowing foreign states to commence investigations and gather evidence against heads of state during their tenure, the ICJ is walking an intriguing line. While carefully recognizing a head of state as inviolate from prosecution while in office, the ICJ is increasing opportunities for human rights victims to successfully build a case against an official when evidence is still fresh and witnesses are still alive or locatable. Thus, once the official leaves office and is no longer cloaked in impenetrable immunity, he may be subject to prosecution, depending on the claims and evidence at issue.

III. Certain Criminal Proceedings in France (Republic of Congo v. France)

A. *Background*

Certain Criminal Proceedings in France arose from the following matters. French law recognizes universal jurisdiction when certain limited conditions are met.[138] In accordance with this policy, France issued a complaint against certain Congolese officials on December 5, 2001, asserting that "[d]omestic courts are . . . entitled to look to international custom . . . to exercise jurisdiction to prosecute the perpetrators of a crime against humanity alleged to have been committed outside France where neither the perpetrator nor the victim is a French national."[139] The international crimes alleged in the complaint concern the "enforced disappearance of more than 350 individuals and crimes against humanity

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[138] Certain Criminal Proceedings in France, *supra* note 16, at 120 n.10 (dissenting opinion of Judge de Cara) (quoting from the hearings, "The Agent of the French Government pointed out that in France universal jurisdiction is subject to two conditions: 'there must in principle be a treaty to which France is a party that provides for that universal jurisdiction and even requires it to be exercised . . . [and] the person suspected must be on French territory' (citation omitted)").

[139] *See id.* at 120 n.11 (citing Letter from the International Federation of Human Rights Leagues to the *Procureur de la République* at the Paris *Tribunal de grande instance*, dated 5 December 2001, p. 25).

and torture, for which responsibility is attributed to,"[140] among others, President Sassou Nguesso.

The *Procureur de la République* of the Paris *Tribunal de grande instance* passed this complaint on to the *Procureur de la République of the Meaux Tribunal de grande instance*.[141] The latter Procureur ordered a preliminary inquiry and on January 23, 2002, issued a *réquisitoire*,[142] which prompted the investigating judge of the Meaux to initiate an investigation against the Congolese officials named in the complaint,[143] many of whom were already under investigation by the Congolese Tribunal de grande instance.[144] The Congo claimed in its complaint that when President Sassou Nguesso was on a state visit to France, "the investigating judge issued a *commission rogatoire* (warrant) to judicial police officers instructing them to take testimony from [Nguesso]."[145] No such warrant has been produced to the ICJ, and France claimed that no warrant was ever issued against the President.[146] France argued that the investigating judge "sought to obtain evidence from [the President] under Article 656 of the Code of Criminal Procedure [CCP], applicable where evidence is sought through the diplomatic channel from a 'representative of a foreign power.'"[147]

The disagreement between the parties involved both the December 2001 complaint and the *réquisitoire* of January 2002,[148] which was based upon the complaint's allegations. The first issue raised by the Congo in response to France's complaint and *réquisitoire* concerned France's unilateral assertion of jurisdiction over the Congolese officials named in the complaint on the basis of universal jurisdiction.[149] France argued that "French courts had jurisdiction, as regards crimes against humanity, by virtue of a principle of international customary law providing for universal jurisdiction over such crimes, and as regards the crime of torture, on the basis of Articles 689-1 and 689-2 of the French Code of Criminal Pro-

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[140] Certain Criminal Proceedings in France, *supra* note 16, at 121 (dissenting opinion of Judge de Cara). The international crimes cited were originally included in the *commission rogatoire* (letter of request for judicial assistance) of the senior investigating judge of the Brazzaville Tribunal de grande instance to the investigating judge of Kinshasa, both of which are located in the Congo. The dissenting opinion of Judge de Cara, after discussing the French criminal proceedings, states that "judicial proceedings were initiated in the Congo in respect of the same events." *Id.*

[141] *Id*. at 104.

[142] This is an application for a judicial investigation of alleged offenses.

[143] *See* Certain Criminal Proceedings in France, *supra* note 16, at 104.

[144] *See id*. at 121.

[145] *Id*. at 106.

[146] *Id.*

[147] *Id*.

[148] *See id*. at 105.

[149] *Id*. at 102-103.

cedure."[150] This Note does not address the Court's ruling on this issue. For purposes of analysis, this Note assumes that universal jurisdiction may properly be asserted based on the allegations, and that, in this particular case, France's assertion of jurisdiction was proper under customary international law. The second issue raised by the Congo was that France, in asserting such jurisdiction, violated the criminal immunity of a foreign head of state,[151] namely, President Sassou Nguesso. On account of these two issues, the Congo requested the indication of provisional measure calling for the immediate "suspension of the proceedings being conducted by the investigating judge of the Meaux Tribunal."[152]

The Congo affirmed its need for provisional measures on the basis that "the two essential preconditions for the indication of a provisional measure . . . urgency and irreparable prejudice, are manifestly satisfied . . . ."[153] The Congo claimed that France's investigations were affecting the Congo's international relations due to the publicity surrounding the investigating judge's actions, particularly against its present head of state, whose honor and reputation were publicly being challenged.[154] The Congo further stated that if the ICJ refused to issue provisional measures, there would be a "continuation and exacerbation of the prejudice already caused to the honour and reputation of the highest authorities of the Congo, and to internal peace in the Congo, to the international standing of the Congo and to Franco-Congolese friendship."[155]

B. *The Challenge to President Sassou Nguesso's Head of State Immunity*

In determining whether the pending French criminal proceedings entailed a risk of irreparable prejudice to the Congolese head of state's immunity, the ICJ considered France's contention that it had not breached President Sassou Nguesso's immunities. Article 656 of the French CCP provides that "the written deposition of the representative of a foreign power is to be requested through the Minister for Foreign Affairs,"[156] and must be abided by if the request is accepted by the for-

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[150] *Id.* at 105. "Article 689-1 of the French Code of Criminal Procedure provides that, pursuant to certain international conventions to which France is a party, 'any person who has committed, outside the territory of the Republic, any of the offences enumerated in these Articles, may be prosecuted and tried by the French courts if that person is present in France.' Article 689-2 refers to the United Nations Convention Against Torture." *Id.*

[151] *Id*.

[152] *Id*. at 103.

[153] *See id*. at 106.

[154] *See id*. at 108.

[155] *Id*. at 108.

[156] *Id.* at 109.

eign power.[157] France argued that the current proceedings had not and could not cause any damage to the Congolese President's immunity because he falls under the CCP's category of "representative of a foreign power" and may only be approached to give evidence upon the express agreement of the Congo.[158] Although a request for a written deposition from President Sassou Nguesso was made by the investigating judge to the French Ministry of Foreign Affairs, the Ministry retained the request.[159] Because the request was never sent to the Congo, France argued that there was no past or future threat to the incumbent executive's immunity.

France further argued that it could not be violating President Sassou Nguesso's immunity because "it in no way denies that [he] enjoys, as a foreign Head of state, 'immunities from jurisdiction, both civil and criminal.'"[160] France claimed that its national law embodied the international principle of the immunity of foreign heads of state, and that the French courts, turning to customary international law as a guide and employing it directly, had compellingly asserted this principle.[161] Because the French courts respected the immunities preserved in French law, which is in conformity with international law, France asked whether it can "be supposed that in the future our courts would move away from respecting the law that they are required to apply?"[162]

The Congo's counterargument questioned whether Article 656 applied to a foreign head of state, and if it did, what kind of protection would be afforded to the head of state if he were a *témoin assisté*,[163] as was the case of President Sassou Nguesso.[164] The Congo's main concern was that Article 656 would not allow for the same type of procedural protections for a head of state as guaranteed under the French CCP for a *témoin assisté*.[165] The Congo also was concerned that the Procureur could still

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[157] *See id.*

[158] *See id*.

[159] *See id*.

[160] *Id*. at 110.

[161] *Id.* ("French law embodies the principle of the immunity of foreign Heads of State . . . . It is the jurisprudence of the French courts which, referring to customary international law and applying it directly, have asserted clearly and forcefully the principle of these immunities.")

[162] *Id*.

[163] A *témoin assisté* is a legally represented witness. It has been explained by France that a *témoin assisté* in French criminal procedure is not merely a witness, but to some extent a suspect. As a suspect, the person enjoys certain procedural rights, such as assistance of counsel or access to case files, which are not conferred on ordinary witnesses. *Id.* at 105.

[164] President Sassou Nguesso had already been mentioned in the complaint, and therefore, qualified as a *témoin assisté*. Certain Criminal Proceedings in France, *supra* note 16, at 105, 109.

[165] *Id*. at 109.

include President Sassou Nguesso in its investigation, without the Congo's express consent, because the *réquisitoire* was made against an unidentified person.[166] The investigating judge would be free to interrogate any person whom he considered likely to furnish evidence. Because President Sassou Nguesso was mentioned in the documentation upon which the *réquisitoire* was based, the Congo contended there was a strong likelihood that the judge could still investigate Congo's sitting head of state.[167]

Despite the Congo's arguments against the potential investigation of its sitting head of state for international crimes, as well as its concern for the minimal procedural guarantees afforded to a head of state as a *témoin assisté* under the French CCP, the ICJ rejected the Congo's request for provisional measures that would have ceased all investigations entirely, including those that could occur against President Sassou Nguesso, challenging his head of state immunity.[168] Before assessing the individual opinions issued by the ICJ in the denial of provisional measures, the standard for issuing provisional measures under ICJ case law will be discussed.

C. *The Standard for Issuing Provisional Measures*

Article 41 of the Statute of the International Court of Justice provides the ICJ with the discretionary power to grant provisional measures.[169] The procedural aspects of this power are set forth in articles 73 to 78 of the Rules of the Court.[170] The Court can, on the basis of Article 41, indicate interim measures of protection for the purpose of protecting "rights which are the subject of dispute in judicial proceedings."[171] The power to issue provisional measures is "independent of the ICJ's substantive juris-

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[166] *Id.*

[167] *See id*.

[168] *See id*. at 110.

[169] Statute of the International Court of Justice, art. 41, June 26, 1945, 59 Stat. 1055, 156 U.N.T.S. 77, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

[170] Tim Stephens, *The LaGrand Case (Federal Republic of Germany v. United States of America): The Right to Information on Consular Assistance Under the Vienna Convention on Consular Relations: A Right for What Purpose?*, 3 MELB. J. INT'L L. 143, 155 (2002); *see also* Rules of the International Court of Justice, arts. 73-78, 1978 I.C.J. Acts & Docs. 4 (as amended Apr. 14, 2005), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0; *see also* JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT: AN ATTEMPT AT A SCRUTINY 33-34 (1983).

[171] Aegean Sea Continental Shelf Case (Greece v. Turk.), 1976 I.C.J. 3, 9 (Sept. 11); Diplomatic and Consular Staff in Tehran (U.S. v. Iran) , 1979 I.C.J. 3, 19 (Dec. 15), *available at* http://www.icj-cij.org/docket/files/64/6283.pdf.

diction to determine the merits of a dispute."[172] Under this power, the ICJ "must weigh 'the protection of the rights asserted (but not yet established) by the Applicant State and respect for the position of the Respondent State *ex hypothesi* not yet held to have been acting unlawfully (at all or in the relevant aspect)' when deciding whether to grant interim orders pending its final judgment."[173] Finally, interim measures will only be indicated if the Court is of the opinion that it does not manifestly lack jurisdiction, but that there is, at least prima facie, a good basis for jurisdiction.[174]

Although the ICJ has been repeatedly requested to issue interim measures, it has only done so on rare occasions.[175] While "some aspects of the ICJ's jurisprudence on provisional measures are ambiguous, the criteria for their indication have been greatly clarified by recent jurisprudence of the ICJ."[176] First, Article 41 preserves the rights of the parties.[177] This factor requires a party to show that a "right [is] going to disappear, or conceivably that the subject-matter of the right [is] going to vanish totally, so that the right could thereafter only have a sort of theoretical, *in posse*, existence."[178] Second, interim measures may be indicated to prevent irreparable prejudice to the rights which are in dispute, as in the *Nuclear Tests* cases[179] where the ICJ deemed irreparable the possible effect on Australian and New Zealand territory of radioactive fall-out due to French testing. Third, the indication of provisional measures should not anticipate the Court's judgment on the merits,[180] a factor which appears to be intertwined with the prevention of irreparable prejudice to the parties.[181]

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[172] Stephens, *supra* note 170, at 155 (citing J.G. Merrills, *Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice*, 44 INT'L & COMP. L.Q. 90, 91 (1995)).

[173] *See* Stephens, *supra* note 170, at 155 (citing to: International Law Commission, *Third Report on State Responsibility*, ¶ 141, U.N. Doc. A/CN.4/507/Add.1 (June 15, 2000) (*prepared by* James Crawford).

[174] *See id.* at 160.

[175] *See id.* at 156 n.87; *see also* SZTUCKI, *supra* note 170, at 47.

[176] *See* Stephens, *supra* note 170, at 156.

[177] RUDOLF BERHNHARDT, INTERIM MEASURES INDICATED BY INTERNATIONAL COURTS 7 (1994).

[178] *Id.* at 7-8.

[179] Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 135, 142 (June 22), *available at* http://www.icj-cij.org/docket/files/59/6115.pdf [hereinafter Nuclear Tests].

[180] *See* BERNHARDT, *supra* note 177, at 11.

[181] *See* Fisheries Jurisdiction (U.K. v. Ice.), 1972 I.C.J. 12, 16 (Interim Protection Order of Aug. 17) ("Whereas the immediate implementation by Iceland of its [Fishery] Regulations would, *by anticipating the Court's judgment, prejudice* the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour.") (emphasis added).

An additional consideration for the ICJ when determining whether to issue provisional measures is that such measures may not request parties to take any action that may aggravate the tension between the parties or increase the difficulty of resolving the dispute.[182] A final important point to consider regarding the issuance of provisional measures is that the ICJ, in the *LaGrand Case*, made it unequivocally clear that orders on provisional measures under Article 41 have binding effect.[183] This final point is particularly significant in understanding the dispute over the ICJ's denial of provisional measures in *Certain Criminal Proceedings in France*, which principally centered on the extent of irreparable harm that might be caused to the Congo. Had the ICJ issued provisional measures ordering France to cease its investigation, this binding order would have prevented France from continuing its investigation of the Congolese sitting head of state. The advantages and disadvantages to this decision will be addressed in Part III.F. of this Note. First, the Court's majority opinion will be examined.

D. *The Majority's Decision*

The request for the indication of provisional measures in *Certain Criminal Proceedings in France* was "an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux *Tribunal de grande instance*."[184] The Congo's contentions for the issuance of provisional measures were as follows: (1) France's proceedings disturb the Congo's international relations because of the media attention surrounding the investigating judge's actions, violating French law governing the secrecy of criminal investigations; (2) the heightened media focus damages President Nguesso's honor and reputation and, consequently, the Congo's international status; and (3) the proceedings harm the Franco-Congolese friendship.[185] For these reasons, the Congo contended that the two preconditions for the issuance of provisional measures, urgency and irreparable harm, were satisfied. The rights that the Congo asserted the ICJ had to adjudge were "first, the right to require a State, in this case France, to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law, and second, the right to respect by France for the immunities conferred by international law on . . . the Congolese Head of State."[186] Thus, any provisional

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[182] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 21 (Provisional Measures Order of Dec. 15), *available at* http://www.icj-cij.org/docket/files/64/6283.pdf.

[183] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 503 (June 27), *available at* http://www.icj-cij.org/docket/files/104/7736.pdf [hereinafter LaGrand].

[184] Certain Criminal Proceedings in France, *supra* note 16, at 107.

[185] *Id.* at 108.

[186] *Id.*

measures that the ICJ might indicate had to preserve these claimed rights and ensure that no irreparable prejudice would be caused to them.

In adjudging whether the pending French criminal proceedings entailed a risk of irreparable prejudice to Congo's right to respect by France for the Congolese head of state's immunity, the Court considered the Congo's arguments that France's Article 656 afforded a possible lack of protections for President Nguesso if he were investigated.[187] The Court also, in examining the protections afforded under French law to heads of state, considered France's arguments that its national laws embody the principle of head of state immunity, "referring to customary international law and applying it directly,"[188] and that France "in no way denies that President Sassou Nguesso enjoys, as a foreign Head of State, 'immunities from jurisdiction, both civil and criminal.'"[189]

The ICJ was only required to examine the risk presented by the French criminal proceedings thus far and whether they caused, or would cause, "irreparable prejudice to [the Congo's]claimed rights."[190] The ICJ was not required to "determine the compatibility with the rights claimed by the Congo of the procedure so far followed in France."[191] Because the ICJ found that France's proceedings did not create a risk of irreparable prejudice to the Congo based on the evidence, nor justify the type of urgency typically required for the issuance of provisional measures, the ICJ denied the issuance of provisional measures under the first question. The ICJ also denied provisional measures under the Congo's universal jurisdiction argument. However, the reasons for the ICJ's decision on this issue are beyond the scope of this Note.

E. *A Divided and Disputed Decision*

1. The Concurring Opinion of Judges Koroma and Vereschetin

The ICJ's decision not to issue provisional measures was not unanimous. Judges Koroma and Vereshchetin issued a joint separate opinion expressing concern over the Court's denial of such measures, stating that the Court had not fully considered all relevant aspects of the risk of irreparable harm that could occur in the Congo as a result of the continuation of the French criminal proceedings.[192] The judges argued that provisional measures may become necessary, not because of imminent irreparable harm to claimed rights, a more traditional justification for provisional measures, but rather, because of the risk of grave consequences resulting from the violation of such rights.[193] The judges implied that the issuance

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[187] *Id.* at 109.
[188] *Id.* at 110.
[189] *Id.*
[190] *See id.*
[191] *See id.*
[192] *See id*. at 113 -115 (joint separate opinion of Judges Koroma and Vereshchetin).
[193] *Id*. at 114.

of provisional measures to prevent harmful consequences potentially resulting from a violation of rights was not the strongest justification for provisional measures. Nevertheless, they recognized that such measures had been issued in the past by the ICJ for such comparable reasons as "preventing 'aggravation,' 'extension' or 'exacerbation' of harm already done to claimed rights, *even if* the risk of immediate irreparable harm was not always so obvious."[194]

For Judges Koroma and Vereshchetin, the grave consequences that would justify an issuance of provisional measures were expressed by the Congo in its explanation of why France's proceedings would cause the country irreparable harm. In their view, such irreparable harm included a fear of a "covert coup d'état, the destabilization of its internal institutions, and the return to war from which the country had recently emerged."[195] All of these arguments directly correspond to the Congo's concern regarding a national court's alleged ability to assert jurisdiction over its sitting Congolese President and his potential loss of immunity. If such jurisdiction were allowed, it would harm the state's international reputation, its ability to participate in inter-state relations while its head of state was awaiting trial, and would pose a serious threat to the maintenance of the Congo's internal stability following an era of civil strife and warfare. Thus, for Judges Koroma and Vereshchetin, it was not the ICJ's denial of provisional measures that was disturbing, but rather, that the ICJ had failed to sufficiently consider all the grave consequences that might result from denying provisional measures to the Congo.

2. The Dissenting Opinion of Judge de Cara

Judge de Cara also issued a separate opinion[196] in which he vehemently dissented from the ICJ's decision not to issue provisional measures, focusing on the meaning of the term, "irreparable prejudice," as well as on the decision's implications for the doctrine of head of state immunity.[197] According to de Cara's analysis, there were two ways in which the ICJ could determine whether irreparable prejudice existed: 1) "if the prejudice had already come into existence,"[198] in which case, the issuance of provisional measures might be too late; and 2) if, after assessing "both the probability and the potential consequences of the occurrence of a fact or event," provisional measures were appropriate.[199] For provisional

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[194] *Id*. (emphasis added).

[195] *Id*. at 113.

[196] It is important to note that Judge de Cara was appointed to this decision ad hoc. *Id.* at 102.

[197] *See id*. at 116 (dissenting opinion of Judge de Cara).

[198] *Id.* at 124.

[199] *Id.*

measures to be appropriate, de Cara stressed that the future event did not have to rise to the level of actual certainty, but need only be probable.[200]

Upon applying these two manners of determining irreparable prejudice to the circumstances at issue, de Cara believed that prejudice not only already existed for the Congo, but that there was a risk of further prejudice in two respects.[201] The first risk of additional prejudice arose when the Paris prosecutor transmitted the complaint appended to the *réquisitoire* to the Meaux prosecutor who failed to decline jurisdiction, even though the complaint implicated a foreign personality whose immunity from jurisdiction was established under customary international law.[202] In both failing to acknowledge a lack of jurisdiction and in asserting the French courts' jurisdiction over acts committed abroad, the *réquisitoire* contravened the international division of jurisdiction among courts and violated the Congolese President's head of state immunity.[203]

The second risk of further prejudice occurred when France claimed that the summons issued for President Sassou Nguesso to give evidence was merely an invitation under Article 656 of the CCP.[204] Any other person implicated in the *réquisitoire* could only have been examined as a *témoin assisté* under the provisions of Article 656, thereby enjoying guarantees of procedural due process.[205] However, because of his head of state status, President Sassou Nguesso might not only receive less procedural due process protections under the French CCP, but also would not know the exact details of the accusations against him because he had been denied access to the French case files.[206]

If he were investigated under the justification of gathering evidence under Article 656, the "deposition that the investigating judges expected to take from him could only have concerned acts of which they were seised and in respect of which [President Sassou Nguesso] was named . . . as the principal perpetrator"[207] in the attached complaints. This second risk of additional prejudice to the Congolese head of state was further supported by the French Minister for Foreign Affair's failure to transmit the invitation for taking evidence to the Congo for consent.[208] Although the failure to transmit the invitation could be "explained by reasons of expediency or legality,"[209] Judge de Cara stressed that because nothing

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200 *See id*.
201 *See id*. at 125.
202 *See id*. at 126.
203 *See id*.
204 *Id*.
205 *Id.* at 126.
206 *See id*.
207 *Id*.
208 *See id*. at 127.
209 *Id.* Judge de Cara suggests that the French Minister might not have transmitted the invitation because he may have considered the Article 656 procedure inapplicable to a foreign Head of state. *Id.* at 127.

had been done regarding the invitation's status, there was nothing preventing the investigating judge from taking actions against President Sassou Nguesso solely on the basis of the *réquisitoire*, without implicating any Article 656 concerns.[210] Because President Sassou Nguesso was expressly accused in the complaints upon which the *réquisitoire* was based, and which were appended to the *réquisitoire* itself, there was a significant chance that he could be placed under judicial examination,[211] regardless of Article 656 and the Congo's consent.

The two risks that Judge de Cara identified in his opinion indicating the need for provisional measures correspond to his fear of irreparable prejudice to the Congolese sitting head of state, and implicitly, to all sitting heads of state. Judge de Cara's concern regarding irreparable prejudice to President Sassou Nguesso's head of state status and internationally acknowledged immunity may be understood by the following analysis.

France's allegations of international crimes could severely harm the international standing of the Congo given the publicity that would be accorded to such proceedings on an international stage.[212] The proceedings against President Sassou Nguesso would not only be detrimental because he was a sitting head of state, but particularly, because he was a head of state in Africa, "a country without unity" and suffering from "instability," where "the Head of state embodies the nation itself"[213] "in all aspects of its international intercourse."[214]

Referring to the writings of Raymond Aron, Judge de Cara stressed that the position of head of state in Africa was unique because:

> the people have a stronger sense of ethnic solidarity than of national or State solidarity. . . lacking cohesion as a result of the multiplicity of tribes, African States are pre-national or sub-national . . . in that the State does not have before it a unified nation. [This new type of State] is territorial and national: territorial in that the sovereign is entitled to do as he pleases within its boundaries; national in that the

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[210] *Id.*

[211] *See id.* at 126 ("[T]he complaints implicate foreign personalities whose immunity from jurisdiction is established or foreseeable . . . . Once President Sassou Nguesso had been expressly accused in the complaints appended to the *réquisitoire* and by a victim, or alleged victim, examined during the preliminary police enquiry, the deposition that the investigating judges expected to take from him could only have concerned acts of which they were seised and in respect of which he was named.").

[212] *See id.* at 131.

[213] *Id.* at 116.

[214] *Id.* at 131.

> sovereign sees himself not as the possessor of the land nor as the master of those occupying it *but as the embodiment of a people*.[215]

Because the head of state in Africa "symbolizes the existence of a nation,"[216] any accusation against him or harm to his person is essentially an attack on the State he represents.[217] As such, international publicity surrounding the claims against the Congolese President of torture and enforced disappearance, arousing suspicions on an international level, could have a detrimental effect on the present condition of the Congo, "given that the case involve[d] the Head of an African State [that was] on the morrow of a series of vicious civil wars."[218]

For Judge de Cara, the irreparable prejudice caused by the French criminal proceedings consisted not only of the proceedings' interference with the Congolese head of state's ability to carry out official duties, but also by their impugnation of the dignity of the African State, personified by the Congo's incumbent President.[219] Because the dignity of the African State and the dignity of the head of state were one and the same, the head of state's inviolability could be impugned by another State through such acts as defamatory publications or offensive press articles emanating from private parties.[220] In denying provisional measures to the Congo, Judge de Cara believed that the ICJ essentially sanctioned French criminal investigations into the Congolese head of state, which would cause irreparable prejudice by publicly impugning the legitimacy of President Sassou Nguesso's actions. It also would challenge his head of state immunity in permitting the gathering of evidence against him. Such public accusation would further weaken an already destabilized state, torn by civil wars and tragic events.

F. *Appraisal of the ICJ's Differing Positions*

By not issuing provisional measures that would have obligated France to stop its criminal proceedings against Congolese officials, including the Congo's current head of state, the ICJ has confirmed and furthered a transition in international law from upholding archaic conceptions of immunity to safeguarding universal human rights values. The ICJ's decision implies that national authorities are authorized, at least, to circumvent the shield of sovereignty during a head of state's tenure by commencing investigations against suspected perpetrators of international crimes as soon as authorities are seized of information concerning

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[215] *Id*. at 132 (quoting RAYMOND ARON, PAIX ET GUERRE ENTRE LES NATIONS, 394-396 (1962)).

[216] Certain Criminal Proceedings in France, *supra* note 16, at 132 (dissenting opinion of Judge de Cara).

[217] *Id.*

[218] *Id*. at 124.

[219] *See id*. at 123.

[220] *See id*.

the violations. Allowing investigations during a head of state's tenure could certainly be problematic for some scholars, who might view ongoing investigations during a head of state's tenure to be just as significant a threat to immunity and interference to official duties as an actual prosecution.[221] However, the ICJ likely denied provisional measures simply because the Congo failed to meet its burden of evidence and show that such interim measures were necessary, not because the Court sanctioned the piercing of a sitting executive's immunity veil.

One of the reasons as to why the ICJ refused to issue provisional measures was a lack of evidence supporting the Congo's arguments. The ICJ stated that it had not been informed of any deterioration, "internally or in the international standing of the Congo, or in Franco-Congolese relations, since the institution of the French criminal proceedings."[222] Furthermore, it found a lack of evidence of any "serious prejudice or threat of prejudice" to the Congo's asserted rights.[223] The Congo's contentions that it was facing irreparable harm from France appeared weak given that France's national laws embodied the principle of head of state immunity, and that France recognized President Nguesso's immunity from both civil and jurisdiction to the Court.

The Congo, on the other hand, could not point to any action taken by France that had directly harmed the Congolese head of state. The only threats alleged by the Congo included the request for a written deposition from the President and the *réquistoire*. However, as previously noted, the deposition request remained in France's possession and had never been sent to the Congo. Also, the Congo's express consent would be required before President Nguesso could be approached for a written deposition.

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[221] During *Clinton v. Jones*, 520 U.S. 681 (1997), Clinton's attorney Bob Bennett argued that "the magnitude of Clinton's duties as President entitled him to a stay of all proceedings in the *Jones* case, including discovery and depositions, until he left office." JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 117 (2007). Although the Supreme Court ruled unanimously that Clinton could not postpone the lawsuit, which included discovery, depositions, and gathering of evidence, until he left office, the Supreme Court's contention that the lawsuit would not occupy any substantial amount of Clinton's time proved to be false. *Id.* at 118; *see also* Walter Dellinger, *The Wrong Way to Oppose: Democrats Shouldn't Diminish the Presidency in Fighting Bush's Agenda*, WALL STREET J., Jan. 10, 2001, at A22, *available at http://www.opinionjournal.com/extra/?id=85000420* ("I remain convinced that the Supreme Court seriously underestimated the potential harm to the functioning of the national government from permitting unrestrained lawsuits to be tried while a president holds office. As time has passed since the decision, however, the countervailing consideration—the positive effects here and in other countries of the message of *Clinton v. Jones* that no person is above the law—seems to me of greater importance now than at the time of the argument.").

[222] Certain Criminal Proceedings in France, *supra* note 15, at 108-09.

[223] *Id.* at 109.

Additionally, the Congo alleged that the *réquisitoire* posed a risk because "[its existence] and the reference of the case to the investigating judge maintain a constant threat in respect of [President Sassou Nguesso's] travels to France or to other foreign countries."[224] Such concern regarding the *réquisitoire's* possible impact on President Nguesso's ability to fully perform head of state duties mirrors the traditional rationale for head of state immunity: "to promote international equality, respect among nations, and freedom of action by heads of state without fear of repercussions."[225] Not only does the argument appeal to more archaic notions of head of state immunity, but it also overlooks two important points. The *réquisitoire* was not made against President Nguesso, but against an unidentified person. Even though the President was mentioned in the documentation upon which the *réquisitoire* was based, the likelihood that he still might be investigated is speculative. Finally, even if the President were investigated based on the *réquisitoire*, the Congo failed to show how an investigation, in contrast to a prosecution, would threaten the veil of President Nguesso's head of state immunity *while in office*. Investigations during the President's tenure would certainly increase opportunities for obtaining or securing fresh evidence before it became tainted, lost or destroyed. They also would increase the chances of a successful prosecution subsequent to Nguesso's tenure. However, the Congo failed to show how *possible* investigations that might lead to *possible* prosecutions threatened the executive's *present* absolute immunity.

A second reason as to why the ICJ denied provisional measures was the Congo's failure to show that interim measures were necessary. Under the first prong for issuing provisional measures, the measures sought must be intended to preserve the respective rights of the parties.[226] Here, the Congo requested interim measures to protect Congolese government officials from further criminal investigation. However, such measures would have prevented France from proceeding with an investigation that it had every right to pursue in light of the international law doctrine of universal jurisdiction. Had the ICJ upheld provisional measures under the first prong, it would not have preserved the rights of the respective parties, only those of the Congo. Thus, denial of provisional measures seems appropriate under the first prong.

Under the third prong, the indication of provisional measures should not anticipate the ICJ's judgment on the merits.[227] Here, issuing provisional measures would have anticipated the ICJ's judgment on the merits. The two issues presented to the Court were (1) the lawfulness of France's unilateral assertion of universal jurisdiction in criminal matters against

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[224] *Id*. at 122.

[225] *See* Hasson, *supra* note 75, at 142; *see also* Tunks, *supra* note 54, at 656.

[226] *See* BERNHARDT, *supra* note 177, at 7.

[227] *Id.* at 11.

government officials, and (2) whether France violated the Congolese head of state's immunity.[228] Stopping France's investigation entirely may have been perceived by some as an anticipation of the judgment on the merits because of the strong correlation between France's continuing investigation, which rested upon its jurisdiction being lawful and not violative of head of state immunity, and the issues before the Court. For these reasons, denial of provisional measures under the third prong also seems valid.

The second prong for issuing provisional measures is where the ICJ's opinions, as previously set forth, most differed. Under this prong, interim measures may be required to prevent irreparable harm or avoid prejudice to the rights in dispute.[229] Although Judges de Cara, Koroma and Vereschetin argued that the majority failed to consider the extent of irreparable harm that would be brought to the Congolese state should France be allowed to continue investigating, it is not clear that the *potential* threat of a government official being drawn into a foreign court may be considered *irreparable* harm. Although the ICJ found that France could continue with its investigations in the initial pleadings, it could still ultimately rule against France on the merits. Thus, the denial of provisional measures likely does not constitute the type of irreparable, permanent, and entirely beyond-repair harm that is necessary for the ICJ to indicate interim measures.

As previously set forth, Judges Koroma and Vereschetin believed that the Court failed to sufficiently consider the following threats of irreparable harm: fear of a covert coup d'état, destabilization of internal institutions, a return to war,[230] and the Congo's international reputation.[231] However, the Congo did not present any evidence indicating that such threats were in danger of being realized, much less that such threats even existed. If the Court were to have accepted Koroma and Vereschetin's positions as sufficient for issuing provisional measures, then national authorities seeking to provide a remedy for human rights litigants would, yet again, face nearly insurmountable odds in building a case while an official was still in office and, most importantly, when evidence might be most easily attainable. If vague and unsubstantiated contentions such as these had been deemed sufficient to stop France's investigation of international crimes, any country could then plausibly use these same arguments to erect a shield around its government's unlawful actions in the face of possible investigations. A country could merely allege, without presenting any evidence, that a coup d'état or disruption of internal affairs might occur if another country were allowed to investigate into its

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[228] Certain Criminal Proceedings in France, *supra* note 15, at 102-103.

[229] *See* BERNHARDT, *supra* note 177, at 8.

[230] Certain Criminal Proceedings in France, *supra* note 15, at 113 (joint separate opinions of Judge Koroma and Vereshchetin).

[231] This last factor will be assessed in the discussion of Judge de Cara's dissent.

government's acts. If investigations of major international law violations can be prevented by unproven claims of possible harm, then the challenge of overcoming government officials' immunity will be the least of human rights litigants' problems.

Judge de Cara validly argues that the ICJ's denial of provisional measures potentially could interfere with Nguesso's ability to carry out his official duties,[232] as he will now be under criminal investigation during his tenure. However, Judge de Cara's argument weakens when he discusses how such investigations constitute an impugnation of the African State. First, interim measures tend to be granted only in circumstances of urgency or clear danger of irreparable harm. Examples of this are *LaGrand*, where, had the Court not issued interim measures, a national of the respondent state would have been executed,[233] and the *Nuclear Tests* case, where, had the Court not issued measures, France would have carried out tests in the South Pacific with potentially grave consequences for New Zealand and Australia.[234] Judge de Cara's position that interim measures are proper to reinforce the appearance of a unified nation does not possess the same urgency generally found in ICJ cases in which interim measures have been granted. Additionally, his position presupposes the right of the Congo to enjoy a particular, nationally unified reputation.

Second, to speak of a state's violated dignity is an anachronistic view of state sovereignty. In his article, "Sovereignty and Human Rights in Contemporary International Law," Michael Reisman discusses how the term "sovereignty" continues to be used in international legal practice, but with a different modern understanding.[235] Although international law still protects sovereignty, "it is the *people's* sovereignty rather than the sovereign's sovereignty."[236] Reisman states:

> [u]nder the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its "invasion" of the sovereign's *domaine réservé*. . . Happily, the international legal system in which declamations such as "l'état, c'est moi" were coherent has long since been consigned to history's scrap heap. In our era, such pronouncements become . . . the stuff of refined comedy.[237]

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[232] Such interference might include discovery requests, the gathering of evidence, and the taking of depositions, all of which could distract President Nguesso from ongoing official acts.

[233] LaGrand, *supra* note 183.

[234] Nuclear Tests, *supra* note 179.

[235] W. Michael Reisman, *Sovereignty and Human Rights Law in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990).

[236] *Id.* (emphasis added).

[237] *Id.* at 869-70.

Thus, following the end of the Second World War, when the concept of popular sovereignty "became firmly rooted as one of the fundamental postulates of political legitimacy,"[238] the concept of a state or sovereign possessing dignity became an antiquated conception in international law. As Reisman argues, violation of sovereignty can only be viewed as a violation of a state's dignity "if one uses the term anachronistically to mean the violation of some mystical survival of a monarchical right that supposedly devolves *jure gentium* on whichever warlord seizes and holds the presidential palace or if the term is used in the jurisprudentially bizarre sense to mean that inanimate territory has political rights that preempt those of its inhabitants."[239] For these reasons, it is unclear as to why one of de Cara's principal arguments against the ICJ's denial of provisional measures centered on an outdated understanding of state sovereignty that only appears to be a form of regional customary international law, at most.[240]

IV. The ICJ's Decision on an International Scale

This Note asserts that the ICJ's denial of provisional measures to the Congo in *Certain Criminal Proceedings in France* represents an important ongoing shift in international law—from respecting a head of state's immunity because the executive and the state are one and the same, to encouraging governmental transparency, providing remedies for human rights violations, and promoting individual accountability, regardless of the individual's political power or authority. The very fact that the more anachronistic arguments favoring the inviolability of a head of state are found in the dissenting opinion demonstrates how far international law has moved in less than a century. The decision reflects a confrontation between two different understandings of the international community: "The first is an archaic conception, under which non-interference in the internal affairs of other states constitutes an essential pillar of international relations. The second is a modern view, based on the need to further universal values."[241] By permitting the criminal proceedings to continue either under the premises of an invitation to gather evidence under Article 656, or under the open-ended allegations stated in the complaints appended to the *réquisitoire*, the ICJ implicitly sanctioned a national court's building of a case for international crimes against an incumbent head of state.

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[238] *Id.* at 867.

[239] *Id.* at 871.

[240] For a discussion on the current position of African states on the immunity question, see Ernest K. Bankas, The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts 133-73 (2005).

[241] *Id.*

The Congo's arguments that France's proceedings will impugn the dignity of the African state and interfere with the executive's ability to carry out official duties appeal to more anachronistic conceptions of head of state immunity. However, the heart of the Congo's argument parallels that raised in *Arrest Warrant*: the ICJ must act to prevent a foreign state from executing acts capable of causing prejudice to a sitting head of state, particularly to his immunity. A major distinction, however, is that in *Arrest Warrant*, the concern was that any third state could execute an existing international arrest warrant against Yerodia. For this reason, the incumbent head of state's immunity was upheld by denying the continued issuance of the international arrest warrant under the logic that:

> the nature of a head of state . . . requires him to travel to other nations without apprehension that he could be exposed to legal liability or criminal punishment. Consequently, a sitting head of state's immunity, unlike that of a former head of state, cannot depend on whether the crime alleged involved his actions in a private capacity or an official capacity.[242]

In this case, it was not the chance that any third state would utilize a document that was already in international circulation to draw a head of state into its courts. Instead, it was that one state had commenced a criminal investigation into another state's head of state. By permitting the investigation in this case to go forward, the ICJ appears to have taken the position that any state suspecting another state's leader of international crimes may proceed with investigations, even when the objective of such investigations may be to establish liability. While offering support for the role of national authorities as guardians of the international community's fundamental values, there are additional issues to consider.

This decision could have important implications for the role of national authorities and human rights litigants in the investigation and prosecution of international crimes. Discovering and collecting evidence of international crimes, however, could be extremely difficult for human rights litigants. Most of the evidence may be found in a state where the crimes were committed. However, national authorities may be reluctant to surrender such evidence, particularly if those authorities were somehow implicated or involved in the commission of the crime. An alleged perpetrator's country would likely be averse to giving evidence to another investigating state to assist a government official's possible prosecution and conviction. Had the ICJ denied France the opportunity to proceed with an investigation that it had every right to pursue, the Court might have discouraged human rights litigants, already facing immunity obsta-

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[242] Tunks, *supra* note 54, at 664-65 (citing Arrest Warrant, *supra* note 10, at 549-50 ("In the performance of these functions, [a Head of State] is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise.")).

cles and evidence-gathering challenges, from seeking remedies for violations of international law. A different decision also might have had a chilling effect on foreign states that intended to initialize investigations into alleged international crimes.

Even assuming that a state is successful in commencing its investigation and gathering evidence, other problems arise. It is not clear when an investigating state will have sufficient evidence to hold a head of state accountable for international crimes. Should a state acquire sufficient evidence while a head of state is still in office, can the investigated head of state now be drawn into a foreign court during his tenure? Or will the investigating state be required to wait until an official has left office, when the official's absolute immunity veil has been lifted to some extent,[243] potentially exposing him to liability? What if a head of state's tenure is for life? Does this mean that a dictator such as Joseph Stalin, Mao Zedong, or Fidel Castro can escape prosecution because he will never leave office and thus always be entitled to absolute immunity?

This Note posits that the transparency created by allowing states to proceed with investigations is a positive development in international law because it may alert a domestic population to the potential crimes of its leaders and cause the population to oust its executives from office, at least in democratic states. Such transparency also benefits the international community. A rise in human rights litigation increases the role of national authorities and courts in applying international criminal law. As national courts continue to confront difficult issues under international criminal law or international human rights law, anachronistic understandings of international relations, such as a ruler embodying a state's dignity, will be recast to fit the modern workings of an increasingly global world.

V. Conclusion

Permitting a national court to investigate a sitting President for criminal allegations demonstrates the tensions surrounding the debates for a theory of absolute immunity or restrictive immunity for heads of state. On one side is the need for broad universal jurisdiction or a restrictive theory of immunity, given the gravity of such international crimes as genocide, torture, and crimes against humanity, acknowledged in numer-

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[243] This Note assumes that a Court will recognize a head of state as having absolute immunity while in office, but restrictive immunity upon leaving. The author uses the phrase "potentially exposing him to liability" because a former head of state would still be entitled to immunity for official acts of state under the restrictive immunity theory. Because the author contends that an international crime should never be considered an official act of state, that is why the immunity veil has only been lifted "to some extent," allowing for the assertion of jurisdiction for violations of international law.

ous treaties and conventions in international law.[244] Corresponding with such crimes is the principle of individual accountability, dating back to the time of the Nuremberg Charter. The need to hold an individual accountable for internationally acknowledged heinous offenses to prevent their further occurrence additionally supports the need for a broad use of universal jurisdiction by national courts, or at the very least, a restrictive theory of head of state immunity.

National courts' investigation of incumbent chief executives also supports a strong view of both state and individual responsibility. Under broad universal jurisdiction or restrictive immunity, not only may an individual perpetrator of international crimes be held accountable, but an individual that also holds a high-ranking state office, traditionally protected under the expansive doctrine of state sovereign immunity. The fact that any state may now hold another state's officials accountable could provide a significant deterrence against the sanctioning of international crimes by present and future leaders. These executives might have permitted such crimes under the guise of performing official functions for the state, knowing they would be cloaked in immunity.

On the other side is the need for an absolute theory of immunity, prohibiting the assertion of any jurisdiction over a head of state, regardless of whether the actions were committed in an official or private capacity. This theory of immunity would prevent the following concerns: one state failing to give deference to the state of territoriality; the unfairness to a sitting head of state, needing to govern his country, but limited in doing so while awaiting trial; the political motivation and selectivity behind such trials; and the inappropriateness of battling out political disputes in distant courtrooms.[245] Adopting a theory of absolute immunity would remove the dangers of a system of international law without clear parameters, where the lines between official and private acts blur, and where the definition of an "international crime" remains unclear given the global race for possession of dangerous technology under the justification of state sovereignty and self defense. It would also ensure that a head of state could fully carry out his official duties, without fear of being drawn into court wherever he might travel, or investigated for any act he might sanction while in office.

While there are advantages and disadvantages to each theory of immunity, this Note proposes a type of compromise between the views. The

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[244] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (Dec. 10, 1948).

[245] *See* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF., July-Aug. 2001, at 86, 90-92.

advantage of a clear bright-line rule while a head of state is in office supports an absolute view of immunity for incumbent heads of state. A head of state can continue to carry out official duties, without fear of being unexpectedly removed from office by any country that asserts jurisdiction over his position, leaving a possibly dangerous political vacuum in his place. Upon leaving office, however, a state should be able to hold a head of state accountable for international crimes. Victims of human rights violations should not be left without a remedy. Ideally, the knowledge that the cloak of immunity will be unveiled upon completion of office will serve as a sufficient deterrence for sitting heads of state so as to prevent the commission of international crimes.

The ICJ's decision to deny provisional measures in *Certain Criminal Proceedings in France* not only raises concerns about whether a restrictive or absolute theory of immunity is appropriate for heads of state. It also raises questions about who should be trying to assert jurisdiction over a head of state in the first place. Is this a job that should be left to an international court that might present a more politically unbiased view in its assertion of jurisdiction and establish a more noticeable precedence on the international stage? Is this a job that national courts should be allowed to perform in order to deter sitting heads of state from sanctioning the commission of international crimes? Or is this a job that a head of state's own domestic courts should assume?

The answers to these questions remain unclear, although the recent decision regarding provisional measures in *Certain Criminal Proceedings in France* suggests that the ICJ strongly supports national courts taking on a more significant role in this area. One point, however, does seem clear following the ICJ's decision: although the Court will continue to recognize an incumbent head of state's veil of absolute immunity, it will not allow that veil to blindfold the Court or human rights litigants from international law violations. An incumbent head of state's decisions, while cloaked in an impenetrable veil during his tenure, are not invisible. Rather, they are carried out on an international stage. As an audience, it is the international community's responsibility, whether through national, international, or hybrid systems, to bear witness to such acts and ensure that history does not repeat itself.