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Head Of State Doctrine And International Law Violations

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ISSUE 5: HEAD OF STATE DOCTRINE AND INTERNATIONAL LAW VIOLATIONS

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I. Introduction and Summary of Conclusions[*]

A. Issues

This memorandum explains in full detail the "Head of State Immunity" doctrine on prosecutions for violations of international law and its application to the Sierra Leone context. The second part of this memorandum sets forth a summary of the relevant factual background. The third part analyzes whether de facto rulers can be considered official Heads of State and describes the criterion that has been applied in other cases. The fourth part examines whether Head of State Immunity has any exceptions to its application. The fifth analyzes the issue of whether the government of the State can waive Head of State Immunity and how such waiver can be effectuated. The sixth part focuses on the issue of whether the Head of State Immunity continues after the ruler has left office. Finally, this memorandum examines whether Head of State Immunity can be used as a defense under the jurisdiction of the Special Court of Sierra Leone.

B. Summary of Conclusions

(1) De facto rulers can be considered official heads of state when their government exercises an effective amount of sovereign power and the international community recognizes it.

Even though de facto rulers use non-legal means to ascend to power, they can gain a Head of State status through the process of foreign recognition. Foreign countries

[*] ISSUE 5: As inquired by the Office of the Prosecutor of the Special Court of Sierra Leone (SCSL): The effect of the Head of State doctrine on prosecutions for violations of international law. E-mail from Sierra Leone Special Court Office of the Prosecutor (OTP), dated December 03, 2003 7:25 AM US/Eastern

recognize de facto leaders who seem to have control over a substantial part of the country's territory as well as the administrative apparatus. However, political reasons may stop countries from recognizing de facto governments that fulfill these requirements.

(2) Head of State Immunity is not an unlimited concept; it can be contested by four different exceptions.

The International Court of Justice numerated four situations in which immunities would not bar criminal prosecution.[1]

1) The individual bears no criminal immunity under international law as implemented in his own country and is tried in his own country's court system.[2]

2) The State which the Minister represents waives his immunity.[3]

3) The individual ceases to hold the office, in which case he may be tried by the court of another state in respect to acts committed before or after his time in office, or acts committed in a private capacity during his time in office.[4]

4) The individual is tried before a "certain international criminal court"[5] that possesses jurisdiction.

Even though the ruling was applied to a sitting Foreign Affairs Minister, the same logic can be used for Heads of State.

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[1] *See infra* notes 154-164 and accompanying text
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

(3) The Sierra Leone government can waive Head of State Immunity expressly or implicitly.

Head of State Immunity is not a right for the individual leader, but it is held to be a right of the foreign state. Therefore, the state may waive the immunity at any time and by any means the state legally has established under their national law.

(4) Former Heads of State lose their immunity once they relinquish power.

United States courts have recently held that the purpose of Head of State Immunity is to avoid the disruption of foreign relations. Thereby, if a Head of State steps down from office the original purpose for immunity seizes to exist, and the former Head of State cannot use immunity as a defense against prosecution.[6]

(5) The Special Court of Sierra Leone has jurisdiction over former heads of state regardless of their immunity.

The authority of the Special Court for Sierra Leone to prosecute for international law violations regardless of the Head of State Immunity doctrine derives from three aspects:

a. The Agreement and its subject matter jurisdiction, as well as the court's composition, render it as an international court;

b. The Agreement could be deemed a waiver of immunity by the domestic authorities;

[6] *See infra* notes 194-196 and accompanying text.

c. Even if the Special Court is not considered an international tribunal, no Head of State enjoys criminal immunity under international law in his own country's courts;

d. In any event, a former Head of State does not enjoy immunity for violations of international humanitarian law that should be deemed outside the scope of the Head of State's official functions.

II. Factual Background

This brief history identifies the Sierra Leone leaders who might assert the Head of State doctrine if prosecuted by the special court.

Sierra Leone was one of the first West African British colonies and gained its independence in 1961.[7] In that year, Sir Milton Margai, Dr. John Karefa-Smart and a group of colleagues formed the Sierra Leone Organization Society (SOS), which led a delegation to negotiate independence with the British government. When independence was granted, the SOS became the Sierra Leone People's Party (SLPP) and Sir Milton Margai was appointed Prime Minister. His government lasted until his death in 1964.[8] That same year, Sir Milton Margai's brother, Albert, was elected as the new Prime

[7] Anonymous, *Sierra Leone: History*, www.africast.com (2000 africast.com LLC) [Reproduced in accompanying notebook at Tab 5]

[8] Interview with Dr. John Karefa-Smart, Former Sierra Leone Minister of Lands, Mines and Labor, Defense and External Affairs (1957-1964); Member of Sierra Leone's Parliament (1957-1964, 1996) Leader of Opposition and Presidential Candidate (1996). (Interview held in Washington D.C. on March 29, 2003 at 5:51 pm, notes taken). [Reproduced in accompanying notebook at Tab 1]

Minister by the parliament.[9] Under Albert Margai the SLPP became more closely associated[10] with the Mendes.[11] Also, Albert Margai's Sierra Leone government transformed into a violent regime[12] and started constantly repressing its opponents.[13] Thus came the first indications of opposition.[14]

A trade union leader, Siaka Stevens succeeded Albert Margai after the 1967 general elections.[15] Stevens was a former member of the SLPP, but he dropped out and formed his own party, the All People's Congress (APC).[16] However, a few minutes after Stevens took the oath of office, a military coup led by Brigadier David Lasana ousted him

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[9] *Id.*

[10] Karefa-Smart, *supra* note 8 [Reproduced in accompanying notebook at Tab 1]

[11] Mende is an "ethnic group" (presumably is Sierra Leone's largest tribe). The Mendes migrated into Sierra Leone around 1540 from Liberia. They descend from "Mane" armies that were part of the old Mali Empire. When Mali was overthrown by the Songhai, the "Manes" were cut off from home and thus came south. Later, major railways were established from Freetown to Pendembu cutting through the Mende area and this brought them into contact with the SLPP. The SLPP party's power and initial support originated from the areas through which the railway passed. Most of these supporters were Mendes.

[12] Peter Andersen, journalist and reporter, e-mail sent on Sun Mar 30, 2003 at 10:50:37 AM US/Eastern. [Reproduced in accompanying notebook at Tab 2]

[13] *Id.*

[14] Peter Andersen argues against this statement establishing that "African countries all tended to walk a tightrope and play east off against west. It was [what they] called "Bi-polarity" at the time."

[15] Anonymous, *Sierra Leone: History*, www.encyclopedia.com (2003 Alacritude, LLC) [Reproduced in accompanying notebook at Tab 4]

[16] *Id.*

and took control of the government.[17] Ironically, Lasana's regime was soon toppled and replaced by the National Reformation Council (NRC) headed by Colonel Andrew Juxom-Smith.[18] In 1968, an army revolt overthrew the NRC and returned the nation to the parliamentary government, with Siaka Stevens as Prime Minister.[19]

Stevens' government was categorized as repressive and extremely debauched.[20] He openly encouraged corruption and all his appointees took advantage of the situation and deliberately stole from the treasury. In 1981, he debased the currency in order to raise enough money to host the Organization of African Unity conference. Steven's corruption would eventually lead to the later decline of schools, hospitals, clinics and the Sierra Leone Produce Marketing Board. The latter was very important for the rural people since farmers sold their cash crops through that institution.[21] After the decline of the Sierra Leone Produce Marketing Board, farmers could only sell their products by smuggling them to Liberia or Guinea. For those who could nott there was no cash income.

Foday Sankoh was a photographer and a corporal in the army.[22] The government repression made him, according to some "very angry and concerned" prompting him to become a revolutionary.[23] Later, he was accused and convicted by Siaka Stevens for

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Andersen, *supra* note 4. [Reproduced in accompanying notebook at Tab 2]

[20] *Id.*

[21] *Id.*

[22] Karefa-Smart, *supra* note 8 [Reproduced in accompanying notebook at Tab 1]

[23] *Id.*

suspected complicity in a coup plot to overthrow the APC government.[24] Sankoh was released after serving a part of his sentence;[25] he thereafter moved to Segbwema in eastern Sierra Leone[26] and started organizing the Revolutionary United Front (RUF).

Siaka Stevens' government became so corrupt that no body trusted him.[27] Student demonstrations were held against his regime, but Stevens repressed them brutally.[28] His power started to slip away, but he managed to appoint his successor, Joseph Saidu Momoh, without an election process. In 1985, Momoh, mayor-general and head of the army, took control of the government as the new Head of State. He also was a member of the All People's Congress (APC) political party, and thereby used the same system of repression. In March 23, 1991, the rebels officially "proclaimed war" against Momoh's regime; this was the start of the Sierra Leone civil war. [29]

Momoh immediately sent soldiers to fight Sankoh's forces in the rural areas. The RUF had raised money for weapons from selling cash crops[30] through Liberia.[31] After a

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[24] Peter Andersen, journalist and reporter, e-mail sent on Sun Mar 30, 2003 at 9:27:12 AM US/Eastern. [Reproduced in accompanying notebook at Tab 2]

[25] There are various reports about the length of his sentence. The general consent seems to be 10 years.

[26] Anonymous, *Sierra Leone: History*, *supra* note 15 [Reproduced in accompanying notebook at Tab 4]

[27] Karefa-Smart, *supra* note 8. [Reproduced in accompanying notebook at Tab 1]

[28] Peter Andersen, journalist and reporter, e-mail sent on Sun Mar 30, 2003 at 5:59:17 AM US/Eastern. [Reproduced in accompanying notebook at Tab 2]

[29] Karefa-Smart, *supra* note 8 [Reproduced in accompanying notebook at Tab 1]

[30] The RUF established their base in the Kailahun District, which is rich in coffee and cacao. These crops initially funded their rebellion. Later, diamonds replaced this funding source.

year of fighting, the government's military personnel began to wear down. Momoh's government had not supported them in any way whatsoever. The soldiers were wounded, unpaid, and complaining for lack of support.[32] Consequently, in 1992 the Sierra Leone soldiers overthrew Momoh[33] and created the National Provisional Ruling Counsel (NPRC), the first military regime in the country.[34] The RUF fought continuously against the NPRC until the start of peace negotiations in 1996.

On March of that same year, elections were held and Dr. Alhaji Ahmad Tejan Kabbah won the Presidency and was named the new Head of State of Sierra Leone. President Kabbah appointed the most broad-based government in Sierra Leone's history. He allowed all major political parties to be represented in his cabinet.[35] His goal was to bring the country to peace and he thought that political inclusion would bring stability.[36] He also exercised his power to continue the NPRC-RUF negotiations and managed to sign a peace agreement[37] with RUF leader Foday Sankoh on November 30, 1996.[38]

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[31] Andersen, *supra* note 11 [Reproduced in accompanying notebook at Tab 2]

[32] Karefa-Smart, *supra* note 8 [Reproduced in accompanying notebook at Tab 1]

[33] President Joseph Saidu Momoh was prosecuted and convicted in Sierra Leone's High Court in 1998 on two charges of conspiracy. He was sentenced to two concurrent five-year terms but was later pardoned. This was for his alleged collaboration with the AFRC after he left office.

[34] Peter Andersen, journalist and reporter, e-mail sent on Sun Mar 6, 2003 at 6:35:05 AM US/Eastern. [Reproduced in accompanying notebook at Tab 2]

[35] Anonymous, *Bio-Data of the President of the Republic of Sierra Leone his Excellency Alhaji Dr. Ahmad Tejan Kabbah*, www.sierra-leone.org (accessed 2002) [Reproduced in accompanying notebook at Tab 3]

[36] *Id.*

[37] Adijan Peace Agreement in Cote d' Ivoire

Unfortunately, peace did not last for long. The RUF resumed hostilities and drove President Kabbah into exile in neighboring Guinea in May 1997.

The 1997 military coup freed many prisoners including Johnny Paul Koroma who was accused of planning a coup in September of 1996. Koroma and his allies called the military regime the Armed Forces Revolutionary Council (AFRC); Koroma emerged as the leader and invited the RUF to join it in power. The international community condemned the RUF-AFRC regime and continued to recognize Kabbah's government as "government-in-exile".[39] A year later, ECOMOG[40] troops and loyal civil and military defense forces attacked the RUF-AFRC troops and their government fell apart allowing President Kabbah to come back to power.

Shortly after in late 1998, the AFRC[41] army mounted an attack on Freetown,[42] using human shields, carrying out amputations, and killing approximately 6,300 people.[43] They were finally expelled from Freetown with Nigerian reinforcements, but Kabbah was

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[38] *Id.*

[39] Peter Andersen, journalist and reporter, e-mail sent on Sun Mar 4, 2003 at 7:09:16 AM US/Eastern. [Reproduced in accompanying notebook at Tab 2]

[40] Economic Community of West Africa Armed Monitoring Group

[41] The attack was launched by Capt. Solomon A.J. Musa. He died at Benguema just before reaching Freetown when he ordered an arms dump destroyed at the Military Training Centre and stood too near. His lieutenants took over, and one of them, Alex Tamba Brima, is now in Special Court custody charged with war crimes in connection with the attack. RUF units are thought to have participated as well.

[42] The attack didn't reach Freetown until January 1999.

[43] Karefa-Smart *supra* note 8 [Reproduced in accompanying notebook at Tab 1]

put under pressure to negotiate. Foday Sankoh was at the time in jail, but the Sierra Leone government sent him to Abuja.

On July 7, 1999, under United Nations official supervision the Lome Peace Agreement was reached between Kabbah's government and the RUF rebel forces. The peace agreement granted amnesty to the members of the RUF and called for the creation of the Truth and Reconciliation Commission[44] to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story and get a clear picture of the past in order to facilitate genuine healing and reconciliation.[45] Later in 2000, the Sierra Leone government requested help from the United Nations to establish a special court to prosecute those responsible for the violations of international law, thereby facilitating the process of reconciliation.[46]

On August 14, 2000, the Security Council adopted Resolution 1315, which among other things authorized the Secretary-General to negotiate an agreement with Sierra Leone to create the special court.[47] In time, the Special Court for Sierra Leone was created and was given the "power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonan law committed in the territory of Sierra Leone since 30 November 1996, this includes those leaders who, in committing such crimes, have threatened the establishment of and

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[44] *Id.* Reportedly, the truth commission was never established.

[45] Michael P. Scharf, *The Special Court of Sierra Leone,* American Society of International Law, www.asil.org (October 2000). [Reproduced in accompanying notebook at Tab 6]

[46] *Id.*

[47] *Id.*

implementation of the peace process in Sierra Leone."[48] The court has been operating in Sierra Leone and has already started indicting those responsible for the atrocities committed in the country, including RUF leader Foday Sankoh.

The following is a chronological list of former Sierra Leone rulers. Some of these might try to assert Head of State Immunity as a defense if tried by the Special Court of Sierra Leone.

Name	**Dates in Power**
1. **Sir Milton Margai (SLPP)** - Born 1895, Died 1964	**from 1961 to 1964**
2. **Dr. John Karefa-Smart** - Born 1915, Alive	**Interim during Sir Milton Margai's absence/sickness**[49]
3. **Sir Albert Margai (SLPP)** - Born 1910, Died 1980	**from 1964 to 1967**
4. **One-year Military Interregnum** **-Brig. David Lasana in Support of Sir Albert Margai** (No information about whether they are dead or alive) **-Col. Andrew Juxom-Smith** Dead	**from 1967 to 1968**
5. **Siaka P. Stevens (APC)** - Born 1905, Died 1988	**from 1968 to 1985**
6. **Joseph Saidu Momoh (APC)** - Convicted,[50] Alive	**from 1985 to 1992**
7. **NPRC Military Regime** **- Cap. Valentine Strasser**	**from 1992 to 1996**

[48] Statute of the Special Court for Sierra Leone, Article 1: Competence of the Special Court) [Reproduced in accompanying notebook at Tab 53]

[49] Karefa-Samart *supra* note 8 [Reproduced in accompanying notebook at Tab 1]

[50] *See supra* note 33

(Alive, He is the Freetown suburb of Hastings
presumably with his mother)
- Julius Maada Bio (only for two months)
(Alive, HE is in Virginia, U.S.A.)

8. **Alhaji Ahmad Tejan Kabbah (SLPP)** **from Mar. 1996-May 1997**
- Alive
(His government was in exile but continued to be
recognized by all countries and the United Nations.)

9. **Johnny Paul Koroma (RUF-AFRC)** **from May 1997-Feb. 1998**
Presumably alive

10. **Alhaji Ahmad Tejan Kabbah (SLPP)** **from March 1998-Present**
- Alive

Throughout this memo, the relevant history will be referred to in order to analyze the different aspects of the Head of State Immunity doctrine as well as its exceptions as applied to Sierra Leone.

III. Whether De Facto Rulers can be Considered Official Heads of State.

A. Definitions and brief explanation of the distinction between de jure and de facto Heads of State.

Technically, there are two types of Head of State: de jure and de facto.[51] Some states only accord immunity to de jure Heads of State.[52] But over time, a de facto Head of

[51] Salvatore Zappala, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghadaffi Case Before the French Cour de Cassation*, European University Institute, University of Pisa, 2000. [Reproduced in accompanying notebook at Tab 8]

State will be treated like a de jure Head of States for purposes of immunity. The distinction is based upon the rule of law and the means used to ascend to power. De jure Head of State exists by right or according to law.[53] This would include, for instance, a constitutionally elected president or prime minister. On the other hand, a de facto leader may acquire effective control of the country even without formal or legal recognition as a Head of State.[54] A military coup that overthrows a government can create this scenario. A leader chosen by a coup to run the country would be a de facto Head of State.

It is noteworthy that the exercise of very strong influence over a State's political life may not be sufficient to qualify as a de facto Head of State.[55] Rather, to be considered a de facto Head of State the power of the state must be exercised directly by the ruler. De facto rulers wield specific powers generally attributed to a Head of State[56]. In *United States v. Noriega*,[57] the court held that "being the strong man behind a governmental apparatus formally held by others does not amount to a position of de facto Head of State." This distinction is fundamental when determining whether a leader or ruler can actually be considered a de facto Head of State.

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[52] *United States v. Noriega,* 746 F. Supp. 1506 (SD Fla, 1990) [Reproduced in accompanying notebook at Tab 9]

[53] *Black's Law Dictionary* 176-177 (Brian A. Garner ed., pocket ed., West 1996) [Reproduced in accompanying notebook at Tab 7]

[54] *Black's Law Dictionary* 172-173 (Brian A. Garner ed., pocket ed., West 1996) [Reproduced in accompanying notebook at Tab 7]

[55] Zappala, *supra* note 51, at 3. [Reproduced in accompanying notebook at Tab 8]

[56] *Id.*

[57] *United States v. Noriega,* 746 F.Supp.1507 (S.D. Fla., 1990) [Reproduced in accompanying notebook at Tab 9]

B. General requirements to become de jure Head of State

In order to establish the legitimacy of a de jure Head of State one must analyze the means taken to get in power as well as the actual exercise of power. International recognition serves as a final check, since by this method foreign countries legitimize the process of election and the appointing of the new leader.

1) *Means used to acquire power*

Every country has its own prescribed ways to access power. For instance, many democratic countries use the popular election as the method to decide who will become the next Head of State. Other countries, especially in the Far East, may have an appointed Head of State such as a King or a Monarch. According to the new Constitution of the Republic of Sierra Leone adopted on October 1, 1991,[58] Sierra Leone popular elections determine who is the Head of State. In the Constitutional text, Sierra Leone establishes the President of the Republic as the official Head of State.[59] Political parties propose the presidential candidates[60] and Sierra Leone's registered voters decide whom of these will become Head of State by participating in the election process.

2) *Exercise of power*

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[58] Enacted by the President and Members of the Sierra Leone Parliament assembled. [Reproduced in the Accompanying notebook at Tab 11]

[59] Constitution of Sierra Leone, Chapter V, § 40 [Reproduced in the Accompanying notebook at Tab 11]

[60] According to Article 41 of the Constitution of Sierra Leone "No person is qualified for election as President unless he is a citizen of Sierra Leone, a member of a political party, attained the age of forty years, and is otherwise qualified to be elected as a Member of the Parliament."

A de jure Head of State will hold office and exercise all powers conferred to him by the Constitution. However, some leaders will remain in power without truly exercising it. In such cases one can find leaders who are just mere figureheads, whose powers are being exercised by personnels or by a different government entity such as the parliament.

A true Head of State will exercise effective power over the government of the state. If not, one could argue that a de facto leader has taken his position as Head of State.

3) *Foreign Recognition*

A formal recognition of a government in the context of international law involves a legally applicable declaration of the intention of a foreign country to recognize it as a state's official power.[61] To determine if a government should be recognized, the recognizing states decide whether there is an effective exercise of sovereign authority over the country's administrative apparatus as well as control over a substantial part of the territory.[62] Since each state has its own appreciation of whether or not the government should be recognized, recognition amounts to a "unilateral declaration."[63]

This practice is significant when there is doubt about the legality of a new government or the collapse of a previous one.[64] As a corollary to recognizing a foreign

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[61] Federal Department of Foreign Affairs (DFA) Directorate of International Law, *Recognition of States and Governments*, http://www.eda.admin.ch (Switzerland 2000) [Reproduced in accompanying notebook at Tab 12]

[62] *Id.*

[63] *Id.*

[64] *Id.*

government, a state grants the authority to a person or a group of persons to act as the Head of State.[65]

Recognition can be either explicit or implicit.[66] In the first sense, it is customary that one state recognizes the government of another by the means of a formal declaration.[67] Nevertheless, implicit recognition may also occur in certain circumstances. A state may negotiate with the new government for trade advantages or immigration issues. These types of actions imply the acceptance of a new legitimate Head of State, and thereby may be considered implicit recognition. Also, Heads of State permanently represent their state and its unity in foreign relations; it can be assumed that there exists a sort of presumption according to which other states are supposed to accept that person as counterpart in foreign relations.[68] This acceptance is referred to as implicit recognition.[69]

(1) De jure Head of State: Sierra Leone's President Kabbah

In order to determine President Kabbah's legitimacy as Sierra Leone's head of State some facts are restated for guidance.

1) Summary of President Kabbah's Facts:

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] Zappala, *supra* note 51, at 6. [Reproduced in accompanying notebook at Tab 8]

[69] *Id.*

Alhaji Ahmad Tejan Kabbah was appointed as candidate for President by the SLPP and in March 1996 won the first multi-party election in twenty-three years.[70] In May 1997, he fled to Guinea as a military-rebel group overthrew his government, but came back after ECOMOG forces defeated the military rebels in Sierra Leone. He also won the second elections for presidency and still remains as Sierra Leone de jure Head of State.

2) Analysis:

President Kabbah's position as de jure Head of State is supported by his legitimate elections and his constant exercise of power. President Kabbah negotiated the 1996 Abidjan and 1999 Leome Peace Agreements. His government has been widely supported and recognized throughout the world. The United Nations even considered his government as the legitimate one when the 1997 rebel coup took over.

All of this indicates that President Kabbah does have Head of State Immunity. Whether this immunity applies as a defense to any crimes he might have committed would be determined by the nature of such offenses. This aspect will be reviewed further in this document starting form parts III, IV, V and VI of this memorandum.

C. De facto rulers in office can be considered official Heads of State

Even though de facto leaders ascend to power by using non-legal means, they can attain Head of State status through the process of recognition.

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[70] Anonymous, *Bio-Data of the President of the Republic of Sierra Leone his excellency Alhaji Dr. Ahmad Tejan Kabbah*, (www.sierra-leone.org 2002) [Reproduced in accompanying notebook at Tab 3]

As stated above, the only requirement international law dictates for the recognition of a government is its effective exercise of sovereign authority.[71] This control must be held over a substantial part of the territory and over most of the administrative apparatus.[72] Exceptions can be made when the target country is engaged in a war and its legitimate government has partially or entirely lost power.[73] It may even be forced to take refuge abroad and be considered by the international community as a "government in exile."[74] In such case, the evicted government may continue to be recognized as the legitimate government even though it has lost the effective control of the state and a different government is exercising power.[75]

A de facto Head of State can have major control over the country and thereby exercise its effective sovereign power. This might lead to a wide spread recognition around the world, imbuing the de facto government with official status under international law.

(1) De facto Head of State and General Augusto Pinochet Ugarte

This subsection will analyze General Pinochet's case under the de facto Head of State doctrine and will determine whether Pinochet's regime was recognized as an official government by foreign recognition. Please note this case will be discussed in more detail in Part IV, subsection D regarding a different issue.

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[71] DFA Directorate of International Law, *supra* 61 [Reproduced in accompanying notebook at Tab 12]

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

a) Pinochet Ugarte's uprising and the establishment of the new Chilean de facto government (1973-1990)

General Augusto Pinochet Ugarte came to power on September 11, 1973, in a military coup that overthrew the democratically elected government of President Salvador Allende.[76] He took control of the government and became Head of State from 1973 to 1990. His government pursued socialist measures, such as land reform, and enlisted the expertise of economists to bring the economy in line with capitalism.[77] Pinochet also created the National Intelligence Dictorate (DINA) to plan and execute political leaders and insurgent operators in the population.[78] "Operation Condor" was also established under his power. This operation created a joint venture[79] of South American Special Forces who operated to eliminate terrorists and subversives.[80] His government was widely supported by the Reagan administration and the government of the British Prime Minister Margaret Thatcher,[81] which each recognized as a legitimate Head of State.

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[76] Janine Davidson, *The Pinochet Precedent: Pushing Human Rights Standards in International Law*, University of South Carolina, November 2001. [Reproduced in accompanying notebook at Tab 13]

[77] *Id.* at 5.

[78] Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 Wash. U. L.Q. 1583, 1589 (2000) [Reproduced in accompanying notebook at Tab 14]

[79] The operation included Argentina, Bolivia, Paraguay, Uruguay and Brazil.

[80] Gilbert, *supra* note 78 at 1590. [Reproduced in accompanying notebook at Tab 14]

[81] Davidson, *supra* note 76. [Reproduced in accompanying notebook at Tab 13]

In 1988, the people of Chile had an opportunity to vote for Pinochet as president, validating military rule for another eight years.[82] However, the election did not go in Pinochet's favor and his defeat paved the way for a freely elected government.[83] Pinochet finally stepped down in March of 1990.[84] Pinochet currently enjoys immunity by virtue of his position as "Senator-for-Life" which he assumed after he stepped down as ComMender in Chief.[85]

Pinochet's government started with a military coup, which made him a de facto Head of State of Chile. Pinochet had control over most of the country and his regime had effective exercise of sovereign power. His position as Head of State was recognized by countries around the world especially those that were opposed to the communist "Allendista" regime. Even though his government was established by a military coup rather than by law, it can be concluded that his position as Head of State was official.

b) Overview: Initial extradition proceedings by the Spanish government and the Queen's Bench Division's Decision.

On October 16, 1998, the Central Court of Criminal Proceedings Number 5 in Madrid issued an international warrant for the arrest of Pinochet.[86] The Spanish court claimed that it had jurisdiction, because over 550 Spanish citizens disappeared or were

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[82] Gilbert, *supra* note 78 at 1590. [Reproduced in accompanying notebook at Tab 14]

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] Andrew Mitchell, *Leave Your Hat On? Head of State Immunity and Pinochet*, 25 Monash U. L.R. 225, 228 (1999) [Reproduced in accompanying notebook at Tab 15]

killed by the Chilean military regime.[87] The warrant requested the arrest and extradition of Pinochet from the United Kingdom and was sent to the British authorities the same day.[88]

The British officials received the request and immediately began extradition proceedings against Pinochet. The General challenged the warrant and sought habeas corpus relief in the Court of the Queen's Bench Division.[89] The decisive issue in this matter was the Head of State Immunity argument raised by Pinochet's legal counsel. The Court reasoned that the State Immunity Act of 1978 conferred immunity on Pinochet for acts performed under his official capacity.[90] According to the court, the General should enjoy immunity from all acts performed in his public function.[91]

More importantly, the court was recognizing Pinochet's official Head of State status in Chile. This means that even though Pinochet was a de facto Head of State, his regime was recognized as an official government. Hence, the Queen's Bench Division initially granted him Head of State Immunity. [92] His case was then appealed to the House of Lords in 1998.

(2) De facto Head of State and Hissene Habre

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[87] *Id.*

[88] *Id.*

[89] Gilbert, *supra* note 78 at 1595. [Reproduced in accompanying notebook at Tab 14]

[90] *Id.*

[91] *Id.*

[92] *Id.*

Hissen Habre was commonly referred to as the "African Pinochet."[93] He took over the Republic of Chad by using violence and force and then ruled like a tyrant. This case is another example of how a de facto Head of State can become legitimate by foreign recognition.

a) Hissene Habre's advancement to Chad and the establishment of his regime

In 1982, Hissen Habre took over the French Colony of Chad by overthrowing the fragile government of Goukouni Wedeye.[94] His one-party regime was marked with widespread abuse of power targeting various ethnic groups from regions such as Sara, Zaghawa and Hadjerai.[95] Like Pinochet he killed and arrested opposition groups and repressed anyone who was posing threat to his regime.[96]

Notwithstanding his violations of international humanitarian law, France and the United States supported Habre's advancement to Chad and backed him throughout most of his rule. He was seen as a bulwark against Libya's Moemmar Khadaffi.[97] These countries recognized his government as the legitimate sovereign power and held him as an official Head of State.

b) Overview: Human Rights Watch complaint in Senegal's Tribunal regional hors-classe de Dakar

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[93] Reed Brody, *The Prosecution of Hissene Habre An "African Pinochet"*, 35 New Eng. L. Rev 321, 322 (2000) [Reproduced in accompanying notebook at Tab 16]

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

After the developments in the Pinochet case on 1999, the Chadian Association for the Promotion and Defense of Human Rights and Human Rights Watch prepared a complaint and filed it on January 26, 2000 in the Dakar Regional Court in Senegal.[98] The Senegalese court indicted the exiled dictator on torture charges and placed him under arrest.[99] Nevertheless, after months of deliberation, the Senegalese court stated that Senegal had no competence to try crimes committed by Chadians in Chad and so dismissed the case.[100] The court held that under Senegal law, its courts had competence only over certain extraterritorial crimes committed by foreigners.[101] It established that the only applicable legal document was the "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" and this treaty did not allocate competence to their jurisdiction.[102] Still, the case affected Habre's regime and its credibility. The Chad government expressly declared its disappointment when the case was dismissed and even suggested that they might bring Habre to face Chadian justice. Nonetheless, these proceedings arguably recognized Habre's de facto regime as the official government in Chad during its period of ruling.

(3) De Facto Head of State and General Manuel Antonio Noriega

Noriega's case is an example of a leader who was not considered as the legitimate Head of State. Noriega arguably had full control of his country's government, but the

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[98] *Id.* at 324

[99] Anonymous, *Hissein Habre- "The African Pinochet" To Face Trial*, Afronet File, afronet.org.za (1999-2000) [Reproduced in accompanying notebook at Tab 17]

[100] Brody, *supra* note 93 at 329 [Reproduced in accompanying notebook at Tab 16]

[101] *Id.* at 330

[102] *Id.*

court rejected this argument establishing that he was never recognized as the legitimate leader of his country.

a) General Noriega in Panama and his arrest

General Manuel Noriega was the chief comMender of the defense forces of the Republic of Panama. While in power he was involved in cocaine trafficking from South America to the United States.[103] Panama's President discharged Noriega from his official post and ordered him to leave the army. Noriega refused to accept the dismissal and declared that a state of war existed between the Republic of Panama and the United States.[104]

The United States government arrested by military action General Noriega and brought him to Florida for trial, where the defendant argued immunity because he was a Head of State.

b) Head of State Recognition Doctrine under United States v. Noriega[105]

Noriega argued that he served as a de facto leader of Panama and thereby he had Head of State Immunity. The court denied this claim, reasoning that "the record indicated that Noriega never served as the constitutional leader in Panama." [106] Noriega was never elected into office and the United States recognized Eric Arturo Del Valle, not Noriega,

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[103] Jordan J. Paust et al, *International Criminal Law: Cases and Materials*, Carolina Academic Press (Durham 2000) [Reproduced in accompanying notebook at Tab18]

[104] *Id.*

[105] United States v. Noriega, 117 F.3d 1206 (US Court of Appeals 11th 1997) [Reproduced in accompanying notebook at Tab10]

[106] *Id.*

as the president.[107] Therefore, to receive immunity the government must have recognized an individual as the Head of State of a foreign country.[108]

(4) Sierra Leone's rebel coup of 1997

The following section will restate the facts of the 1997 coup in order to determine whether Johnny Paul Koroma was a legitimate Head of State in that period of time.

Koroma came to power in 1997 as the result of a military coup. He was in prison when the coup originated, but was set free and named the leader of the AFRC, the military group that overthrew Kabbah's constitutionally elected government.

Koroma's leadership lasted for more than 8 months, during which time he arguably held effective sovereign power over the country and he also addressed himself as the leader of the military junta. Nonetheless, the United Nations Security Council condemned the military coup and deMended the immediate installment of the original Kabbah government.[109] Kabbah had fled to Guinea and the international community considered his leadership as a "government-in-exile."[110]

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[107] Amber Fitzgerald, *The Pinochet Case: Head of State Immunity within The United States*, 22 Whittier L.R. 987, 1020 (2001) [Reproduced in accompanying notebook at Tab19]

[108] *Id.*

[109] Security Council Press Release, *Security Council strongly deplores attempt to overthrow democratically elected government in Sierra Leone*, (May 27, 1997) [Reproduced in accompanying notebook at Tab 20]

[110] Peter Andersen, journalist and reporter, e-mail sent on Sun Mar 4, 2003 at 7:09:16 AM US/Eastern. [Reproduced in accompanying notebook at Tab 2]

Koroma was a de facto Head of State, but his regime was never recognized. Like Noriega's case, Koroma cannot persuasively argue that he was a Head of State since no country or international organization recognized his regime as the legitimate government of Sierra Leone. Rather, the "government-in-exile" of Kabbah was considered as the official power of the Sierra Leone Nation.

The AFRC regime's only legal claim to legitimacy was based on the Conakry Peace Accord negotiated between it and the Economic Community of The West African States (ECOWAS) in 1997.[111] After the negotiators returned home from signing the peace accord, the AFRC immediately rejected it.[112] The AFRC argued that the negotiators had not wanted to disappoint the people of Sierra Leone by failing to reach an agreement with ECOWAS.[113] However, the AFRC could not live with its terms. The junta members claimed that this negotiation consisted recognition of the AFRC as the government of Sierra Leone by the ECOWAS. Koroma continuously held this claim to prove his legitimacy as a Head of State.

On the other hand, when the AFRC took over the government, the RUF was invited to share leadership with them.[114] This was an attempt by the AFRC to bring peace to the country. Notwithstanding this arrangement, some argue that the RUF members of

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[111] Sylvester Rowe, Sierra Leone's Deputy Permanent Representative for Political Affairs in the United Nations, e-mail sent on Sun Mar 4, 2003 at 7:09:16 AM US/Eastern. [Reproduced in accompanying notebook at Tab 21]

[112] Andersen, *supra* note 110. [Reproduced in accompanying notebook at Tab 2]

[113] *Id.*

[114] *Id.*

the coalition government held the real power and Koroma was just a mere figurehead.[115] If this were the case, it could not have been Sankoh; he was detained in Nigeria during Koroma's regime.[116] Some say Sam Bockarie was giving orders for the most part, but others name Eldred Collins as the real leader behind the scenes.[117] Koroma did reportedly say that he was "surrounded by dragons."[118] This implies that he may not have had total power after all.

If the RUF leaders held the real power over Koroma's regime, it is important to recognize that Libya, Liberia and Burkina Faso allegedly provided support to the RUF and its leaders. If this is the case, these three African countries may have implicitly recognized the RUF as an official legitimate government. Reportedly, the Liberian Government had troops in Sierra Leone during the ARFC-RUF regime in 1997-1998.[119] RUF leaders could try to make the case that they held effective exercise of sovereign power over Sierra Leone during that period and that they were implicitly recognized by Libya, Liberia and Burkina Faso. Nonetheless, the United Nations Security Council targeted the regime with an arms and oil embargo. The Council also supported the return of Kabbah's democratically elected government to Sierra Leone.[120]

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[115] *Id.*

[116] Peter Andersen, journalist and reporter, e-amil sent on Wed. April 16, 2003 2:20:40 PM US/Eastern [Reproduced in accompanying notebook at Tab 2]

[117] *Id.*

[118] *Id.*

[119] Rowe, *supra* note 111. [Reproduced in accompanying notebook at Tab 21]

[120] Security Council Resolution 1181 (July 13, 1998) [Reproduced in accompanying notebook at Tab 22]

On the other hand, some sources have declared that the 1997 military junta was never recognized as an official government. Sylvester Rowe, Sierra Leone's Deputy Permanent Representative for Political Affairs in the United Nations, determined that "Libya did not recognize the AFRC; actually no country did, except of course the junta had sympathizers, such as Taiwan and Liberia"[121] Alimany Pallo Bangura, former AFRC Secretary of State and Foreign Affairs, similary maintains that the "AFRC-RUF regime was never recognized, not at all."[122] Dr. John Karefa-Smart, former presidential candidate for Sierra Leone and leader of the opposition party, explained that "no country that he can recall ever explicitly or implicitly recognized the military junta of 1997."[123] Yada Williams, former secretary of the Sierra Leone Bar Association, claimed that "The AFRC-RUF regime was an illegal and unconstitutional regime. It […] did not secure both de facto and de jure legitimacy."[124] However, Yada Williams contradicts this statement by adding that "the Liberian government expressly recognized the AFRC."[125] Another source[126] exclaimed that "no country ever recognized the AFRC but Burkina Faso invited them to send a delegation to attend a water conference and they loudly portrayed it as a recognition by Burkina Faso…"

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[121] Rowe, *supra* note 111. [Reproduced in accompanying notebook at Tab 21]

[122] Alimamy Pallo Bangura, former AFRC Secretary of State for Foreign Affairs, telephone call on March 18, 2003 at 10:35 am US /Eastern

[123] Karefa-Smart, *supra* note 8. [Reproduced in accompanying notebook at Tab 1]

[124] Yada Williams, for Secretary of the Sierra Leone Bar Association, e-mail sent on Thu. April 17, 2003 12:11:57 PM US/Eastern [Reproduced in accompanying notebook at Tab 21]

[125] *Id.*

[126] Source preferred to remain anonymous and asked me to not include his name.

Notwithstanding this arguably implied act of recognition by Burkina Faso, the United Nations placed the AFRC regime under sanctions[127] and determined it was illegitimate.[128] It would have been very hard to actually recognize a government that was explicitly rejected by the world's most important international organization. Also, no explicit recognition was ever made by any country. Rather the RUF faction was supported by a small group of countries, but that support was not strong enough to establish an implicit recognition of the AFRC-RUF military junta. Thereby, one can argue that the ARFC-RUF regime lacked legitimacy and that Johnny Paul Koroma cannot be considered as a true Head of State, eliminating his ability to raise Head of State Immunity as a viable defense.

IV. Whether Head of State Immunity Admits Exceptions

A. Head of State Immunity Doctrine and Traditional Application

The Head of State Immunity doctrine is grounded in customary international law, which grants a Head of State Immunity from prosecution in a foreign state's courts with respect to official acts taken by the Head of State while in power.[129] Throughout time, the courts likened Head of State Immunity to sovereign immunity because the Head of State was once thought of as the personification of the state.[130] Sovereign immunity

[127] Security Council Resolution 1181 (July 13, 1998) [Reproduced in accompanying notebook at Tab 22]

[128] Andersen, *supra* note 40 [Reproduced in accompanying notebook at Tab 2]

[129] Gilbert, *supra* note 78 at 1590. [Reproduced in accompanying notebook at Tab 4]

[130] *Id.*

establishes that one sovereign could not sit in judgment by another sovereign because under the Westphalian model they had equal standing in the international plane.[131] Today, the rationale for Head of State Immunity focuses the states' interests under the doctrine of reciprocity. It is in the state's best interests to safeguard the immunity of a foreign Head of State so that other states will afford equivalent protection to its own Head of State while out of the country.[132] However, with all the recent developments in case law, the prevailing standard for Head of State Immunity in international law is constantly changing.

B. Private Acts versus Official or Public Acts

A formal distinction has been drawn between the Head of State's official conduct and his private conduct. The private conduct includes all acts that the head of state undertakes in his personal capacity.[133] The official conduct will include all acts that the Head of State undertakes under his public duty.[134]

Originally, the courts would only hear cases that involved Heads of States' private conduct and not those that argued their public duty. Under this view all criminal and unlawful acts that were constituted under private and personal capacity were prosecutable.[135] The problem is that this leaves out the possibility of criminal acts done under the scope of the Head of State's official role. Nonetheless, it is equally possible for

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[131] *Id.*

[132] *Id.*

[133] *Id.* at 1586

[134] Heidi Altman, *The Future of Head of State Immunity: The Case Against Ariel Sharon*, (April 2002) [Reproduced in accompanying notebook at Tab 23]

[135] *Id.*

a Head of State to commit a crime while using his office to carry out the functions of Head of State. According to this view, if the criminal act were committed in such a manner the Head of State would be immune from prosecution regardless of the legality of the act.[136]

However, recent cases involving Ferdinand Marcos of the Philippines, Manuel Noriega of Panama and Radovan Karadzic of Bosnia suggest that United States courts might find the doctrine inapplicable in a criminal case involving flagrant violations of international law.[137] For instance, consider the following dicta.

In Ferdinand Marcos's case, *In re Doe*[138], the court held that "There is respectable authority for denying Head-of -State Immunity to a former Head-of –State for private or criminal acts in violation of American Law."[139] Bn the same trend, in *United States v. Noriega*,[140] the district court held that "there is ample doubt whether Head of State Immunity extends to private or criminal acts in violation of U.S. law." Finally, consider

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[136] Gilbert, *supra* note 78 at 1590. [Reproduced in accompanying notebook at Tab 24]

[137] Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons through sanctions, use of force, and Criminalization*, 20 Mich. J. Int'l. 477, 505 (1999) [Reproduced in accompanying notebook at Tab 33]

[138] *In re Doe*, 860 F.2d at 44 (2d Cir. 1988) [Reproduced in accompanying notebook at Tab 38]

[139] *See*, *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (court rejects dicta of *In re Doe* and finding that such a "theory for circumventing Head-of-State Immuntiy is unacceptable."

[140] *United States v. Noriega*, 746 F. Supp. 1506 (SD Fla, 1990) [Reproduced in accompanying notebook at Tab 9]

Doe v. Karadzic,[141] where the court stated that "we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly ungratified by that nation's government, could properly be characterized as an act of state."

Concluding, a former Head of State does not enjoy immunity for violations of international law that should be deemed outside the scope of his functions.

C. Absolute Immunity and Universal Jurisdiction

Some states have gone as far as declaring absolute immunity for their Heads of State. For instance, Russia has granted a broad degree of immunity to its Head of State declaring that foreign courts cannot indict the Russian Head of State under any circumstance.[142] Many countries such as the United States have followed this example.

Still, it is a common practice that Head of State Immunity is not granted in civil and administrative proceedings. This is because these types of acts are essentially of private character.[143]

On the other hand, Head of State Immunity is still absolute with respect to criminal proceedings initiated in foreign courts of other states. Yet, in international law there are some circumstances when Head of State Immunity is not considered a legitimate defense. Recent developments in international law have included the prosecution of serious violations such as war crimes and genocide as an exception for Head of State Immunity.

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[141] *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) [Reproduced in accompanying notebook at Tab 25]

[142] Gilbert, *supra* note 78 at 1587 [Reproduced in accompanying notebook at Tab 14]

[143] *Id.* at 1588

Today, courts have extended their jurisdiction over the commission of crimes against humanity, genocide and war crimes.[144] This broad jurisdiction is known as Universal Jurisdiction. Universal Jurisdiction allows any state jurisdiction under international law to provide "criminal or civil sanctions for violations of international law."[145] This principle provides that there are certain crimes of such a horrifying nature that they pose an affront to all states, and as such all states have an interest in bringing their perpetrators to justice.[146]

Universal jurisdiction has also been implemented through the establishment of international criminal courts such as the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, as well as the impending International Criminal Court of Justice.[147]

D. International Cases and Head of State Immunity

(1) Ex parte Pinochet

In this subsection, General Pinochet's case is restated and analyzed under the issue of Head of State Immunity.

On November of 1998, General Pinochet's case was taken to the House of Lords challenging the Queen's Bench decision that granted Head of State Immunity for the

[144] Altman, *supra* note 134 [Reproduced in accompanying notebook at Tab 23]

[145] Paust et al, *supra* note 103 [Reproduced in accompanying notebook at Tab 18]

[146] Altman, *supra* note 134 [Reproduced in accompanying notebook at Tab 23]

[147] *Id.*

international law violations of which he was accused.[148] The House of Lords concluded, "that a former Head of State was immune from criminal prosecution for acts performed in his official capacity as Head of State."[149] However, it also established that acts "condemned as criminal by international law" cannot "amount to acts performed in the exercise of the [official] function of a Head of State."[150] The court reasoned that serious wrongs had been outlawed by international law and thereby they cannot constitute official functions of a Head of State for which Pinochet would be granted immunity.

This ruling by the House of Lords may have changed the Head of State Immunity doctrine drastically, but the decision was vacated in light of an undisclosed conflict of interests of one of the Law Lords that decided the case.[151] The case was re-argued and the House of the Lords changed its ruling, this time holding that Pinochet was immune except in respect for the violations that occurred after December 8, 1988.[152] On this date Britain had ratified a treaty known as the Torture Convention, which made torture an extraterritorial crime and served as a valid basis for extradition.[153] Still, the decision does

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[148] *Ex parte Pinochet Ugarte*, 1 AC 61 (2000) (House of the Lords, United Kingdom) [Reproduced in accompanying notebook at Tab 26]

[149] *Id.*

[150] *Id.*

[151] Lord Hoffman failed to declare that he was an unpaid director of Amnesty International, a non governmental organization that had intervened in the case as an interested party.

[152] *Ex parte Pinochet* 1 AC 119 (2000) (House of Lords) [Reproduced in accompanying notebook at Tab 27]

[153] J.R. Spencer, *Case and Comment: Former Head of Foreign State-Extradition-Immunity*, 58 Cambridge L.J. 461, 465 (1999) [Reproduced in accompanying notebook at Tab 29]

represent a significant first step in the establishment of a new rule of Head of State Immunity: there is no Head of State immunity for acts prohibited by an international convention which covers responsible leaders so long as the countries at issue have ratified the convention.

(2) Congo v. Belgium: International Court of Justice Ruling[154]

The *Congo v. Belgium* case established four different exceptions for Head of State Immunity. These are initially discussed here and then analyzed throughout the memorandum.

On April 11, 2002, investigating Judge Vandermeersch from the Brussels Tribunal of the Kingdom of Belgium issued an international arrest warrant against the Minister for Foreign Affairs in the office of the Democratic Republic of Congo, Mr. Abdulaye Yerodia Ndombasi.[155] The warrant was issued for alleged violations of international humanitarian law to be prosecuted in the courts of Belgium.

The International Court of Justice received a request by the Democratic Republic of Congo to declare that Belgium shall annul the international warrant against the Congo Minister of Foreign Affairs.[156] In February 14, 2002, the court made its decision in the case and presented its vision of the state of international law regarding the immunity from criminal process for incumbent Ministers.[157]

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[154] *Democratic Republic of the Congo v. Belgium*, 41 I.L.M. 536 (ICJ 2002) [Reproduced in accompanying notebook at Tab 30]

[155] *Id.*

[156] *Id.*

[157] Altman, *supra* note 134 [Reproduced in accompanying notebook at Tab 23]

The court found that "Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts."[158] In this regard, the International Court of Justice numerated four situations in which immunities would not bar criminal prosecution.[159]

1) The individual bears no criminal immunity under international law as implemented in his own country and is tried in his own country's court system.[160]

2) The State which the Minister represents waives his immunity[161]

3) The individual ceases to hold the office, in which case he may be tried by the court of another state in respect to acts committed before or after his time in office, or acts committed in a private capacity during his time in office.[162]

4) The individual is tried before a "certain international criminal court"[163] that possesses jurisdiction.[164]

Even though the ruling was applied to a sitting Foreign Affairs Minister, the same logic can be used for Heads of State. Nevertheless, this could also be viewed the other way around. One could argue that this ruling was particular to Foreign Affairs Ministers, and thereby it should not be applicable to Heads of State.

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[158] *Democratic Republic of the Congo v. Belgium*, *supra* note [Reproduced in accompanying notebook at Tab 30]

[159] *Id.* at 551

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] Altman, *supra* note 134 [Reproduced in accompanying notebook at Tab 23]

For practical purposes, numerals two and three will be analyzed first. Numeral one will be analyzed together with number four in section VI.

V. Whether Head of State Immunity can be waived by the state and how such waiver can be effectuated.

A. General Considerations

Head of State Immunity is not a right for the individual ruler, but is held to be a right of the foreign state.[165] Therefore a state may waive the immunity at anytime and by the means the state legally has established under their national law.

It is noteworthy in this regard that the Vienna Convention of Diplomatic Relations established that immunity of Diplomatic agents may be waived by the sending state. [166] The waiver of Head of State Immunity is analogous to the waiver provisions of this Convention. The reasoning is that the state is the one that grants the power to lead and it can therefore withdraw it when it pleases.[167]

On the other hand, the state might have never conferred immunity to some of its leaders. This would be the situation with respect to de facto Head of State. For instance,

[165] Amber Fitzgerald, *supra* note 107 [Reproduced in accompanying notebook at Tab 19]

[166] The Vienna Convention of Diplomatic Relations, 23 U.S.T. 3227, 1972 WL 122692 (U.S. Treaty), T.I.A.S. No. 7502 articles 31(a), 31(2), 32(1) and 29 [Reproduced in accompanying notebook at Tab 31]

[167] Fitzgerald, *supra* note 171 at 1021 [Reproduced in accompanying notebook at Tab 19]

in the *Noriega* case, Panama never sought to give Noriega immunity.[168] The duly elected president of Panama even discharged Noriega and ordered him to leave the country. Nevertheless Noriega argued that he was a de facto leader and that he should have immunity. His de facto leadership was never internationally recognized and so that argument was rejected.

B. Express Waivers

Immunity can be waived expressly or implicitly. Article 32(2) of the Vienna Convention requires that waiver must always be express. As an example consider *Paul v. Avril*.[169]

In this case, six Hatians filed a complaint against former President of the Military Government in Haiti, Lieutenant General Prosper Avril, for torture, degrading treatment, arbitrary arrest and detention without trial.[170] All these violations occurred when Avril was de facto leader of Haiti. The complaint was filed later when Avril was residing in Florida. In this situation, the court rejected Avril's claim for immunity on the basis that Haiti had already waived all immunities he previously had enjoyed.[171] The court used as a basis for its holding the actual waiver that stated:

> "Prosper Avril, ex-Lieutenant-General of the Armed Forces of Haiti and Former President of the Military Government of the Republic of Haiti, enjoys absolutely no form of immunity, whether it be of a sovereign, a chief of state, a former chief

[168] *United States v. Noriega*, 117 F.3d 1206 (US Court of Appeals 11th) [Reproduced in accompanying notebook at Tab 10]

[169] *Paul v. Avril*, 812 F. Supp 207, 209 (S.D.Fla. 1993) [Reproduced in accompanying notebook at Tab 32]

[170] *Id.*

[171] *Id.*

> of state; whether it be diplomatic, consular, or testimonial immunity, or all other immunity, including immunity against judgment, or process, immunity against enforcement of judgments and immunity against appearing before the court before and after judgment."[172]

The court concluded in its ruling that "[t]he waiver could hardly have been more strenuous."[173] Clearly, the Haitian government had waived his immunity expressly and so his privilege had ended.

C. Implicit Waivers

On the other hand, immunity can be waived implicitly by failing to intercede for the government official that was being called to trial. In the case of *In re Doe*,[174] the appellants, Philippine Head of State and his wife, challenged an order of the United States District Court for the Southern District of New York, holding them in civil contempt for failing to comply with grand jury subpoenas to produce exemplars and to execute bank consent directives.[175] In this case, the court held that the Philippine government had waived all immunities because it never interceded in the proceedings.[176] In *Domingo v. Philippines*,[177] immunity for Ferdinand E. Marcos was denied because "neither the State Department nor the Philippine government had intervened on his behalf, rather the Philippine government was opposing Ferdinand's motion to terminate

[172] *Id.*

[173] *Id.*

[174] *In re Doe*, 860 F.2d at 44 (2d Cir. 1988) [Reproduced in accompanying notebook at Tab 33]

[175] *Id.*

[176] *Id.*

[177] *Domingo v. Philippines*, 808 F.2d 1349, 1351 (9th circuit 1997) [Reproduced in accompanying notebook at Tab 34]

his deposition."[178] The lack of interest in whether former leaders are sued or prosecuted has been deemed enough to waive any type of immunity the former Heads of State might have. This has been the tendency in the U.S. court system.

In contrast, consider Pinochet's case in the sense that Chile refused to waive any basis of immunity. In fact, Chile even intervened as a party in the case before the House of Lords and fought adamantly for Pinochet's return to Chile.[179] In this case, immunity was not waived but explicitly recognized by the Chilean government.

D. Suggestion of Immunity

Suggestion of Immunity is a privilege that is determined by the U.S. executive branch through the State Department, but it can also be found in many other jurisdictions.[180] It basically consists of an expressed concern by the U.S. government about the defendant's court proceedings and implies that immunity should be granted for political reasons. The U.S. Supreme Court held in *Ex parte Republic of Peru*[181] and *Republic of Mexico v. Hoffman*[182] that these suggestions are binding on the courts and thereby immunity must be granted. The reasoning involves a Constitutional interpretation that the executive branch should be allowed to handle foreign affairs with

[178] *Id.*

[179] Fitzgerald, *supra* note 107 at 1021 [Reproduced in accompanying notebook at Tab 19]

[180] *Id.*

[181] 318 US 578, 588-589 (1942). Courts are bound by Suggestions of Immunity issued by the executive branch because they are a "Conclusive determination by the political arm of the Government" [Reproduced in accompanying notebook at Tab 35]

[182] 324 US 30, 35-36 (1945). The reasoning determines that it is "overriding [necessary] …not to interfere with the executive's proper handling of foreign affairs." [Reproduced in accompanying notebook at Tab 37]

minimum restraint. This type of determination is obviously political and the courts should never get involved in those matters that are not a matter of law.

In *Lafontant v. Aristide*,[183] a complaint was filed against former Haitian President Jean-Bertrand Aristide. The facts established that Dr. Roger Lafonant and a group of supporters attempted a coup d'etat to prevent Aristide from taking office. The next day, his coup was thwarted and Lafontant was arrested and taken to jail. He later was sentenced to life in prison, but such sentence was never effectuated since Captain Stagne Doura executed Lafontant on midnight September 29, 1991. Gladys M. Lafontant, Dr.Roger Lafontant's daughter, filed a complaint alleging international human right violations.[184]

In this case, the State Department issued a suggestion of immunity stating that the United States continuously had recognized President Aristide as the duly elected President in Haiti and thereby "permitting action to proceed against President Aristide would be incompatible with the United States foreign policy interests."[185] Consequentially, the court granted Aristide immunity, holding that it was bound to follow the suggestion issued on behalf of "a recognized Head of State, who has violated the civil rights of a person by having him killed."[186]

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[183] *Gladys M. Lafontant v. Jean-Bertrand Aristide*, 844 F. Supp. 128 (1994 US Dist. LEXIS 641) [Reproduced in accompanying notebook at Tab 38]

[184] *Id.*

[185] *Id.*

[186] *Id.* at 129-130. Note that this case does not follow the public versus private act distinction.

It is worth noting that, Suggestions of Immunity may not apply to later cases against the same defendant.[187] In 1982, a wrongful death action was filed in the Western District of Washington against Philippines President Marcos.[188] The District Court dismissed the action because the State Department had issued a Suggestion of Immunity.[189] In March 1986, when Marcos was no longer president and while living in Hawaii, he was served with a deposition subpoena by a different plaintiff.[190] Marcos moved to quash the subpoena and argued that the 1982 suggestion of immunity completely immunized him from any court process.[191] The District Court rejected the argument stating that the 1982 Suggestion was applicable only to that parcticular case and that Marcos would need a new Suggestion for Immunity to argue the same defense.[192] The Ninth Circuit eventually dismissed the case for lack of jurisdiction on other grounds, but established that Marcos is now an alien with no official status who has chosen to take up residence in the US and he should not receive immunity.[193] One can see then that previous Suggestions of Immunity only apply to the cases they were issued for.

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[187] Fitzgerald, *supra* note 107 at 1021 [Reproduced in accompanying notebook at Tab 19]

[188] *Domingo v. Philippines*, 694 F.2d 782, 783 (W.D. Wash. 1988) [Reproduced in accompanying notebook at Tab 40]

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Domingo v. Philippines,* 808 F.2d 1349, 1351 (9th circuit 1997) [Reproduced in accompanying notebook at Tab 34]

V. Whether the Individual is a Former Head of State or a Current Head of State

While recognized Heads of State have immunity when they hold official status, their absolute immunity will cease to exist once they leave office.[194] After such time, some courts hold that they lose all immunity, while others hold that they are entitled to immunity for official acts.[195]

The Marcoses were the first defendants to argue that former heads of state should posses immunity. The courts rejected their argument in every case.[196] In *Roxas v. Marcos,*[197] the court stated that "Ferninand has repeatedly and unsuccessfully claimed Head of State Immunity in various lawsuits around the country," supporting the thesis that Head of State Immunity ends once the leader is out of office. For example, in *Domingo v. Phillipnes*, the Marcoses argued that Head of State Immunity protects foreign leaders from responsibility for decisions they made while holding office after they leave.[198] They also suggested that "Head of State Immunity […] insulate[s] foreign leaders from the chilling effect of being subjected to the jurisdiction of foreign courts at some future date."[199]

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[194] Fitzgerald, *supra* note 107 at 1021 [Reproduced in accompanying notebook at Tab 19]

[195] Democratic Republic of the Congo v. Belgium *supra* note [Reproduced in accompanying notebook at Tab 30]

[196] *Roxas v. Marcos*, 969 P.2d 1209, 1252 (Haw. 1998) [Reproduced in accompanying notebook at Tab 40]

[197] *Id.*

[198] *Domingo v. Philippines*, 694 F. Supp. 782, 786, (W.D. Wash. 1988) [Reproduced in accompanying notebook at Tab 39]

[199] *Id.*

Despite the efforts, the court rejected this argument by stating: "Since the purpose of Head of State Immunity is to avoid the disruption of foreign relations, the original reason for immunizing the Marcoses - - protecting the relations between the United States and the Marcos' regime - - is no longer present. Head of State Immunity serves to safeguard the relationship among foreign governments and their leaders, not as the Marcoses assert, to protect former Heads of State regardless of their lack of official status."[200] Clearly, the court rejects the classical view[201] of Head of State Immunity for former leaders and asserts that immunity only exists when it "serves as a safeguard to relationships among foreign governments."[202]

In *Roxas v. Marcos*, the court also rejected the immunity claim.[203] It held, "Head of State immunity serves to safeguard the relations among federal governments and their leaders, not as the Marcoses assert - - to protect former heads of state regardless of their lack of status."[204]

The case law on this is not, however, consistent. Back in 1876, the New York Supreme Court ruled in favor of immunity for former Heads of State.[205] In *Hatch v. Baez*,

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[200] *Id.* at 786

[201] is in the state's best interests to safeguard the immunity of a foreign Head of State so that other states will afford equivalent protection to its own Head of State while out of the country.

[202] *Domingo v. Philippines*, 694 F. Supp. 782, 786, (W.D. Wash. 1988) [Reproduced in accompanying notebook at Tab 39]

[203] *Roxas v. Marcos*, 969 P.2d 1209, 1252 (Haw. 1998) [Reproduced in accompanying notebook at Tab 40]

[204] *Id.*

[205] Fitzgerald, *supra* note 107 at 1022 [Reproduced in accompanying notebook at Tab 19]

the court held that the defendant was still entitled to immunity as a former president of the Domincan Republic.[206] The court stated that "By the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory. Each state is sovereign throughout its domain."[207] The court held "the fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them …"[208]

Hatch v. Baez reflects the classical view of Head of State Immunity, which may have been overtaken by the modern trend reflected in the Marcos cases. The courts in both *Paul v. Avril*[209] and *Roxas v. Marcos*[210] expressly rejected *Hatch.* In *Paul*, the court rejected Avril's reliance on *Hatch* because it was "easily distinguishable"[211] not only from a different jurisdiction, but also from a time when immunity laws were different.[212]

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[206] *Hatch v. Baez*, 7 Hun 596 at 599-60 (New York 1876) [Reproduced in accompanying notebook at Tab 41]

[207] *See Philippines v. Marcos*, 818 F.2d 1473, 1484 n. 10 (9th Cir. 1987) [Reproduced in accompanying notebook at Tab 42]

[208] *Id.*

[209] *Paul v. Avril*, 812 F. Supp 207, 209 (S.D.Fla. 1993) [Reproduced in accompanying notebook at Tab 32]

[210] *Roxas v. Marcos*, 969 P.2d 1209, 1252 (Haw. 1998) [Reproduced in accompanying notebook at Tab]

[211] *Paul v. Avril*, [Reproduced in accompanying notebook at Tab 40] The court did not explain the ruling though, rather it express that "there was respectable authority for denying Head of State Immunity to a former head of State for private or criminal acts in violation of American Law."

The U.K. House of Lords did not, however, follow the modern U.S. approach in the Pinochet case. In *Ex parte Pinochet*, the defendant argued Head of State Immunity since he was Chile's former government leader.[213] In the opinion, Lord Browne-Wilkinson argued against this by considering that "a former Head of State has immunity in relation to acts done as part of his official functions when Head of State."[214]

This brings us to the last point: whether head of state immunity applies when international wrongs of a serious nature are committed and who has jurisdiction over these matters.

VI. Whether Head of State Immunity can be Used as a Defense Under the Jurisdiction of the Special Court of Sierra Leone

A. Whether Head of State Immunity applies when international wrongs of a serious nature are committed.

As previously stated, the Universal Jurisdiction principle provides that there are certain crimes of such a horrifying nature that they pose an affront to all states, and as such, all states have an interest in bringing their perpetrators to justice.[215] This ideal has established a moral argument against Head of State Immunity when in violation of international law principles, and has strengthened the protection and respect for the rights

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[212] Fitzgerald, *supra* note 107 at 1022 [Reproduced in accompanying notebook at Tab 19]

[213] *Ex parte Pinochet Ugarte*, 1 AC 147 at 18 (2000) [Reproduced in accompanying notebook at Tab 28]

[214] *Id.*

[215] Altman, *supra* note 107 [Reproduced in accompanying notebook at Tab 19]

of individuals. The status of sitting Heads of State appears to be the last battleground on whether immunity should be granted when rulers act under their official powers.[216]

In *Ex parte* Pinochet, Lord Browne-Wilkinson debated whether the Chilean fomer leader had immunity under the Head of State doctrine. In the opinion, Lord Browne-Wilkinson argued that "[i]t is not enough to say that it cannot be part of the functions of the Head of State to commit a crime. Actions that are criminal under the local law can still have been done officially and therefore give rise to immunity ratione materie."[217] He then concluded that "*Pinochet* organized and authorized torture […] he was not acting in any capacity which gives rise to immunity rationae materiae because such actions were contrary to international law […]"[218] Clearly, Lord Brown-Wilkinson argued that international law violations should be treated as an exception for Head of State Immunity.

It is reasonable to believe that such exception should exist since unlike average citizens, leaders have control over most of their nation's functions, and have therefore the utmost opportunity and ability to inflict loss of life and dignity where they commit international crimes.[219] As an example, consider the fact that the prosecutor in the International Criminal Tribunal for the Former Yugoslavia (ICTY) issued a detailed description of Slobodan Milosevic's *de jure* and *de facto* control over nearly all functions of the state during his time as president and was used to determine his responsibility in

[216] *Id.* at 10

[217] *Id.*

[218] *Id.* at 20

[219] *Id.*

the Balkan War.[220] These details prove that Milosevic had enough power to create as much damage as he wanted. Most Heads of State also have such control in their countries and therefore those given the opportunity to represent and rule a nation of people should be held to the very highest standards of international law, not the lowest.[221]

The Nuremberg International Military Tribunal established a precedent on this issue. Under the Charter of the International Military Tribunal at Nuremberg[222] the Military tribunal had the power "to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. […] *Crimes against peace* […] *War crimes* […] *Crimes against humanity* […]."[223] The Charter stated that "[t]he 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."[224] It is conclusive that Head of State immunity was stripped away from the German officials in order to try them for the violations of international law at Nuremberg.

It is worth noting that some argue that the German leaders were stripped from their immunity by the occupying power's waiver rather than the fact that they committed

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[220] *The Prosecutor of the Tribunal v. Slododan Milosevic*, et. al., IT-99-37, paragraphs 55-62 (ICTY 1999) [Reproduced in accompanying notebook at Tab 43]

[221] *Id.*

[222] Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement (8 aug. 1945), 82 U.N.T.S. 279 [Reproduced in accompanying notebook at Tab 44]

[223] *Id.* Art. 6

[224] *Id.* Art. 7

international violations.[225] The allied powers had total control of Germany after the Nazis where beaten, and arguably they did not need the German consent to prosecute their officials. None of the judicial opinions of the Nuremberg Tribunal cite the consent of Germany as the basis for the tribunal's jurisdiction.[226] Professor Henry King[227] explained this establishing that "[i]t should be noted that the German armies surrendered unconditionally to the Allies on May 8, 1945. There was no sovereign German government which they dealt in the surrender arrangements."[228] Additionally, Professor Hans Kelsen determined that the allied powers never sought to establish a peace treaty with German leaders because by the end of the war no such authorities existed "since the state of peace has been de facto achieved by Germany's disappearance as a sovereign state."[229]

Nonetheless, jurisprudence from war crimes trials based on the Nuremberg Charter and conducted under the international authority of Control Council Law No. 10 (CCL10), established universal jurisdiction for international law violations.[230] As an example, one could cite *In re List* which involved the prosecution of German officers who comMended executions of thousands of Greek, Yugoslav and Albanian civilians.[231]

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[225] Michael P. Scharf, *The ICC's Jurisdiction over the National's of Non-Party States: A Critique of the U.S. Position*, 64 L. & Contemp. Probs. 67, 105 (2001) [Reproduced in accompanying notebook at Tab 46]

[226] *Id.*

[227] Former junior prosecutor at Nuremberg

[228] Scharf, *supra* note 225 [Reproduced in accompanying notebook at Tab 46]

[229] *Id.* at 106

[230] *Id.*

[231] *Id.*

In order to describe its basis for jurisdiction to prosecute such offenses, the U.S. CCL10 tribunal in Nuremberg stated that the German leaders had committed "international crimes" that were "universally recognized" by existing customary and treaty law.[232] The tribunal explained that international crimes are "considered a grave matter of international concern and […] cannot be left within the exclusive jurisdiction of the [s]tate that would have control over it under ordinary circumstances."[233] Thereby this provides a compelling precedent for the exercise of universal jurisdiction when international wrongs are committed.[234]

Recently, the non-immunity of Heads of States has been codified in the Statues of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute for the International Criminal Court (ICC).[235] In these statutes, Head of State Immunity has been barred as a legitimate defense against violation of international law.[236] Nonetheless, rather than relying on the fact that immunity cannot be granted because serious international law violations have been committed, these statutes determine that Head of State Immunity is not a legitimate defense in an international tribunal as the ICJ suggested in *Congo v. Belgium.* This aspect is examined with detail below.

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[232] *Id.* at 107

[233] *Id.*

[234] *Id.* at 108

[235] Altman, *supra* note 107 at 8 [Reproduced in accompanying notebook at Tab 19]

[236] Statute of the ICTY at Art. 7 paragraph 2, [Reproduced in accompanying notebook at Tab 47] Statute of the ICTR at Art. 6 paragraph 2 [Reproduced in accompanying notebook at Tab 48] and Statute of the ICC at Art. 27 [Reproduced in accompanying notebook at Tab 49]

B. International law implemented in the Head of State's own country

The final question is about jurisdiction. Which courts have the power to prosecute Heads of State? Which courts have jurisdiction to hear these types of cases? These questions will be answered in the following subsections.

In *Congo v. Belgium*,[237] the International Court of Justice (ICJ) stated that "[Heads of State] enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law."

According to this instance, any official who commits violations of international law can be prosecuted under his or her own country's judicial system. This derives from the principal of waiver. It is believed that if their own country is willing to prosecute them, this constitutes an implied waiver.

C. Whether Head of State Immunity is a legitimate defense under the jurisdiction of an international court.

In *Congo v. Belgium*,[238] the ICJ stated that "[Heads of State] may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."

In that case Belgium had argued that it could issue an international warrant against Congo's Minister of Foreign Relations since he had committed international law

[237] *Democratic Republic of the Congo v. Belgium*, *supra* note [Reproduced in accompanying notebook at Tab 30]

[238] *Democratic Republic of the Congo v. Belgium*, *supra* note [Reproduced in accompanying notebook at Tab 30]

violations. These violations were breaches of the Belgian Act Concerning the Punishment of Grave Breaches of International Humanitarian Law and thereby Belgium claimed it had Universal Jurisdiction and could prosecute the Congo Minister. Belgium also pointed out "that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction."[239] The court analyzed this matter and reviewed the Charter of the International Military Tribunal of Nuremberg Art. 7, the Charter of the International Military Tribunal of Tokyo Art. 6, Statute of the International Criminal Tribunal for the former Yugoslavia Art.7 paragraph 2, Statute of the International Criminal Tribunal for Rwanda Art.6 paragraph 2, and Statute of International Criminal Court, Art. 27. The court concluded "that none of the decisions […] cited by Belgium deal with the question of the immunities […] before national courts where they are accused of having committed war crimes or crimes against humanity."[240] Nevertheless, the ICJ accepted the fact that International Criminal Courts may strip immunity from Heads of State when they are granted jurisdiction. Statutes that create these special criminal courts grant them the power to prosecute persons regardless of "immunities or special procedural rules."[241]

In the ICTR, jurisdiction of the tribunal has been a constant issue. The tribunal has held that Articles 2, 3 and 4 of its statute[242] grant subject matter jurisdiction over

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[239] *Id.* at 550

[240] *Id.*

[241] *Democratic Republic of the Congo v. Belgium*, *supra* note [Reproduced in accompanying notebook at Tab 30]

[242] [Reproduced in accompanying notebook at Tab 48]

genocide, war crimes and crimes against humanity. The ICTR has also held that Head of State Immunity is not a legitimate defense since Article 6 states the principle of individual responsibility and determines that "the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." [243]

The ICC also eliminates the possibility of Head of State Immunity. Article 27 of the Rome Statute provides:

> " 1. This Statute shall apply equally to all persons without any discrimination based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[244]

In sum, international criminal courts have jurisdiction over Heads of States when they commit violations of international law. Nevertheless, this jurisdiction is limited to the scope of their subject and territory. Consider the fact that the ICTR can only prosecute persons involved in the Rwanda conflict and that the ICTY can only prosecute those who took part in the Balkan conflict. The ICC has jurisdiction over acts committed in the territory or by the nationals of countries that have ratified the Rome Statute. Countries such as the United States have not done so.

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[243] *The Prosecutor v. Akayesu*, ICTR-96-4-T [Reproduced in accompanying notebook at Tab 51]

[244] [Reproduced in accompanying notebook at Tab 49]

D. Sierra Leone Special Court: An International Criminal Tribunal?

(1) Establishment and jurisdiction

The Special Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone. The purpose of the establishment is to "prosecute person who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[245]

The Special Court's Statute grants jurisdiction over persons that committed crimes against humanity as part of a widespread or systematic attack against any civilian population.[246] These include murder, torture, sexual slavery, and deportation, among others. The Statute also grants jurisdiction over crimes under Sierra Leonan law such as abuse of young girls.[247] Most importantly, the Statute provides that " [t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such a person of criminal responsibility nor mitigate punishment."[248] This Article clearly eliminates the possibility of Head of State Immunity.

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[245] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [Reproduced in accompanying notebook at Tab 52]

[246] Statute of the Special Court for Sierra Leone Articles 1, 2 [Reproduced in accompanying notebook at Tab 53]

[247] *Id.* Article 5

[248] *Id.* Article 6

(2) Authority

The Special court was not formed under the powers of Chapter VII of the United Nations Charter and therefore there has been doubt about the legitimacy of the tribunal and the actual extent of its jurisdiction. Notwithstanding, the Special Court for Sierra Leone is a hybrid international criminal tribunal with authority to prosecute crimes against humanity just like other traditional international criminal tribunals.

The authority of the Special Court to prosecute for international law violations regardless of the Head of State doctrine derives from three aspects:

a. The Agreement and its subject matter jurisdiction as well as the court's composition, render it as an international court,

b. The Agreement could be deemed a waiver of immunity by the domestic authorities,

c. Even if the Special Court is not considered an international tribunal, no Head of State enjoys criminal immunity under international law in their own country's courts;

d. In any event, a former Head of State does not enjoy immunity for violations of international humanitarian law that should be deemed outside the scope of the Head of State's official functions.

a) The Agreement and the Special Court for Sierra Leone as an International Tribunal

The agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court was made on January 16, 2002. This agreement

reflected the mutual recognition of both parties of the need of a court that will bring those persons who bear the greatest responsibility in the Sierra Leone conflicts to justice.[249]

By making this agreement the government of Sierra Leone has ceded sovereign power to the Special Court. The Sierra Leone government was constitutionally elected and appointed. It is the legitimate official ruling entity of the country. Thereby its agreement with the United Nations is binding and creates obligations for both sides. These obligations are enforceable and recognized under the rule of law. The parties are required to honor the provisions of this agreement.

The agreement and statute empower the Special Court of Sierra Leone (SCSL) with special characteristics that can only be found in international criminal tribunals. Hence, the SCSL has similar jurisdiction attributes to the ICTY and ICTR. The main difference is the territorial aspect, since SCSL focuses on crimes committed within the boundaries of Sierra Leone territory. Like the ICTY and ICTR, the SCSL can prosecute any individuals that committed crimes against humanity even if they were Heads of State.[250]

As an international tribunal, SCSL can prosecute Sierra Leone nationals as well as other foreigners who under any circumstance committed violations of international law in the Sierra Leone territory. This would include, Charles Taylor[251] from Liberia who is

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[249] *Id.* Article 1

[250] *Id.* Article 6

[251] RUF's Foday Sankoh supposedly met Taylor while their men were both training in Libya, and fought alongside Taylor's NPFL in Liberia before crossing into Sierra Leone. Charles Taylor expressively supported the RUF and provided them with weapons.

under UN sanctions because of his support for the RUF and Blaise Compaore[252] from Burkina Faso whom also is believed to have backed the rebels.[253] Reportedly, RUF's armies were composed of Sierra Leonean expatriates backed by Liberian and Burkinabe mercenaries.[254] Therefore, Charles Taylor's and Balaise Compaore's contributions in the Sierra Leone war render them subject to the SCSL's jurisdiction.[255]

The international character of the SCSL will justify any indictments to leaders from foreign countries, who could not argue Head of State Immunity. The powers given by the SLSC statute have excluded the official position of persons as a legitimate defense.[256]

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[252] Burkinabe mercenaries accompanied Foday Sankoh across the border in 1991. Blaise Campaore had known ties to Charles Taylor, and Taylor had known ties to Foday Sankoh. The UN Panel of Experts on Sierra Leone and on Liberia found evidence that Campaore was helping to get illicit arms to Taylor, and that Taylor was supporting the RUF. One of the rebel training bases was "Camp Burkina." According to journalist Peter Andersen, in 1999 the RUF field comMender Sam Bockarie suggested that "Blaise" sponsored negotiations between the RUF and the government. The government rejected this, claiming that Burkina Faso was supporting the RUF.

[253] Peter Andersen, journalist and reporter, e-mail sent on Sun Mar 6, 2003 at 6:35:05 AM US/Eastern. [Reproduced in accompanying notebook at Tab 2]

[254] *Id.*

[255] Libya's authorities may also be indicted. There is belief that Libya had a plan for toppling weak states, including Liberia, Burkina Faso and Sierra Leone.

[256] *Democratic Republic of the Congo v. Belgium* [Reproduced in accompanying notebook at Tab 30]

b) The Agreement as a Waiver

As noted previously, the agreement is a consensus between the Sierra Leone government and the United Nations to bring those persons "who bear the greatest responsibility for serious violations of international humanitarian law and the Sierra Leonean law" to justice.[257] If the Sierra Leone government was willing to request help from the United Nations and negotiate and sign the agreement for the establishment of the special court, it is reasonable to believe that they are waiving all immunities from all of those persons who are indicted and prosecuted. On the contrary, if immunity were granted, the Sierra Leone government would not be consistent with their side of the agreement. Thereby, it is fair to say that the agreement can also be deemed a waiver of immunity by the Sierra Leone authorities.

c) Sierra Leone Special Tribunal as a Domestic Court

The ICJ in *Congo v. Belgium* held that Heads of State "enjoy no criminal immunity under international law in their own countries."[258]

As indicated above, SCSL is a hybrid between an international criminal court and a domestic court. This characteristic is unique to the SCSL and it creates some advantages. By also being a domestic court, the SCSL can actually prosecute war crimes against their own nationals without any Head of State Immunity concern. A national that is being prosecuted by its own court system under international law does not enjoy

[257] Agreement, *supra* note 245 at Article 1(1) note [Reproduced in accompanying notebook at Tab 52]

[258] *Id.*

criminal immunity. The SCSL has the authority of the Sierra Leone constitution given to its judicial system and can hear cases that result against their own nationals. Head of State Immunity is to be exempted by this situation. As explained previously, it is believed that if their own country is willing to prosecute them, they are making an implied waiver by allowing the case to go forward.[259]

d) International law violations outside of the scope of the Head of State's official functions.

Finally, a Head of State's ultra virus acts do not enjoy immunity. These types of acts are those that cannot be consider part of the Head of State's official functions.[260] Examples of these are genocide, war crimes and crimes against humanity.

VIII. Conclusion

The Special Court for Sierra Leone can prosecute individuals who claim Head of State Immunity for violations of international law. First, the court must determine if such immunity exists by establishing if the individual is a *de jure* Head of State or a recognized *de facto* Head of State. After such assertion is made, a careful evaluation of

[259] *Domingo v. Philippines*, [Reproduced in accompanying notebook at Tab 34]

[260] *In re Doe*, 860 F.2d at 44 (2d Cir. 1988), [Reproduced in accompanying notebook at Tab 33] *United States v. Noriega*, 746 F. Supp. 1506 (SD Fla, 1990), [Reproduced in accompanying notebook at Tab 9] *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) [Reproduced in accompanying notebook at Tab 25]

the exceptions discussed throughout this memoradum must be conducted within each case:

1) Whether a waiver has been effectuated
2) Whether the individual is a former Head of State or a current Head of State
3) Whether international wrongs of a serious nature are committed and these should be deemed outside the scope of the Head of State's official functions
4) Whether the Special Court of Sierra Leone has jurisdiction

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Tab 53. Statute of the Special Court for Sierra Leone

Extra Documentation

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