ESSAY

HEAD-OF-STATE IMMUNITY IN U.S. COURTS: WHEN LAW TRUMPS FACTS

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I. INTRODUCTION

In March 2020, then-Attorney General William Barr announced criminal charges against Nicolás Maduro and fourteen alleged co-conspirators for narco-terrorism, corruption, and drug trafficking.[1] Maduro was elected President of Venezuela in 2013 and subsequently claimed victory in disputed elections in 2018 and 2024.[2] The Acting Administrator, Uttam Dhillon, of the Drug

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1. *See* Press Release, U.S. Dep't of Just., Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges (Mar. 26, 2020), https://www.justice.gov/archives/opa/pr/nicol-s-maduro-moros-and-14-current-and-former-venezuelan-officials-charged-narco-terrorism [https://perma.cc/3HM5-9JR5].

2. *See* Tom Phillips, *Pressure Grows on Maduro After Top Court Endorses Election Win*, GUARDIAN (Aug. 22, 2024), https://www.theguardian.com/world/article/2024/aug/22/maduro-accused-power-grab-top-court-endorses-venezuela-election-win [https://perma.cc/BU9G-97S9] (noting that Maduro "is facing a growing chorus of international outrage after the government-controlled supreme court endorsed his disputed claim to have won the presidential election."); José Ignacio Hernández G., *Rigged*

Enforcement Administration ("DEA") characterized the indictments as a warning: "Today's actions send a clear message to corrupt officials everywhere that no one is above the law or beyond the reach of US law enforcement."[3] On January 3, 2026, the US military carried out an operation to seize Maduro and bring him and his wife to the United States for trial.[4] As of this writing, Maduro and his wife Cilia Flores are facing trial in New York.[5]

The superseding indictment refers to Maduro as the "*de facto* but illegitimate ruler" of Venezuela.[6] That is because sitting foreign heads of state cannot be sued or prosecuted in US courts.[7] Under both international law and US law, this status-based immunity attaches to the office, not the individual.[8] Consequently, if the

Elections: Venezuela's Failed Presidential Election, ELECTORAL INTEGRITY PROJECT (May 30, 2018), https://www.electoralintegrityproject.com/eip-blog/2018/5/30/rigged-elections-venezuelas-failed-presidential-election [https://perma.cc/8SCN-S33A] (noting that Latin American countries in the Lima Group, the United States, and the European Union "denounced the presidential election as rigged and fraudulent.").

3. Press Release, U.S. Dep't of Just., *supra* note 1.

4. *See* Matthew Olay, *Trump Announces U.S. Military's Capture of Maduro*, U.S. DEP'T OF WAR (Jan. 3, 2026), https://www.war.gov/News/News-Stories/Article/Article/4370431/trump-announces-us-militarys-capture-of-maduro/ [https://perma.cc/C84U-TE6Q].

5. *See* Sealed Superseding Indictment, United States v. Maduro Moros, No. S4 11 Cr. 205 (S.D.N.Y. 2025).

6. *Id.* ¶¶ 5, 8. Under international law, spouses of heads of state are not entitled to status-based immunity unless the receiving state accords them diplomatic status during an official visit. *See, e.g.*, Bellinda Chinowawa, *International Law or Comity? Exploring Whether Grace Mugabe Can Successfully Claim Immunity for Crimes Committed on Foreign Soil*, EJIL: TALK! (Sep. 4, 2017), https://www.ejiltalk.org/international-law-or-comity-exploring-whether-grace-mugabe-can-successfully-claim-immunity-for-crimes-committed-on-foreign-soil/ [https://perma.cc/3XRJ-YRVF] (arguing that South Africa's recognition of Grace Mugabe's claim to diplomatic immunity for assault was based on comity, not law); *see also* Yena Hong, *Pedigree Prosecution: Should a Head of State's Family Members Be Entitled to Immunity in Foreign Courts?*, 86 FORDHAM L. REV. 3033 (2018) (arguing against status-based immunity for a head of state's family members).

7. *See, e.g.*, Lafontant v. Aristide, 844 F. Supp. 128, 131–32 (E.D.N.Y. 1994) (head-of-state immunity for exiled Haitian President); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (head-of-state immunity for British Prime Minister); *see also* Suggestion of Immunity Submitted by the United States of America at 6, Miango v. Dem. Rep. Congo, No. 15-cv-01265 (D.D.C. Dec. 3, 2018) ("Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's or head of government's status as the current holder of the office.").

8. *See generally* William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 FORDHAM L. REV. 677, 696–97 (2021) (describing head-of-state immunity); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2D 61, 63–65 (2010) (emphasizing the distinction between status-based and

individual is not a sitting head of state, then status-based immunity does not apply.[9] Moreover, under US law, the President's decision about who to recognize as a foreign head of state binds courts, even though it might not correspond to existing facts.[10]

Part II of this Essay reviews the international law governing head-of-state immunity. Part III turns to US practice regarding head-of-state immunity from civil and criminal proceedings in US courts. Part IV considers some implications of the current US approach. While the United States has not yet initiated or endorsed legal proceedings against a foreign head of state without denying that individual's claim to head-of-state status, the Executive Branch's approach in the Maduro case stretches the bounds of judicial deference to Executive Branch determinations and opens the door for other countries to question US Presidents' status-based immunity.

II. HEAD-OF-STATE IMMUNITY UNDER INTERNATIONAL LAW

International law governs the relations between sovereign states, including their treatment of each other's leaders and representatives. Countries have codified rules governing diplomatic and consular immunities in international treaties.[11] Even where there is no applicable treaty, countries remain bound by customary international law.[12] The International Court of Justice (ICJ) has indicated that customary international law

conduct-based immunity). Conduct-based immunity attaches to acts performed in an official capacity, although its precise contours remain disputed.

9. The International Court of Justice (ICJ) has noted that, under customary international law, a foreign head of state's absolute immunity ends when the official "ceases to hold the office." Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 61 (Feb. 14); *see* Sikhs for Justice v. Singh, 64 F. Supp. 3d 190, 194 (D.D.C. 2014) ("The day he left office, however, [Prime Minister] Singh lost the absolute protection of status-based head-of-state immunity."). The contours of a *former head of state's* residual, conduct-based immunity from criminal proceedings or civil suit remain a subject of debate and are beyond the scope of this Essay.

10. *See infra* text accompanying notes 30–31.

11. *See, e.g.*, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

12. Customary international law "results from a general and consistent practice of states followed out of a sense of international legal right or obligation." RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 401 cmt. a (A.L.I. 2018).

requires states to accord status-based immunity to each other's sitting heads of state, heads of government, and foreign ministers, and to treat the occupants of those offices as inviolable.[13] The ICJ has explained that this immunity and inviolability "protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."[14] This does not mean such individuals are above the law—but it does narrow the available options for accountability in recognition of sovereign equality and the importance of effective diplomacy.

The UN General Assembly endorsed the principle established during the Nuremberg Trials of Nazi war criminals that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him [or her] from responsibility under international law."[15] Although some countries indicted Adolf Hitler under their domestic laws while he was Germany's head of state,[16] the Nuremberg Trials have come to stand for the narrower proposition that head-of-state immunity does not shield foreign leaders from prosecution before *international* courts, even if it continues to shield them before *national* courts. For example, the Special Court for Sierra Leone took the position that it could adjudicate criminal charges against Liberian President Charles Taylor because it was an international, rather than a domestic, court.[17]

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13. *See Dem. Rep. Congo v. Belg.*, 2002 I.C.J. ¶ 51.

14. *Id.* ¶ 54.

15. *Formulation of Nürnberg Principles*, [1950] 2 Y.B. INT'L L. COMM'N 374, 375, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

16. For more on the work of the UN War Crimes Commission and its member states, see Dan Plesch, *An Important Past: Since Hitler, Heads of State Have No Immunity*, UN WAR CRIMES COMM'N (July 2, 2025), https://unwcc.org/2025/07/an-important-past-since-hitler-heads-of-state-have-no-immunity/ [https://perma.cc/829A-72YJ]; see also Miguel Manero de Lemos, *The Indictments Against Adolf Hitler, Their Endorsement by the UNWCC, the IMT Judgment and a Twenty-First Century Immunity Myth*, 38 LEIDEN J. INT'L L. 1, 8 (2025).

17. *See* Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (Special Ct. for Sierra Leone May 31, 2004); *see also* Charles C. Jalloh, THE LEGAL LEGACY OF THE SPECIAL COURT FOR SIERRA LEONE 260 (2020) (noting that "the SCSL's existence represented the collective will and interests of the international community," thereby arguably "neutraliz[ing] the destabilizing effect of potentially controversial action by one sovereign against another's leader").

Article 27(2) of the Rome Statute, which created the International Criminal Court (ICC), provides: "[i]mmunities . . . 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."[18] Accordingly, head-of-state immunity will not bar ICC proceedings against a sitting head of state of an ICC state party. Controversially, the ICC has also found that head-of-state immunity does not absolve an ICC member state of the obligation to arrest and surrender a sitting head of state of a non-state party for trial before the ICC.[19] This would elevate a state party's treaty obligation to cooperate with the ICC above its customary international law obligation to respect the immunity and inviolability of a foreign head of state, even though there is a direct conflict between the two coequal obligations.

Questions relating to head-of-state immunity before international courts will persist as long as state leaders continue to commit international crimes such as war crimes, genocide, crimes against humanity, and the crime of aggression against another state. For example, the French Cour de cassation found that Syrian President Bashar al-Assad could not be the subject of an arrest warrant for international crimes while he was the sitting president, but that France could issue a warrant for his arrest once he no longer held that office.[20] The Special Tribunal for the Crime of Aggression Against Ukraine will permit its future prosecutor to indict heads of state for aggression, but it will require these

18. Rome Statute of the International Criminal Court art. 27(2), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

19. *See* Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment (May 6, 2019). *But see, e.g.*, Ward Ferdinandusse, *Why the ICC Should Respect Immunities of Heads of Third States*, JUST SEC. (Mar. 19, 2025), https://www.justsecurity.org/108885/icc-immunities-heads-of-third-states/ [https://perma.cc/G7UA-KM9R] (indicating that state practice does not support the ICC's position); Dapo Akande, *The Immunity of Heads of States of Nonparties in the Early Years of the ICC*, 112 AJIL UNBOUND 172, 174 (2018) (noting that "immunities do not disappear simply because the tribunal is international"). The position of heads of non-party states might also be different depending on whether the situation has been referred to the ICC by the UN Security Council. *See, e.g.*, Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al-Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333 (2009) (considering the argument that the Security Council referral has the effect of binding Sudan to the Rome Statute).

20. *See Press Release: Scope of Immunity of Foreign Officials and Heads of State*, COUR DE CASSATION (July 25, 2025).

proceedings to be suspended until the individual leaves office.[21] Meanwhile, the International Criminal Court has issued arrest warrants against sitting heads of state and heads of government of non-states parties including Russian President Vladimir Putin and Israeli Prime Minister Binyamin Netanyahu. Although states parties to the Rome Statute are bound by the renunciation of immunity defenses in Article 27(2), it remains unclear on what legal basis the ICC could disregard the status-based immunity of a non-state party's sitting head of state, particularly where there has been no action by the UN Security Council. Moreover, the ICC cannot proceed with a trial absent a defendant's arrest and surrender by a cooperating state.[22]

III. HEAD-OF-STATE IMMUNITY UNDER U.S. LAW

While countries have occasionally used indictments of sitting foreign heads of state to send a political message, the principle of head-of-state immunity during an individual's term in office remains robust.[23] The United States has consistently endorsed

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21. *See* Christian Wenaweser & Sina Alavi, *A Special Tribunal for the Crime of Aggression Against Ukraine: Origins, Debates, and Implications*, YALE J. INT'L L. ONLINE (Feb. 7, 2026), https://yjil.yale.edu/posts/2026-02-07-a-special-tribunal-for-the-crime-of-aggression-against-ukraine-origins-debates-and [https://perma.cc/68LU-Z63K]; *see also* Noëlle Quénivet, *The Special Tribunal for the Crime of Aggression Against Ukraine and Immunities*, OPINIO JURIS (Mar. 24, 2026), https://opiniojuris.org/2026/03/24/the-special-tribunal-for-the-crime-of-aggression-against-ukraine-and-immunities/ [https://perma.cc/5R6H-ZTCB].

22. *See, e.g.*, Max du Plessis, *Pinochet, Bashir, Putin, Netanyahu, Gallant, Herzog: Immunities for High Officials – the Importance of Getting State Practice Right*, EJIL: TALK! (Oct. 3, 2025), https://www.ejiltalk.org/pinochet-bashir-putin-netanyahu-gallant-herzog-immunities-for-high-officials-the-importance-of-getting-state-practice-right/ [https://perma.cc/U2EY-SFMS]; Anastasia Safioleas, *A Former Prosecutor Thinks Vladimir Putin and Binyamin Netanyahu May Never Face the ICC*, AUSTL. BROAD. CORP. NEWS (Apr. 8, 2025), https://www.abc.net.au/news/2025-04-09/international-criminal-court-netanyahu-putin-duterte-icc/105108726 [https://perma.cc/2TFB-TT6W].

23. For example, Türkiye issued an arrest warrant for Israeli Prime Minister Binyamin Netanyahu for genocide in Gaza. TOI Staff, *Turkey Issues Arrest Warrants for Netanyahu, 36 More Israeli Leaders over 'Genocide' in Gaza*, TIMES ISR. (Nov. 8, 2025), https://www.timesofisrael.com/turkey-issues-arrest-warrants-for-netanyahu-other-israeli-leaders-over-genocide-in-gaza/ [https://perma.cc/AY5H-WA4H]. Argentina and Venezuela have issued "tit-for-tat" arrest warrants for each other's president. Daniela Pulido, *Argentina and Venezuela Issue Tit-for-Tat Arrest Warrants for Presidents*, JURIST NEWS (Sep. 24, 2024), https://www.jurist.org/news/2024/09/argentina-and-venezuela-issue-reciprocal-arrest-warrants-for-presidents-amid-diplomatic-tensions/

foreign head-of-state immunity.[24] The question is thus not whether the United States recognizes such immunity, but rather how disputes about head-of-state immunity are resolved in US courts. In a civil suit, the question of immunity generally arises as a defense raised by an individual defendant, sometimes accompanied by a Suggestion of Immunity from the US Department of State. In a criminal trial, the Justice Department's determination that the defendant is not entitled to immunity from jurisdiction is treated as implicit in the decision to charge an individual and take them into custody.

Disputes about head-of-state immunity have arisen most frequently in conjunction with civil suits against foreign defendants. For example, when a suit was filed against President of Cameroon Paul Biya, the State Department informed the court that the defendant was entitled to immunity.[25] The letter stated that "[t]he Department of State recognizes and allows the immunity of President Biya as a sitting head of state from the jurisdiction of the United States District Court in this suit"—language that suggests the Department could *disallow* such immunity if it chose to do so.[26] However, the implied assertion of authority to disallow a claim of head-of-state immunity is difficult to reconcile with the letter's statement that, "[u]nder common law principles articulated by the executive branch . . . and informed by customary international law, President Biya, as the sitting head of state of a foreign state, is immune from the jurisdiction of the United States District Court in this suit while in office."[27] The letter further explained that immunity determinations are made on a case-by-case basis by the Department of State, taking into account factors including

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[https://perma.cc/TB54-MPV3]; Débora Rey, *A Court in Argentina Orders the Arrest of Venezuela's President and His Right-Hand Man*, AP NEWS (Sep. 23, 2024), https://apnews.com/article/argentina-court-maduro-arrest-c9eb994d71c4f58744e7c74137ac5768 [https://perma.cc/3FPL-3RZF].

24. *See, e.g.*, Suggestion of Immunity, *supra* note 7, at 6 ("Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's or head of government's status as the current holder of the office.").

25. *See* Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to Stuart F. Delery, Acting Assistant Att'y Gen., U.S. Dep't of Just., *Re: Fotso v. Republic of Cameroon, No. 12-cv-01415 (D. Or.)* (Dec. 6, 2012), https://2009-2017.state.gov/documents/organization/211898.pdf [https://perma.cc/NKD6-GQ26].

26. *Id.* at 1.

27. *Id.*

"international norms and the implications of the litigation for the United States' foreign relations."[28] This attempt to preserve the Executive Branch's unfettered discretion is seemingly at odds with the binding nature of head-of-state immunity under customary international law. It also undermines the US President's ability to assert head-of-state immunity from foreign jurisdiction regardless of the "implications of the litigation for [that country's] foreign relations."[29]

In its judicial filings, the Executive Branch has asserted absolute authority over both status-based and conduct-based immunity determinations. When it comes to status-based immunity, there is broad agreement that the Constitution vests authority in the President to receive ambassadors, and that this authority entails the power to recognize foreign states.[30] Consequently, as Ingrid Brunk has explained, "[w]ith respect to status-based immunity, complete deference is due to the [E]xecutive [B]ranch on the recognition of the state and on whether the individual claiming immunity holds the government position to which immunity is accorded (e.g., President, Foreign Minister)."[31] However, the claimed authority to issue binding immunity determinations untethered from determinations of status does not have a clear constitutional anchor. Department of Justice Attorney Lewis Yelin has argued in his personal capacity that the President's lawmaking authority in this area derives from the President's "ability to speak authoritatively on behalf of the United States in the nation's dealings with foreign counterparts."[32] This broader claim goes beyond the explicit recognition power.

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28. *Id.*

29. *Id.*

30. *See, e.g.*, Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 258 (2011) ("The Constitution assigns to the President the authority to receive foreign ambassadors, and the Supreme Court has plausibly interpreted this authority to include the power to determine which governments and heads of state should be recognized by the United States.").

31. Ingrid Wuerth Brunk, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 971 (2011).

32. Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 916 n.23 (2011).

As a matter of practice, US courts treat Executive Branch suggestions of head-of-state immunity as binding.[33] However, it remains a matter of debate whether courts are more narrowly bound by only the President's determination of an individual's *status* as a foreign head of state, from which status-based immunity flows automatically, or whether a court would also be bound by a suggestion of immunity that *conflicts* with the President's underlying status determination.[34] Such a conflict might arise, for example, if the President indicated that an individual is a foreign head of state and then suggested non-immunity based on other case-specific factors.

As noted above, criminal proceedings rarely involve suggestions of immunity or non-immunity, because the decision to bring charges itself reflects the Executive Branch's decision to treat the defendant as non-immune. This was the case in the United States' 1990 apprehension and prosecution of Manuel Noriega for racketeering and other offenses relating to drug trafficking. The Eleventh Circuit affirmed the district court's rejection of Noriega's claim to head-of-state immunity because "the United States government never recognized Noriega as Panama's legitimate, constitutional ruler."[35] Noriega acknowledged that he was not Panama's *de jure* leader, but he argued that he should benefit from status-based immunity as its *de facto* leader.[36] The appeals court rejected this argument, noting that Panama had not sought immunity on Noriega's behalf, and that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity."[37] Moreover, the court found that the fact that Noriega's

33. *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763, 772 (4th Cir. 2012) (according "absolute deference" to "the State Department's pronouncement" that the defendant lacked head-of-state immunity because the State Department had "never recognized" him as Somalia's head of state).

34. *Compare* Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) (granting deference because courts are "ill-prepared to assess [foreign relations] implications and resolve the competing concerns the Executive Branch is faced with in determining whether to immunize a head of state."), *with Samantar*, 699 F.3d at 773 (indicating that, to the extent "immunity decisions turn upon principles of customary international law and foreign policy," courts "respect, but do not automatically follow, the views of the Executive Branch.").

35. United States v. Noriega, 117 F.3d 1206, 1211 (11th Cir. 1997).

36. *Id.*

37. *Id.* at 1212.

surrender occurred during the US invasion of Panama did not bar his prosecution.[38]

Maduro has also asserted head-of-state immunity and challenged the lawfulness of his prosecution based on the alleged unlawfulness of his apprehension. These arguments are unlikely to shield Maduro from prosecution, even though he has a stronger claim than did Noriega to head-of-state status under international law. As a matter of US law, the United States has not recognized Maduro as Venezuela's head of state since 2019, and the Executive Branch's decision to prosecute him makes clear that it does not view him as entitled to head-of-state immunity. US courts will defer to the Executive Branch's determination, as they have in other cases involving status-based immunity.[39] Yet there are reasons to be concerned. First, while Maduro's abduction violated international law and Venezuela's territorial sovereignty, this fact will not automatically bar US proceedings.[40] This removes a procedural safeguard that might otherwise deter unlawful US conduct. Second, if a country can unilaterally decline to recognize another country's head of state and thereby ignore the immunity attached to the position, head-of-state immunity starts to appear illusory. This undermines head-of-state immunity as a matter of international law, and it weakens international law's ability to help maintain stability and predictability in international relations.

The United States was not alone in refusing to recognize Maduro as head of state after 2019,[41] and there are well-founded reasons to view his presidency as illegitimate.[42] However, the absolute deference accorded the Executive Branch under US law seems to prevent courts from inquiring into the factual basis for the Executive Branch's status determination, creating the

38. *Id.* at 1212–13.

39. *See*, *e.g.*, *Samantar*, 699 F.3d at 772.

40. The abduction, which occurred as part of a US military operation, violated the prohibition on the use of force in Article 2(4) of the UN Charter and was not authorized by the UN Security Council or conducted in self-defense against an armed attack by Venezuela. *See* Michael Schmitt, Ryan Goodman & Tess Bridgeman, *International Law and the U.S. Military and Law Enforcement Operations in Venezuela*, JUST SEC. (Jan. 5, 2026), https://www.justsecurity.org/127981/international-law-venezuela-maduro/ [https://perma.cc/RE6C-UALQ].

41. *See supra* note 2.

42. *See supra* note 2.

possibility that a future non-recognition decision untethered to any facts could carry legal force.

Criticism of the US approach to head-of-state immunity based on Executive Branch recognition focuses on this potential malleability. For example, Adrián Agenjo emphasizes that Article 226 of the Venezuelan Constitution makes the President of the Republic both Head of State and Head of Government.[43] In his view, "creating an exception [to immunity] through non-recognition would cut against the function and very purpose of personal immunity."[44] France's Cour de cassation made a similar point in its opinion about Syrian President Bashar al-Assad's entitlement to status-based immunity from a French arrest warrant while he was in office. In that court's view, recognition is a discretionary political act that affects bilateral relations but does not alter an individual's entitlement to status-based immunity under customary international law.[45]

The converse is also true: just as a forum state should not be able to manipulate entitlement to head-of-state immunity by arbitrary de-recognition, there should also be guardrails against spurious head-of-state appointments for purposes of evading foreign jurisdiction. The integrity of the system of status-based immunities presumes that a country's decisions to appoint heads of state, and to recognize foreign heads of state, will not be instrumentalized for immunity purposes. That presumption might not always be warranted; for example, when Saudi Crown Prince Mohammed bin Salman faced civil damages suits in US court for allegedly ordering the killing and dismemberment of *Washington Post* journalist Jamal Khashoggi, King Salman bin Abdulaziz

43. *See* Adrián Agenjo, *Which Immunity for Nicolás Maduro? Personal Immunity, Inviolability, and the Implausible Exceptions the US Might Claim*, EJIL: TALK! (Jan. 22, 2026), https://www.ejiltalk.org/which-immunity-for-nicolas-maduro-personal-immunity-inviolability-and-the-implausible-exceptions-the-us-might-claim/ [https://perma.cc/6NGY-4R57]. A further question might be whether Venezuelan law would view both Maduro and acting President Delcy Rodríguez as heads of state entitled to status-based immunity. *See Venezuela's Supreme Court Names Delcy Rodríguez Interim President*, MOD. DIPL. (Jan. 4, 2026), https://moderndiplomacy.eu/2026/01/04/venezuelas-supreme-court-names-delcy-rodriguez-interim-president/ [https://perma.cc/G3BG-EKKF].

44. *See* Agenjo, *supra* note 43.

45. Cour de cassation [Cass.] [supreme court for judicial matters] crim., July 25, 2025, Bull. crim., No. 685, ¶¶ 16–20 (Fr.).

appointed bin Salman, his son, as Prime Minister.[46] The State Department informed the district court that the position of prime minister entitled bin Salman to status-based immunity as Saudi Arabia's head of government, and the court treated this determination as conclusive.[47] The Maduro case presents the mirror image: rather than creating immunity through a strategic appointment, the Executive Branch has removed immunity through strategic non-recognition.

As of this writing, Venezuela has not elected a new president or indicated that Maduro is no longer the head of state.[48] Delcy Rodríguez continued to serve as acting president, long past the expiry of her ninety-day appointment.[49] The United States has decided to treat Rodríguez as Venezuela's "sole Head of State," even though she lacks constitutional legitimacy.[50] Although the

46. *See* Cengiz v. Salman, No. 20-3009, 2022 WL 17475400, at *4 (D.D.C. Dec. 6, 2022); *see also* Aljabri v. bin Salman, 106 F.4th 1157, 1164 (D.C. Cir. 2024) (noting the State Department's determination in the *Cengiz* case that "Mohammed bin Salman, the Prime Minister of the Kingdom of Saudi Arabia, is the sitting head of government and, accordingly, is immune from . . . suit.").

47. *Cengiz*, 2022 WL 17475400, at *4.

48. *See, e.g.*, Associated Press, *U.S. Lifts Sanctions on Venezuela's Acting President Delcy Rodríguez*, NPR (Apr. 2, 2026), https://www.npr.org/2026/04/02/g-s1-116142/u-s-lift-sanctions-venezuela-president-delcy-rodriguez [https://perma.cc/SA2D-KRF8] (noting that the US government called Rodríguez Venezuela's "sole Head of State" in a legal filing, but that Maduro "legally is still Venezuela's president"); Ryan Mancini, *Maduro Is Venezuela's Only President, Says VP Delcy Rodriguez*, HILL (Jan. 3, 2026), https://thehill.com/policy/international/5671446-venezuelan-vice-president-defends-maduro/ [https://perma.cc/G7P6-JZG7]. As of June, observers noted that images featuring Maduro were "disappearing from various public spaces and institutions in Venezuela," reportedly because of Maduro's "'very poor image.'" Julio Blanco, *Why Is Delcy Rodríguez's Government Erasing Nicolás Maduro's Image Across Venezuela?*, LATIN AM. REP. (June 10, 2026), https://latinamericareports.com/why-is-delcy-rodriguezs-government-erasing-nicolas-maduros-image-across-venezuela/14643/ [https://perma.cc/EF8L-NCDE].

49. Regina Garcia Cano, *Venezuela's Delcy Rodríguez Remains Acting President After Her Initial 90-Day Appointment Expired*, AP NEWS (Apr. 6, 2026), https://apnews.com/article/venezuela-maduro-acting-president-delcy-rodriguez-trump-f33d6fe7407305b513940dfa4f69136c [https://perma.cc/HXU6-L6WL] [hereinafter Garcia Cano, *Acting President*]; *see* Julio Blanco, *Delcy Rodríguez's Term as Acting President Has Expired. Why Haven't New Elections Been Called in Venezuela?*, LATIN AM. REP. (Apr. 24, 2026), https://www.latinamericareports.com/delcy-rodriguezs-term-as-acting-president-has-expired-why-havent-new-elections-been-called-in-venezuela/14304/ [https://perma.cc/S5VL-5RR4].

50. *See* Statement of Interest of the United States at 2, Stansell v. FARC, No. 16-mc-405 (S.D.N.Y. Mar. 11, 2026), ECF No. 621 (conveying that, in order to facilitate a democratic transition in Venezuela, "the United States is recognizing Delcy Rodríguez as

Executive Branch's determination is conclusive as a matter of US domestic law, this does not ensure compliance with international law.[51] As a matter of international law, Maduro's claim to head-of-state immunity rests primarily on Venezuela's treatment of Maduro as its head of state, both *de jure* (because he was sworn in as president in January 2025) and *de facto* (because he exercised control over Venezuelan state institutions).[52] If Maduro is no longer Venezuela's *de jure* or *de facto* head of state, then his prosecution would not violate head-of-state immunity under international law, although his abduction would remain internationally unlawful.[53]

Maduro's lawyer has indicated that, in addition to asserting status-based immunity on the grounds that he is Venezuela's head of state, Maduro will also claim conduct-based immunity for alleged unlawful acts committed while he was in office.[54] Yet not every act performed while in office or using state authority is shielded by conduct-based immunity under either US or international law.[55] Maduro's wife, Cilia Flores, is not entitled to

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the sole Head of State, able to take action on behalf of Venezuela"); *see also* Order, Rusoro Mining Ltd. v. Bolivarian Republic of Venez., No. 18-7044, Doc. No. 1785518 (D.C. Cir. May 1, 2019), *quoted in* OI Eur. Grp. B.V. v. Bolivarian Republic of Venez., 2019 WL 2185040, at *5 (D.D.C. May 21, 2019) (quoting Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938)) ("What government is to be regarded here as representative of a foreign state is a political rather than a judicial question, and is to be determined by the political department of the government.").

51. *Samantar*, 699 F.3d at 777.

52. Regina Garcia Cano, *Nicolás Maduro Sworn In for Third Term as Venezuelan President Despite Evidence of Election Loss*, PBS (Jan. 10, 2025), https://www.pbs.org/newshour/world/nicolas-maduro-sworn-in-for-third-term-as-venezuelan-president-despite-evidence-of-election-loss [https://perma.cc/ARP3-UVBM]. Most often, *de jure* authority and *de facto* control go hand in hand; when they diverge, complicated questions can arise about who to treat as a country's authoritative representative. *See, e.g.*, Scott R. Anderson, *Recognition, Between Domestic and International Law: The United States as a Case Study*, 119 AJIL UNBOUND 270 (2025).

53. On the international unlawfulness of the US military operation, see Schmitt, Goodman & Bridgeman, *supra* note 40.

54. Kara Scannell, *Nicolas Maduro Heads Back to Court Arguing that the US Is Trying to Hamstring His Defense*, CNN (Mar. 25, 2026), https://www.cnn.com/2026/03/26/us/maduro-heads-back-to-court-amid-fight-over-his-lawyers [https://perma.cc/76BR-RQPN].

55. *See* Dodge & Keitner, *supra* note 8, at 701 ("Whether a foreign official was acting in an official capacity for purposes of conduct-based immunity depends in part on the scope of the official's authority under foreign law."); *see also id.* at 704 ("Conduct-based immunity attaches only to acts taken in an official capacity, which does not include all acts performed under color of law or authorized by the foreign state.").

status-based immunity because she is not a head of state, head of government, or foreign minister. Under customary international law, countries may extend temporary status-based immunity to members of a foreign head of state's entourage during an official visit, but that doctrine is not relevant here.[56] Ordinarily this kind of status-based immunity depends on whether the *forum state* consents to grant the individual immunity during an official visit. What the United States has done here is the opposite: it brought Flores to the forum state without *her* consent. She can neither claim status-based immunity nor exemption from US jurisdiction.[57]

IV. IMPLICATIONS OF THE CURRENT U.S. APPROACH

The Maduro prosecution has captured attention both because of the US military operation that preceded it, and because of the controversy over Maduro's claim to head-of-state immunity.[58] Unlike the accreditation of diplomats or members of special diplomatic missions, which requires the consent of the host state, an individual's status as a foreign head of state entitled to status-based immunity has not generally been viewed as a discretionary matter. From a policy perspective, treating Maduro as Venezuela's head of state appears to legitimize his contested rule. However, international law does not generally distinguish among regime types or differentiate among heads of state based on the method by which they came to power.[59] Although a head of state who is not

56. *See* Michael Wood, *The Immunity of Official Visitors*, 16 MAX PLANCK Y.B. U.N. L. 35, 42 (2012).

57. *See* United States v. Noriega, 117 F.3d 1206, 1214 (11th Cir. 1997) (finding that "Noriega's due process claim 'falls squarely within the [Supreme Court's] *Ker-Frisbie* doctrine, which holds that a defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his presence.'"). In a decision that has not been followed broadly, the Second Circuit found that forcible abduction by US agents abroad would preclude the assertion of US jurisdiction. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

58. Recognizing an individual as a country's head of state is distinct from maintaining diplomatic relations with that country. For example, the United States recognizes Kim Jong Un as North Korea's leader but does not maintain formal diplomatic relations with North Korea. The threshold question whether to recognize a particular entity as a state to begin with can pose additional challenges not raised by the case of Venezuela.

59. International organizations have their own processes for resolving recognition debates within the organization; for example, the United Nations credentials committee

recognized by a foreign country can generally sidestep the question of whether they would be accorded status-based immunity by avoiding travel to that country, the United States' decision to capture Maduro in a military operation creates a highly anomalous situation.

As explained in Part III above, US courts have approached the question of head-of-state immunity by according absolute deference to the Executive Branch's determination of whether a particular defendant is a sitting head of state. Lewis Yelin argues that the President has the constitutional authority to make law by determining an individual's entitlement to immunity—not just an individual's status—by virtue of the President's "sole authority to speak for the nation in its relations with foreign states."[60] In Yelin's view, courts are responsible for "ensuring that the Executive Branch does not improperly expand its power beyond its constitutional grant," but he interprets the scope of the constitutional grant broadly.[61] He reads existing jurisprudence as "recogniz[ing] that it is for the Executive Branch alone to determine whether to apply the customary international law principles [of head-of-state immunity] in a particular case," rather than simply affirming the Executive Branch's recognition power and its concomitant authority to determine a foreign official's status within the US legal system.[62] However, even if one accepts Yelin's argument, it is not clear that the Executive Branch's decision to *deny* immunity falls within the President's exclusive authority to conduct diplomacy, since the preservation of diplomatic relations generally involves *providing* immunity as a way of shielding an individual's ability to represent their country in the conduct of its foreign relations.

Even if the Executive Branch's suggestions of immunity (as opposed to determinations of status) are not entitled to absolute deference, courts will still accord them substantial weight.[63] Under an administration that values compliance with international law

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determines who is authorized to act for member states in the General Assembly. *See, e.g.*, Catherine Amirfar, Romain Zamour & Duncan Pickard, *Representation of Member States at the United Nations: Recent Challenges*, 26 AM. SOC'Y INT'L L. INSIGHTS 1, 1 (2022), https://www.asil.org/insights/volume/26/issue/6 [https://perma.cc/3X34-BEVD].

60. Yelin, *supra* note 32, at 919.

61. *Id.*

62. *Id.* at 974.

63. *Accord Samantar*, 699 F.3d at 772.

and the maintenance of peaceful international relations, the difference between absolute deference and substantial weight will often be inconsequential. However, as Ingrid Brunk highlights, President Donald Trump's conflation of his personal interests with the national interest and his "personal style of politics . . . illustrate the dangers of allowing the [E]xecutive [B]ranch to make foreign official immunity determinations binding on the courts."[64] The United States' inconsistent treatment of foreign leaders accused of drug-related crimes is not merely hypothetical: the US Ambassador to the United Nations justified the Maduro abduction and prosecution on the grounds that "[t]he United States will not waver in our actions to protect Americans from the scourge of narcoterrorism"[65] not long after Trump pardoned the former president of Honduras, who was convicted in a US court of large-scale drug trafficking committed while he was in office.[66]

US recognition policy vis-à-vis Venezuelan leaders has itself been opaque and inconsistent, further illustrating the problems with unconstrained executive discretion. On March 10, 2026, the US Attorney for the Southern District of New York notified the court in Maduro's criminal trial of the State Department's determination that "the United States is recognizing Delcy Rodríguez as the sole Head of State, able to take action on behalf of Venezuela."[67] This recognition was particularly noteworthy given

64. Ingrid (Wuerth) Brunk, *Does President Trump Control Head-of-State Immunity Determinations in US Courts?*, LAWFARE (Feb. 22, 2017), https://www.lawfaremedia.org/article/does-president-trump-control-head-state-immunity-determinations-us-courts [https://perma.cc/6WXH-JGUN].

65. Mike Waltz, U.S. Representative to the United Nations, Remarks at a UN Security Council Briefing on Venezuela (Jan. 5, 2026), https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-venezuela-2/ [https://perma.cc/L9NY-RBDE]. For states' reactions, see Marie Miller, *U.S. Allies and Adversaries' Reactions to Operation Absolute Resolve to Capture Maduro: UN Security Council Emergency Meeting*, JUST SEC. (Feb. 18, 2026), https://www.justsecurity.org/131396/maduro-allies-adversaries-react/ [https://perma.cc/ZBS8-Y7QK].

66. *See Juan Orlando Hernández Pardon: Implications for U.S. Foreign Policy*, WASH. OFF. ON LATIN AM. (Dec. 16, 2025), https://www.wola.org/analysis/juan-orlando-hernandez-pardon-implications-for-u-s-foreign-policy/ [https://perma.cc/AF64-URJR].

67. *See* Letter from Michael G. Kozak, Acting Assistant Sec'y of State, to Jay Clayton, U.S. Att'y for the S. Dist. of N.Y. (Mar. 10, 2026), *reprinted in U.S. Formalizes Before Court Its Recognition of Delcy Rodríguez as Venezuela's State Authority*, MERCOPRESS (Mar. 12, 2026), https://en.mercopress.com/2026/03/12/u.s.-formalizes-before-court-its-recognition-of-delcy-rodriguez-as-venezuela-s-state-authority [https://perma.cc/H752-7UEK]. This

reports that US federal prosecutors had drafted an indictment against Delcy Rodríguez for corruption and money laundering, to be used by the United States as "leverage" to control her—though the Justice Department has denied these reports.[68] Moreover, Rodríguez's ninety-day tenure as acting president under Venezuelan law officially expired on April 3, and the National Assembly had not taken action to extend it as of April 8.[69] Accordingly, little legal basis remains under Venezuelan law for the United States to recognize Rodríguez as Venezuela's *de jure* head of state. Moreover, the implicit threat of withdrawing recognition as a prelude to prosecuting her runs counter to basic principles of sovereign equality and the international law prohibition on coercive intervention in the internal affairs of foreign states.[70]

The United States has previously used criminal proceedings as an extension of its foreign policy.[71] For example, it has indicted members of the Chinese military for computer hacking and

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recognition predated the Trump administration's removal of Rodríguez from its sanctions list of "specially designated nationals," which reportedly did not happen until April 1. *See* Chris Cameron, *U.S. Lifts Sanctions on Venezuela's New Leader*, N.Y. TIMES (Apr. 1, 2026), https://www.nytimes.com/2026/04/01/us/politics/us-lifts-sanctions-rodriguez.html [https://perma.cc/HT7Q-5W86].

68. *See, e.g.*, Sarah Kinosian & Matt Spetalnick, *US Turns Up Heat on Venezuela with Threat to Indict New Leader Delcy Rodriguez*, REUTERS (Mar. 11, 2026), https://www.reuters.com/world/americas/us-turns-up-heat-venezuela-with-threat-indict-new-leader-delcy-rodriguez-2026-03-03/ [https://perma.cc/CQJ2-FAR7]; Lisa Monica & Dhika Priambodo, *US-Venezuela Tensions Rise over Delcy Rodríguez Charges*, IDN FIN. (Mar. 5, 2026), https://www.idnfinancials.com/news/61912/usvenezuela-tensions-rise-over-delcy-rodr%C3%ADguez-charges [https://perma.cc/K9X5-XEAV]. On the Justice Department's denial, see Antonio María Delgado, *Trump Ally or Target? DOJ Denies Report of U.S. Charges Against Delcy Rodriguez*, MIAMI HERALD (Mar. 4, 2026), https://www.miamiherald.com/news/nationworld/world/americas/venezuela/article314918301.html [https://perma.cc/84MR-P5HG].

69. Garcia Cano, *Acting President*, *supra* note 49.

70. For more on the prohibition on coercion under international law, see Marko Milanovic, *Revisiting Coercion*, EJIL: TALK! (July 17, 2023), https://www.ejiltalk.org/revisiting-coercion/ [https://perma.cc/DT73-9UWP]. On coercion and Venezuela, see Marko Milanovic, *Some Further Thoughts on the Illegal US Attack on Venezuela: Self-Defence, Cyber, and Continuing Coercion*, EJIL: TALK! (Jan. 7, 2026), https://www.ejiltalk.org/some-further-thoughts-on-the-illegal-us-attack-on-venezuela-self-defence-cyber-and-continuing-coercion/ [https://perma.cc/Q5DE-RDES].

71. *See* Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 740 (2021) (highlighting the risks of presidential politicization of criminal prosecutions under the foreign affairs authority, including with respect to Venezuela); Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 391 (2019) (noting that cross-border prosecutions can both complicate US diplomacy and serve as instruments of a broader US diplomatic agenda).

economic espionage, and Russian hackers for interfering in the US political system.[72] These indictments serve multiple purposes, including calling out and deterring unlawful activity and defining international standards of behavior.[73] Yet instrumentalizing criminal law to pursue a political agenda can undermine these potentially constructive functions. In addition, if the United States violates international law in the name of law enforcement, this places the very idea of a rule-of-law system under even greater strain.[74] In a 1989 opinion that helped pave the way for the Maduro operation,[75] the Office of Legal Counsel advised the Attorney General that the FBI could "forcibly apprehend a fugitive in a foreign country that would not consent to the apprehension" because the President has the constitutional authority to violate international law.[76] Even if one adopts that position as a matter of domestic law, it does not absolve the United States of international legal responsibility. Moreover, treating international law as optional turns the entire system of reciprocal protections—including protections for sitting US Presidents who travel abroad—into a menu of policy options rather than legal commitments.

V. CONCLUSIONS

The United States appears poised to continue using criminal indictments as a foreign policy tool. Under the Trump Administration, this means using the threat of criminal punishment and the possibility of pardons as leverage over individuals, including foreign leaders. For example, at the end of

72. *See* Chimène I. Keitner, *Attribution by Indictment*, 113 AJIL UNBOUND 207 (2019).

73. *Id.*

74. *See* Chimène I. Keitner, *The Problematic Rhetoric of a "Rules-Based International Order" and Selective Support for Proceedings Before International Courts*, 10 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. (forthcoming 2026) and sources cited therein.

75. Proposed War Dep't Operation to Support L. Enf't Efforts in Venez., 49 Op. O.L.C. (Dec. 23, 2025) (slip op. at 7), https://www.justice.gov/olc/media/1423306/dl?inline [https://perma.cc/5SVX-E9HQ] (citing the 1989 Opinion); *see* Arturo Jimenez-Bacardi, *Imperial Prerogative: How the Panama Invasion and the "Barr Doctrine" Set the Stage for the Maduro "Snatch" Operation*, NAT'L SEC. ARCHIVE (Jan. 16, 2026), https://nsarchive.gwu.edu/briefing-book/2026-01-16/imperial-prerogative-how-panama-invasion-and-barr-doctrine-set-stage#_ednref13 [https://perma.cc/7HLX-VZV2].

76. Authority of the Fed. Bureau of Investigation to Override Int'l L. in Extraterritorial L. Enf't Activities, 13 Op. O.L.C. 163, 164 (1989) (rejecting the opposite conclusion reached in a 1980 Opinion).

March 2026, US officials reportedly assured Colombia's government that its president, Gustavo Petro, does not face criminal charges related to ongoing drug trafficking investigations "right now."[77] Even if prosecutors might have undertaken a similar investigation in another administration, Trump's willingness to disregard other states' territorial sovereignty and the Executive Branch's authority over recognition decisions means that the Maduro non-recognition strategy potentially threatens every foreign leader, especially but not exclusively in Latin America.

Given the United States's military and economic power, Trump is unlikely to find himself in Maduro's position during his time in office. After that, the same theories that allow US prosecutors to pursue criminal charges against former (or non-recognized) foreign heads of state should enable foreign countries to do the same when warranted by evidence against former US leaders. There are also domestic, foreign, and international options for prosecuting international crimes committed by former officials, if there is sufficient political will.

The farther the Executive Branch strays from reasonable uses of its recognition power and from suggestions of immunity that reflect customary international law, the more reluctant US courts should be to treat the Executive's foreign affairs power as essentially absolute. Even if status determinations are considered binding, the legal effects of such determinations—as well as the President's broader claim to unreviewable authority over matters connected to foreign affairs—should be subject to judicial scrutiny and reasoned argument.[78] Although US law gives the President remarkable latitude to pursue his preferred policies and personal agenda, this "law" of deference cannot invariably trump observable "facts."

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77. Annie Correal, *U.S. Assures Colombian President He Does Not Face Charges Right Now*, N.Y. TIMES (Mar. 31, 2026), https://www.nytimes.com/2026/03/31/world/americas/gustavo-petro-colombia-president-us-charges.html [https://perma.cc/SP6T-GBJK].

78. *See generally* Quinta Jurecic, *The 'Presumption of Regularity' Is Evaporating*, ATLANTIC (June 11, 2026), https://www.theatlantic.com/ideas/2026/06/trump-doj-judges-lawfare/687501/ [https://perma.cc/CG7K-L7UF] (noting in the context of domestic prosecutions that "judges, skeptical of what they are seeing from [the Department of Justice], have begun building upon one another's work to adapt criminal law to an era when the federal government cannot be trusted").