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### THE IMMUNITY OF HEADS OF STATE AND THE APPROACH OF INTERNATIONAL AND DOMESTIC COURTS IN ITS APPLICATION

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#### ABSTRACT

When the heads of state in the past centuries invoked absolute immunity due to the independence and equal sovereignty of states as well as the power they enjoyed as a result of their dignity and position. The current orientation of the international legal system, as well as the approach of the United Nations and its organs, is more in the direction of preserving and protecting humanity and human rights and towards the formation of customary rules in the denial of criminal immunity. Heads of state are evolving at the time of large-scale international crimes. This change can be seen in the statutes of the courts of Nuremberg, Tokyo, the former Yugoslavia, Rwanda, the Special Court of Sierra Leone, and the statute of the International Criminal Court. In addition, the current practice of international courts and, to some extent, national courts, clearly indicates that the era of absolute immunity of heads of state is over. In this regard, this article examines and explains this issue.

#### INTRODUCTION

The occurrence of heinous crimes throughout history has always led to the disruption of international order and insecurity at the national level. International criminal courts have been set up to deal with inhumane acts at various times in order to prevent the perpetrators from committing these inhumane acts again by punishing them. Therefore, creating measures to restore order, security and justice to that land and its effects at the global level has always been considered. To this end, various international criminal courts, such as the first-generation courts (Nuremberg and Tokyo), the second-generation courts (Yugoslavia and Rwanda), and the third-generation courts (Sierra Leone Special Court), have dealt with these crimes. The Special Court of Lebanon, etc.) And finally the International Criminal Court have been established under the title of fourth generation courts with general and permanent jurisdiction. Although generations of international criminal courts have been established in different decades of

history to deal with international criminals, these inhumane acts have been repeated throughout history due to the lack of deterrence for individuals. It is clear that silence and negligence towards these people could have had more inappropriate effects. Moreover, the establishment of these courts is far better than not acting and remaining silent in the face of inhumane acts. The issue of the immunity of heads of state has always been an important issue in international criminal law. The immunity of heads of state has been raised through both treaties and customary international law. Thus, the issue of the immunity of government officials in terms of the criminal jurisdiction of foreign states, as well as the issue of the judicial immunity of states, are issues related to relations between states. In the laws of some countries, the issue of immunity of foreign government officials is covered, which is mainly about the heads of state. The immunity of heads of state from the jurisdiction of foreign criminal courts is based on both functional necessity and the theory of the nature of representation. The most basic immunity of heads of state is their immunity from criminal jurisdiction. Of course, this does not mean that the head of state is innocent of criminal responsibility. The immunity of heads of state in national courts is another manifestation of the general principle of immunity of heads and has an absolute character, according to which non-prosecution prescribes some criminal acts of perpetrators, which include both occupational and personal immunity. Cassese, 2011,<sup>321</sup> all systems world criminal justice has recognized the concept of criminal responsibility of individuals for violating norms that are accompanied by punishment and punishment. Therefore, individual criminal responsibility, both in domestic law and in international criminal law, is one of the general principles of law. The concept of individual criminal responsibility was introduced directly in the light of international criminal law and led to its emergence in the Nuremberg and Tokyo Charters after World War II. Article 6 of the Nuremberg Charter constitutes the principle of individual criminal responsibility. This principle is subsequently stated in Articles (1) 7 and (1) 27 of the Statute of the Former Yugoslavia Criminal Court and Articles (1) 6 and (1) 22 of the Statute of the International Criminal Tribunal for Rwanda and finally Article 25 of the Statute of the International Criminal Court. Recognized. According to the Statute of the International Criminal Court, individuals far from any position they hold will not have criminal immunity from the commission of international crimes such as genocide, crimes against humanity, war crimes and rape. The Statute of the International Criminal Court stipulates that the provisions of the Statute shall apply to all persons without regard to their official position and without any discrimination, and that the official position of the Head of State shall in no way relieve him of any responsibility. Penalty will not be forgiven. In general, the trend of developments in the immunity of heads of state from the Versailles Treaty, which we have witnessed in the statutes and procedures of international and national criminal courts, emphasizes that if any of the heads of state commits If they commit one or more serious international crimes or commit gross and serious violations of international human rights and humanitarian law, they will be held criminally liable and will be prosecuted, tried and punished in accordance with international criminal law. The issue of the immunity and criminal responsibility of

heads of state has been brought before national and international courts in the last decade. This importance is further exacerbated by developments in human rights and fair trial perspectives. Therefore, the question that comes to mind is whether this transformation can be a sign of the formation of an emerging customary rule in the field of international relations? In other words, can it be argued that the abolition of criminal immunity of heads of state has now become a customary rule of customary international law? In this paper, the criminal immunity and responsibility of heads of state in terms of criminal jurisdiction in national courts and the International Criminal Court are analyzed.

### **CHALLENGES OF PUNISHMENT TOLERANCE AND ZERO TOLERANCE OF LEADERS FROM THE PERSPECTIVE OF DOMESTIC LAW:**

The issue of criminal liability of government officials in terms of the criminal jurisdiction of foreign states as well as the issue of judicial immunity of states are issues related to relations between states. In this speech, the extent of responsibility and criminal immunity of heads of state in the presence of national courts is analyzed.

#### **Tolerance of punishment of leaders and its application in the laws of countries:**

In some countries, the law provides for the immunity of foreign officials, which is primarily a matter for the head of state. In the laws of countries such as the United Kingdom, Pakistan, Singapore, South Africa, Canada and Australia that have been passed, the concept of the state is included in the official capacity of the head of state, as in the 2004 Convention on the Immunity of State. They and their property have come. In this respect, under British law, the head of state in official capacity enjoys the same immunity as the head of a diplomatic mission. Pursuant to Article 36 (1) of the Australian Foreign Immunity Act, the Diplomatic Benefits and Immunities Act extends to persons who are currently the Head of State or the wife of the Head of State. The laws of the Russian Federation contain provisions regarding the immunity of all officials of foreign states. According to the second paragraph of Article 3 of the Code of Criminal Procedure of Russia, criminal proceedings are instituted against a foreign official who has immunity, and such proceedings are concluded in accordance with generally accepted rules of international law or international treaties or the Russian Federation. , Can be established with the consent of the foreign government on which the person serves. In this regard, the Ministry of Foreign Affairs of the Russian Federation submits information to the relevant Russian court or executive authorities as to whether the person in question has immunity from criminal proceedings and to the extent of such immunity. It is noteworthy that international law governs the immunity of foreign officials from criminal jurisdiction under Russian domestic law. Regarding the establishment of universal jurisdiction in the legal system of some countries, there are provisions in some national laws that can be interpreted in such a way that the exercise of universal criminal jurisdiction denies the immunity of foreign authorities. For example, Belgium's 1993 Law on the Protection of Victims of War, which was amended in 1999 and included a regulation that prohibits the use of

immunity to support criminal prosecution. According to this regulation, immunity granted due to official capacity does not prevent the application of this law. The regulation allowed criminal proceedings against the Foreign Minister of the Republic of the Congo. However, the law was amended after the International Court of Justice ruled in his detention. Therefore, the extent of a foreign official's immunity from criminal jurisdiction for war crimes under Belgian law is primarily determined by international law. In this regard, we can refer to UN Security Council Resolution 987 of 1995, which calls on governments to bring to justice, in accordance with their national laws and the standards of international law, persons for whom there are sufficient reasons against them. "Bagheri, 1397, 146" should be noted that the primary and fundamental source in these issues is international law, which dates back to the Treaty of Versailles (1919). The victorious states in the war, under the aforementioned treaty, demanded the trial of the German emperor on charges of gross violation of international morality and the sacred validity of treaties. After World War II, the International Military Courts of Nuremberg and Tokyo explicitly recognized the individual responsibility of individuals for crimes against peace, crimes against humanity, and war crimes.

**The precedent for predicting the necessity of criminals and the statutes of the first generation courts:**

The most important jurisdiction of these courts, as set out in the Nuremberg and Tokyo Statutes, was to try and punish those accused of war crimes. Subsequently, with the establishment of the criminal courts of the former Yugoslavia, Rwanda, Sierra Leone, and domestic criminal courts, such as the British criminal court in Pinochet, the immunity regime changed and the basic immunities of the heads and other officials of the former governments The commission of specific international crimes was seriously suspected. Jeffrey, 2004: 409 In addition to the above, UN General Assembly Resolution 1946, issued within the framework of customary international law, Article 4 of the 1948 Convention on Genocide, Article 3 of the 1973 Apartheid Convention, and Articles 4 to 12 of the Convention. 1984 Torture also reaffirmed the waiver of the immunity of previous heads of state in relation to international crimes. This is clearly seen in the proceedings of the International Court of Justice and the International Criminal Court. . Article 27 of the Statute of the International Criminal Court definitively waives the basic and temporary immunities for all government officials, including the heads of state, who commit crimes of genocide, crimes against humanity and war crimes. Has placed them under the jurisdiction of national courts and the International Criminal Court. Bassiouni 2008,51-53 The immunity of heads of state from the jurisdiction of foreign criminal courts is based on both functional necessity and the theory of the nature of representation. In the examination of diplomatic immunities, the creation of appropriate conditions for the performance of duties is the reason for its existence. "Surasrafil, 1379, 270" In principle, in all documents related to immunity, it is emphasized that these immunities are not granted in the framework of the individual interests of the representatives, but in order to effectively perform the duties of representation and government. "Wickremasinghe, 2010, 406 »The

International Court of Justice in the case (detention order) emphasized this. In the contemporary international legal system, a number of high-ranking officials, such as heads of state and government, due to the necessity of their duties in the domestic and international arena, as well as their (representation) status of their respective countries from special immunity and Special, which is general and absolute, they benefit from what is called (personal immunity) "Shah, 2011,818 Akand &". "Imamian and Azizi, 1397, 5" and also in the comments of a group of jurists believe that this right exists in customary international law for heads of state.

- **Explain the principle of necessity of punishers**

From the point of view of international law, the source of criminal responsibility of heads of state and other government officials depends on the commission of one of the most important international crimes that have a characteristic (dangerous and serious) and are mentioned in international documents as the most serious crimes. In traditional international law, heads of state have always had immunity and therefore were free from any responsibility for actions that would constitute gross and serious violations of international human rights and humanitarian law, and this is customary. And the procedure had changed; However, after the First and Second World Wars, and with the gradual development of international criminal law, the responsibility of heads of state and other high-ranking officials of countries was raised, and thus the commission of international crimes, including war crimes, genocide. And crimes against humanity will be responsible and will not be immune. For the first time, in 1919, the Allies called for the trial of the German emperor after the defeat in World War I on charges of violating international ethics and treaties. Pursuant to Article 227 of the Treaty of Versailles, his immunity was revoked for the purposes of Wilhelm II. After World War II, the Nuremberg Trials in 1945 and the Tokyo Trials in 1946 were held to try German and Japanese officials for committing international crimes. Articles 2 to 7 of the Statute of the Nuremberg Tribunal and Article 6 of the Tokyo Charter state that the criminal immunity granted to representatives of States by international law does not include their criminal acts. The following years will see the trial of leaders and officials of other countries and other rulers, including Serbian officials, at the International Criminal Tribunal for the former Yugoslavia in The Hague for committing international crimes. According to Article 27 of the Rome Statute, the immunities of heads of state and other government officials do not preclude their prosecution, trial or punishment. This article of the Statute of the International Criminal Court emphasizes that the official position as head of state or government shall in no case result in personal exemption from criminal liability.

## **THE EXTENT OF THE IMMUNITY OR LIABILITY OF LEADERS IN INTERNATIONAL LAW:**

### **Immunity of heads:**

Currently, the International Law Commission (ILC) has one of the most important projects on its agenda to examine the extent to which high-ranking heads of state benefit from immunity from criminal prosecution in other countries. Following the receipt of the third report by Special Rapporteur Professor Escobar Hernandez in 2014, the Commission decided

to refer the draft material to the Drafting Committee. Article 3 of the draft, entitled "Persons with Personal Immunity", states that three groups of officials, known as Troika officials (i.e., the head of state, the head of government and the minister of foreign affairs), and exercise jurisdiction over the criminal courts of other countries. They have absolute immunity, and this immunity even applies to the commission of international crimes. In this regard, the International Court of Justice, in the case (detention order), refers to the enjoyment of personal immunity by these officials (paragraph 51) and ordered Belgium to cancel the detention order issued against the Congolese Foreign Minister. Slowly.

Given that immunity is an international legal phenomenon, in order to explain its limits and effects, it is necessary to refer to international documents and procedures, including the founding documents of international criminal courts, which pay special attention to immunity.

- **Exercising doubts about the immunity of leaders:**

On July 17, 1998, the Rome Statute was adopted to establish the International Criminal Court, pursuing the most serious international crimes, to end impunity for the perpetrators of these crimes. According to the preamble to the Rome Statute, the International Criminal Court is a permanent judicial body that has complementary jurisdiction alongside domestic criminal courts. It has war crimes and aggression. The Statute of the Court of Appeals explicitly ignores the immunity of high-ranking government officials, including the head of state. For this reason, paragraph 1 of Article 27 refers to the responsibility of government officials in the event of a crime and paragraph 2 emphasizes that the immunities conferred on government officials under international law or domestic law preclude the Court from exercising jurisdiction. Such persons shall not become Kennedy, 2013, 4. "Najafi Aberandabadi, 186, 1373". It should be noted that the immunity of heads of state from international criminal tribunals does not begin with the statute of the International Criminal Court, but the statute (ICC) is a continuation of the process that followed the formation of the Nuremberg and Tokyo special tribunals. World War II began and continued with the formation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICTR) in the 1990s. (Paragraph 2 of Article 7 of the Statute of the mentioned courts). "Imamian, Azizi, 1397" The International Law Commission (ILC) also stated this point in Article 13 of the draft law on crimes against international peace and security. The title of this article is about official status and criminal responsibility. "Ibid. 8" The official position of a person who commits international crimes against international peace and security, even if he has acted as head of state or government, does not remove his international responsibility or does not reduce. The provisions of this article are based on the provisions of the statutes of the courts of Nuremberg and Tokyo, in Articles 6 and 7 of the statutes of the two courts, respectively. "Najafi Aberandabadi, 1373,186" by stating the orientation of the international community regarding the immunity of heads of state in contemporary international law, the customary rule based on the abolition of job immunities of heads of state in international law Contemporary is emerging in the event of serious international crime, striking a balance

between supporting the government's ability to perform its duties and protecting human rights. "Tajani, Mir Fallah, 59, 1394". Thus, although the disregard for immunity from international tribunals has been a new development in international law, it has been well established and enshrined in customary international law. Paola, 2009,316. The establishment of an international criminal court is the only solution to ensure the exercise of purposeful, definite and impartial international criminal jurisdiction in order to achieve criminal justice. In the light of developments in human rights, the recent development of international tribunals, and the increasing willingness of governments to prosecute heads of state in the event of international crimes, sufficient grounds for recognizing impunity there is the head of state before the international criminal courts. Accordingly, Iverson (2012, 135) (ICJ), in the case of the Congolese detention of Belgium, states: that customary international law, while giving immunity to heads of state before a foreign national trial, Such immunity does not exist before international courts; "Imamian, Azizi, 1397" and states that if the international courts have jurisdiction, the former and current foreign ministers can be prosecuted before the special international courts. To take. This lack of immunity from international tribunals is justified by the logic that the relationship between states and international criminal courts is a vertical one, and that the existence of immunity from foreign criminal courts is due to the fact that Governments have a horizontal relationship with each other and are based on a common legal example that no government has the right to sue another government or other heads of state in its domestic courts. Akande, 2015,875 A group of lawyers They are concerned that governments may abuse this rule and, in cases where countries themselves are unable to prosecute the head of state, abuse this provision and establish an international criminal court or tribunal to prosecute foreign heads of state. Ibid., 416 Accordingly, it is important to provide a correct definition of an international tribunal that does not allow states to abuse, to the extent that states abuse the norm of combating impunity and punishing perpetrators of crimes between The international community should not prosecute foreign heads of state in national domestic criminal courts and should not turn judicial proceedings into a place for political settlements. The expansion of mixed courts, such as the Sierra Leone International Criminal Court and the Cambodian International Criminal Court, is of particular importance. Sierra Leone Special Court on questions arising as to whether this is an international tribunal? And is it competent to handle or not? In the case of Charles Taylor, it ruled that the tribunal was an international tribunal and therefore disregarded Taylor's immunity. "Kress, 2009, 951-952" The Sierra Leone Special Court (SCSL) also ruled in favor of the immunity exception. In front of international courts, he emphasized customary international law. Although it is important to provide guidance on how an international tribunal should work, Courts established by the Security Council and any United Nations-affiliated regional organization (even if mixed) or courts based on the membership of a majority of the members of the United Nations with the aim of disregarding the immunity of heads of state, To be created (like the International Criminal Court), are international. «Mohanty, 2015, 12».

The most basic immunity of heads of state is their immunity from criminal jurisdiction. Of course, this does not mean that the head of state is not criminally liable. Immunity is formal in nature; a criminal issue is a matter of substantive rights. Judicial immunity may prevent the prosecution of certain crimes or be restricted for a period of time, but does not absolve that person from criminal liability. The criminal immunity of heads of state in the national courts is another manifestation of the general principle of immunity of heads and has an absolute character, according to which the non-prosecution of some perpetrators of criminal acts is prescribed and includes both professional and personal immunity. "Cassese, 2011,321" Sands, as Special Judge of the Sierra Leone Court in the case of Charles Taylor, argues that: In the face of national criminal courts, serving leaders have immunity even when committing international crimes . The International Court of Justice in the Congo v. Belgium case clearly states that customary international law provides for absolute immunity for heads of state before foreign national courts, even when committing international crimes. It explicitly states that: The Court has carefully considered state practice, including national legislation, as well as a number of rulings of national supreme courts. And is unable or unable under international customary law, with the exception of immunity from criminal jurisdiction and immunity from aggression by foreign ministers in office, in cases where they are accused of committing war crimes or crimes against humanity. Be immune. In addition, the Court stated that: The Court has examined the rules relating to the immunity and individual responsibility of those holding official positions in the legal documents of the founders of the International Criminal Courts, and these rules do not enable the Court to Conclude that such an exception exists within the framework of customary international law concerning national courts. The International Court of Justice (ICJ) in the case of Djibouti v. France, dated June 4, 2008, has also granted the incumbent head of state absolute immunity. "Abdi, 1387-441" In the cases that have been raised in the domestic courts of some countries, the criminal immunity of the heads of the serving governments has been emphasized; For example, the French Supreme Court in the case of Muammar Gaddafi in March 2001, Zappala, 2001,595, as well as in the case of Fidel Castro, a Spanish court in its March 1999 ruling declaring it incompetent to investigate crimes attributed to Fidel Castro. Emphasizes that he is the incumbent President of the Cuban Government and therefore the provisions of Article 23 of the Code of Jurisdiction cannot apply to him. Sobhani, 2010, also in the case of Robert Mugabe, President of the State of Zimbabwe, a US tribunal, finally ruled in 2004 that: Great legal protection and immunity be granted to heads of state in customary international law and domestic law. Which prevents the prosecution of litigation. Therefore, Mugabe, as President of the Zimbabwean Government, is entitled to immunity as long as he is in power and will not be subject to any arrest or detention.

It is worth mentioning that in the criminal laws of some states, the immunity of senior government officials has been limited or abolished. These include the 1993 Belgian Law and the 1999 Amendment to the Penal Code, which penalize serious violations of international humanitarian law. Under the Amendment Act 1999, immunity from official position does not

preclude the jurisdiction of the Belgian courts. "Mansouri, 2016, 10-77" However, the practice of governments shows that the heads of government serving in the courts have immunity and cannot be tried. "Judicial practice and government practice are consistent in this regard, and no case has been found in which it has been ruled that government officials enjoying personal immunity are subject to the criminal jurisdiction of a foreign state," Ekand said. Even when those officials are accused of committing international crimes. However, several different procedures have been developed regarding the waiver of the immunity of former heads of state before the national courts, of which the case of Augusto Pinochet, Khalid Nazar and the case of Hussein Habre are more important. In the Pinochet case, a Spanish district court judge issued an arrest warrant for Pinochet on charges of genocide and terrorism, and asked the Spanish embassy to detain and extradite Pinochet under the European Convention on the Extradition of Criminals. The British government arrested and imprisoned Pinochet despite his physical condition. Following his arrest due to an appeal by the Spanish government, the case was sent to the highest court in the United Kingdom, the House of Lords. Finally, on March 24, 1999, the House of Lords voted against Pinochet. "Foakes, 1999, 9" states that the immunity of the state, which recognizes the customary rights of heads of state and government officials, is organized against international rules such as the prohibition of torture, which has taken the form of rules. Cannot be documented. "Jeffrey, 1383-504" The case of Pinochet's arrest and trial is very important in terms of revoking the personal immunity of the former head of state, and it was the first time that government immunity was not allowed to lead to escape from arrest and trial. In other words, the decision of the House of Lords in this case indicates that the head of a government or any government official in relation to acts committed under international conventions cannot claim immunity, only because such acts cannot be part of the legal and official duties of a government. "Byers, 1379, 98" In the case of Khaled Nazar, the former Minister of Defense of Algeria, a decision was made by the Swiss Federal Criminal Court, according to which the former Minister of Defense of Algeria, who was accused of war crimes, was declared without criminal immunity. The Swiss Federal Criminal Court has ruled that: There is no denying that in international law there is a clear tendency to limit the immunities of (former) heads of state in the face of international war crimes that violate the rules of jurisprudence. There are. As for the Court's personal immunity, he stated that the fact that he was the Algerian Minister of Defense at the time of the incident was in itself sufficient to guarantee his personal immunity during his tenure, but that there were other such immunities. Does not have. Regarding occupational and material immunity, the Federal Court stated: "On the one hand, it is useless to emphasize the intention to fight against the violation of fundamental human values, and on the other hand, with a broad interpretation of the rules governing functional or occupational immunity." And somehow exempt former government officials from any investigation and prosecution. In this case, it is very difficult to accept that behavior contrary to the values of the international legal order can be upheld by the rules of the same legal order.

In the case of former Chadian President Hussein Habre, however, the Belgian judiciary issued an international arrest warrant against Habre in September 2005 on charges of complicity in or complicity in crimes against international humanitarian law. In this agreement, the Belgian government calls on Senegal to prosecute or extradite Hussein Habre to Belgium, in accordance with the Convention against Torture, so that the Belgian judiciary can prosecute and prosecute him. The Belgian government's judicial procedure explicitly does not recognize any immunity for former heads of state, and even the Belgian Minister of Justice explicitly declares the Belgian courts competent to hear Mr Habre's allegations. "Tajani, Mir Fallah, 1394, 47" The dispute between Belgium and Senegal over the trial of Hussein Habre has led to a lawsuit filed by Belgium against Senegal in the International Court of Justice. On February 19, 2009, Belgium filed a complaint against Senegal with the International Court of Justice. The lawsuit is based on a dispute between Belgium and the Republic of Senegal over the fulfillment of a commitment by the Senegalese government to the trial of former Chadian President Hussein Habre or his extradition to Belgium for trial. The International Court of Justice (ICJ) ruled by a landslide on 20 July 2012 that the Senegalese Government had failed to fulfill its obligations to conduct an immediate investigation into the alleged crimes against Hussein Habre and that the case of Hossein Habre had not been referred. It has violated the provisions of Article of the Convention against Torture to the competent authorities for criminal prosecution. The Senegalese Government should therefore refer Mr Habre's case to its competent authorities for prosecution and trial without further delay; of course, if he does not intend to extradite him to the Belgian government. In fact, the International Court of Justice, in its ruling, contrary to its previous case in the Congo case against Belgium in 2002, which considered the immunity of heads of state to be absolute, regardless of the immunity of Mr. Habre, as the former head of the Chadian government, demands that the Senegalese government prosecute him.

Although the Court does not fall directly into the category of immunity, by ordering Senegal to try Mr Habre or extradite him to Belgium for trial, it is in fact implicitly declaring that no one, not even the head of state, violates the rules. It will not be immune from the jurisdiction of domestic courts. "Tajani, Mir Fallah, 1394, 51" It can be concluded that this decision of the Court is a seal of approval on the procedure of domestic courts in revoking the immunity of former heads of government to commit international crimes. "Mansouri, 1391, 1391" The statute of the International Criminal Court also contains provisions on the abolition of the immunity of heads of state before the national courts; And when a State ratifies the Statute, that State shall accept all the obligations of the Statute, including Article 27 of the Statute, which provides: The Heads of State of a Contracting State shall not enjoy immunity from prosecution under the provisions of the Statute. Paragraph 2 of Article 27 of the Statute provides that: Immunities or special formal rules applicable to official authorities under domestic law or international law shall not preclude the Court from having jurisdiction over those persons apply. Article 27 deals specifically with the process of arrest and extradition of wanted defendants. If Article 27 of the Statute is to be applied only in cases before the International

Criminal Court, and the national courts are not able to try the accused or execute their detention order, then the whole basis of the Statute It will be absurd. However, in relations between Contracting States and non-Contracting States, it is stated that the immunity of officials of non-Contracting States should continue in accordance with customary international law by domestic courts seeking the enforcement of a detention order issued by the Court. Internationally criminalize, to be respected, because the statute as a treaty cannot revoke the immunity of non-member states. Pursuant to Article 34, which provides that a treaty does not create obligations or rights for a third country without its consent, the Vienna Convention on the Law of Treaties, a treaty may not impose rights or obligations on that State without its consent. Considering the procedure of national courts and what has been said, it can be said that a single and comprehensive procedure regarding the abolition of criminal immunity of heads of state in national courts has not been formed yet, and the limited procedure created in this regard cannot be. Provide the element of generality necessary for the formation of customary rule. Therefore, national courts now have a variety of reasons, such as having a friendly relationship with the government of the head of state, lack of authorization in customary international law or following the procedure of the Court The International Court of Justice, particularly in the case of the Congo v. Belgium, has refused to criminalize incumbent heads of state and recognized their immunity, even for international crimes committed during their service.

#### **Responsibility of leaders:**

The issue of the immunity of heads of state before international courts is one of the most exciting yet complex and challenging issues in the field of international law and intergovernmental relations. In the international jurisprudence, different and at the same time accurate cases and opinions have been issued in connection with this issue, in which some of these opinions and rulings have been mentioned and examined.

#### **• International Judicial Procedures:**

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 in Bosnia and Herzegovina following the Security Council Resolutions 808 and 823 to deal with crimes committed between 1991 and 1994, citing Article 7 of the Statute and emphasis on Articles 2. Up to 5 of its statutes, on May 22, 1999, Oslo convicted Milosovich, and thus for the first time an international tribunal ignored the immunity of the head of state in power, prosecuted, tried and punished him. He questioned the principle of immunity of heads of state in the event of international crimes. The International Criminal Tribunal for Rwanda, established by UN Security Council Resolution 955 of 8 November 1994 to deal with violations and crimes committed in Rwanda, has also tried a number of political leaders and government officials since 1999. And issued a verdict against them, including former Rwandan Prime Minister Jane Kambada, who was convicted of genocide. "Jeffrey, 2004, 409" and on June 4, 2003, the Sierra Leonean Special Court issued an arrest warrant for Liberian President Charles Taylor. Finally, on May 31, 2004, the Sierra

Leone Special Court of Appeal unanimously waived immunity from prosecution of Charles Taylor, the former head of the Liberian government. "Hazel, 2008,678" The Court explicitly states in this case that: The principle is now enshrined in international law that equality of sovereignty of states is no longer an obstacle to the prosecution and trial of heads of state in inter-tribunal courts. "The nation is not a criminal. An important and influential case in this regard is the case of Sudanese President Omar Hassan Ahmed al-Bashir in the International Criminal Court. Following the referral of the situation in Darfur, Sudan, by the Security Council to the International Criminal Court, the Prosecutor of the Court, after years of investigation, on 14 July 2008, ousted Sudanese President Omar Hassan Ahmad al-Bashir in accordance with Articles 6, 7 and 8 of the Statute. Rome accused him of genocide, crimes against humanity and war crimes in the Darfur region and requested that the Court's Preliminary Branch issue an arrest warrant. Thus, for the first time, the Prosecutor of the International Criminal Court has declared a crime against the President in the power of a country and, based on Article 58 of the Statute of the Court, requests the arresting branch of the Court to issue an arrest warrant. Finally, on 4 March 2009, the Court's Pre-Trial Chamber issued an arrest warrant for Omar al-Bashir and asked the Secretariat to inform all States Parties to the Rome Statute as well as the States Parties to the Charter of the United Nations. The important point in this regard is that although the International Criminal Court issues a warrant for the removal of an ousted president by revoking his criminal immunity, another important point is that governments, especially the government to what extent do non-members of the Statute cooperate with the Court in enforcing the arrest and detention order of Omar al-Bashir?"

#### **REALIZING THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN EXERCISING DOUBTS ABOUT THE IMMUNITY OF LEADERS:**

On December 12, 2012, the Preparatory Branch of the International Criminal Court (ICC) issued a decision pursuant to Article 78 of the Statute on the Republic of Malawi's failure to comply with the Court's request for co-operation on the arrest and extradition of Omar al-Bashir. In this decision, the Preliminary Branch, taking into account all available evidence, states that: Customary international law is an exception to the principle of immunity of the Head of State when international courts seek his arrest for a crime the crimes are international. "Akande, 2016,93" In support of this view, the Pre-Trial Chamber of the Court also raises other issues, stating that: In recent decades, the prosecution of heads of state by international courts has increased. And this shows that the beginning of international prosecutions against heads of state has gained (widespread recognition) as an accepted practice. The other is that the number of member states of the Charter has now reached 120 in 9 years, and all of them have agreed to deprive their senior officials of any immunity under international law. In addition, in the case of the 120 States Parties to the Statute, the Court has achieved this by exercising its jurisdiction over individuals to commit the most serious crimes of international concern. Ibid, 38, criticized the statements of the International Criminal Court's Pre-

Trial Chamber. Judge Dukion, for example, a judge at the International Criminal Tribunal for the Former Yugoslavia (ICTY), states: First, while it is a reasonable conclusion that the head of state cannot escape criminal responsibility. And this is a rule of customary international law, but it does not mean that a person with immunity is not outside the jurisdiction of the court. 2 Ibid as Akand puts it, the fact that an official position does not preclude criminal immunity should not necessarily be interpreted as meaning that a person cannot be immune from the jurisdiction of a foreign court. Exercising immunity as a formal obstacle may cause the Court to refuse to exercise the principle of jurisdiction, which does not mean the legitimacy or illegitimacy of a particular action, but although the International Criminal Court has jurisdiction over all offenses set forth in the Statute, Several factors, such as the immunity of the head of state, may sometimes prevent the International Criminal Court from exercising its jurisdiction. In the case of Omar al-Bashir, the International Criminal Court states that: Heads of state have been widely identified and comprehensive action has been adopted as an accepted practice. "Mansouri, 1395, 78" It is true that these 120 member states have waived the immunity of their leaders, but it is wrong to conclude that there is sufficient evidence from government practice to establish a customary international rule. There is something new and binding for all of them, because the courts of the other half of the world's governments are no longer members. "Akande, 2016,433" Akande emphasizes the importance of the fact that: the only states that are members of the Statute of the International Criminal Court are those who have deprived their senior officials of the immunity granted under international law and no Nothing in the Statute can affect the immunities enjoyed by the authorities of non-member States in other ways. Ibid, 98. Paragraph 1 of Article 98 of the Statute clarifies the Court's duty in this regard and states that: The Court may not request any kind of co-operation which would require the requested State to act contrary to its obligations under international law in the matter. The immunity of States or the political immunity of a person or property of a third State shall be assumed, unless it has previously sought the cooperation of that third State in order to waive the immunity. Even among the member states of the Rome Statute, significant differences can be seen in the immunity of heads of state. Therefore, the argument of the Preliminary Branch of the Court that there is sufficient evidence to indicate the widespread acceptance of a comprehensive procedure and the formation of the necessary element of generality of a customary rule in this regard is largely refuted. Ibid, 98. Another criticism leveled at the decision of the Pre-Trial Chamber is that the branch has failed to comply with the domestic laws of the States Parties, as many of these laws distinguish between the immunities of States Parties and the immunities of non-States Parties. Are drawn. Obviously, this negligence diminishes the value of this argument. It also states in the Congo v. Belgium case that immunities conferred on former and current foreign ministers under international law can be prosecuted in some international criminal courts, provided that this The courts have jurisdiction. He goes on to say that: These examples include the International Court of Justice for the former Yugoslavia, the International Criminal Court for Rwanda and

the International Criminal Court to be established in the future under the 1998 Rome Statute.

### **CONCLUSION:**

Examining the statements of the International Court of Justice, the hypothesis is formed that these statements are nothing more than confirmation of the fact that where the International Court of Justice has a specific jurisdiction, the possibility of waiving immunities there is a head of state. Especially in cases where the head of state is a national of a member of the Rome Statute and has been prosecuted by the International Criminal Court. With regard to non-member states of the Rome Statute, referral by the Security Council under Chapter VII of the Charter of the United Nations and Article 113 (b) of the Rome Statute is the most effective way of exercising jurisdiction over the serving heads of these States. In accordance with Chapter VII of the Charter of the United Nations, with the delegated powers, the Security Council may adopt such measures as it deems necessary for the establishment of international peace and security, and in such cases the sovereignty of States in certain cases. Impress. The Security Council therefore has the power to decide explicitly or implicitly that even the personal immunity of the Heads of State may not preclude States from cooperating in complying with the Court's request for the arrest and extradition of the accused. In addition, it is acknowledged that the Security Council has the authority to lift the ban on Heads of State in the exercise of its powers under Chapter VII of the Charter of the United Nations. This view is reinforced by the view that by referring a situation to the Security Council, the Council in fact gives the Court the necessary authority to exercise its jurisdiction in this regard, thereby providing for the provisions of Article 27 of the Statute. Rome also applies to senior officials of non-member states. Therefore, with the referral of the situation by the Security Council, a compromise is easily established that leads to the jurisdiction of the International Criminal Court in the case of non-member states.

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