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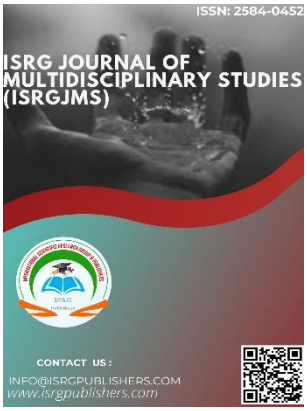

In light of the International Law Commission's proposal (Trial of Heads of State after the end of their official duties)

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Abstract

A historical review of the global community's modern approach reveals the progress of international criminal justice in international crimes against the legal system governing the rules of immunity of state officials. An approach that has been reflected in the work of international courts, especially the International Criminal Court. The International Law Commission, in its draft "Immunity of State Officials from Acts of Foreign Jurisdiction" (2003), considered the immunity of Heads of State, Heads of Government, and Ministers of Foreign Affairs to constitute personal immunity from acts of foreign criminal jurisdiction, by establishing a balance between justice and peace. On the other hand, Bayan Dasht (2017) stated that material immunity does not apply to crimes such as "genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance." The present study aims to examine, using a descriptive and analytical method and using library studies, the trial of the President of the country for committing international crimes, taking into account developments in international law. This study, by analyzing the sources of international law and distinguishing between personal and material immunity, concludes that the head of state is subject to punishment in cases of committing international crimes, after the end of the term.

However, the prosecution and surrender of the head of state to the competent authority in cases of committing crimes of the International Law Commission. Internationalization requires the cooperation of the state of the official and other countries.

Keywords: Criminal Jurisdiction, Immunity Of Heads Of State, Exercise Of Foreign Jurisdiction, International Law Commission.

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1. A Brief Look at the Historical Background of Qualified Immunity for Heads of State

A review of the historical course in some countries confirms the tendency to achieve criminal justice for heads of state for committing international crimes. Among them, Napoleon Bonaparte, Emperor of France, was prosecuted, convicted of war crimes and exiled before the International Congress of 1818. (Marchand, 2017: 214)

Karl Dönitz was appointed Chancellor of the Reich after Hitler's suicide in May 1945; He was later found guilty of crimes against peace and war crimes by the International Military Tribunal at Nuremberg and sentenced to prison. (International Military Tribunal at Nuremberg, 1945:145) The Special Tribunal for the Iraqi Governing Council was established in December 2003 to try officials from the regime of Saddam Hussein, the dictator and former president of Iraq.

In 2006, the ICC convicted and executed Saddam Hussein on charges of crimes against humanity, war crimes, and genocide. (Human Rights Watch, 2006: 21). Despite the international community's desire to achieve criminal justice, some leaders have escaped criminal responsibility with flimsy justifications under international law (Behrens, 2017: 317); Among them is former Sudanese President Omar al-Bashir, who was indicted for (committing international crimes), and his first arrest warrant was issued on March 4, 2009 and the second on July 12, 2010. He is also a fugitive. (International Criminal Court, 2009) Former Chilean President Gustavo Pinochet was arrested in October 1998 while seeking medical treatment in London and was indicted in 2004 in connection with 9 Ademrbai was placed under house arrest. (Human Rights Watch, Report 1998)

In addition, some leaders and leaders such as Muammar Gaddafi (Libyan leader), Ariel Sharon (Israeli politician and Prime Minister), Laurent Kabila (Democratic Republic of Congo politician), and George W. Bush (US President) were also not prosecuted in national courts for political reasons. The current international system has adopted two approaches in relation to the commission of international crimes by State officials: (Saillard, 2019: 420)

First, based on international treaties and in line with the order of the international community, it rejects any exception to immunity from prosecution in a foreign court, except for acts performed in a private capacity. Second, based on the realization of criminal justice, the (material) immunity of state officials from the exercise of criminal jurisdiction in the case of international crimes is not applied. The first approach is based on international commitments and in accordance with the international community's order, which has rejected any exception to immunity in a lawsuit brought before a foreign court, except for acts performed in a private or unofficial capacity.

Of course, according to international documents related to immunity, representatives of states, including the Head of State, Head of Government, and Minister of Foreign Affairs (members of the Troika), whether they are in service or otherwise in an official capacity, may be subject to prosecution in their own country; or their immunity is waived by the host State (see 2022:229). But to the extent that States are unwilling or unable to prosecute or investigate their own senior officials, the crime goes unpunished and the higher objectives of criminal law are not achieved (Reinisch, 2016:180-193).

As we were confronted with the above logic in the Congo v. Belgium case, where Congo challenged Belgium's exercise of universal jurisdiction over its Foreign Minister while serving accused, while it was itself committed to investigating and prosecuting Mr. Yerodia and refrained from exercising criminal jurisdiction over him.

It also violated Senegal's commitment, as per the International Court of Justice's ruling, to not immediately investigate and prosecute the former President of Chad, Mr. Hassan Habre, who is accused of crimes such as torture and crimes against humanity, and to extradite him to Belgium. International treaties that affirm the shared global responsibility to prosecute or extradite and require cooperation from States.

The criminal justice approach aimed at punishing perpetrators of international crimes and led to the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY) and (ICTR) in the 1990s, following the adoption of the Rome Statute of the International Criminal Court (ICC). The trial of Slobodan Milosevic in May 24, 1999, was a turning point in the pursuit of international criminal justice for the people of the former Yugoslavia. He was the first head of state to be indicted for war crimes by an international tribunal (the Slobodan Milošević Trial). (Prosecution's case, 1999: para. 28) However, he died in a UN detention facility in 2006, before the end of the trial. Also during the years 1998-2001, efforts were made to hold senior government officials accountable for Domestic courts of foreign countries were established. Crimes that were the subject of universal jurisdiction were introduced to bring justice to the victims of these crimes. The Statute of the International Criminal Court (ICC) does not recognize any immunity.

Despite this, the prosecution of heads of state in international criminal courts remains very challenging. Currently, the International Criminal Court is investigating the situation in Russia and Ukraine for crimes against humanity and war crimes committed during Russia's invasion of Ukraine. The International Criminal Court, in its first ruling in the Pre-Trial Chamber on 17 March 2023, requested the arrest of Russian President Putin and some of his senior officials on charges of the illegal deportation of children and the illegal transfer of people from the territory of Ukraine to Russia. (ICC, 2023) Mr Putin is the third serving president to be the target of an arrest warrant by the ICC, after Omar al-Bashir (Sudan) and Muammar Gaddafi (Libya). The importance of a legal mechanism to address the challenge of immunity of international officials for committing internationally dangerous acts led the International Law Commission, at its fifty-ninth session (2007), to consider the topic of "Immunity of State officials from foreign criminal jurisdiction" in light of "the needs of States in the progressive development and codification of international law" and "the pressing concerns of the international community." International" on serious international crimes, in its long-term work programme. Accordingly, it appointed Mr. Roman Kolodkin as Special Rapporteur on the subject, who submitted three reports between 2008 and 2011.

The Commission then decided, at its sixty-fourth session (2012), to appoint Ms. Concepcion Escobar Hernandez as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission, The Commission received the initial report of the Special Rapporteur at the same session (2012) and his eighth report in (2020). The Commission, on first reading, adopted draft article 18

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and a draft annex on immunity of public officials from foreign criminal jurisdiction, together with comments thereon. The Commission then decided, in accordance with articles 16 to 21 of its statute, to consider the draft articles through The Secretary-General shall forward the report to States for their comments. (UN, ILC, Seventy-third Session, 2022)

This issue reflects a significant tension between two fundamental foundations of international relations, namely the need for stability in international relations and the need to respect the practice of immunity on the one hand and the desire to achieve justice in the international criminal system on the other. As the Commission noted in its draft "Immunity of State Officials against Acts of Article 3 of the Convention on the Rights of the Child, the Rights of the Child and 7

The Commission's proposal therefore presents the fortress of immunities – this legal edifice that humanity has painstakingly built over the centuries and whose preservation is vital to the security and well-being of today's complex international community – with some observations.

In fact, the aim of the draft of Article 7 is to strike a balance between the values defended by the rules of immunities in the interests of international peace and the right to enjoy criminal justice and to be prosecuted for crimes. International.

Despite the emergence of new values of the international community, which are manifested in the framework of protecting human values contained in the rules of the Umrah, and the era that speaks of the anthropocentrism of international law, the weakening of the immunity of the state against these values is a category that has still raised many doubts at the level of judicial and doctrinal perspectives (Kadkhdayi and Abedini, 2015: 35). Thus, the above research, using an analytical-descriptive method, has collected information from library sources by studying domestic and foreign books and articles; in order to answer the question: What approach has the International Law Commission taken in the trial of heads of state, considering the developments in international law in the rules of immunity? Therefore, by focusing on the exercise of the jurisdiction of foreign courts according to the Commission's approach, the first development The concept and scope of application of immunity of state officials in international instruments are examined, then the evolution of the rules of immunity of state officials in the International Court of Justice is analyzed.

Finally, the challenge of criminal justice in the International Criminal Court is examined and the new approach of the International Law Commission to the rules of immunity and the exercise of jurisdiction of foreign courts in cases of international crimes is examined. It is being investigated by foreign government authorities.

2. The evolution of the concept and scope of application of immunity of state officials in international instruments

International law has numerous rules that protect state officials against the jurisdiction of foreign national courts; they can be divided into two categories: personal immunities, either based on status and material immunity, or based on the performance of duties. To determine the scope of personal immunity, state authorities must answer three questions: Who? In what cases? And when? Are they immune.

2.1 The concept and scope of personal immunity

Personal immunity is considered to be "absolute", "complete or total" in relation to all criminal acts of its beneficiaries. Following international treaties, in addition to the special immunities granted to diplomats as reflected in the Vienna Convention on Diplomatic Relations, 1961: Arts. 31(1), 37(2) and 38(1), the 1969 Convention on the Privileges and Immunities of Special Missions, the 1975 Vienna Convention on the Representation of a State in its Relations with International Organizations, provides personal immunity for three of the officials The Head of State, who, as representatives of the State, have the duty to carry out important matters, has been granted personal immunity. Personal immunity covers all the functions that the members of the Troika, i.e. the Head of State, the Head of Government and the Minister of Foreign Affairs, carry out during their term of office.

Although the ambiguity in the definition of the immunities in question under international law is a problem in identifying the nature (absolute or limited) and the scope of the immunities of heads of state, The country, the government, the foreign ministers and other high-ranking personalities are being discussed in the shadow of the possible transformation of the territory and the immunities of the state; but this point is certain, and that is the absoluteness of the immunity of the heads of the country, the government, the foreign ministers during the time of the mission.

And the absoluteness of the personal immunity of the heads of the country, the government, the foreign ministers during the mission, since it is provided for both in the Convention on Special Missions and The Vienna Convention on the Rights of the State in its relations with international organizations has confirmed the immunity (non-infringement) of the representatives of the State in its relations with international organizations with the phrase "they shall not be subject to any form of arrest, detention or imprisonment". There is no doubt that this immunity is based on both personal and performance of duties.

This performance of duties is also limited to the mere official mission, but also to any coercive measure or Attacking him in any form and for any reason prevents him from performing his duties, which is a mission (Dehim, 2022:264-265). In the draft "Immunity of State Officials from the Exercise of Criminal Jurisdiction", the Special Rapporteur of the International Law Commission defined the concept of "absolute" immunity in Article 3 as follows: "Heads of State, Heads of State and Ministers for Foreign Affairs" from personal immunity in the exercise of criminal jurisdiction. (UN, ILC, 2012: article 3). The scope of personal immunity of heads of state is limited to the period of their office. Such immunity covers all acts performed by heads of state, heads of state and foreign ministers during or before their term of office (in a private or official capacity). (UN, ILC, 2012: article 4)

Thus, the "completeness" of personal immunity means "every act and function It is to be carried out by the Head of State, Head of Government or Minister for Foreign Affairs, regardless of the nature of the act, the place where it was committed and the nature of the foreign trip (official or private) during which a particular State was pursuing the exercise of its extraterritorial criminal jurisdiction. (UN, ILC,2012: article 3). Completeness means the absence of exceptions to personal immunity, even in the case of international crimes.

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Some states, such as Norway, believe that granting immunity to members of the Troika in the new circumstances for the exercise of state functions is not sufficient and appropriate, because such benefits and immunities should be equally granted to other high-ranking officials, such as the Minister of Economic Affairs or the Minister of State (UNGA Sixth Committee, 2014). Similarly, in the opinion of France, "the Commission should grant personal immunity based on the rulings of the International Court of Justice." The Court shall determine the criteria for determining which officials, other than the so-called Troika, may enjoy such immunity in the light of existing rights." (UNGA Sixth Committee, 2012: 44) However, the Special Rapporteur of the International Law Commission believes that, given the lack of a coherent approach among States, there is a case for expanding personal immunity and its scope, including high-ranking officials. It is impossible for a State to be a member of the Troika. Since it is not possible to list all the positions of State officials enshrined in domestic legal systems, it is not possible to draw up a comprehensive list of States that would include all persons covered by immunity. (UN, ILC: article 2)

The Commission believes that the existence of two reasons, namely the representation and the other the function of the Heads of State, the Heads of State States and Foreign Ministers have been granted personal immunity. Because the Troika, in addition to their "special status," "represent the State at the highest international level solely by virtue of the position they hold" and they "exercise functions that fall within the powers of the State both within the country and in international relations." (ILC, Escobar Hernández: 27) The main basis of immunity for the Head of State And the State and the Minister of Foreign Affairs have been prevented from any kind of attack on them by virtue of their position and personal status while they are in their own country. The International Court of Justice also rejected personal immunity for the Head of National Security and the Public Prosecutor of the Republic of Djibouti in the case of mutual opposition in criminal matters. (ICJ, 2008:R.177: 194)

The specialized judge in the case of the detention order also expressed his opposition to The expansion of the Troika group, he declared. He believes that this would illogically expand the group of individuals who could escape effective prosecution for serious crimes. (ICJ, 2001: 39) In another case, the French court (2008) issued an arrest warrant against Mr. Teodoro Ngouma Obiang Mbogo, Second Vice President of Guinea, son of the President of Equatorial Guinea and Minister of Agriculture and Forestry at the time. The government, which was accused of embezzling public funds in Equatorial Guinea, was reinvesting the proceeds in France.

The investigation into the defendant ended in 2016, and the Paris prosecutor, after refusing to grant him immunity, charged him with money laundering and issued an order to freeze his assets in France, including the building at 42 rue Foch in Paris. (ICJ, 2020: 25). Kabul It is noted that the scope of immunity depends on the nature of the conduct of the members of the troika and is "time-limited" in the case of unofficial acts.

According to Article 39(2) of the 1961 Vienna Convention on Diplomatic Relations and Article 43 of the 1969 Convention on Special Missions, which are clearly based on customary international law (Denza, 2007: 157), when the mission of the State's representatives ends, the privileges and immunities also cease. It shall cease upon departure from the country, or upon the expiry of a reasonable period for its completion; however, immunity shall continue to exist for acts performed by such person (only) in the exercise of his functions as a member of the mission.

Accordingly, the Russian Federation has adopted a bill granting former heads of state lifelong immunity. (the guardian news website of the year, 2020) Thus, heads of state The former and their families enjoy immunity from any legal or criminal prosecution for acts committed during their lifetime. According to international law, the President of the Russian Federation, during his or her term of office and in connection with acts performed in his or her official capacity, enjoys personal immunity from criminal jurisdiction.

The scope of his or her immunity extends after the end of his or her official capacity and in respect of acts performed outside of his or her official capacity. An official act intended to commit an international criminal offence does not confer immunity.

It is a principle accepted by States that in relations between States, internal regulations cannot prevail over the provisions of international treaties. As the Court emphasized in the case of the dispute between France and Switzerland concerning the free zones, the French State cannot limit its international obligations to Citing its own internal laws (The Permanent Court of International Justice, 1928), Mr. Putin, following the draft of Article 7 of the International Law Commission, enjoys limited material immunity after the end of his term; which will be explained in the previous discussion.

2.2 The concept and scope of material immunity or immunity based on the performance of a duty (function)

As states act at the international level through official authorities, material immunity is applied to protect states from claims arising from acts carried out by their officials on behalf of the state. (Okeke, 2018: 114). The scope of material immunity in the Pinochet case Former Head of State The question was raised as to whether the former Head of State of Chile enjoyed material immunity for acts of torture committed by him as Head of State. Lord Browne-Wilkinson noted in his opinion: "Material immunity applies not only to former heads of state and travel, but to all public officials who have been involved in the exercise of State functions.

Such immunity is necessary to prevent prosecution or complaint or any other form of enforcement action against an official" (Pinochet case, per Lord Browne-Wilkinson, 2012: 154). Substantive immunity is paradoxically both broader and more limited than personal immunity. In the sense that substantive immunity covers all official acts and continues beyond the period of holding an official position.

While personal immunity covers acts performed while in office, it is limited in time and ceases when the position ends. On the other hand, material immunity applies to all (former) government officials in relation to their "official" acts or "acts performed in an official capacity". Whereas personal immunity is granted to heads of state, heads of government and ministers of foreign affairs.

The International Law Commission, in its draft article 7, "Immunity of State Officials from Acts of Foreign Jurisdiction," establishes a limitation on material immunity with the aim of holding States accountable for their actions and putting an end to impunity and impunity for the most serious international crimes, which is one of the main objectives of the international community.

In accordance with Article 7 of the draft, material immunity based on the performance of duty shall not apply to the crimes of "crime of genocide; crimes against humanity; war crimes; crime of apartheid; torture; enforced disappearance", in accordance with international law UN, ILC, Doc. A/CN.4/L.893, 2017: Draft Articles

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3 ( ).) and 7 The crimes listed in draft article 7 are crimes that are of the greatest concern to the international community as a whole; and there is broad international agreement on their definition and the obligation to prevent and punish them. They are crimes that are prohibited by both international treaties and customary international law. They did. Therefore, the prohibition of such conduct and punishment is a direct consequence of international law and rights.

At present, Mr. Putin enjoys personal and material immunity from foreign criminal jurisdiction during the period of his responsibility, and his personal immunity will cease only after the end of his official position.

Although the International Law Commission's draft is limited to foreign criminal jurisdiction and The applicable legal regime does not apply to international criminal courts, but in circumstances where a court of a country has jurisdiction under international law, it may try them for the above crimes after the end or cessation of the formal proceedings.

3. The evolution of immunity of state officials before the International Court of Justice

Strengthening the mechanisms for the effective and efficient implementation of the judicial functions of the International Court of Justice, as the principal judicial organ of the United Nations and the only permanent court with general jurisdiction, is of paramount importance for the status of the existing international legal order.

Since most of the disputes before the Court concern public issues, sovereignty, and international peace and stability, the role of the International Court of Justice is important in identifying customary international rules and, consequently, in developing and codifying international law. On this basis, the cases related to the Court's determination of the immunity of State officials are examined as follows.

3.1 The Democratic Republic of the Congo's claim against Belgium in the matter of the arrest warrant

The Democratic Republic of the Congo filed a claim against Belgium against the "arrest warrant" with the International Court of Justice (ICJ) in April 2000, filed by the then Minister of Foreign Affairs, Mr. Abdallah Yerodia Ndambasi.

Relying on the principle of sovereign equality of States, in accordance with Article 2 of the Charter of the United Nations, Congo considered that Belgium The Minister for Foreign Affairs had violated the immunity of the Minister for Foreign Affairs under Article 41(2) of the 1961 Vienna Convention on Diplomatic Relations.

The Court stated that the rules on immunity were intended to: "protect the person concerned against any act of the authority of another State which might interfere with the exercise of his functions." The International Court of Justice held that immunity was a formal, not a substantive, barrier to the exercise of criminal jurisdiction by national courts. It was emphasized that the non-exercise of the jurisdiction of the courts does not mean the denial of responsibility; in the sense that immunity only prevents legal proceedings during certain periods and the Minister for Foreign Affairs or the Head of State, after completing his service in this position, does not have any immunity against other States. (ICJ, 2002: 40)

The Court on the Nature of the Immunity Granted to Ministers for Foreign Affairs in Customary International Law It was recalled that this immunity was not for their personal benefit, but rather to ensure the effective performance of their duties by their respective countries. (ICJ, 2002: 50-54). Therefore, the arrest of high-ranking officials such as the President of the Russian Federation while serving in another country would clearly prevent them from performing their duties.

So it can be said that the President of the Russian Federation, during all periods of his business and while abroad, He enjoys absolute immunity from criminal jurisdiction and inviolability in the country he is in. However, in the case of international crimes, immunity does not prevent him from criminal responsibility and only prevents the exercise of the jurisdiction of the foreign State.

Since the arrest warrant was issued when Mr. Yerodia was Minister for Foreign Affairs of the Congo, the Court, having regard to the nature and purpose of the warrant, found that its issuance alone constituted a breach of Mr. Yerodia declared as Minister of Foreign Affairs while serving in the Congo.

Although Judge ODA emphasized in his dissenting opinion that the mere issuance and publication of the detention order, without any action by third countries on the order, had no legal effect (dissenting opinion of Judge ODA, 2002: 50-52), he believed that Belgium could reissue a new order for the detention of Mr. Yerodia as former Minister of Foreign Affairs.

Also Judge Ranjewa noted in his declaration that the development of treaty law has proceeded with the gradual establishment of the jurisdiction of domestic courts to impose sanctions, moving from "affirming the commitment to prevention and punishment" in cases where jurisdiction to impose sanctions had not been established, to the recognition of the "try or extradite principle" in treaty law (Declaration of Judge Ranjewa, 2002: 54-58). Judges generally The Court agrees that the immunity of the Minister of Foreign Affairs or the Head of State should not be equated with impunity and that immunity cannot absolve him of personal responsibility for the commission of serious crimes in circumstances other than those in which he is serving.

However, it seems that in order to maintain a balance between the objectives of immunity and personal criminal responsibility, the concept of official acts should be defined narrowly. Judge Al-Khasawneh also, in his dissenting opinion, It was argued that the need to effectively combat serious crimes (as recognized by the international community) outweighs the rules on immunity and that there is a high degree of international normativity, which should prevail in the event of conflict. The above objectives require a narrow approach to immunity rules that aligns immunity from criminal jurisdiction with the narrow immunity rules of States established in the international system.

3.2 The Republic of the Congo's claim against France in a matter relating to certain criminal proceedings in France

The Republic of the Congo's claim for provisional measures against France (2002) with the aim of quashing the investigative and prosecution measures of the French prosecutors and of protecting the rights of the Congo on the basis of a violation of the principle of the sovereign equality of all Members of the United Nations in accordance with Article 2(1) of the Charter of the United Nations and a breach of the immunity of the President of the Republic of the Congo, in The International Court of Justice has issued a ruling.

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The Court ruled on two claims by the Congo alleging a risk of prejudice to the criminal proceedings resulting in irreparable harm to the rights of the Congo in respect of the French institution of respect for the immunity of President Sassongousso (the President of the State), and on another claim by the Congo alleging the existence of irreparable harm in the unilateral obligation of a State to exercise universal jurisdiction in breach of one of the principles of international law. The International Court of Justice argued that the request of the French investigating judge to give evidence under Article 656 of the French Code of Criminal Procedure, which was pending before the French Ministry of Foreign Affairs against President Sassongousso and had not yet been executed, did not therefore constitute an urgent need to take provisional measures to protect the rights of the persons concerned in the Congo (ICJ, 2003: 22-40)

3.3 Djibouti's Claims Against France on Matters Related to Bilateral Judicial Disputes

The Government of Djibouti filed a claim (2008) with the International Court of Justice based on the French Government and authorities' refusal to exercise international judicial jurisdiction in the investigation and handover of judicial records for the murder of Bernard Borrell in Djibouti and the presence of the President of the State and high-ranking Djiboutian officials as witnesses. The Court stated that the President of the Republic, while in office, enjoys complete and inviolable immunity from criminal jurisdiction and must be protected against acts of sovereignty by other States in the exercise of his duties. The Court also declared that the summons to the President does not constitute a subpoena under Article 109 of the French Code of Criminal Procedure and is in fact a summons to give evidence; Then the President can freely accept or reject it.

However, regarding the conduct and performance of the investigating judge (Bazper) in sending the summons by fax and setting a short deadline for the President to appear, the Court stated that the above conduct was a lack of political decency in international relations, but this issue in itself did not constitute a breach of France's international obligations regarding the immunity of the President from foreign criminal jurisdiction. (ICJ, 2008:180-200)

3.4 Claims Belgium v. Senegal in the matter of the undertaking to prosecute or extradite the former President of Chad

The Belgian Government brought an application at the Registry of the Court (2009) against the Government of Senegal concerning a dispute concerning the observance of Senegal's undertaking to prosecute the former President of Chad, Mr. Hassan Habré, for crimes such as torture and crimes against humanity, or to extradite him to Belgium for the purpose of prosecution.

The Court, referring to the object and purpose of the treaties, believes that all States Parties to the treaty have a universal common interest in the performance of their obligations towards all other States Parties to the treaty, as well as any State in whose territory the accused is present. (ICJ, 2009: 64-70) This was also confirmed in the Barcelona Traction (1970) Opinion.

The Court believes that the commitments of States to Germanization and the exercise of jurisdiction have a deterrent and preventive character; because the States Parties ensure that their legal systems are equipped with the necessary legal instruments to prosecute and combat impunity. (ICJ, 2012: 73)

Therefore, these commitments can be described as "universal commitments" towards other states; which confirms the common interest of states in implementing the commitments in each specific case. In Azainrou, the Court held that Senegal, as a party to the 1984 Convention against Torture, had failed to refer the case to its competent authorities by 2007, having adopted the necessary legislation (ICJ, 2012: 74). (ICJ, 2012: 74)

Senegal should therefore have exercised its jurisdiction over any act of torture at issue and merely requested an investigation by the investigating judge at the Dakar Regional Court to establish the identity and inform the accused of the charges against him. His charges do not give rise to the obligations under Article 6(2) of the said Convention.

The Court therefore concludes that Senegal has breached its obligations under Article 6(2) of the said Convention by failing to initiate an investigation in a timely manner (ICJ, 2012: 88); since the State in whose territory the accused is present cannot, on any grounds, delay the performance of its obligation to prosecute and hand over the bird to the competent authorities; But this postponement, in addition to violating the commitments included in the agreement, will violate the rights of the victims and the rights of the accused. The Court also stressed that Senegal could not justify its breach of its obligations by invoking its domestic law. (ICJ, 2012: 118)

Regarding the question of the choice between extradition and referral for prosecution by States, the Court held that States had an international obligation in the matter of prosecution, the breach of which constituted an internationally wrongful act and would give rise to the international responsibility of the State.

While extradition is an option granted by the Convention to States to return the accused to the competent authorities in the event of a failure to prosecute (ICJ, 2012, 93-95), the Court found that Senegal had breached its obligations under Article 6(1) of the Convention by failing to conduct a preliminary investigation into the alleged crimes and, by failing to refer Mr Habré's case to the competent authorities for the purpose of prosecution, had breached its obligations under Article 7(1) of the Convention. Senegal must therefore immediately and without delay hand Mr. Habré over to the competent authorities for prosecution, failing which it must extradite him. (ICJ, 2012: 79-90)

In his dissenting opinion, Judge Skotnikov warned that it could not be ignored that those who were victims of serious violations of human and humanitarian rights in the Habré regime should await justice; Because delaying justice is itself an injustice. Moreover, they are victims of ongoing violations of human and humanitarian rights, which must be considered as a whole until the violations are brought to an end.

In his view, the prohibition of torture as a general rule does not imply any limitation in terms of time or place. This legal view has set aside the limitations of legal inquiry and has also rejected legal realism (Separate opinion of Judge Skotnikov, 2012: 481-). (486) Therefore, the obligations of states to protect, prosecute, investigate, punish and compensate arise from the prima principia of international law; which include the principles of humanity and respect for human dignity, which are also enshrined in the Convention against Torture. The matter is emphasized. (Separate opinion of Judge Cançado Trindade, 2012: 184)

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3.5 The case of Equatorial Guinea and France concerning the immunity and legal status of the embassy building

On 11 December 2020, the International Court of Justice delivered its Opinion in the case between Equatorial Guinea and France concerning the immunity of the Second Vice-President of Equatorial Guinea, Mr. Théodore Ngouma Obiang Mongeau, and the legal status of the building located at 42 rue Foch, Paris, as part of the (ICJ, 2020: 24) In this case, Equatorial Guinea claimed that the proceedings in France against Mr. Obiang Mong on charges of money laundering and the order of seizure of all movable property and buildings located at 42 rue Foch in Paris, the 1961 Vienna Convention on Diplomatic Relations and the United Nations Convention on Organized Crime 2000 (Palermo Convention) and ultimately violated international law.

The Court, having first examined the status of immunity (2018), found that Mr. Obiang Mong lacked jurisdiction under the Palermo Convention on the issue of immunity (ICJ, 2020: 23); it was therefore not given the opportunity to explain the logic and scope of the substantive immunity rule in order to identify the customary international rules on the immunity of officials.

However, the Court noted that under the 1961 Vienna Convention, diplomatic relations had jurisdiction over the building at 42 Fouch Street. The Court therefore addressed in this Opinion only the question under what conditions does a property acquire the status of "seat of a mission" and proceed in accordance with customary international law? However, the explanation of the said question leaves its investigation outside the scope of the discussion.

The Court also believes that the Vienna Convention cannot be interpreted in a way that allows a sending State to unilaterally impose the choice of the seat of its mission on the receiving State, where the latter State has objected to this choice (ICJ, 2020: 41). Therefore, according to Article 12 of the above Convention, the sending State must obtain the express and prior consent of the receiving State before establishing the mission or assigning a location other than the mission's headquarters, in order to benefit from the protective and preventive measures under Article 22, except in cases where the States have previously declared their mutual consent, or have applied advantages or restrictions to each other in accordance with reciprocal relations. The said Convention also requires the receiving State, in Article 21, to provide, within the limits of its laws, the means of facilitating the acquisition of the sending State's premises by the mission. (ICJ, 2020:70-75)

However, the Court concluded that where the receiving State objects to the "situation of the premises" of the sending State, it must inform it in due time through a formal notification, which is also in essence It was not "arbitrary" or "discriminatory". France's subsequent action to challenge the designation of the building at 42 Foust Street was duly notified and it has consistently objected to any claim in this regard.

The Court held that France had not acted in a discriminatory manner and had not acted differently from other States in similar situations (ICJ, 2020:119-125); The Court therefore declared, in response to the requests of the Republic of Equatorial Guinea, that France had not violated its obligations under the Vienna Convention and that the building in question could not be recognized as a "place of mission".

4. Criminal prosecution of the head of state and head of government

While the foundation and basis of international criminal law is based on the principle of individual criminal responsibility, and despite the efforts of the international community to end the impunity of heads of government and prominent state officials for committing international crimes, the existence of immunity for these officials when they are in the position of power and position prevents any exercise of the judicial jurisdiction of the countries where the crime occurred. Or has been harmed by their conduct and actions by the courts.

The research will examine the challenges of the International Criminal Court and, ultimately, the new approach of the International Law Commission in exercising the jurisdiction of foreign courts to try heads of state for international crimes, with a view to achieving the higher goals of criminal justice.

4.1 The International Criminal Court and the lack of influence of location and title on the exercise of jurisdiction

The lack of immunity of heads of state is reflected in the statutes and decisions of the Nuremberg, Tokyo, and ICTY tribunals, and ultimately in the International Criminal Court (Shariat Baqeri, 2012:22). The jurisdiction of international courts, including the International Criminal Court, is based on a system of It is based on the common values and will of the international community; this means that in the case of referral of a criminal case, the direction of heads of state and other high-ranking officials has not prevented the exercise of jurisdiction.

The International Criminal Court has jurisdiction to deal with crimes (genocide, crimes against humanity, war crimes and territorial violations) based on Article 12 (Rome Statute of the International Criminal Court, 1998). Whether on the territory, in the territory or by Nationality of one of the member states (Mir Mohammad Sadeghi, 2016:80) Therefore, upon referral of the matter by the Prosecutor or a member state or the Security Council, the Court exercises its jurisdiction over the crimes committed. Non-member states, if the crime is committed by their nationals or in their territory, may, by depositing a declaration with the Registrar based on the acceptance of the jurisdiction of the Court, Accept the verdict regarding those crimes.

In accordance with Article 27(1) of the Statute of the International Criminal Court, immunity does not preclude the exercise of the Court's jurisdiction over such persons. However, Article 98(1) provides that "the Court may not request a type of cooperation which would oblige the requested State to act contrary to obligations it has under international law in respect of State immunity or the political immunity of a third State;" "Unless it has previously engaged the cooperation of a third State for the purpose of lifting immunity." Therefore, the problem arises when the Court cannot, in view of the principle of relativity of treaties, request cooperation or extradition of officials of other States from a State that is not a party to the Statute. As stipulated in Article 86 of the Statute, any prosecution and investigation of crimes within the jurisdiction of the Court will be possible with the cooperation of States. Therefore, achieving the objectives of international criminal courts is not possible without the effective cooperation of the main subjects of international law. At the same time, in accordance with Article 13(1) of the Statute of the Court, the United Nations Security Council may, in cases of international crimes and violations of international law, refer the situation to the Prosecutor in accordance with Chapter VII of the Charter of the United Nations (Mir Mohammad Sadeghi, Rahmati (2018:20). Therefore, in the event of crimes being committed in a

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non-member state, only the Security Council can exercise jurisdiction by referring the situation to the Court. Expand the Court's jurisdiction over crimes committed.

The case of former Sudanese President Omar al-Bashir, following his 2009 International Criminal Court (ICC) arrest warrant, has revealed the ICC's limitations in enforcing the arrest warrant, as none of the countries (including Chad, Malawi, Djibouti and other Arab countries) have cooperated in his arrest and extradition. (ICC, 02/05-01/09, 2009)

Although the Security Council resolution on Darfur was not explicit or binding to compel states to take such drastic measures, Russia and China have made their position on the above issue clear by opposing and criticizing the prosecution of President Bashir and any sanctions against Sudan (UN, Security Council, resolution 1593, 2009:339). Some African and Arab countries also criticized this indictment due to sensitive issues and efforts to establish peace and stability in Sudan. (Tijani, 2021: 22)

Therefore, the trial of a serving head of state by the International Criminal Court may face legal obstacles; because the arrest and surrender of these individuals to the Court if their state of origin is a State Party to the Statute It will not be easy, it will be difficult and will require the cooperation of the offender's country of origin and other countries in terms of arrest and surrender to the Court.

4.2 The exercise of criminal jurisdiction in domestic courts is a way out of impunity

In accordance with treaties and international instruments relating to the political relations of the Head of State and high-ranking personalities (subject of Article 21 of the 1969 Convention on Special Missions) from immunity They are subject to criminal, civil and administrative prosecution (except in the cases listed in Article 31 of the Convention). Similarly, no executive action will be taken against representatives of the sending State. The treaty arrangements for the trial of heads of state are provided for in international instruments as follows:

However, first, judicial prosecution in the sending State: Pursuant to paragraphs (5) and (4) of Article 31 of the 1961 Vienna Convention on the Law of the Sea. Diplomatic immunity shall not exempt the heads of state and representatives of the receiving state from the jurisdiction of the sending state.

Second, waiver (revocation) of immunity: In accordance with Article 32 of the 1961 Convention on Diplomatic Relations and Article 41 of the 1969 Convention on Special Missions, the sending state may waive its immunity in cases of serious international crimes committed by its representatives and officials. Their judiciary should declare that this waiver of immunity should be explicitly declared.

Third, declaration of an undesirable element: Another method is action through the Ministry of Foreign Affairs of the receiving country, which, by resorting to political pressure, can request the sending country to waive the immunity of any of its diplomatic agents (Article 9 of the Vienna Convention on Diplomatic Relations) or representatives of special missions (Article 12 of the Convention on Special Missions) or to waive the immunity of any of its diplomatic agents (Article 9 of the Vienna Convention on Diplomatic Relations) or representatives of special missions (Article 12 of the Convention on Special Missions). to expressly dismiss the representative; and to declare the official as "persona non grata" or "persona non grata" in cases of international crimes or violations of international obligations when there is or is likely to be evidence of abuse of office (Deihme 2020:73).

In short, it should be noted that legal and judicial proceedings against a diplomat in the courts of the sending country are normally a means of resolving They do not provide satisfaction to the plaintiff and the injured party of the receiving country; especially since sometimes there are both formal (procedural) and substantive obstacles.

A procedural obstacle that still exists in many countries is the requirement to pay the requested security in legal complaints by non-resident foreign nationals. Another problem is the issue of costs and expenses. The plaintiff must incur heavy costs for legal advice and the implementation of measures. Legal costs in a foreign country may be incurred, possibly including the costs of obtaining the consent of witnesses to travel from the receiving country (their own country) to the sending country.

On the other hand, a declaration of an undesirable element by the receiving country will only result in the sending country recalling the person or terminating his service in the mission; it will not lead to criminal liability (Deihme 2022:61).

In view of the above challenges and because serious international crimes undermine the values and principles recognized by the international community, the International Law Commission has taken a new approach. At its fiftieth session (2007), the Commission included in its agenda the topic "Immunity of State officials from foreign criminal jurisdiction". It then appointed Mr. Roman A. Kolodkin as Special Rapporteur. Based on the State's examination, he concluded that "it is now difficult to speak of exceptions to immunity as a norm of customary international law; however, it cannot be asserted with certainty that there is a trend towards the creation of such a norm" (Kolodkin, Second Report 2011, para. 90). He did not recognize the existence of a new rule in the light of the rights sought in international law. In his view, government officials would enjoy immunity based on the performance of duty in connection with acts they perform in their official capacity, because these behaviors are considered to be acts of the state in their capacity as representatives of the state and as acts of the state, which also include illegal and extrajudicial acts. (United Nations, 2011: para. 109) In contrast, some members of the International Law Commission advocated a systematic approach based on the denial or limitation of immunity, territory and territory.

Another group believed that it was better to be cautious about the denial of immunity in the Commission than to deny it "absolutely" and to strike a balance between respecting sovereignty and ending impunity in cases of heinous crimes and serious harm to their victims (Deixa (2022),

Then, at the sixty-fourth session (2012), the Commission appointed Ms. Concepción Escobar Hernández as Special Rapporteur instead of Mr. Kolodkin, who had previously submitted three reports (during 2008-2011), appointed Ms. Escobar Hernández (UN, ILC, A/76/10/2021). Ms. Escobar Hernández's view on the issues under consideration by the Commission (like her country of nationality, Spain, unlike Klodkin's previous rapporteur, Russia) was more in favor of limiting the scope of immunity.

Of course, the Commission's approach to selecting members, regardless of their nationality, It is based on individual and moral competence and the principle is that the views of the elected members of the Independent Commission for the Protection of

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Human Rights and Fundamental Freedoms are the views of their country of origin and do not influence the views of those members. However, in the mid-term elections, this principle is more pronounced.

In her report, Ms. Hernandez distinguished between two legal systems, namely personal immunity and material immunity, and believed that in practice there is a rule of customary international law based on It has not been possible to make limitations or exceptions to immunity on a personal basis. However, limitations and exceptions to immunity on a material basis in cases of international criminal crimes have been possible, although there are differences of opinion.

It has also been stated that the commission of international crimes is not recognized as an official duty of these officials. Therefore, limitations and exceptions Immunity does not apply to persons enjoying personal immunity, such as Heads of State and Government and Ministers for Foreign Affairs, as long as they remain in office (Articles 3 and 4 of the draft). The representative of Spain, speaking in the Sixth Committee on Human Rights, expressed her support for the above draft, stating that the provisions of this draft take into account the principle of accountability and the fight against impunity, and The UN, General Assembly, Sixth Committee, GA/L/3673, 2022, provides a solid basis for that.

The Rapporteur of the Commission, in his fifth report, addressed limitations and exceptions to the immunity from prosecution of public officials based on material necessity/performance of duty 3. He noted, following the preamble to article 7, that immunity on a material basis from the exercise of external criminal jurisdiction in respect of the crimes of “genocide, crimes against "Crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearances" shall not be committed under international law. The said crimes are defined in accordance with their definitions in the treaties listed in the annex to the preamble.

Crimes which are of the greatest concern to the international community as a whole and which are the subject of broad international agreement on their definitions and the existence of an international obligation to There are ways to prevent and punish them.

However, the limitations and exceptions provided for in the above article for persons enjoying personal immunity (e.g. heads of state, heads of government and ministers of foreign affairs) are time-limited, meaning that limitations and exceptions to immunity can only be applied to these three groups once they have left their official duties. (UN, ILC, A/72/10/2017: 83-87)

This means that the commission of crimes International can be identified as an exception to the immunity of state officials from foreign criminal jurisdiction because these actions are not recognized as part of the official duties of these officials and undermine the values and principles recognized by the international community. On 20 July 2017, the International Law Commission provisionally adopted paragraph 7 of the draft by a recorded vote of 21 in favour, 8 against and 1 abstention. (UN,ILC, A/CN. 4/6 R. 3378.2017: 74).

The Commission also stated that the draft contained a general legal system applicable to the immunity of State officials and was limited to immunity from foreign criminal jurisdiction. Therefore, it does not affect the legal system applicable to international criminal courts.

Therefore, the preamble is based on ensuring respect for the principle of sovereign equality of States and considers the basis for the immunity of state officials from foreign criminal jurisdiction; because the immunity system is based on international law in order to guarantee their ability to represent their State or perform their duties. The Commission's draft also provided that States should take the following into account when deciding whether to exercise extrajudicial jurisdiction under article 7:

A. The competent authorities of the State party shall, immediately before the commencement of criminal proceedings and before the taking of coercive measures, obtain information on the immunity of the State party affected by the exercise of criminal jurisdiction (art. 9). Inform the State of the official of the criminal proceedings (Article 10)

B. The State of the court shall examine the immunity of the official and the cases in which the State of the official has relied or disregarded the immunity of its officials (Article 14).

C. The State of the court shall have treated the official charged with the crime fairly and impartially, including a fair trial and full protection of the rights and guarantees of due process under national and international law. (Article 16, paragraph 1)

D.The official charged with the charge shall be able to communicate without delay with the nearest appropriate representative of his country and to be visited by the representative of that country and informed without delay of his rights. (Article 16, paragraph 2)

F.Consideration in good faith of the transfer of the matter by the State of the seat of the court if the State of the official consents to the submission of the case to its competent authorities for the purpose of legal prosecution. Such a transfer shall be possible only if the State of the official concerned agrees to the submission of the case to its competent authorities for the purpose of prosecuting the official. Otherwise, the State of the forum may resume its criminal proceedings (Article 15).

C.The States concerned (the State of the seat of the forum and the State of the official concerned) undertake to consult and consult on questions relating to the immunity of the official concerned. The Court shall have the power to identify ways of avoiding a dispute between the two States or to facilitate peaceful settlement of the dispute (Article 17).

G.In the event of a dispute between the State of the seat of the Court and the State of the responsible authority as to the interpretation or application of the provisions of the present Convention, they shall seek a solution by peaceful settlement of the dispute.

If they are unable to arrive at a mutually acceptable solution within a reasonable time, The dispute shall be referred to the International Court of Justice at the request of the State of the place of origin or of the State of the official. Unless both States otherwise agree (Article 18).

The Commission shall, at its first reading, adopt Article 18 and a draft annex on the immunity of public officials from foreign criminal jurisdiction, together with comments thereon. The Commission shall then In accordance with articles 16 to 21 of the Statute, the draft articles were transmitted to States for comments by the Secretary-General. (UN, ILC, A/77/10.2022)

The representative of the Netherlands stated at the 70th meeting of the Commission that the laws of this country explicitly provided for

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the compliance of the courts with international law in the exercise of criminal jurisdiction.

Therefore, the Code of Public Procedure of the Court of Auditors of the country, in accordance with article 13 (a), The jurisdiction of courts and the execution of judicial decisions and actions are subject to exceptions that have been formally recognized in international law. (UN,ILC, 2019, 71st session, Netherlands)

The representative of Belarus, while expressing her agreement with the Commission's proposal, stated that a thorough examination of the various aspects of the process of this issue would help to strike a balance between the various rights and interests of the international community.

He stated that although the Commission has the right to participate in the progressive development of international law, the acceptance of its results depends directly on the observations that the positions of States on the matters expressed in the Sixth Committee. (UN, ILC, 2021, 72nd session, Belarus)

In this regard, the Sixth Committee, while examining the issue of the functioning of the immunity of State officials from foreign criminal jurisdiction, explicitly distinguished between two systems of immunity Personal and material immunity from the criminal jurisdiction of foreign countries, stressed the need to find a balance between protecting immunity and ensuring accountability for international crimes. (UNGA, sixth Committee, GA/L/3673.2022)

At this meeting, following the Commission's proposal, some members expressed their agreement. For example, the representative of New Zealand, in the Sixth Committee, supported the Commission's proposal, stating that there are limitations and exceptions to the material immunity of State officials from foreign criminal jurisdiction in international law, particularly in relation to certain types of conduct that constitute the most serious crimes under international law (UNGA, Sixth Committee, A/C.6/72/SR.19, 2017: 73). In addition, many States noted the significant trend of limiting or withdrawing material immunity in international crimes and encouraged the Commission to further develop international law on this issue.

For example, the representative of Chile agreed with the Commission that there was a clear and well-established trend in public international law towards limitations on material immunity when State officials committed serious international crimes. The work of the Commission should therefore strengthen this trend towards the achievement of criminal justice. (UNGA, Sixth Committee, 23rd Meeting. 2017) The representative of South Africa also welcomed the Commission's decision to draft article 7, as she believed that there was a significant trend towards limiting the application of immunity from substantive jurisdiction in relation to certain types of conduct that were considered crimes under international law. UNGA, Sixth Committee 24th Meeting. 2018) The representative of Spain also stated that the draft prepared on the principle of accountability and the fight against impunity had been taken into account.

Similarly, the representative of Algeria stated that the principle of sovereign equality was the basis for the immunity of State officials from criminal jurisdiction and granted this right to the State of the court or tribunal to exercise its criminal jurisdiction. UNGA, GA/L/3673.2022)

Another group of members, while endorsing some of the provisions of the draft, made suggestions for its amendment. Including the representative of China, who welcomed the draft Article 18 on dispute settlement, expressing concern about the prosecution of officials for political motives; he also added that, in accordance with the principle of the consent of States, they had the right to decide whether to resort to compulsory dispute settlement. Accept or not the third person, and on this basis proposed changes to the draft article 18 (UNGA, sixth Committee, GA/L/73/556/A. 2018). Similarly, the representative of Iran, emphasizing that immunity does not equal exemption from punishment, stated: The Commission should review the list of crimes included in the draft article 7 and also the annexed list of international treaties mentioned therein. (UNGA, GA/L/3673.2022)

Other members expressed concern about the possible misuse of domestic remedies by some countries to prosecute foreign officials. The representative of Cuba, in particular, stressed the need to strike a balance between fundamental principles of international law and national laws protecting public officials from the abuse of politically motivated trials.

The representative of Germany also He believed that the Commission's draft should reflect transparency in the distinction between the two systems of existing rights and the rights sought. He added that the draft article would be acceptable if it reflected the domestic systems of different States and their approach to equality.

The representative of the United Arab Emirates, on the other hand, considered immunity to be a matter of form and not substance and believed that the draft article 7 struck the necessary balance between The equality of sovereign States and the fight against impunity do not achieve. The representative of the United States of America also expressed concern about the draft of Article 7, stating that the above article did not reflect customary international law, and that the Commission should therefore reconsider the nature of the draft.

Finally, Ms. Hernández, the Special Rapporteur of the Commission, stated at the meeting of the Sixth Committee that the Commission The International Law Commission has been aware of the views of all Member States.

Although not all views have been taken into account when preparing the draft articles, the Commission has prepared the draft articles in the light of the views of Member States and in the belief in full coherence and transparency of the law. (UNGA, Sixth Committee, GA/L/3672.2022)

The Rapporteur of the Commission also emphasized that in preparing the draft articles, the following elements Various considerations have been taken into account. The first of these elements is the need to ensure respect for the principle of sovereign equality of States, which is the basis for the immunity of state officials from foreign criminal jurisdiction.

Because granting immunity under international law to a State official is to ensure their ability to represent their State or to perform State functions. Second, based on the principle of sovereign equality of States, the State hosting the Court has the right to exercise criminal jurisdiction over international crimes.

Third, in drafting the draft articles, attention has been paid to the rights existing in various fields of contemporary international law. On the one hand, effective steps have been taken towards the objectives of international criminal law to punish the most serious crimes and the principle of accountability and to strengthen the fight against impunity.

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Finally, the Commission stated that in its draft articles it had also considered the issue of exercising criminal jurisdiction over officials of another country for political reasons or abuse, which in turn would create undesirable tensions in relations between the collecting State and the responsible State.

The Commission believes that the draft of the present articles includes a set of procedural provisions and measures aimed at enhancing trust, mutual understanding and cooperation between the State of the seat of the court and the State of the official, providing security measures against possible abuses and politicization in the exercise of criminal jurisdiction over an official of another State. (UN, ILC, A/77/10.2022)

In any case, the observations and views of the members of the Commission are welcome. Their positions are divided into several areas. One is on the Commission's mandate to develop and promote international law and its codification, the second is on the place of the immunity regime in the international legal system as a whole, and the third is on the interrelationship between limitations and exceptions to immunity and its formal dimensions.

In particular, the Rapporteur has selectively focused on citing examples of the application of limitations and exceptions, meaning that he has mentioned cases of their approval but not cases of non-approval.

Some members were concerned that the limitations and exceptions proposed by the Rapporteur could lead to the abuse of proceedings in the domestic courts of the third country. For example, politically motivated trials of foreign officials have in turn undermined the stability of countries and undermined the goal of combating impunity and the foundations of human rights. The opinion of the English High Court in the Pinochet case also seems to be in line with the approach of the International Law Commission.

In that case, Spain requested the British authorities to arrest and extradite the former Chilean president, who was receiving medical treatment in England, for the purpose of investigation and prosecution for international crimes. As head of state, Pinochet enjoyed personal immunity for all his actions, whether in connection with his public or private affairs, and from civil or criminal proceedings in the courts of another state, as long as he was officially in the exercise of his functions.

Here, the majority of the Supreme Court judges accepted that the former head of state, along with other state officials, only enjoyed personal immunity in relation to official acts. (Pinochet case, per Lord Browne-Wilkinson, 2012:154) However, the issue that had to be clarified in the Pinochet case was whether the crimes for which extradition was requested were covered by material immunity or not. Brown-Wilkinson, Hope, Hutton, Saville, Millett and Phillips and Lord Gough held that, under the 1984 United Nations Convention against Torture, Pinochet did not enjoy immunity in respect of acts of torture and conspiracy to commit torture committed by Spain, Chile and the United Kingdom after the ratification of the 1984 Convention.

They interpreted the Convention as the basis for the fully-formed concept of "international crime" in such a way that the Head of State, in the terms "public authorities or other persons acting in an official capacity" in Article 1 of the Convention, was defined as the person responsible for the commission of the international crime of torture (Pinochet case, per Lord Browne-Wilkinson, 2012:154-156). They They concluded that in relation to an international crime it is clearly established that prosecution is accepted both by the State of the seat of the court and by the State of the person concerned.

Thus, a public official who commits an international crime is, in the event of termination or deprivation of office, himself subject to the law of the State where the crime was committed; that is, just as the doctrine of limited immunity covers commercial transactions between States. They considered private acts to be subject to the laws of the State of the forum, and the decision of the High Court of England also considered the commission of international crimes to be private acts and outside the duties of officials who have committed them by abusing their position.

They are subject to the domestic laws and legal proceedings of the State against whose nationals the crime was committed. Some judges have considered immunity to be contrary to the objectives of the Convention on Torture and have The title of the judgment was "the exception to functional immunity." Lords Hatton and Phillips held that the alleged acts of torture "are not part of the official duties of a Head of State."

Although the Pinochet judgment did not lead to the creation of a general exception to functional immunity for cases of gross human rights violations, the differing reasoning of the judges undoubtedly limited its impact, to the point where the International Law Commission adopted a new approach in He adopted a limited immunity.

Vladimir Vladimirovich Putin has been the current head of state of Russia since 2012. On February 24, 2022, as Supreme Commander-in-Chief, he ordered Russian forces to invade Ukraine. The Ukraine crisis is under investigation by the International Criminal Court, and Putin could be indicted by the International Criminal Court for war crimes, genocide, and crimes against humanity. Of course, Russia signed the Rome Statute of the International Criminal Court (17 July 1998) on 13/09/2000, but it did not ratify it.

Therefore, arresting and surrendering him to the Court is difficult, given the fact that Russia is not a State Party to the Rome Statute. In this regard, the International Court of Justice, in its Belgium v. Senegal judgment, described the obligations of States to Germanize and exercise jurisdiction as "comprehensive." Which confirms the common interest of States in the implementation of international obligations; therefore, the State in which the accused is present cannot delay the implementation of the obligation to prosecute and refer the bird to the competent authorities for any reason. Furthermore, the arrest and surrender of the Head of State to the competent authority in cases of international crimes requires the cooperation of the State of the official and other States.

5. Conclusion

Despite the emergence of new values of the international community, which are reflected in the framework of protecting human values, and an era that speaks of humanity and achieving justice in international law, the people of Gaza, despite the cycle of occupation, war, and all-out siege, which has turned Gaza into the world's largest prison, and the emergence of a humanitarian tragedy, have stood on the principle of defending the Palestinian identity.

Given the role of the International Court of Justice in the development and recognition of unwritten rules of customary international law, it has been recalled in several decisions that the enjoyment of immunity during service does not imply the enjoyment of impunity for crimes that may be committed, regardless of their gravity.

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States have an international obligation to prosecute and to immediately and without delay refer the accused to the competent authorities for prosecution, failing which he or she must be extradited, a failure to do so would constitute an internationally wrongful act and would entail the international responsibility of the State. The ICC's approach is also based on the pursuit of criminal justice and the need to hold the Head of State and other members of the Troika accountable for international crimes.

Currently, the ICC is investigating the situation in Ukraine and Russia, seeking the assistance of Mr. Putin, the President of the Russian Federation, and some of his senior officials, on charges of the illegal deportation of children and the illegal transfer of individuals from Ukrainian territory to Russia.

However, the limitations of the International Criminal Court in executing the arrest warrant and the lack of cooperation of states support special measures and provisions in this regard; because the arrest and surrender of Mr. Putin to the International Criminal Court will be difficult, given that Russia is not a state party to the Rome Statute; It requires the cooperation of the offender's home state and other countries in apprehending and handing him over to the competent authorities.

On the one hand, the development of international law has moved towards the jurisdiction of domestic courts to impose sanctions, moving from "affirming the commitment to prevention and punishment" in cases of lack of jurisdiction to impose sanctions, to the recognition of the "tried or extradited principle" in treaty law.

In this regard, the International Law Commission declared that there is no customary rule permitting the application of limitations or any exceptions to immunity on a personal basis; Therefore, heads of state enjoy personal immunity as long as they remain in office (preamble to articles 3 and 4), but the commission of international crimes in the course of the official acts and duties of these officials is not recognized; because grave crimes undermine the values and principles recognized by the international community.

Azainrou heads of state in cases of committing crimes "crimes of genocide, crimes against humanity, war crimes, crimes Apartheid, torture, enforced disappearances" shall not enjoy material immunity under international law (preamble to Article 7). Therefore, after the end of the official term, the Head of State shall be liable to prosecution and trial in foreign courts of the country with jurisdiction in cases of the above crimes.

Therefore, according to international treaties, the first state of which the Head of State is a citizen is obliged to prosecute and try in cases of the above crimes. It is an international crime. However, in the absence of a trial in the country of origin, other countries are obliged to try or extradite the accused to the competent authorities in cases where the accused is present in their territory.

In this regard, the Commission is committed to the principle of fair and impartial treatment and full protection of the rights and guarantees of the person under applicable national and international law, including human rights and humanitarian law. Internationally emphasized in the treatment of the accused.

Therefore, the signs of a different approach in national and international courts, with regard to the immunity of heads of state accused of committing international crimes, have been shaped by the desire to end impunity for international crimes in a manner that requires the assistance and cooperation of States in this regard.

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