THE PRINCIPLE OF DISREGARDING OFFICIAL CAPACITY IN INTERNATIONAL CRIMINAL LAW

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Abstract:
The subjects of international law are states and international organisations, but individuals have also become subject to international criminal responsibility for committing international crimes. International criminal courts have addressed this issue, and based on the principle of holding individuals accountable, immunity cannot be used as a means of escaping punishment. Most international agreements and conventions have emphasised the disregard of the official capacity of the perpetrator in committing a crime, regardless of their status as head of state or military commander.
Keywords: *Official capacity, immunity, international criminal responsibility, natural person, legal person.*

INTRODUCTION:

International criminal law is considered one of the modern specialisations and is a branch of general international law. Its scope includes the study of international crimes, criminal responsibility for such crimes, and the procedures related to the prosecution of offenders before international criminal courts.

Previously, only states and international organisations were considered subjects of international law and bound by its rules. However, with the emergence of international criminal law, and based on the opinions and positions of legal scholars, there was a call to include individuals as subjects of international law, in addition to states and organisations, in the area of international criminal responsibility for the commission of crimes classified as international under international treaties and conventions. This led to the prosecution of individuals in international criminal courts.

In reality, it has been proven that international crimes are committed by natural persons on behalf of their states.

Consequently, the moral element of the crime, which includes the presence of free will and knowledge that the act is criminal, has become necessary.There has been a long-standing debate about who bears international criminal responsibility - whether it is states, individuals or both. However, international criminal law has transcended this dispute and assigned responsibility to individuals, despite several political and legal obstacles. One of these obstacles is the principle of disregarding official capacity, regardless of the position of the perpetrator, which means excluding the immunity provided for in national laws and constitutions. This is what we will discuss by presenting the following problem: the principle of disregarding the official capacity of the perpetrator after committing acts classified as international crimes under international conventions that explicitly exclude immunity. This principle contradicts the domestic laws of states that grant immunity to officials at the highest level of the state during the performance of their duties.

How, then, is this principle applied by international criminal tribunals against the accused on the basis of international agreements that supersede the domestic laws of the states that have ratified them? Moreover, most constitutions affirm the primacy of international law over domestic law. How does this conflict with the sovereignty of domestic criminal law?

To answer these questions, we have divided the study into two sections:

Section One: International Responsibility and the Principle of Disregarding Official Capacity.

Section Two: Disregarding Official Capacity in International Criminal Justice.

Section One: International responsibility and disregard for official capacity

One of the obstacles that has delayed the establishment of a permanent international criminal court has been the concept of international criminal responsibility of heads of state, presidents and high-ranking officials who enjoy immunity under their national laws while performing their duties. The international legal community has been divided over who should bear this responsibility: states, individuals, or both. However, most international treaties and conventions relating to international crimes explicitly exclude the official capacity of the perpetrator when the commission of international crimes is proven.

First requirement: International criminal responsibility in international jurisprudence.

Interntional jurists are divided on who should be held criminally responsible for international crimes. Some argue that states should bear this responsibility, while others argue for individual responsibility. There are also those who argue for shared responsibility between the state and the individual.

Section One: Proponents of State Responsibility in International Criminal Law

Proponents of this view argue that states should be held solely responsible for international crimes committed by their agents. They justify this approach on the basis that state responsibility in international criminal law is a new issue. They argue that it is necessary to hold states solely responsible for international crimes, regardless of the degree of responsibility of individuals, because international crimes can only be committed by states. International law is directed at states, not individuals. Individuals are subject to their national criminal law, and it is unreasonable for them to be subject to both international and national criminal law at the same time[1].

Since the beginning of the 20th century, several legal scholars, including Lauterpacht, have introduced the idea of the criminal responsibility of states. Lauterpacht argued that there are two systems of international responsibility: one concerning the general responsibility of states, and the other concerning the responsibility of states for serious violations of international obligations giving rise to international criminal responsibility, in particular the crime of aggression.

Another legal scholar, Garcia Amadour, who was appointed by the United Nations International Law Commission to study and define the rules of international criminal responsibility between 1955 and 1961, submitted four draft resolutions to the General Assembly on the criminal responsibility of States for violations that undermine peace and international security, stressing the need for their criminal punishment and civil liability for breaches of treaty obligations, including compensation and the possibility for individuals to seek compensation internationally[2].

However, these views have met with strong opposition from states, which argue that they violate their sovereignty. Opponents of this approach believe that the concept of international criminal responsibility of States contradicts the concept of State responsibility, which is based on the relationship between States. According to this view, only states and international organisations are subject to international law, and therefore responsibility lies solely with them as social organisations with political authority, without extending to individuals residing within them. The concept of sovereignty, they argue, is not incompatible with holding states criminally responsible, since their unlawful actions harm the order and common good of the international community and constitute international crimes that must be punished[3].

The Italian jurist Anzilotti argues that in international law, states are merely legal entities, while individuals are subjects of domestic law. Accordingly, the obligations imposed by law fall on the state. When international responsibility arises from a breach of international obligations, it is the State that bears that responsibility, and the individual is not involved. In cases where international

[1]- Mohamed Abdel Moneim Abdel Ghani, International Crimes: A Study in International Criminal Law, Dar Al-Jadeedah Al-Iskandariyya, 2007, p. 545.

[2]- Ali Jameel Harb, The International Criminal System: International Sanctions against States and Individuals, Halabi Legal Publications, Lebanon, 2010, p. 195.

[3]- Sami Mohamed Abdel Aal, Criminal Penalties in International Law, Dar Al-Jadeedah, Alexandria, 2015, p. 284.

law holds the individual responsible for committing an act contrary to the provisions of the international legal order, this means that international law itself allows the State to punish the individual according to its legal order. In other words, if the law of the State does not punish such an act, the individual cannot be considered responsible, because responsibility is determined by the domestic law that governs him. Consequently, the individual cannot be held accountable or punished for the act, even if it violates the provisions of international law[1].

This view is shared by the jurist Weber, who rejects the notion of the state as a mere fictional assumption. Instead, he sees the state as a social entity with political authority, which benefits from the use of that authority without us having the idea of attributing it to the group of individuals residing within it. The State is thus a social reality and not a mere legal fiction or a trick without a will. It has international legal personality in the international community, where the legal personality of the natural persons who make up the State is dissolved[2].

The lawyer Pella states that a legal person has its own will, which translates its real and legal existence. This will qualifies it to engage in legal acts and therefore it bears responsibility for civil or criminal wrongs. Pella rejects the idea that the state is a mere trick or illusion, but rather a real entity whose existence extends back in time and transcends the existence of transient individuals. Pella asks: "Can trickery and illusion regulate society? And therefore there is no justification for exempting them from criminal responsibility"[3].

Criticism of the opinion: To hold the state accountable is to impose criminal punishment on it, which is inappropriate because the state is a legal entity, which, by virtue of its sovereignty[4], contradicts such accountability. Moreover, holding the State criminally liable would result in the individuals who represent it, natural persons, escaping punishment. Declaring war on an aggressor state makes international law the source of an unlawful act of war. Punishing a state through economic sanctions means besieging a population that has nothing to do with the crimes committed by its state. Given the concepts of punishment and the nature of the state, holding it criminally accountable does more harm than good, since the purpose of punishment is deterrence. Holding the State criminally accountable leads to the revival of inhumane collective punishment, which has been surpassed by time. As a result, international jurisprudence has shifted towards holding individuals accountable.

Branch Two: Proponents of Individual Criminal Responsibility in International Law

Proponents of this view see the issue of individual criminal liability in international law as a response to the criticisms of the previous view. They argue that it is impossible to hold the state criminally liable on the basis of the fundamental principle of criminal law, which requires the presence of moral elements in the crime committed. These moral elements include the awareness and voluntary intention of the perpetrator to commit the criminal act freely and without coercion. This cannot be fulfilled when the state is held liable, as the state is considered a legal entity that only applies to natural persons - individuals who have the capacity to perceive and make choices[5].

Although international lawyers disagree on the position of individuals in international law, some recognise their international personality and consider them subjects of international law, while others reject this notion. Proponents of individual criminal responsibility in international law provide arguments and justifications based on the premise that the perpetrator of an international crime can only be a natural person, regardless of whether he or she committed the crime on his or her own behalf or on behalf of his or her state[6].

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[1]- Abdel Wahid Mohamed El-Far, International Crimes and the Authority to Punish Them, Dar Al-Nahda Al-Arabiyya, Cairo, 1997, p. 26.

[2]- Ibrahim Al-Daraji, Crime of Aggression, Halabi Legal Publications, Beirut, 2005, p. 50.

[3]- Ibrahim Al-Daraji, ibid, p. 602.

[4]- Sami Mohamed Abdel Aal, op. cit., pp. 284, 285.

[5]- Ahmed Bashara Musa, International Criminal Responsibility of Individuals, Dar Huma, Algeria, 2009, pp. 50, 51.

[6]- Touji Samia, International Criminal Responsibility for Violations of International Humanitarian Law, Dar Huma, Algeria, undated, p. 109.

This view is supported by the jurist Glassair, who argues that the perpetrator of an international crime can only be a natural person. According to Glassair, determining whether an individual is responsible for an international crime depends on answering the following question Does the individual have rights and duties under international law, in other words, does the individual have an international personality[1]?

The jurist Trainin strongly criticises the concept of international criminal liability of states, which he considers to be a flawed concept in international law. According to Trainin, criminal liability depends on the commission of a wilful or negligent criminal act, taking into account factors such as the circumstances of the crime, the characteristics of the perpetrator, the gravity of the offence and the assessment of the appropriate punishment. Trainin argues that international criminal responsibility cannot be conceived beyond these considerations and cannot be attributed to states[2].

Trainin further asserts that there is a realistic school of thought that considers the individual as the sole legal entity in both international and domestic law. From this perspective, the principles of international and domestic law address individuals as rulers of states and representatives of the people. The state, in this view, is merely a means of pursuing collective interests and does not have the status of a legal person in the field of international law.

Third branch: Proponents of dual responsibility of states and individuals:

Proponents of this position argue that both the state and individuals should bear joint international criminal responsibility for the commission of international crimes. They contend that the state, as a legal entity under international law, must bear criminal responsibility for the commission of international crimes, and that individuals who commit such crimes on behalf of the state should be held accountable in order to prevent them from escaping punishment[3].

This view is supported by the jurist Pella, who calls for the joint criminal responsibility of the state and the individual, based on the recognition of states as legal entities in international law. Since international criminal law protects states against aggression, it is not possible to exempt the state from being held accountable for such criminal acts. Pella argues that the mere recognition of the legal personality of the state implies its capacity to assume criminal responsibility. As far as individuals are concerned, they should be punished and held criminally responsible for committing criminal acts because they "by their actions have led the nation into an aggressive war or other act, or have committed an act that constitutes a crime under the laws of nations"[4]. Pella justifies his opinion by attributing international criminal responsibility to the state on the basis of its exercise of free will in committing the criminal act, which can be inferred from its contribution to the preparation, incitement and direction of its people to commit international crimes. Crimes committed by States may be subject to two types of responsibility: collective responsibility of States and individual responsibility of natural persons. The individual is punished for the international crime in accordance with the rules of national criminal law, while the State is held accountable on the basis of its exercise of free will as addressed by the provisions of international law. Since international criminal law is responsible for the protection of States against aggression, it is not possible to exempt the State from criminal responsibility for its criminal acts[5]. Recognition of the legal personality of the State implies recognition of its capacity to assume criminal responsibility. As for individuals, they should be held criminally responsible because they are the ones who carry out the will of the state in committing the crime.

Saldana, a lawyer, shares this view, stating that "the state has a will that can be criminal when it commits internationally criminal acts, and it should be held criminally responsible. This includes ensuring the necessary respect for political commitments and sacred international agreements, since they violate the laws and customs of war and commit crimes against the law of nations".

[1]- Mohamed Abdel Moneim Abdel Ghani, ibid, p. 490.
[2]- Ahmed Bashara Musa, op. cit., p. 54.
[3]- Ali Jameel Harb, op. cit., p. 206.
[4]- Touji Samia, op. cit., p. 104.
[5]- Ashraf Mohamed Lashin, General Theory of International Crime, publisher unknown, 2012, p. 95.

Second branch: Principle of non-recognition of official capacity in treaties and international agreements

A treaty is an agreement, whatever its form or name, concluded between two or more States or international legal persons having the capacity to conclude treaties. It is documented in writing and governed by international law. Article 2 of the 1969 Vienna Convention on the Law of Treaties defines a treaty as an agreement between two or more States which is in writing and subject to the rules of international law. It is considered the primary source for the establishment of international legal rules.

The issue of immunity and non-recognition of official capacity is one of the issues addressed by specific provisions in treaties and international conventions to prevent perpetrators of international crimes from escaping punishment.

First subdivision: Non-recognition of official capacity in the Treaty of Versailles

The Treaty of Versailles was signed on 28 June 1919 in the town of Versailles, France, between the Allied and Associated Powers and Germany. It consisted of fifteen parts and 440 articles. The first part contained the Covenant of the League of Nations in Articles 1 to 26, while the seventh part dealt with criminal responsibility for war crimes and penalties in Articles 227 to 230. The treaty was influenced by the work of the Commission for the Definition of the Responsibilities of the Authors of the War and the Enforcement of Punishments, in particular the proposals of Professors Larnoud and Dibradil on international criminal responsibility.

Article 227 of the Treaty explicitly stated that the Allied Powers would bring charges against Emperor Wilhelm II, irrespective of his official capacity as Emperor. This provision clearly indicates the non-recognition of the official capacity of the accused[1].

The second branch: Non-recognition of official capacity in the London Agreement

After the failure of the League of Nations as the first global international organisation to settle international disputes peacefully, the Second World War broke out. This prompted the Allies to sound the alarm and work to prevent further wars. They held several conferences and issued numerous declarations condemning the war and emphasising the need to hold those responsible for starting it to account. However, there was disagreement among the delegates of the nations about bringing the major war criminals to justice. Some insisted on prosecuting them without recognising their official capacity, while others, notably the American and Japanese delegations, ruled out this possibility.

After lengthy discussions, the parties reached the London Agreement on 8 August 1945. The first article of the agreement established an International Military Tribunal for the prosecution of war criminals and confirmed the trial of all persons who participated in the war, regardless of their position or official capacity[2].

The third branch: Non-recognition of official capacity in the Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide is considered to be the first international treaty adopted by the United Nations General Assembly in Resolution 96 (I) of 11 December 1948. Its second article defines genocide as the destruction, in whole or in part, of a national, ethnical, racial or religious group, committed in time of war or peace. Article 4 emphasises the punishment of the perpetrators of this crime, as well as of the acts listed in Article 3, which include genocide, conspiracy to commit genocide, incitement to commit genocide and attempts to commit genocide.

Article 4 also affirms the punishment of perpetrators regardless of their position, whether they are constitutional rulers, public officials or individuals. Furthermore, Article 5 obliges States Parties to take the necessary legislative measures, in accordance with their respective constitutions, to

[1]- Look Article 01: Agreement for the prosection and punishment of the major warcriminals of European Axis. Signedatlondon 08/08/1945 thereshallbeestablishedafter consultation with the control concil for Germany an international Militarytrubunal for the trail of warcriminals.

[2]- Salma Jihad, Crime of Genocide, Dar Al-Huda Ain M'lila, Algeria, 2009, p. 136.

ensure the implementation of the Convention, including the imposition of effective criminal penalties against perpetrators. In addition, Article 6 establishes the obligation to prosecute the accused before a competent court of the State where the offence was committed or before an international criminal court recognised by the States Parties[1]. It is clear from these provisions that the Convention excludes immunity and emphasises the trial of any individual accused, regardless of his or her official capacity.

The fourth branch: Non-recognition of official capacity in international conventions and treaties

First: Non-recognition of official capacity in the Geneva Conventions

The Geneva Conventions, consisting of four treaties, oblige States Parties to prosecute any perpetrator of a crime within the scope of these Conventions. Article 49 of the First Convention, concerning the Improvement of the Condition of the Wounded and Sick in Armed Forces in the Field, held at Geneva from 21 April 1949 to 12 August 1949, and which entered into force on 21 October 1950, stipulates that the Parties undertake to adopt legislative measures which include the imposition of effective criminal penalties on persons who commit or order the commission of grave breaches, irrespective of their nationality, and to bring them to trial or extradite them to a Party for prosecution in accordance with the provisions of law.

The Second Convention, which deals specifically with the improvement of the condition of wounded, sick and shipwrecked members of the armed forces at sea, also emphasises this in Article 50[2]. Similarly, Article 129 of the Third Convention, relating to the treatment of prisoners of war, states the obligation of States Parties to provide in their internal law for effective penal sanctions against persons who commit or order the commission of violations of this Convention.

Article 146 of the Fourth Convention, on the Protection of Civilian Persons in Times of War, insists on the obligation of States Parties to prosecute and bring to justice persons suspected of committing or ordering the commission of violations, emphasising the referral to criminal justice[3].

Second: Non-recognition of official capacity in the First Additional Protocol to the Geneva Conventions

The First Additional Protocol to the Geneva Conventions, which was adopted by the Diplomatic Conference for the Reaffirmation and Further Development of International Humanitarian Law Applicable in Armed Conflicts on 8 June 1977, opened for signature, ratification and accession, and entered into force on 7 December 1978, establishes in Article 86 the obligation of the States Parties to take severe penal measures against violations of the Geneva Conventions. The second paragraph of the same article emphasises that superiors shall not be exempted from criminal responsibility for violations of the Conventions or of this Protocol if they knew of such violations and did not take the necessary measures to prevent or repress them[4].

Third: Non-recognition of official capacity in the Convention on the Suppression and Punishment of the Crime of Apartheid

The Convention on the Suppression and Punishment of the Crime of Apartheid was adopted and opened for signature, ratification and accession by General Assembly resolution 3068 (XXVIII) of 30 November 1973, and entered into force on 18 July 1976, in accordance with Article 15 of the Convention.

Article 3 of the Convention imposes international criminal responsibility, regardless of motive, on individuals, members of institutions and representatives of the State, whether they are in the territory of the State where the crime was committed or in the territory of another State. They are responsible if they commit, participate in or instigate the crime. States Parties shall take all necessary legal measures to suppress incitement to commit the crime, to prosecute the perpetrators and to hold accountable those responsible for the commission of the crime. They may

[1]- Judge Hisham, Encyclopaedia of International Documents Related to International Humanitarian Law, Dar Al-Mufid, Ain M'lila, Algeria, 2010, p. 43.
[2]- Judge Hisham, ibid, pp. 23, 43, 88, 147.
[3]- Qasi Hisham, op. cit., p. 198.
[4]- Salma Jihad, op. cit., p. 143.

be tried by a competent court of any State party to the Convention or by an international criminal court accepted by the State[1].

Fourth: Non-recognition of official capacity in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity

Article 2 of the Convention explicitly states the non-recognition of official capacity in the commission of war crimes and crimes against humanity as defined in Article 1. The provisions of this Convention apply to representatives of State authority and persons acting in the name of the State who are proved to have acted as principal or accomplice in the commission of, or to have directly instigated or conspired in the commission of, any war crime or crime against humanity. State officials who contribute to their commission are criminally responsible.

Fifth: Non-recognition of official capacity in the commission of crimes against international peace and security

Article 3 of the Draft Statute of Crimes against the Peace and Security of Mankind, prepared by the United Nations International Law Commission in 1954, states that official capacity does not exempt an individual from criminal responsibility for the commission of any of the crimes set forth in the Draft Statute. Furthermore, the acts of a person acting as head of state or ruler do not exempt him or her from responsibility for the commission of any of the acts enumerated in the Statute[2].

Sixth: Non-recognition of official capacity in the Nuremberg Principles

The principles of the World War II trials by the International Military Tribunal, despite the harsh criticism directed against them, are considered to be the cornerstone for the establishment of a permanent international criminal court. This is evidenced by the consideration of the proceedings of those trials as principles of international criminal law in General Assembly Resolution 94(1) of 1 December 1946, which excludes the immunity of Heads of State and the non-recognition of their official capacity when they commit international crimes[3].

The General Assembly entrusted the International Law Commission with the task of formulating these principles and incorporating them in a statute defining international crimes against peace and international security. Accordingly, in its resolution 177 of 21 November 1946, the General Assembly instructed its Legal Committee to study the matter and to prepare a draft statute between 5 and 29 June 1950. The report was submitted to the General Assembly at its fifth session on 3 August 1950, and the International Law Commission proposed seven principles, including the principle of non-recognition of the immunity of Heads of State under Article 7 and the principle of superior orders under Article 8 of the Nuremberg Charter[4].

Seventh: Non-recognition of official capacity in the law of the Control Council for Germany

The Control Council for Germany, established by the Allied Powers which divided Germany into four zones - the United States, Great Britain, the Soviet Union and France - issued Law No. 10 on 20 December 1945. Each occupying power administered a zone headed by a governor. The law provided for the prosecution and trial of German officials who had not been tried for war crimes by the Nuremberg Tribunal. Article 2(4)(a)[5] of the Law states that the responsibility of a person occupying an important official position, whether as a head of state or as a high-ranking official,

[1]- Ashraf Lashin, op. cit., p. 739.

[2]- Ahmed Mohamed Al-Mahdi Ballah, General Theory of International Criminal Justice, Dar Al-Nahda Al-Arabiya, 2010, p. 317.

[3]- Ahmed Mbkhouta, Evolution of the International Criminal Justice System, Dar Al-Fikr Al-Jami'i, Alexandria, 2018, p. 208.

[4]- See Article II 4 (a) of the Statute No. 10: "The official position of a person, whether as Head of State or as a responsible official in a government department, shall not exonerate him from responsibility for a crime or entitle him to mitigation of punishment."

[5]- Mahfouz Sayed Abdel Hamid Mohamed, The Role of the International Criminal Tribunal for the former Yugoslavia in Developing International Humanitarian Law, Dar Al-Nahda Al-Arabiya, Cairo, 2009, p. 27.

does not exempt him from prosecution and that his official capacity cannot be considered as a mitigating circumstance[1].

The second topic: Non-recognition of official capacity in international criminal justice

Any law that demands respect for its provisions requires an independent judicial system that enforces its rules and determines the responsibility of those who violate or contravene its procedures, thus ensuring that the idea of justice is achieved without allowing violations to go unpunished. This is evident in the trials of the First and Second World Wars, as well as the trials conducted under the auspices of the United Nations for crimes committed during the conflicts in Yugoslavia and Rwanda, culminating in the establishment of the permanent International Criminal Court.

First, the non-recognition of official capacity in the trials of the First and Second World Wars:

Due to the immense human suffering, destruction of lives, property and cultural heritage during both World Wars, the Allied Powers established international criminal tribunals to hold accountable those responsible for international crimes committed during the wars, without regard to their official positions as emperors or military leaders.

First branch: Non-recognition of official capacity in the trials of the First World War

After the end of the First World War on 11 November 1918, the victorious Allies convened a preliminary peace conference in Paris on 25 December 1919 to discuss the establishment of an international criminal court to prosecute those responsible for crimes committed. The conference recommended the punishment of individuals who violated the rules of war in international treaties, without distinction as to their official capacity. The conference established a committee, the Committee on the Responsibility of War Criminals and the Enforcement of Punishments, which issued a report consisting of 32 articles emphasising the personal responsibility of war criminals, in particular the principle of the personal criminal responsibility of individuals, including heads of state, who committed acts constituting violations of the laws and customs of war.

The committee's report is considered the first international document to explicitly refer to the personal criminal responsibility of negligent presidents who failed to take necessary measures to prevent violations of the laws and customs of war.

The report stated that the proposed court would have the power to prosecute anyone who failed to take measures to prevent violations of the laws and customs of war.

On 28 June 1919, the Treaty of Versailles was signed between the Allies and Germany in the French town of Versailles.Its provisions included Germany's responsibility for the First World War and its obligation to compensate the countries affected[2].

The treaty confirmed the trial of the German Emperor Wilhelm II under Article 227, out of his official capacity, for undermining the sanctity of treaties and international morality. The United States and Japan objected, arguing that the trial of the Kaiser as head of the German state was unacceptable. The Allies formally requested the Netherlands to surrender the Kaiser for trial, but the request was rejected because the charges were not specified in Dutch law and were not provided for in international treaties. They were considered political crimes, and extradition would violate Article 04/01 of the Dutch Constitution, which states: "Every person present in the territory of the Kingdom, whether a citizen or a foreigner, enjoys the protection of his person and property"[3].

Second branch: Non-recognition of official capacity in the trials of the Second World War

After the outbreak of the Second World War and the atrocities committed, several international conferences were held and various declarations were made stressing the need to bring the perpetrators of heinous crimes to justice. On 8 August 1945, the London Agreement was reached,

[1]- Mohammed Khudair Ali Al-Anbiyari, The International Criminal Court and its Relationship with the Security Council, Halabi Legal Publications, Lebanon, 2019, p. 37.

[2]- Mahmoud Shareef Besyouni, The International Criminal Court, 2001, publisher unknown, p. 06.

[3]- See Article 7 of the Statute of the International Military Tribunal: "The official position of the accused, whether as Heads of State or as responsible officials in government departments, shall not be considered as relieving them of responsibility or as mitigating the punishment".

which led to the creation of the Nuremberg Charter. The Charter established the principle of the exclusion of immunity and non-recognition of official capacity for the commission of international crimes. Since the establishment of the Tribunal, this principle has become customary international law and has been applied in all subsequent international criminal tribunals[1].

Article 7 of the Nuremberg Charter stated that the official position of the accused, whether as head of state or high-ranking official, shall not be considered as a defence or as a mitigating circumstance. The Court's rulings on the non-recognition of official capacity have meant that only natural persons who commit crimes, and not abstract theoretical entities, are held accountable. Respect for international law can only be enforced by punishing the individuals who commit such crimes. Therefore, the Nuremberg Trials punished and convicted the accused on the basis of the principle of command responsibility and the responsibility of superiors for the crimes of their subordinates, despite the absence of this principle in international treaties at the time. The Court interpreted its application on the basis of customary international law, which does not require written documentation.

The official position of an individual, including heads of state, was excluded, and on the basis of Article 7 of the Nuremberg Charter, the court rejected the defendants' arguments of immunity and the claim that they were performing acts of sovereignty. The Court held that the acts were within the jurisdiction of the State and not the personal responsibility of the individuals who committed them. The principle of state sovereignty protects those who carry out the acts, but they are not personally responsible. The Court rejected such defences, stating that international law, which protects state officials, cannot be applied to acts prohibited by international law. Criminals cannot hide behind their official positions to escape punishment[2]. The Nuremberg Tribunal sentenced Nazi leaders to death and imprisonment without recognising their official capacity.

Second demand: Non-recognition of official capacity in international criminal tribunals established by Security Council resolutions and the Rome Statute

In the aftermath of the Second World War and the establishment of the Nuremberg Tribunal, which tried those responsible for international crimes, the international community became committed to the peaceful resolution of international conflicts. This commitment was manifested in the creation of the United Nations Organisation, which emerged from the San Francisco Conference in 1946. This global international organisation was entrusted with the task of maintaining peace and international security through its important arm, the Security Council, which is one of the main organs of the United Nations.

The violent conflict in the former Yugoslavia, resulting from serious violations of international humanitarian law committed by Serbs against Muslims in the Republic of Bosnia and Herzegovina, and the violent conflict in the Rwanda region, brought the issue of accountability for international crimes back to the forefront. This was based on international criminal conventions that criminalised such acts and led to the establishment of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda through Security Council resolutions and the Rome Statute.

First partial claim: Non-recognition of official capacity in the Statute of the International Criminal Tribunal for the Former Yugoslavia

As the situation in the former Yugoslavia escalated and the Serbs committed serious violations of international humanitarian law, crimes against humanity and genocide against Muslims in the Republic of Bosnia and Herzegovina, the United Nations intervened through the Security Council, which adopted over fifty resolutions to address the crisis. These measures included the deployment of UN peacekeeping missions and an arms embargo. However, these efforts proved to be

[1]- The principle of international law, which under certain circumstances protects the representative of the State, cannot be applied to acts condemned as criminal by international law. The perpetrators of these acts cannot hide behind their official position in order to escape punishment in appropriate proceedings.
- Mahfouz Sayed Eid Al-Hamid Mohamed, op. cit., p. 431.

[2]- See United Nations Security Council Resolution 780/1992 at its 3119th meeting on 2 October 1992.

ineffective. As a result, resolution 780/1992[1] was adopted, establishing an international commission of inquiry to prepare a report on serious violations of the Geneva Conventions and other violations of international humanitarian law committed in the former Yugoslavia.

The Committee submitted its report to the Secretary-General of the United Nations, concluding that serious violations and breaches of international law had occurred, including wilful killings, ethnic cleansing, mass killings, torture, rape, looting, destruction of property and the deliberate destruction of cultural and religious sites. The report also highlighted arbitrary detentions. It also reaffirmed the personal responsibility of all those who committed or ordered crimes against humanity and serious violations of international humanitarian law, regardless of their official capacity.

And the Secretary-General, in his report to the Security Council, reaffirmed that the Statute of the Yugoslavia Tribunal should include provisions on individual criminal responsibility of Heads of State and government officials, based on the trials of the Second World War, in particular the Nuremberg Tribunal[2]. Therefore, the Statute of the Tribunal should include provisions that exclude immunity for heads of state or that the act was committed in an official capacity[2]. Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia was drafted accordingly. The report concluded that it was necessary to establish an international criminal court. On the basis of this report, Security Council Resolution 808/1993 was adopted on 22 February 1993, stating that persons who commit or order the commission of grave breaches of the Geneva Conventions are personally responsible for such breaches. It emphasised that the situation in Yugoslavia constituted a threat to international peace and security and required the establishment of an international criminal court[3]. On 25 May 1993, Security Council Resolution 827/1993 was adopted, confirming the establishment of the Court, adopting its Statute and providing for the prosecution of persons responsible for the commission of international crimes.

Article 1 of the Statute empowers the Court to prosecute persons responsible for serious violations of international humanitarian law and persons who commit or order the commission of serious violations of the Geneva Conventions, the laws and customs of war, genocide and crimes against humanity. Article 7, entitled "Individual Criminal Responsibility", affirms that any person who plans, instigates, orders, aids, abets or otherwise assists in the planning, preparation or execution of such crimes shall be individually responsible for them. The second paragraph of the same article states that superiors and their commanders cannot be exempted from criminal responsibility, nor can the President, if they knew that subordinates would commit or were committing crimes and failed to take the necessary measures to prevent or punish them.

The perpetrators of these crimes cannot claim that they were acting under orders from their government or superiors, and the Tribunal may impose punishment if it deems it justified[4]. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has handed down several prison sentences against Yugoslav leaders and officials found to have committed international crimes within the jurisdiction of the Tribunal. Among them was the President of the Republic of Serbia, Slobodan Milosevic, who was arrested by order of the Tribunal but died in prison in 2006 before his trial.

Branch Two: Non-recognition of official capacity at the International Criminal Tribunal for Rwanda

While the United Nations was working to bring the perpetrators of international crimes to justice in the former Yugoslavia, another equally serious conflict broke out in Rwanda in 1994 between the Hutu and Tutsi tribes, motivated by a struggle for power. More than a million people died in this

[1]- Ahmed Mikhouna, Evolution of the International Criminal Justice System, Dar Al-Fikr Al-Jami'i, Alexandria, 2018, footnote p. 493.

[2]- See United Nations Security Council Resolution 808/1993 at its 3175th meeting on 22 February 1993.

[3]- See Article 7 of the Statute of the ICTY.

[4]- See United Nations Security Council Resolution 955/1994, adopted at its 3453rd meeting on 8 November 1994.

conflict. The Rwandan government petitioned the United Nations for the establishment of an international criminal tribunal.

The Security Council intervened through a series of resolutions, including the deployment of UN peacekeeping missions and a ceasefire, culminating in Resolution 935/1994, which established an international commission of inquiry into serious violations of international humanitarian law and acts of genocide. After four months, the Commission submitted its report to the Secretary-General on 9 December 1994, confirming the commission of international crimes, in particular genocide. On the basis of this report, the Security Council adopted Resolution 955/1994, which aimed to put an end to the crimes committed in Rwanda and to take effective measures to bring those responsible for these crimes to justice. The resolution also called for the establishment of an international criminal tribunal, the statute of which was annexed to the resolution[1].

The Statute consists of 22 articles covering the Court's jurisdiction, trial procedures and composition. Article 1 states that the Court shall exercise jurisdiction over violations of international humanitarian law committed on the territory of Rwanda. Article 5 confirms that the International Criminal Tribunal for Rwanda (ICTR) has jurisdiction over natural persons and may prosecute anyone who planned, instigated, ordered, committed, aided, abetted or otherwise contributed to the commission of the crimes set forth in the Statute. Article 6, paragraph 2, emphasizes that superiors cannot escape criminal responsibility for any of the acts referred to in Articles 2 to 4 of the Statute if they were aware that such acts were being committed by subordinates and failed to take the necessary measures to prevent or punish them. Furthermore, no accused person can be exempted from criminal responsibility on the grounds that he or she committed the crimes under orders from his or her government or superiors[2]. The court imposed severe sentences on officials at the highest level, including former Prime Minister Jean-Paul Akayesu.

The third branch: Non-recognition of official capacity in the Rome Statute

The establishment of an international criminal court was a priority for the international community, but it faced several legal and political obstacles. The temporary international criminal tribunals played a crucial role in advancing the project. In December 1996, the General Assembly decided by resolution 51/207 to convene a Preparatory Committee in 1997 to finalise the draft statute of the International Criminal Court (ICC) for presentation to the Diplomatic Conference to be held in Rome in June 1998. On 3 April 1996, the Preparatory Committee completed its work and approved the draft for presentation and discussion at the Diplomatic Conference, which took place in Rome from 15 June to 17 July and was attended by some 160 States, 250 non-governmental organisations and a number of specialised agencies. The Statute was approved by 121 States, while seven States voted against it. On the basis of the deliberations and reports of the Preparatory Committee and the discussions among the diplomatic representatives of the participating States, the Rome Statute of the International Criminal Court was adopted and opened for signature and ratification. It entered into force after 60 States had ratified it, on the first day following 60 days from the date of the sixtieth ratification, in accordance with Article 126. The Rome Statute, which consists of 128 articles divided into 13 parts, entered into force on 7 January 2002, with Part I dealing with the establishment of the Court, its jurisdiction and applicable law[3].

Article 25 of the Rome Statute, entitled "Individual Criminal Responsibility", establishes the jurisdiction of the International Criminal Court (ICC) to prosecute natural persons who commit crimes within the jurisdiction of the Court. Individuals can be held criminally responsible for committing crimes individually or in association with others, for ordering the commission of crimes, for aiding and abetting the perpetrators by providing the means for their commission, or for direct and public incitement to commit or attempt to commit genocide, even if the crime is not ultimately committed.

[1]- See Article 6 of the Statute of the International Criminal Tribunal for Rwanda.

[2]- Essam Abdel Fattah Matar, The International Criminal Court, Dar Al-Jadeedah Al-Iskandariyya, 2010, p. 114.

[3]- Essam Abdel Fattah Matar, The International Criminal Court, Dar Al-Jadeedah Al-Iskandariyya, 2010, p. 114.

Article 26 states that the Court has no jurisdiction over persons who were under the age of 18 at the time of the crime. Furthermore, Article 27, entitled "Irrelevance of official capacity", states that the Rome Statute applies to all persons without distinction on the basis of their official capacity. Irrespective of their position as heads of state, government officials, members of parliament, elected representatives or government employees, no one is exempt from international criminal responsibility for crimes within the jurisdiction of the Court. An official capacity does not exempt an individual from punishment or confer immunity from prosecution under national or international law.

Article 28 emphasizes that military commanders may be held accountable for crimes within the jurisdiction of the Court committed by forces under their command if they did not exercise control over those forces and either knew that the forces were committing or about to commit crimes, or failed to take necessary measures within their authority to prevent the commission of such crimes. Military commanders can also be held responsible for crimes committed by their subordinates because they failed to exercise proper control over them.

Indeed, the International Criminal Court has indicted and prosecuted heads of state for crimes within its jurisdiction, regardless of their official capacity. Examples include the prosecution of former Ivorian President Laurent Gbagbo and the issuance of an arrest warrant by the Pre-Trial Chamber against Sudanese President Omar al-Bashir and Libyan President Muammar Gaddafi.

CONCLUSION:

Through our study of the principle of non-consideration of official capacity in international criminal law, it has become clear that international lawyers have long sought to establish a permanent international criminal jurisdiction to protect the principles of international law from violation. However, these attempts have encountered various obstacles.

Nevertheless, these efforts did not cease, as evidenced by the Treaty of Versailles, which dared to include provisions in the Convention that allowed for the prosecution of the then German Kaiser. It was instrumental in establishing the principles of individual international criminal responsibility and the disregard of official capacity, even if the individual held the position of emperor.

This progress continued with the trials of the Second World War, where the Nuremberg Tribunal was able to impose death sentences on Nazi leaders without regard to their official capacity.

When the United Nations was established as a global international organisation in 1946, following the Nuremberg trials, the General Assembly adopted a resolution endorsing the principles of Nuremberg, in particular the principle that the official capacity of the perpetrator should not be taken into account. This continued until the outbreak of armed conflicts in Yugoslavia and Rwanda, when the Security Council intervened under Chapter VII of the Charter and established the International Criminal Tribunal for the former Yugoslavia. The Tribunal issued an arrest warrant for Serbian President Slobodan Milosevic, who died in prison before trial, without regard to his official capacity.

Following the establishment of the United Nations as a global international organisation in 1946, the General Assembly adopted a resolution in the aftermath of the Nuremberg trials, which adopted the principles of Nuremberg, in particular the principle that the official capacity of the perpetrator should not be taken into account. This continued until the outbreak of armed conflicts in Yugoslavia and Rwanda, when the Security Council intervened under Chapter VII of the Charter and established the International Criminal Tribunal for the former Yugoslavia.The Tribunal issued an arrest warrant for Serbian President Slobodan Milosevic, who died in prison before trial, without regard to his official capacity. Similarly, the Rwanda Tribunal convicted the Rwandan Prime Minister for the crimes he was accused of committing, in particular the crime of genocide against the Tutsi tribe.

In 1998, the international community achieved the goal of establishing a permanent International Criminal Court through an international treaty that embodies the will of States and complements national jurisdictions.It operates on the principle of respect for sovereignty and emphasises the criminal responsibility of individuals, irrespective of their official capacity.

RESULTS:

The non-consideration of the official capacity of perpetrators and the existence of a permanent International Criminal Court have reduced the commission of international crimes and wars that have claimed millions of lives.

Non-consideration of official capacity in international jurisprudence before the trials of the First World War was a mere fantasy, and it was inconceivable to hold the Kaiser, the Emperor or the King accountable for the crimes they committed. But this became a reality with the establishment of a permanent international criminal court.

Specialised international criminal courts have encroached on the sovereignty of national criminal justice systems and brought them under their jurisdiction, as evidenced by the joint jurisdiction of the Yugoslavia and Rwanda Tribunals, where the International Criminal Court took precedence over national criminal justice systems in Yugoslavia and Rwanda.

The contribution of international conventions and treaties in embodying the principle of non-involvement of official capacity and its application in international criminal justice.

Recommendations:

1. It is necessary for countries to accede to the International Criminal Court and to amend their constitutions to bring them into line with the Statute of the Court, in particular with regard to the non-respect of official capacity.
2. States should commit to incorporate into their domestic legal systems criminal laws that criminalise international crimes ratified under international treaties, excluding official capacity when charges are proven.

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6. Vienna Convention on the Law of Treaties - 1973.

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2. Statute of the International Criminal Tribunal for the former Yugoslavia - 1993.
3. Statute of the International Criminal Tribunal for Rwanda - 1994.
4. Rome Statute of the International Criminal Court - 1998.

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