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The role of domestic and international law in the immunity of state leaders in terms of criminal jurisdiction in national courts, the International Criminal Court and other international criminal tribunals

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Abstract

One of the existing mechanisms at the international level to prosecute and punish crimes, is the establishment of the International Criminal Court complex. Crimes against humanity, war crimes, and genocide, the three criminal offenses of which are subject to the jurisdiction of the International Criminal Court and other international courts, are the subject of the criminal jurisdiction of the courts. There are both national and international judges in the primitive chambers and appeals. But without a positive vote, at least one international judge will not make any decision. In addition, the international community also established the need for the participation of the country's legal and judicial system in the country where the offense was committed, in order to effectively punish such crimes of peril and prosecution. Internationally, Permanent and Criminal Officers are the right options for using the international community todeal with international crimes. Consequently, the International Criminal Court is the only pending and competent judicial authority to handle international crimes, but there are some limitations, such as the need to refer the matter to the Security Council, for the purpose of prosecuting international crimes. Nonetheless, case trials, whether purely or mixed internationally, with national authorities, may also be formed to prosecute and prosecute these crimes, but these actions require the adoption of a decision by the Security Council in accordance with Chapter VII of the United Nations Charter.

Keywords: Domestic and International Law, Criminal Jurisdiction, Immunity of State Leaders, International Criminal Tribunals.

1. Introduction

The idea of establishing an international criminal tribunal for the perpetrators of the most heinous international crimes has long been considered. With the establishment of mixed courts or so-called third-generation courts, international law in general and international criminal law has specifically entered a new stage in their evolution. Prior to World War II, the principle was always on the immunity of the heads of state. But after World War II, the first step was taken to change this principle. For the first time, Article 227 of the Treaty of Versailles was referred to the trial of the German Emperor. Articles 228 and 230 also mention the trial of 900 people who committed war crimes. Though these courts were a show, they were an effective and courageous step toward the punishment of the heads of state committing crimes against humanity (Meijknecht, 2018). In other words, with the passage of time and the trial of the leaders of Germany and Japan by the Allies, we witnessed the evolution of the immunity of the heads of state and possibly the dismantling of their immunity from international crimes. In the 1990s, the move accelerated. The discussion of the unity or dichotomy of national and international law has always been one of the most controversial issues in the writings of international law scholars, especially in the twentieth century, and that, in the case of unity, international law prevails over national law, it has always been discussed and There was a difference (Abashidze and Svetlana, 2017). But during the twentieth century, as late as the end of the century, the number of advocates of the theory of international law superiority will increase over national law.

As it turns out from international custom, governments in the past were more inclined to the theory of duality of rights, which was due to prejudices that had their sovereignty and independence, but in the current century, with the limited autonomy of states and the need for cooperation Internationally, the importance of the theory of duality of rights has diminished over time, and in turn, the importance and influence of the theory of unity of law with the superiority of international law has been gradually increased. Third-generation hierarchy with the participation of the United Nations and the government Land is committed international crimes (Bair, 2008). The headquarters of most of the tribunals has been in the territory of the place where the crime occurred, and in some cases even the relevant government has agreed that the trial should be held, if necessary, outside the homeland of the said country - The Hague. The acceptance of the intervention or cooperation of the United Nations in the establishment of these

courts and the prosecution of crimes committed within the territory of the countries concerned is in some way recognition of the primacy of the principles of international law over sovereignty and national rights (Krzan, 2016).

In addition, by examining the provisions of the agreements between the United Nations and the relevant government and the constitution of the courts, there is a certain predominance of international standards on national law. The impact of third-generation tribunals on the evolutionary process of international criminal law and its relevance to national law is a turning point that is important and relevant. In this paper, we seek to investigate and answer the question of how far the relevant governments are restricting the acceptance of international norms of national sovereignty and accepting the superiority of international standards. To find an answer, we will look at the legal framework for the establishment of mixed courts, the criminal jurisdiction of the courts, the composition of the courts and the choice of judges, how to act and decide, the principles governing, how to fund and the extent of influence of international standards of prosecution. Paying for these topics will be reviewed in two parts. The study of the areas that led to the intervention of the international community at the top of the United Nations is inevitable under the name of historical background before entering into such articles. Finally, we will conclude and conclude (Benzing et al., 2013).

2. Literature Review

The rule of law and crimes committed in the four Timor-Leste, Cambodia, Sierra Leone and Kosovo, which ultimately led to the establishment of mixed criminal courts, are briefly cited before the courts are established (Bair, 2008).

Oriental Timor: The country, which was almost four centuries of Portuguese colonial colonies, eventually launched a local election with the permission of Portugal in 1974 to form an independent state. But in December 1975, Indonesia invaded East Timor and attempted to annex the country as the twenty-seventh province of soil. The Timorese Occupation that lasted until August 1999 can be divided into three periods: in the first period - 1975 to 1979 - nearly 200 thousand people, roughly equivalent to one third of the population of that time, directly or indirectly, mainly in effect. Military strike and famine have died. In the second period, which

lasted from 1980 to 1989, the military strides continued to be broad-based, but this period was distinguished by strengthening East Timor's resistance against the Indonesian sovereignty. During the third period, from 1989 to 1999, the restrictions are reduced slightly and foreigners, including the media, are allowed to attend, but the threat and repression of the government continue. For example, there are about 200 people killed in a peaceful demonstration. Eventually, under international pressure in January 1999, Indonesia with the help of the United Nations and the agreement with Portugal, it was holding a referendum. In spite of threats and military pressures, 78 percent participated in the referendum on independence and separation (98 percent), while Indonesia / Indonesia voted 5th Timor from Indonesia. The announcement of the results of the referendum led to widespread violence. As a result, more than a thousand civilians were killed and about 600,000 people, at least three quarters of the population, were displaced. Only in September 1999, with the intervention of international and international peacekeepers, followed the issuance of a Security Council resolution that law and order were established in East Timor in relative terms. Then, the need for international community intervention and cooperation was felt to try international criminals (Bernaz and Prouveze, 2010).

Cambodia: During the rule of the Khmer Rouge in Cambodia from April 1975 to January 1979, nearly three million people died. Following the end of the Khmer regime, the civil war began in Cambodia, which lasted until 1998. Initially, in 1997, the Cambodian government asked the United Nations to help establish a court to prosecute high-ranking Khmer leaders. The Cambodian National Assembly then ratified the 2001 Special Tribunal to prosecute major crimes committed during the Khmer Rouge. The government insisted that trial inside Cambodia be conducted by judges and Cambodian staff alongside foreign workers. But due to the weakness of the legal system, the international nature of the crimes committed and the attempt to implement international standards, an agreement was finally reached between the Government of Cambodia and the United Nations in June 2003 on how the international community participated in the trial (Campbell, 2015).

Sierra Leone: The 11-year-old devastating Civil War in Sierra Leone - 1991 to 2002 - is associated with brutal crimes through violent behavior and brutal brutality. Tens of thousands of civilians were killed and nearly a quarter of the population was displaced. Sexual injury, disappearances, and sexual violence are a widespread aspect of the characteristics of the war.

Finally, in 2002, under the treaty between the Government of Sierra Leone and the United Nations, the Special Court for Sierra Leone was established to prosecute perpetrators of crimes against humanity, war crimes and other violations of international humanitarian law, as well as some of the crimes set forth in the domestic laws of that country (Caroline, 2015).

Kosovo: Violation of humanitarian law in the war has had a profound impact on the lives of the people of Kosovo. About 800,000 Albanians - nearly half the population of Kosovo - were fired and returned to neighboring countries, and about 500,000 displaced internally. Eventually, NATO troops ended in massive violations in June 1999, followed by the Security Council in its resolution establishing an institution to rebuild war devastation, ending several decades of discrimination against the Albanian people, organizing a legal system and trial Perpetrators of violent acts (Caroline, 2016).

3. International Criminal Tribunal Legal Framework

In the course of this century, a new generation of criminal justice authorities has been created to prosecute and prosecute international suspects. These trials, known as mixed courts, are in some cases formed during internal armed conflicts of some crimes against humanity, genocide and war crimes (Cedric et al., 2018). These courts are designed to overcome the weaknesses of international and domestic criminal tribunals, combine international and national judges and can apply international and domestic law (Bernaz and Prouveze, 2010). In the meantime, international criminal tribunals have been classified into three generations in terms of origin:

First-generation tribunals based on an international treaty, such as the Nuremberg and Tokyo Courts. Second-generation courts are based on a Security Council resolution, in accordance with Chapter VII of the United Nations Charter (which prescribes the use of armed force to repel or threaten international security), such as the International Criminal Tribunal for Yugoslavia Ex and Rwanda The Third Generation Tribunal, which forms the basis for a Security Council resolution based on an agreement between the United Nations and a government difference (Abashidze and Svetlana, 2017). However, the fundamental development and development of the international criminal law system has accelerated with the creation and deployment of a new generation of mixed courts, so that today, the establishment and consolidation of trials of

national, transnational, semi-transnational, semi-transnational and mixed (international) Or a combination) of numerous political and legal opportunities and challenges, the interaction of domestic and international law, and finally the enforcement of criminal laws in line with the interests of the international human rights principles and rules (Dicker, 2012). Hence, over the years and from 1999 to today, several types of mixed courts in different parts of the world included: 1- Senegalese super divisions, 2- East Timor Special Tribunal, 3- Sierra Leone Special Court, 4 - Courts Khmer Rouge (Cambodia Special Courts for the Prosecution of Crimes of the Khmer Rouge) and 5th Special Tribunal for Lebanon (Bernaz and Prouveze, 2010).

In the formation of mixed courts, as in other international judicial bodies, such as the International Court of Justice or the European Court of Human Rights, the fundamental principles of the handling of crimes such as fair trial and guaranteeing the independence and impartiality of judges have been fully respected. These courts have established procedural principles and their decisions and opinions have internal and international enforcement guarantees. The purpose of establishing this kind of international criminal tribunal is to provide fair and impartial criminal trials (Hakan, 2010). Because domestic armed conflicts commit crimes committed by either the ruling power and the perpetrators of the government, or by opposition and militant groups, the fair trial of the defendants and the perpetrators of those crimes by the national courts is scarce and difficult because the government is exposed It is under an obligation to look at its own agents and to conduct their trials in a formal manner in order to end their culpability or to crush their crimes as ordinary crimes, and to oppose groups of opponents To deal severely and ruthlessly, in such a way as to deprive them of the necessary guarantees of a fair trial (Caroline, 2016). Therefore, in order to ensure the independence and impartiality of these trials, international judges are present alongside national judges. In their articles of association, they also emphasize the rights of the accused and the necessary guarantees, and it is possible to reconsider the crimes under the jurisdiction of the court judged by a national court (Hakan, 2010).

The right to a fair trial today in various areas of international law, in particular the international human rights law, international humanitarian law and international criminal law, are among the fundamental rights and it is basic to well-known people and to such a status that international diplomacy is not based on international documents and treaties, but is based on the general

principles of law and even Some have put it in line with international conventions. The fair trial in international criminal trials and tribunals, which has become the main factor behind the emergence and evolution of international criminal law, has evolved, although in the first generation of authorities investigating these types of trials, that is, the International Criminal Court, which after World War II was established to address the crimes of the heads of government of Germany and Japan, despite the adoption of the principle of fair trial, the criteria and indispensable guarantees of this right were not overlooked, but in the next generations, international criminal tribunals not only had doubts about this The field did not go away, but it emphasized the need to secure this right from the very beginning Statute and Rules of Procedure and Evidence complex and relatively detailed proof of this court rules on the issue was allocated (Jure, 2016).

The examination of these regulations, together with the practice of the International Criminal Tribunal for the former Yugoslavia and Rwanda, with a view to interpreting and implementing internationally recognized standards and guarantees for a fair trial by international human rights institutions, well signifies that for the sake of the courts Just in international criminal procedures, not only should the same internationally recognized rights and guarantees be applied, but is expected to be higher than that of national trials (Hakan, 2010).

4. The type and amount of punishment

Throughout history, the type and amount of punishment in different countries differ from each other according to the opinions, beliefs and common culture of societies. However, since the contents of the instruments of the establishment of all third-generation courts originated from the single source, known as the standards in the international community, they all only provided for the prosecution of imprisonment and financial penalties. Therefore, whether in the domestic law of the countries concerned, the death penalty is revoked or canceled, third-generation courts are not authorized to impose such punishment. In accordance with the Sierra Leone Special Court's Statute, imprisonment is the highest penalty. Under Article 19 of the Constitution, the term of imprisonment is determined by the procedure before the Rwanda International Criminal Court and the national courts of Sierra Leone. In addition, regarding the amount of imprisonment, the

severity of the crime and the circumstances of the accused person should also be taken into account (Article 19.2 of the Statute) (Kenneth, 2015).

The Special Court has the power, in addition to imprisonment, to order the seizure of property and any property that is illicitly or through culpability and to return them to the original owners or the State of Sierra Leone (Section 3, Article 19). Meanwhile, the domestic law of Sierra Leone has not yet abolished the death penalty. By studying the relevant agreements and constitutions, we are faced with some internationally recognized criminal standards that are accepted in both international and national trials of different criminal systems (Klaus et al., 2018). These include the principles of the legality of crimes and punishments, or the presumption of innocence. However, some of the principles that are internationally accepted and practiced are unknown in the internal systems of the countries concerned. The introduction of this category of international rules and principles in the treaties of the third generation of tribunals reflects the influence of international standards and the erosion of prejudice against national sovereignty (Jure, 2016).

5. Legal status

The status of mixed courts to date suggests that these institutions have not fully fulfilled their promises. In some cases, widespread public initiatives have been positive and the use of local cadres in the judicial system has brought about practical learning. In addition, mixed courts have contributed to the promotion of human rights and the rule of law. Despite the positive outcomes of the mixed model of international criminal justice, there are challenges that point to them (Libya, 2012):

First, when mixed courts of the future are formed, the right balance between the domestic and international elements will be most important. As the Cambodian Supreme Branch pointed out, the presence of a small number of international judges and prosecutors is not sufficient to guarantee the neutrality and under the influence of the state's lack of jurisdiction. In other ways, a sense of local ownership can be created, for example, by establishing a court at the crime scene or by adding offenses under the national criminal laws of the country involved in the statute of the court (Jure, 2016).

Second, one justification for the establishment of mixed courts was the formation of more cost-effective institutions than the case courts. One way to realize this is the cost-effectiveness of limiting the logic of personality, material logic, spatial logic, and time logic of jurisdiction to mixed courts, but the qualification framework that is so limited restricts the legitimacy of a particular entity and creates the choice and choice This is the case of Lebanon's special court. This limited competence can be offset by the formation of a truth and reconciliation commission, or with the capacity of a country's judicial system capable of prosecuting offenses outside the jurisdiction of mixed courts (Bernaz and Prouveze, 2010).

In the end, the issue of ensuring cooperation with local authorities or foreign countries has also been a serious concern. Without cooperation, it will be very difficult to conduct searches and to collect evidence and evidence. It would be very difficult to establish an effective cooperation mechanism, such as the framework established by the Security Council for case trials, for the success of more mixed courts of law (Mikkel, 2015).

7. Prosecution of International Criminals in the View of International Criminal Courts

There is no doubt that the prosecution and punishment of international criminals is a decisive factor in ensuring the enforcement of international criminal law. It seems that the jurisdiction of the state's courts to commit crimes is sufficient. In order to ensure that a competent court is in all cases, there must be other ways of thinking for the first time in the Geneva Conventions, by accepting the principle of universal jurisdiction, requiring all States parties to these conventions to seek and prosecute those accused of committing major offenses (Meijknecht, 2018). These conventions have made the courts very effective in this regard. Although violations of the rights of civilians and the attack on them have been an international crime for decades, but today, in addition to the contractual and extraordinary renditions of these attacks and the prosecution of their perpetrators on the basis of international documents, there are several specialized courts and international criminal tribunals that deal with These crimes are included in the scope of their eligibility (Mikkel, 2015). So far, the need for several war criminals has been tried and condemned, even though many other defendants have not done so. In view of the existence of the Geneva Convention and the Additional Protocols of the Internal Rules of the two countries, on

the one hand, and on extremes in dealing with criminals and convicts Strong international humanitarian law and the abuse of international law the question remains, what is the main problem with regard to human rights? What is certain is that international humanitarian law is capable of confronting all the challenges posed by modern-day, out-of-border and terrorist wars. What makes this process ineffective is not the absence of humanitarian rules, but the failure to implement it. Because the Geneva Conventions and the Additional Protocol not only encourage governments to bring the perpetrators of war crimes to justice, but also demand fair trials by exercising universal jurisdiction over governments.

8. Conclusions

In the wake of violent behavior and bloodshed, the United Nations, acting on behalf of the general public and the Security Council, acts as the only authority that can make binding decisions under the seventh chapter of the United Nations Charter. Often, due to the lack of rule of law and effective and impartial judicial system, oppressed people welcomed the countries concerned for international intervention. Consequently, in co-operation with relevant governments and the United Nations, mixed courts were established, which became known as third-generation courts. From this perspective, the Nuremberg and Tokyo courts of the first generation, the special tribunals for the former Yugoslavia and Rwanda, established independently by the Security Council, are the second generation, and these courts, established with the cooperation of the United Nations and the government, are the third generation called. Given that the establishment and enforcement of criminal law and the administration of justice are the most obvious examples of sovereignty, the mere acceptance of the United Nations legislative and judicial cooperation in prosecuting and punishing crimes committed within the land of countries is to accept the superiority of the administration of justice and International human rights standards on national sovereignty. In addition, by studying the agreements and documents establishing these courts, the overcoming of international standards is evident in particular from the following:

First, the legal basis for establishing these courts is often an international agreement. Even where a domestic law is the basis for the establishment of a tribunal (Cambodia), the law has been

drafted entirely within the framework of an agreement with the United Nations; Second, it is clear from the point of view of jurisdiction that the prevalence of international criminal law is so evident that crimes The triple international (war crimes, crimes against humanity and desertification) is the subject of these trials; thirdly, the composition of the courts is such that the international judges are often appointed by the Secretary-General of the United Nations in the majority, and even where the majority (Cambodia), the decision-making process is expected by a majority of at least one international judge Is; fourthly, of the principles of justice, Tommy similarity between the courts and proceedings of international and in some cases explicitly, following the procedures and court documents referred second generation. In this regard, in addition to the principles of legality, innocence and non-enforcement of the death penalty, the following principles should be mentioned: fair and public hearing, defendant's defense rights, prohibition of retrial, equality of persons against the law and the court, and The lack of influence of the official position of individuals and the independence and impartiality of the judges; and Khamesa, in administrative and financial terms, while a large number of employees are recruited by the United Nations, is also responsible for the financial affairs of the courts and the law of judges and employees The international community is the court and the courts are required to report to the United Nations.

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