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Traditional Frameworks of Immunity of States and Heads of States in International Law

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Abstract

Immunity is among important factors in international law. Until the formation of international law the principle has been existed, although the form and shape of it changed. In the paper the situation of immunity of heads of states has been discussed and the major factors in international law have been examined in this regard. Eventually we came to conclusion that the immunity of heads of states was exist in its absolute form because of the existence of some factors such as power of kings and absoluteness of sovereignty and absence of some factors such as human rights, situation of individuals and etc.

Key Words: *Immunity, sovereignty, diplomatic immunity, state immunity, individuals, human rights, traditional international law.*

Introduction: Immunity of heads of states is from ancient issues of international law. From the time of initiation of states the issue of immunity of states and their heads were considered. Because just countries were the subjects of international law and individuals had no place in the domain. There was no chance for them to obtain their rights and heads of states hide behind the immunity of their states. In this situation, immunity defined as the holder of it is safe from the pursuance of government agents, in other words, law and agents executing law could not pursue the holder of immunity.¹

In past the whole of country and state illuminated in the head of state or government and the only way to try them was to overcome them in wars. The issue rooted in definition and position dedicated for sovereignty of states. Today the issue of accountability of states and their heads regarding acts of citizens is one of the emerging issues of international law, but considering the evolution in concept of human rights and respect and promotion of human dignity and widening the domain of courts competence, the issue of criminal immunity of heads of states find new definitions and changed in form and concept.

In the paper firstly the issue ‘absolute immunity of states’ will be discussed, then the Basis of state immunity in traditional international law shall be considered, concluding the issue, diplomatic

¹ Sadr, J. (1995). *Diplomatic and Consulate Law* (3 ed.). Tehran: Tehran University.
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immunity and Immunity of heads of states in traditional international law are going to be surveyed. After considering Traditional basis of diplomatic immunity, Relation of fundamental concepts of international law to immunity such as sovereignty, Individuals and human rights, law of war and criminal courts in ancient era will be discussed. Eventually the conclusion shall be made by referring to all of these important factors and we will answer the question: what was the situation of immunity of heads of states in ancient era?

Absolute immunity of states: Immunity of states is among one of the first notions and known legal principles in international society. From historical regard the record of this concept can be found in international relations of ancient era, in late empires of Persia, Greece and Rome in which the immunity of foreign ambassadors had been accepted based on religious codes and hospitality manner.² By gradual evolution in Rome law, a principle had been entered to the law literature based on that, the governing king could not be placed under internal or foreign competence of others. This traditional principle which had been named ‘equals do not have competence over each other’, in middle 17th century, inspired one of the fundamental principles of international law order, by the name ‘equality of states’.

The principle of immunity at first indicates on commitment to incompetence on kings and governors and in literature of classic international law had been known as the concept of absolute immunity of king and his properties from the competence of other kings.³ In ancient era kings and elites of international law stressed on general principle of absolute immunity of king and his properties. The doctrine had been known as the prerequisite of independence and equality of states and respectful situation of kings. From historic regard, on one hand according to an old custom in common law it was assumed that the state is free from any responsibility, because it was told that it is not possible to pursue a reference which itself is the source of right and the right itself is derived from its will and the governing power shall not be summoned to court reluctantly.⁴ On the other hand the root of absolute immunity theory can be found in traditional principle of Rome law according on it ‘equals have no superiority over each other’. According to the principle which basically related to the arrangement of internal distribution of power inside the competence borders of Rome kingdom, it was accepted that the king must not be under internal and foreign juridical competence.⁵ According to this old principle, the foreign state like the state court located in it, must benefit from immunity. These two logics, in fact are interpretations from principles of dignity, equality and independence of states as the most well-known bases of state immunity which had been referred to in process and doctrine to choose the absolute immunity inclination. Also Brohmer stressed on the principle and knows the equality of states as a base of absolute immunity of states.

What can be told about the sovereignty is: the concept of sovereignty from the first day has political essence but gradually it transformed to legal one. The legal interpretation from concept of sovereignty has been changed during time. By deeper survey the levels of these evolutions regarding formation of state- country concept shall be discovered. By referring to writings remained from late

² Daftari, A. M. (1962). *Developments of International Relations and laws* Tehran: Pocketsize Books Organization.

³ Khezri, M. (2011). Immunity of State From International Law Point of View. *Legal Law Search book, 1(3)*, 146-113.

⁴ Nasiri, N. (1991). *Multi National Law*. Tehran: Danesh Emrooz Publication.

⁵ Steinberger, H. (1989). State Immunity. *Encyclopedia of Public International Law, 10*.

people, it can be understood that they named sovereignty as the supreme power of state. Of course many are doubtful about the existence of sovereignty concept before 15 and 16th century. Vincent believes that: in Greek and mediaeval thoughts sovereignty was not exist. Although many of features and statuses of sovereignty in various eras had been discussed and later on indicated in sovereignty issue.

Other reasons which have been raised supporting absolute immunity doctrine are: because according to the supreme rules of international law, carrying out some acts against a foreign state without consent of that state is not possible, therefore enjoying competence even if depends on the governing concept of discussing issue, is a futile act for an impossible issue. Also enjoying competence on a foreign state assuming the separation of tasks of states because of impossibility of this separation is not possible.⁶ Therefore reasoning of traditional theories of absolute immunity for a long time prevented courts from pursue foreign states and therefore states in each of two commercial and non-commercial cases have immunity and the theory of absolute immunity still known as the only way to solve the problem is to pursue a case by national courts against foreign states and pursuing a case in internal courts was impossible. Immunity of sovereignty and immunity of heads of sovereignty have been recognized from the first day of formation of immunity of foreign state. Even in 'Parliament Bulge' case while Louis the 16 was at power, the absolute immunity had been recognized.⁷

Basis of state immunity in traditional international law: According to the principle of state immunity, a state which has been recognized as an international entity is allowed to be immune from pursuant of other countries courts. A question raise in mind about the issue is: what are the base and the raison d'être of this immunity and why internal court despite the fact that they have general competence, are avoided in this specific issue? In other words which excuse recognized the necessity or social actuality of such immunity? Recognizing the reason is important because basically credibility of each principle depends on existence of its reason and if social and historical factors disappear the initial necessity of the principle or affect the issue, to the same stake the principle or its credibility will be affected. Therefore considering the basis and raison d'être are important. Specially, it must be considered that many of struggles and understandings over some of evolutions in immunity of states rose from change in basis.

About the basis of state immunity, there is no consensus among elites and in writings and works of international law elites and court sentences, the said principle have been excused by various theories from among them some related to traditional principles of international law which are the equality of states, the principle from the time of formation of international law and by recognizing the absolute sovereignty of states born. Some lawyers such as Dickinson believes that the principle is exactly means the equality not categorizing countries to weak and powerful or in other words to stratum making of countries.⁸ On the other side Dr. Simpson does not believe on the equality and says only the great powers shall be actors in international society and other countries are followers.⁹

⁶ Bankas, E. K. (2005). *The State Immunity Controversy in International Law*. Berlin: Springer.

⁷ van Alebeek, R. (2008). *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*: E. M. Meijers Inst.

⁸ De Witt Dickinson, E. (1920). *The Equality of States in International Law*: Harvard University Press.

⁹ Simpson, G. (2004). *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*: Cambridge University Press.

It is obvious that the principle is entangled closely to sovereignty. Another base of immunity is the principle of dignity. The theory remains from the dominance of personal concept of sovereignty in which because of king's dignity and high position, competence over his acts and properties was banned.¹⁰ Other basis exists in international law for immunity of states may be used in traditional era, like reciprocity, but no reliable source founded.

Diplomatic immunity: Basically diplomatic immunity is a kind of immunity in which two countries promise each other to prevent from pursue the other countries diplomats in their courts. In legal concept, immunity means that the holder is immune from pursue of law and government agents. In ancient era granting diplomatic immunity to a representative was not obligatory and each country could refrain from it by its own will, by prior announcement. Some lawyers expressed an example from the relation of Britain and Soviet Union.¹¹ Ahluwalia believes that the reason for such situation is the overcome of sovereignty and warmongering importance over economics.¹² From other side Harvey says the principle had existed in ancient era by itself and the principle preparing ground for codification of immunity.¹³ Eventually it can be said that, in that era the customary form of immunity exists.

Immunity of heads of states in traditional international law: Immunity of head of state until the early 20 century prevented states from sentence international wrongdoers, they enjoy full immunity and therefore they had no responsibility about their acts, violating the international human rights.¹⁴ From historical point of view heads of states, like the states, enjoy immunity; whether in general activities or private ones, therefore in many of cases there is no distinction between immunity of states and its heads. This immunity in ancient era had just a customary framework and there was no codified structure for immunity.¹⁵ Pedretti and Italian lawyer believes that the existence of this immunity is just because of sovereignty equality and knows it dedicatedly to heads of states.¹⁶

Traditional basis of diplomatic immunity: A principle diplomatic immunity relies on, is according to an ancient principle rooted in Rome law and it is: equals cannot rule over each other. According to the principle, because states have equal sovereignties, cannot rule over representatives from other states and force their rules over them.¹⁷ But about the legal basis of these immunities there are various ideas from different legal schools. These ideas are reciprocity, cross-border and the necessity of service which except the last one others considered in ancient era.

¹⁰ Trooboff, P. D. (1987). *Foreign State Immunity: Emerging Consensus on Principle*. Boston: Martinus Nijhoff Publishers.

¹¹ Frey, L., & Frey, M. (1999). *The History of Diplomatic Immunity*: Ohio State University Press.

¹² Ahluwalia, K. (2012). *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations*: Springer Netherlands.

¹³ Langholtz, H. J., & Stout, C. E. (2004). *The Psychology of Diplomacy*: Praeger.

¹⁴ Javad, K. F. (2009). Evolution in Concept of heads of States Immunity in Criminal International Law. *Foreign Policy*, 4(23), 1137-1164.

¹⁵ Abdollahi, M. (2005). *Criminal Immunity of State in Internationall Law* (2 ed.): Deputy of Reseach and Codification of Rules of Presidency.

¹⁶ Pedretti, R. (2014). *Immunity of Heads of State and State Officials for International Crimes*: Brill.

¹⁷ Zoleyn, P. (2014). *Diplomatic Law* (5 ed.). Tehran: Ministry of Foreign Affairs.

Among lawyers Grotius supports cross border theory, he knows it as except to the principle of being under sovereignty of a country which a person residing in it. The theory of reciprocity was a customary contract among countries in their relations.¹⁸ The idea of representativeness had been observed from the time of sending ambassadors and envoys by kings, Montesquieu believes that ambassadors are speakers of kings and their speech must be free.¹⁹ Eventually it can be inferred that all of the theories in field of diplomatic immunity had a customary form at first and considered by sovereignties and then it has been codified and extracted by lawyers.

Relation of fundamental concepts of international law to immunity: There were some fundamental concepts in international law which affect the other notions and also there were being affected by others. Many of these concepts were existed customary rules or had been observed by will of king and the sovereignty. The codification of rules and principles did not exist in the era. Following the situation of some main factors such as sovereignty, human rights, individuals and war law will be surveyed.

Sovereignty in traditional international law: The concept of sovereignty in time of creation has a political essence, later it transformed to a legal notion. The legal interpretation from sovereignty in passage of time changed. With a deeper survey the procedures of these changes in relation with formation of state-country is obvious.²⁰ By referring to writings remained from ancients it can be conceived that they call the sovereignty as the supreme power of state.²¹

Of course many are doubtful about the existence of the concept of sovereignty before 15th and 16th century. As Vincent told: in the Greek and Middle Ages thoughts there were not sovereignty. Although many of the features of sovereignty in various eras have been discussed and later filled in the sovereignty concept.²² It can be said that the concept of sovereignty is an abstract concept. Before the renaissance era there was no concept like the existing concept of sovereignty and even state. If we define sovereignty as the supreme reference of law making, the concept exists from long time ago, from the time of existence of political societies and it was used.²³

According to Platonic philosophy some evidences can be found which proof the idea. The false republic of Plato is a symbol of a society based on pluralism and suppress of individual freedoms and according to mere relation of ruling and being ruled. Plato believed that the ruler or philosopher has relation with the upper world and rule the people of earth and may be a king pave the way of reaching upper world.²⁴ Eventually in the ancient law there exists a kind of insight about sovereignty that if it can be analyzed, two dimensions from it shall be seen, firstly 'independence' and secondly

¹⁸ Sadr, J. (1995). *Diplomatic and Consulate Law* (3 ed.). Tehran: Tehran University.

¹⁹ de Secondat baron de Montesquieu, C., Cohler, A. M., Miller, B. C., & Stone, H. S. (1989). *Montesquieu: The Spirit of the Laws*: Cambridge University Press.

²⁰ Ghazi, A. (1994). *Constitutional law and Political Foundations*. Tehran: Tehran University.

²¹ Karami, J. (1996). *UN Security Council and Humanitarian Intervention*. Tehran: Ministry of Foreign Affairs.

²² Vincent, A. (1991). *Theories of the State*: Wiley.

²³ Sovereignty Intervention and a seen away. (2015). from <http://www.siiionline.org/article/rodolfo.pdf>

²⁴ Changing definition of sovereignty ,From

http://www.unc.edu/depts/diplomat/archives_roll/2001_1012/marks_sovereign/marks_sovereign.htm

‘exclusiveness’; Independence against foreign forces and states and exclusiveness of power in relation with interior groups and individuals.²⁵ the mentioned matters shows that in the ancient era sovereignty exist in its thickest shape and countries like isolated islands just do their own affairs and people of their own and other countries did not allowed to interfere in them. The absolute sovereignty led to absolute immunity of states. Schooner Exchange and Mc Faden case had been terminated by this excuse in the USA.²⁶

As it was told in past all of countries and states emanated in the king and the only way for trial of king was to overthrow him in war. The issue rooted in the definition and place of sovereignty in traditional international law. In fact existence of sovereignty was the necessity for immunity. Some lawyers such as Krowicz and Brohmer asserted on the principle and their researches entangled closely with sovereignty and immunity.²⁷ In fact it can be inferred that sovereignty and immunity have direct relation and they have a great impact on each other, in other words the absolute sovereignty leads to absolute immunity. As we know in the said era, there was no notable importance given to the natural science and just internal perception was considered. Of course the idea had great impact on political thoughts and ruling political regimes. While the ruler believes on such a thing and bases its principles and rules on this idea, it is obvious that ruling will be in its harsh and inflexible form. Therefore human in shadow of such an arbitrary regime, would be the mere victim of power and sovereignty of state, a situation exists in renaissance era.

Individual and human rights in ancient era: According to 19th century doctrine, international law was a regime that only considers relationship of states. Of course all of the rules are grew to arrange human behaves, but according to this doctrine, individual regarding direct rights or responsibilities had no place and in a place international law create a right to a person, this person could enjoy the right while his state raise it in international domain. Individual in traditional international law was not the subject of law; therefore his law was powerful enough to affect the immunity of states and individuals.²⁸ Of course human rights has an old history, the Cyrus Cylinder is one the symbols of human rights.²⁹ Observance of such law was just in form of sovereignty and observance or non-observance of it just related to king himself. Parlett in his researches concluded the same idea and sees the role of individual before the 20th century minor.³⁰ In fact equality and importance of sovereignties and the king himself excused immunity, not the rights of individuals in international society.

The Law of War: Attempts to define and regulate the conduct of individuals, nations, and other agents in war and to mitigate the worst effects of war have a long history. The earliest known instances are found in the Mahabharata and the torah.³¹

²⁵ Ghazi, A. (1994). *Constitutional law and Political Foundations*. Tehran: Tehran University.

²⁶ Bröhmer, J. (1997). *State Immunity and the Violation of Human Rights*: Springer Netherlands.

²⁷ Bröhmer, J. (1997). *State Immunity and the Violation of Human Rights*: Springer Netherlands.

²⁸ Mohammad Reza, Z. B. (2014). *Public International Law*. Tehran: Ganje Danesh.

²⁹ Farzin, R. (2006). *Seven Faces of Iran*. Abyaneh: Green Circle Publication.

³⁰ Parlett, K. (2011). *The Individual in the International Legal System: Continuity and Change in International Law*: Cambridge University Press.

³¹ Barton, J. (1996). *Reading the Old Testament: Method in Biblical Study*: Westminster John Knox Press.

In the Indian subcontinent, the Mahabharata describes a discussion between ruling brothers concerning what constitutes acceptable behavior on a battlefield: One should not attack chariots with cavalry; chariot warriors should attack chariots. One should not assail someone in distress, neither to scare him nor to defeat him ... War should be waged for the sake of conquest; one should not be enraged toward an enemy who is not trying to kill him.

An example from the Deuteronomy 20:19–20 limits the amount of acceptable collateral and environmental damage: When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy the trees thereof by forcing an axe against them: for thou mayest eat of them, and thou shalt not cut them down (for the tree of the field is man's life) to employ them in the siege: Only the trees which thou knowest that they be not trees for meat, thou shalt destroy and cut them down; and thou shalt build bulwarks against the city that maketh war with thee, until it be subdued.³²

Also, Deuteronomy 20:10–12, requires the Israelites to make an offer of peace to the opposing party before laying siege to their city. When you march up to attack a city, make its people an offer of peace. If they accept and open their gates, all the people in it shall be subject to forced labor and shall work for you. If they refuse to make peace and they engage you in battle, lay siege to that city.³³ Similarly, Deuteronomy 21:10–14 requires that female captives who were forced to marry the victors of a war could not be sold as slaves.³⁴

Furthermore, Sura Al-Baqara 2:190-193 of the Koran requires that in combat Muslims are only allowed to strike back in self-defence against those who strike against them, but, on the other hand, once the enemies cease to attack, Muslims are then commanded to stop attacking.

During two world wars, in fact it observed that the civil people of enemy had been attacked. On the era, contrary to traditional understandings expressed by classic elites, war was not an act only for sovereignties, but directly affect people from among them was keeping in concentration camp. Unfortunately in past peace treaties asserted on such acts, may be it can be told that for the first time in 1874 Brussels Treaty, the segregation of civil and armed people has been defined. Delupis in his book noted the ignorance to individuals and only recognize states as subjects of international law.³⁵ Another lawyer, Solis believes that some nowadays principles of war law existed in past such as prisoners exchange and good behavior but by the own will of dominant sovereignty not the exact rules.³⁶

Criminal courts: For the first time Gustave Moynier suggested a criminal international court. He in a report published in 1872 to the international committee of helping wounded people in war, proposed a court consisting of 5 elements (two elements from the countries at war, and three elements from states impartial) their task is to inspect the violations of 1864 Geneva treaty. The suggestion did not concluded and Moynier in Cambridge institute of international law in 1895 again

³² Authors, V., & Engelbrite, M. P. (2016). *American King James Version: Holy Bible - AKJV 1999*.

³³ *NIV, Books of the Bible, eBook*. (2012). Zondervan.

³⁴ Authors, V., & Engelbrite, M. P. (2016). *American King James Version: Holy Bible - AKJV 1999*.

³⁵ Delupis, I. D. (2000). *The Law of War*: Cambridge University Press.

³⁶ Solis, G. D. (2010). *The Law of Armed Conflict: International Humanitarian Law in War*: Cambridge University Press.

proposed his offer. In each two cases, the suggestion rejected and the reason was that the suggestion ignored the competence of internal courts.

After world war 1st Treaty of Versailles tried to trial the emperor of Germany Wilhelm 2nd along with 21 thousand suspects to war crimes, but the court did not held, because Wilhelm took asylum of Netherlands and his retraction had not happened. In the same era, another treaty suggested the investigation to crimes of Turkey in a criminal international court, but the court did not held and criminals remained unpunished.

Also it must be mentioned that in the traditional domain of international law two courts paved the way of criminal courts in international society, although the courts have been held by victors of war. The first one is Nuremberg court and the other was Tokyo court.

The Nuremberg trials were a series of military tribunals, held by the Allied forces after World War II, which were most notable for the prosecution of prominent members of the political, military, and economic leadership of Nazi Germany who planned, carried out, or otherwise participated in The Holocaust and other war crimes. The trials were held in the city of Nuremberg, Germany. The first and best known of these trials, described as "the greatest trial in history" by Norman Birkett, one of the British judges who presided over it, was the trial of the major war criminals before the International Military Tribunal (IMT). Held between 20 November 1945 and 1 October 1946, the Tribunal was given the task of trying 23 of the most important political and military leaders of the Third Reich.³⁷

On January 19, 1946, MacArthur issued a special proclamation ordering the establishment of an International Military Tribunal for the Far East (IMTFE). On the same day, he also approved the Charter of the International Military Tribunal for the Far East (CIMTFE), which prescribed how it was to be formed, the crimes that it was to consider, and how the tribunal was to function. The charter generally followed the model set by the Nuremberg Trials. On April 25, in accordance with the provisions of Article 7 of the CIMTFE, the original Rules of Procedure of the International Military Tribunal for the Far East with amendments were promulgated.³⁸

Conclusion: By considering some concepts such as sovereignty, human rights and war law along with investigating the existing situation in ancient era, reveals that the immunity of heads of states in the then era was in absolute form, because they have the situation equal to law and sometimes sacred place, on the other hand nonexistence of legal concepts such as human rights, humanitarian law and existence of unilateralism led to negligent to individual in international law. The absolute immunity led to the fact that the heads of states cannot be punished even if their violation be tremendous. It must be mentioned that the immunity had some benefits, for instance: in ancient era while a war occurred between two tribes, the envoy of one side while going to the other side for peace talks, had immunity and if he did not have it, peace could not reached any time. These immunities during centuries accepted and developed in different forms by countries and it was observed until the near future according to custom or international gentleness.

³⁷ Marrus, M. R. (1997). INTERNATIONAL LAW: The Nuremberg Trial: Fifty Years After. *The American Scholar*, 66(4), 563-570. Retrieved from <http://www.jstor.org/stable/41212687>

³⁸ Bix, H. P. (2009). *Hirohito And The Making Of Modern Japan*: HarperCollins.

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