



The criminal responsibility of presidents and leaders in light of the Statute of the Permanent International Criminal Court - the case of Burma as an example

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Abstract:

Contemporary international law recognizes the principle of the individual's criminal responsibility for committing international crimes and considers it among its general principles. This applies to crimes committed by an individual in his personal capacity or those committed by him in his capacity as an official official in that country. It constitutes the responsibility of heads of state and leaders for crimes that are within their jurisdiction. The International Criminal Court receives international attention due to its negative effects that may affect international peace and security. Therefore, the principle of individual criminal responsibility is addressed by extrapolating the texts of the Statute of the Criminal Court while applying that to the perpetrators of genocide crimes against the Rohingya Muslims.

Keywords: international law, individual criminal responsibility, international crimes, heads of state, International Criminal Court, genocide, Rohingya Muslims.

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1. INTRODUCTION

The scourges of wars witnessed by the international community have left tragedies, victims, and deterioration at all levels. There has become an urgent need among the members of the international community, in the necessity of stopping the suffering that has been inflicted on peoples, and by achieving international criminal justice by prosecuting the perpetrators of these serious crimes. An effort was made and an effort was made. In order to establish an international criminal judiciary to carry out the task of holding the perpetrators of these crimes accountable, the issue of establishing individual criminal responsibility before the international criminal judiciary was the first step in this field, especially after World War II, when the Allied victory led to the rapid conclusion of agreements between the

Allied countries, and then the formation of Two military tribunals, Nuremburg and Tokyo, and from that time the idea of prosecuting perpetrators of crimes that constitute a danger to humanity began to take shape. These efforts culminated in the

formation of two international tribunals in Yugoslavia and Rwanda, but the world culminated in a permanent international criminal judicial body with the establishment of the International Criminal Court. This is considered an effective step toward achieving criminal justice and tracking down the perpetrators of crimes, by devoting and including in the texts of the court's statute the principle of individual criminal responsibility, establishing its rules, and confronting many of the obstacles that may undermine its role in pursuing leaders and heads of state, the most important of



which is the obstacle of immunity so that The principle of immunity being disregarded has been stipulated as one of the obstacles to the arrangement of criminal responsibility, and this study comes to shed light on the responsibility of leaders and presidents in light of the Statute of the International Criminal Court, while applying this to the issue of the Rohingya, which is considered one of the worst tragedies experienced by Muslims in this era, as it The international community has ignored their suffering for decades, and the International Criminal Court has failed to prosecute the leaders of the Myanmar army, even though all the actions they commit against Rohingya Muslims fall within the jurisdiction of the court, and thus the following problem arises:

To what extent are the rules of criminal responsibility for individuals considered, through the provisions of the Statute of the International Criminal Court, sufficient to prosecute leaders and presidents and combat the phenomenon of impunity?

2. The First Topic: Enshrining The Principle Of Individual Criminal Responsibility In The Rome Statute

One of the most important principles that crystallized from the Nuremberg and Tokyo trials is the principle of criminal responsibility for individuals who commit international crimes and violate the rules of international law. The United Nations worked to codify all the rules related to international criminal law. The permanent International Criminal Court, after great efforts by the international community, established the principle of imposing criminal responsibility. For natural persons [1].

Therefore, through this study, the objective and personal jurisdiction of the court will be determined by clarifying the actions that lead to the responsibility of leaders and presidents, while applying that to the crimes of genocide and ethnic cleansing committed by the leaders of Myanmar, and then clarifying the personal responsibility of leaders and presidents and the forms of that responsibility. This is in light of the provisions of the Statute of the International Criminal Court.

The first requirement: The jurisdiction of the International Criminal Court to try those responsible for committing the crime of genocide and ethnic cleansing against the Rohingya

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The Statute of the International Criminal Court addresses the substantive jurisdiction and personal jurisdiction of the Court, and its texts confirm that the Court is competent to try persons who commit the most serious crimes, and these crimes are exclusively defined through Article 5 of the Statute of the International Criminal Court [2].

Therefore, this requirement will be divided into two sections to determine the jurisdiction of the International Criminal Court, as well as to approach the acts committed against the Rohingya with the provisions of the Statute of the Criminal Court.

Section One: The substantive jurisdiction of the Permanent International Criminal Court

The Criminal Court is competent to try and punish perpetrators of international crimes identified in Article 5, Paragraph 1, of the Statute of the International Criminal Court, which stipulates: "The jurisdiction of the Court is limited to the most serious crimes of international concern as a whole, and the Court, in accordance with the Statute, may consider the crimes following the

crime of genocide, Crimes against humanity, war crimes, crimes of aggression [3].

In this section, we focus on the crime of genocide as the subject of this study on the basis that what is committed by the leaders of Myanmar against the Rohingya Muslim minority, how is it considered a crime of genocide, in addition to an attempt to draw an approach between the issue of ethnic cleansing and genocide, and on what basis is responsibility established? Myanmar leaders.

First: the crime of genocide

Genocide is a serious international crime that was criminalized under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which was unanimously agreed upon by all member states of the United Nations General Assembly on December 9, 1945. It was stated in the preamble of the convention that the crime of genocide is considered an international crime[4].

1- Definition of the crime of genocide according to the Rome Statute

The Statute of the International Criminal Court defines genocide of a specific species in its Article VI as any act committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such[5].

This crime cannot be described as a crime unless it fulfills a number of elements.

2- Elements of the crime of genocide

The elements of genocide consist of the material element, the moral element, and the international element.

The material element is the external activity or behavior that is punishable by law and its perpetrators are held accountable. The acts that constitute the criminal behavior of this crime are diverse, and they are all the acts stipulated in

Article 6 of the Statute of the International Criminal Court[6].

These acts, according to Article VI of the Statute of the International Criminal Court, are as follows:

- Killing members of the group.
- Causing serious physical or mental harm to members of the group.
- Intentionally subjecting the group to living conditions intended to bring about its complete or partial destruction.
- Imposing measures aimed at preventing births within the group.
- Forcibly transferring the children of the group to another group[7].

If we try to match these actions mentioned in the text of Article 6 to what the Buddhists and leaders of the Myanmar army are committing against the Rohingya, we find that the material element has been met and therefore their actions are consistent with Article 6 of the Basic Law.

As for the moral element of the crime of genocide, we find the image of criminal intent, which consists of two elements: knowledge and will, with the presence of the perpetrator's own criminal intent, which is extermination. As for the international element of the crime, it has an international character, as it occurred based on a plan prepared by the state against a specific group [8].

From the above, if we apply these pillars to what is happening in Burma against the Rohingya Muslim minority, we find that they are consistent with the actions committed by the leaders of the Myanmar army, in addition to the systematic plan by the state against the Rohingya group to exterminate them, so that the international pillar is available, as well as the availability of knowledge and the will that The moral element and the presence of intent to exterminate are formed by

the perpetrators, and therefore what is happening against the Rohingya can be classified as a crime of genocide in accordance with the provisions of the Statute of the International Criminal Court.

Second: The crime of ethnic cleansing

The concept of racial or ethnic cleansing in the modern era has been linked to the civil war that the former Yugoslavia witnessed and the gross violations, genocide, and massacres it witnessed, the greatest victims of which were the Muslims of Kosovo, as there is no specific crime in international law called ethnic cleansing, but this term has prevailed over the years. It was widespread and continued thanks to the active international human rights mobilization that emerged as a result of the war massacres against the Muslims of Bosnia and Herzegovina and the forced deportations to which they were subjected. It became clear that its goal was to make entire areas of Serbia and Croatia free of Muslims. The concept of ethnic cleansing is closely linked to the concept of A crime against humanity and genocide, which is a connection in the sense that both the war against humanity and genocide constitute the most important tools for ethnic cleansing, which is originally attributed to the use of force, that is, all the acts mentioned in Articles 6 and 7 of the Statute of the Court [9].

It is difficult to imagine ethnic cleansing occurring without committing acts that constitute crimes against humanity and genocide, so international law often adapts ethnic cleansing to become crimes against humanity and genocide.

Section Two: The personal jurisdiction of the International Criminal Court

The court's personal jurisdiction is stipulated in Articles 25, 26, 27, and 28, where personal jurisdiction means the jurisdiction of the International Criminal Court to try natural persons only. Legal or voluntary persons from countries, organizations, or bodies that have voluntary personality are not brought before it [10].

The Statute of the International Criminal Court has settled the issue of the Court's jurisdiction and international criminal responsibility, whether it is established for states or only for natural persons, which is what was stipulated in Article 25 of the Rome Statute, which stipulates that "the Court shall have jurisdiction over natural persons in accordance with this Statute[11]

Therefore, the theory of criminal liability of states or international organizations was excluded in this system, so that civil liability was devoted to legal persons only.[12]

Accordingly, the jurisdiction of the International Criminal Court was limited to natural persons who commit or contribute in any way to the commission of one of the crimes that fall within the jurisdiction of the Court, i.e. it adopted the principle of individual criminal responsibility, and its jurisdiction did not extend to legal persons. Therefore, the person who commits one of the crimes stipulated He is responsible for it in his individual capacity and is subject to punishment. Therefore, individual criminal responsibility does not affect the responsibility of states under international law.[13]

The second requirement: The personal responsibility of the leaders and presidents of Myanmar in accordance with the Rome Statute

Despite all the challenges that occurred during the establishment of the International Criminal Court and the preparation of its statute, the

drafters of this statute agreed on the necessity of placing international criminal responsibility on individuals, and they agreed on the necessity of applying this responsibility on an equal footing, without distinction between a superior or a subordinate, a commander, or a soldier, whether they were directly involved or indirectly as contributors to it [14]

Therefore, this requirement will address the foundations of criminal liability and the forms of this liability.

The first section: The foundations for establishing individual criminal responsibility for leaders and superiors

Before the individual was determined to be criminally responsible under contemporary international law, several opinions and trends emerged between opponents and supporters of this responsibility. Despite the meeting held between jurists that the individual is of special interest to international law, we find that there is a clear difference of opinion regarding this issue. Reasons have also been determined for assigning responsibility to the individual if those reasons are available[15]

First: Jurisprudential opinions regarding determining the international criminal responsibility of an individual

The individual is considered a primary actor in the conflict in that he is considered a party to it in terms of his connection and loyalty to the state. Therefore, jurisprudence has divided into several directions, including the traditional school that adopted the direction that criminal responsibility is based on a personal basis. This means that the human being alone has the choice to He takes one

of two paths, either the path of good or the path of evil.[16]

In addition to the supporters of the positivist school, its position was contrary to what was brought by the traditional school, as it established responsibility on the basis of social responsibility, depending on the degree of seriousness of the act and its consequences without regard to the will of the actor [17]

You also find that the position of contemporary criminal legislation leans towards the traditional theory and works according to it.

Second: Reasons for imposing criminal responsibility on leaders and presidents

They are the reasons that prevent the perpetrator from assuming responsibility. They are also called impediments to criminal responsibility. They are defined as the reasons that prevent the perpetrator's responsibility in a way that responds to the lack of awareness and freedom[18].They are addressed through the text of Article 31 of the Statute of the International Criminal Court, which stipulates the following: "In addition to the other reasons for avoiding criminal responsibility stipulated in this statute, the person is not asked if, at the time of committing the crime, he was suffering from a mental disability, a state of intoxication, or a state of intoxication. Legitimate defense..... Coercion..... Compliance with the orders of superiors who must be obeyed[19].

Section Two: Forms of criminal liability for presidents and leaders

The international criminal responsibility of presidents and leaders is established in accordance with the Rome Statute when they commit one of the crimes stipulated in Article 5 of the Rome Statute, that is, those crimes that fall within the substantive jurisdiction of the International Criminal Court. If we extrapolate the texts of the Statute, we notice that the framers of the statute have specified forms The individual responsibility of leaders and superiors comes in two forms: direct or indirect responsibility[20]

First: The direct criminal responsibility of presidents and commanders

The establishment of direct responsibility against commanders and chiefs in accordance with what is included in the Statute of the International Criminal Court requires that the chief or commander conduct and practice himself one of the criminal acts referred to in Article Five of the Statute of the International Criminal Court, and thus play a fundamental role in issuing written or oral orders. Directly or seeking the assistance of another person and participating with him in incitement.[21]

Therefore, through the provisions of the statute, the responsibility of leaders and direct superiors can be drawn within the framework of three cases:

- Either the president or the leader alone committed the international crime, which is what is stipulated in Article 25 of the Basic Law: "According to this law, the person is criminally liable and liable to be punished for any crime within the jurisdiction of the court if this person does the following: commits this crime whether in his capacity Individuality".....[22]

- The second case is the criminal contribution of presidents and leaders in committing the international crime, whether it was an original contribution, which is what is stipulated in Article 25, paragraph 3/a: "According to this statute, a person is criminally responsible and liable to punishment for any crime that falls within the jurisdiction of the court in the event of The person commits the crime, whether individually or jointly with another person [23].
- Or by issuing orders to commit these crimes, in accordance with the text of Article 25/3/B of the Statute of the International Criminal Court, which says: "...ordering or enticing to commit or urging the commission of a crime that has already occurred or has been attempted [24]

Direct responsibility also ensue against direct superiors and commanders in the event of incitement to commit those acts that fall within the jurisdiction of the court, in accordance with the text of Article 25/3/C, which stipulates ".....providing aid, incitement, or assistance in any other way." For the purpose of facilitating the commission of this crime or the attempt to commit it, including providing the means to commit it [25].

Second: Indirect criminal liability of presidents and leaders

Often times, presidents and leaders do not commit criminal acts that constitute international crimes and fall within the jurisdiction of the International Criminal Court, whether by directly committing the acts or issuing orders or inciting

them to do so, but that does not negate their responsibility, as they incur indirect liability [26].

Through the texts of the Statute of the International Criminal Court, you find that it has addressed this type of responsibility so that there is no reason for presidents and leaders to escape punishment.

We find Article 28/1: "The military commander or the person actually acting as the military commander shall be criminally responsible for crimes within the jurisdiction of the court and committed by forces subject to his effective command and control... if he knew or assumed that He knows...if that military commander does not take all necessary measures"[27].

3. The Second Topic: The Difficulties Faced In Arranging The Criminal Responsibility Of Leaders And Presidents

The individual has come to occupy an important position in international law, and what reflects this importance is that he is held accountable for international criminal responsibility if he commits acts that constitute international crimes in accordance with what is stipulated in the Statute of the International Criminal Court [28].

The Rome Statute is considered a legal system whose goal is to achieve justice and prevent the criminal from escaping punishment, regardless of his description. However, in this system there are a number of legal and political obstacles that have become an obstacle to arranging the criminal responsibility of leaders and presidents, especially if we apply this to the Rohingya issue. The necessity of arranging criminal responsibility for the leaders of the Myanmar army for crimes committed against the Rohingya minority.[29]

Therefore, this research will be divided into two sections:

The first requirement: legal obstacles

It is possible to extrapolate from the texts of the Statute of the International Criminal Court two types of legal obstacles that could constitute an obstacle to arranging the international criminal responsibility of leaders and presidents, as they are:

Section one: Supplementary Jurisdiction of the International Criminal Court

It is concluded from the provisions of the Rome Statute that the purpose of activating the role of the International Criminal Court is to be the last resort after the failure of national courts to achieve criminal justice in the case of serious crimes, and therefore the principle that governs the work of the Court is the principle of complementarity, which means that the jurisdiction of the Court is a reserve appellate jurisdiction complementary to the jurisdiction of the national judiciary of states and not a substitute for it, in the sense that the national judiciary is competent in accordance with the principle of sovereignty and therefore competent to consider crimes that is located in the territory of the State [30].

Recourse to international criminal justice is possible only if the State is unable or unwilling to do so in accordance with article 17 of the Statute of the International Criminal Court, which states "..... The court decides that the claim is inadmissible in a case in accordance with the following:

- A. If the investigation or prosecution of the case is conducted by a State having jurisdiction over it unless such State is unwilling or unable to undertake the investigation or prosecution.
- B. If the case has been investigated by a State over which it has jurisdiction,

the State has decided not to prosecute the person concerned, unless the decision results from the State's genuine unwillingness or inability to prosecute[31].

Therefore, international criminal responsibility does not entail leaders and presidents, no matter how terrible they commit, and therefore the state may collude with those who committed these crimes and conduct mock trials aimed at silencing the international community and not holding the perpetrator accountable, and this may happen with the Burmese government so that it clearly shows its complicity with those who committed these crimes and try to cover them up through investigations that are useless except to silence the international community. and human rights organizations.

Section Two: Role of the Security Council in Referring Cases to the International Criminal Court

The role of the Security Council in referring to the International Criminal Court is highlighted by the text of Article 13 of the Statute, which stipulates that:

The Court may exercise its jurisdiction in respect of a crime referred to in Article 5 in accordance with the provisions of this Statute in the following cases:

- If the Security Council refers a situation to the Prosecutor acting under Chapter VII of the Charter of the United Nations in which one or more of these crimes appear to have been committed.".....[32]

Indeed, the granting of this power to the Security Council is justified on the basis of its

primary responsibility for the maintenance of international peace and security under the Charter of the United Nations .[33]

In addition, the granting by the Security Council of the power to prosecute before the Court is a kind of preservation of the Court's prestige, because it has the power to establish special courts and its compulsion to establish special international criminal tribunals weakens and destabilizes the Court's standing.[34]

If we apply this to the Rohingya issue, we find that the Security Council failed to refer this issue to the Criminal Court and to hold the military leaders of the Myanmar army accountable because the political nature of the role of the Security Council in this matter has already emerged, and also the most important obstacle it faces is the right of veto, as China uses its veto power to thwart the referral of the perpetrators of genocide and ethnic cleansing against the Rohingya minority to the International Criminal Court because China protects the Myanmar state and government.

Second Requirement: Political Obstacles

There are a range of obstacles facing the Court outside its basic scope and legal texts, which are governed by international circumstances and interests, as well as international relations, the most important of which is the principle of national sovereignty, as well as the Court's failure to protect some communities because they are Muslims, for example, which is the case with the case of the Rohingya minority, despite the consensus of all the international community and human rights organizations that what is happening in Myanmar is a crime of genocide and ethnic cleansing, but the Court did not Any effective measures other than opening only a preliminary investigation to investigate some of the military commanders of

the Myanmar army into the displacement of the Rohingya minority.

Section one: The principle of sovereignty is a barrier to the arrangement of criminal responsibility of individuals

Although the principle of individual criminal responsibility of leaders and presidents was established in the system of international law, it was a radical transformation of this system from its inclusion in the Nuremberg judiciary until its enshrinement in the system of the International Criminal Court[35].

However, the principle of ordering the criminal responsibility of leaders and superiors often collides with an important principle of international law: sovereignty.

The principle of sovereignty as a political and legal concept has played a fundamental role in regulating relations between States and continues to do so despite all the changes in the international community [36].

This principle is evident in that it is the foundation and cornerstone on which international relations are based through the United Nations Charter, so that it has been made one of the foundations that govern international relations.

It is observed from all the international conflicts that have occurred and resulted in many international crimes, that those accused of these crimes escape punishment, and this is due to the invocation of the principle of national sovereignty, and that holding presidents and leaders accountable is considered interference in the internal affairs of states, and therefore sovereignty is considered one of the Obstacles that stand in the way of any international deterrence mechanism by obstructing the arrangement of responsibility for

perpetrators of crimes that constitute crimes dangerous to humanity.

The best evidence of this is what is happening in Myanmar, where the Burmese government rejected a United Nations investigation into the issue of the Rohingya minority being subjected to violations. The Myanmar government considered this an interference in internal affairs and thus a violation of the principle of national sovereignty. Myanmar government spokesman ZawHtay responded: "We do not allow an investigation mission." The facts of the United Nations entry into Myanmar are that we do not agree or accept any decisions taken by the Human Rights Council. The official spokesman added that Burma had formed an independent investigation committee, which he said would respond to what he considered to be false allegations made by United Nations agencies and other international bodies[37].

Section two: The Court's Reluctance to Pursue a Range of Presidents and Leaders

Despite the seriousness of the violations that occur in the world and the crimes that are supposed to fall within the jurisdiction of the International Criminal Court, the Criminal Court has been unable to follow up many leaders and presidents who committed acts that have raised the concern of the international community, and there has become a state of impunity for those responsible for those crimes. International criminal responsibility of leaders and officials and then refer them to international justice.

The internal crisis in the Arkan region, where the Muslim minority lives, is called the Rohingya, where the most heinous crimes have been committed against the Muslim minority at the clear instigation of officials to do so, where the

Myanmar presidents and leaders rely on radical changes in the demographics of Muslim areas by establishing homes for Buddhists as well as exerting pressure on the Rohingya regarding marriage, where the government's approval is required to marry and pay a huge amount of money, and the number of children has also been determined. They are supposed to have children of no more than two for the purpose of ethnic cleansing of the Muslim minority[38].

However, if we return to the statute of the International Criminal Court, we find that the actions committed against the Rohingya minority constitute crimes of genocide and crimes against humanity. However, the court did not react to the facts and did not move to hold the leaders in Myanmar responsible for those actions. It did not move. Except in a decent manner after the persecution of the Muslim minority increased, as the Prosecutor of the International Criminal Court, Fatou Bensouda, announced the start of examining the charges brought against the Myanmar authorities regarding the forced displacement of the Rohingya Muslim minority, after the worsening of the crisis since August 2017 [39].

4. CONCLUSION

The development of the idea of applying criminal punishment to individuals is a turning point in the emergence of international criminal responsibility. The emergence of the trend that calls for the internationalization of personal responsibility in some serious crimes reflects the failure of the majority of countries to punish the perpetrators of these crimes. This important development in international criminal justice aims to end immunity for such crimes. These crimes, and this means that when a country or one of its people violates human rights and commits crimes that humanity rejects,

there must be responsibility and judicial prosecution for the perpetrators of the criminal acts. Given the importance of the principle of criminal responsibility of individuals at the international level, it has been enshrined in The Statute of the International Criminal Court. We conclude through this study:

- The vision was clarified through the texts of the Rome Statute by specifying the rules governing the criminal liability of the individual, which made the Rome Statute avoid all the problems that occurred in previous judicial systems.
- Devoting the criminal responsibility of the individual internationally to reduce the phenomenon of impunity, because the experiences of the years have proven the spread of this phenomenon.
- It has become clear from this study and its application to the issue of the persecution of the Rohingya that there is a failure on the part of the international community to fulfill its responsibilities to pursue the perpetrators of genocide crimes, especially the military commanders of the Myanmar army, as this is considered a form of threat to international peace and security, and of course that For many considerations, the most important of which is political interests.

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