

# ***Reasonableness of ICC Judgment of the Bashir Case from the International Status, Clause Conflicts and Scope of Application***

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**Abstract:** This article addresses the International Criminal Court ruling in the Bashir case from the perspectives of the International Criminal Court's position following the United Nations Security Council's referral of the case, and the conflict between Articles 27 and 98, which in the Rome Statute, and the rationale of Article 27's scope of applicability. The immunity *ratione personae* can be divided into two parts: Rome Statute and customary international law, which are the principal sources. Sudan is not the contracting party of the Rome Statute, and the Rome Statute only applies to signatories. This essay first contends that the position of the International Criminal Court in the Bashir case has not altered toward a vertical connection after the United Nations Security Council transferred the case. Second, the field of applicability of Article 98 should be broadened, and Article 27's effective time should not be restricted to the appeals phase. Third, the International Criminal Court cannot demonstrate that there is an existing case in which the immunity of in-service leaders of state has been revoked in international customary law. In the end, this article contends that the International Criminal Court's ruling of the Bashir case is irrational and insufficiently supported by the facts. Sudan is a third country to the Rome Statute, had its rights violated by the International Criminal Court's explanation of Article 27.

**Keywords:** bashir case, immunity *ratione personae*, waiver of immunity

## **1. Introduction**

Bashir enjoyed immunity *ratione personae*, the right to be blocked from appeal, during his tenure, a protection based on respect for Sudan as a sovereign state.

International treaties and customary law are the principal sources of immunity *ratione personae* law, and treaties often make reference to the Rome Statute. However, it theoretically only applies to States parties, and Sudan is not a part of it. The international standing of International Criminal Court in the Bashir case and the scope of application about Article 27 of the Rome Statute have generated substantial debates in academic circles since the United Nations Security Council delegated the management of the Darfur problem to the International Criminal Court. The validity of the International Criminal Court ruling in the Bashir case has been the subject of numerous domestic and international investigations, but both proponents and opponents of the ruling have strong arguments, and the topic is still up for debate.

The discrepancy between Articles 27 and 98 and the area of applicability of Article 27 will all be discussed in this article as they relate to the position of the International Criminal Court following the United Nations Security Council's referral of the case.

## **2. Legal Framework of Immunity**

### **2.1. Immunity Ratione Materiae and Immunity Ratione Personae**

The laws and rules that shield particular people from legal prosecution are referred to as the "legal framework of immunity". Immunity is a legal concept that protects state sovereignty and encourages respect for national authorities [1]. The immunity can be divided into two different parts. In international criminal law, immunity *ratione materiae* and immunity *ratione personae* are often the two categories.

Some people enjoy immunity because of their official responsibilities, therefore the benefits are only applicable to acts related to the state, although they can continue to exercise their official tasks after leaving office. The right of immunity *ratione materiae* doesn't belong to a specific individual. to enjoy immunity from prosecution for that behavior.

Leaders and diplomats of state frequently be benefited by the immunity *ratione personae*. A head of state or diplomat's ability to carry out their duties successfully in the face of outside interference is protected by immunity [2]. More specifically, immunity allows states to protect their ambassadors and officials from legal action [3].

### **2.2. Immunity Ratione Personae of Customary International Law and Treaties**

International customary law as well as specific provisions in international treaties and conventions, and it is the main determinants of the relevant legal foundation for the immunity in international law. As a result, the immunity framework can be divided into two parts: immunity from international treaties and conventions, which principally refers to the Rome Statute and immunity from the customary international law.

It can first be looked at in the context of international customary law. According to customary law, every head of nations and diplomat is immune *ratione personae*.

Second, the Rome Statute is specifically considered from this perspective. Regardless of a person's position of authority, criminal culpability will apply for crimes for which the International Criminal Court has jurisdiction under Article 27(1) [4].

Immunity may be waived in some special circumstances. Treaties, on the other hand, establish exceptions to immunity. In specific situations, states signatories to the Rome Statute voluntarily surrender their immunity. Therefore, the fact that immunity does not take effect is because the country voluntarily handed over its own immunity, and the key point lies in the link of "voluntary renunciation".

### **2.3. Conflict over Immunity in Bashir Case**

Conflicts and inconsistencies in the Bashir case mostly center on the question of "whether Bashir enjoys immunity *ratione personae*". Bashir is not immune from prosecution, according to different arguments made by the International Criminal Court, which contends that immunity does not apply to leaders of state who are not parties. Researchers who support the International Criminal Court's claim that it has been granted jurisdiction over the Bashir case, which is closely tied to United Nations Security Council Resolution 1593, have come forward. Because the United Nations delegated the International Criminal Court of Justice's Prosecutor to handle the Darfur problem in United Nations Security Council Resolution 1593.

However, a lot of academics think Bashir has protection, because Sudan is non-contracting party of the Rome Statute, has not renounced it. This question now becomes one that relates to the above-mentioned Article 27's scope of application. The discrepancy between Article 27 and Article 98 is apparent. How should Article 98 be taken into account while applying Article 27? Should the Article 27 apply to Sudan, which is not a party to it? This section will be thoroughly covered in this article.

### **3. Discussion on the Strained Relation Between Articles 27 and 98 in the Bashir Case**

#### **3.1. Basic Overview of Articles 27 and 98**

No matter a person's position of authority, criminal responsibility will result for crimes for which the International Criminal Court has jurisdiction, according to Article 27 [4]. Before the International Criminal Court can respond to a request for referral or assistance under Article 98 [5], a third state must first waive its immunity. The arrest must go off without a hitch if the individual scope of these two articles and their interrelationship are understood. However, in the preparation of the Rome Statute, the writers do not seem to have taken into account the consistency between Articles 27 and 98. The two immunity provisions also coexist in an awkward tension. Article 98(1) purports to protect interstate immunity, in contrast to Article 27, which appears to lift all immunity. This ambiguity has caused many interpretations by other persons as well [6].

#### **3.2. Inconsistency Between Articles 27 and 98**

The understanding of Article 98 will directly affect the applicability of Article 27. Since Article 98 is closely related to arrests. According to some academics, Article 98 states that the International Criminal Court will not arrest someone who is entitled to immunity unless their nation surrenders them. Article 27 has nothing to do with the waiver of immunity in this situation. This would limit Article 27 to cases of voluntary surrender by persons enjoying immunity, which are extremely rare and impractical in practical situations. If Articles 27 and 98 are interpreted in this way without considering applicability, the inconsistency between Articles 27 and 98 will be exacerbated, which will seriously affect the applicability of the treaty [6].

The conditions under which Article 27 removes immunity must be clarified further if the conflict between Articles 27 and 98 is to be resolved. The interpretation of the scenario of canceling immunity should not be limited to the appeal stage, but extended to the non-appeal stage, which is in line with the application scenario of Article 98. This is because, from the perspective of maintaining the consistency of the treaty, it should be considered that the country enjoying immunity has voluntarily agreed to or waived its immunity under the restrictions of Article 27. According to this perspective, Articles 27 and 98 continue to be very cohesive, and the central contention in the Bashir case is the question of whether Article 27 pertains to non-parties. The only thing that has to be clarified is how broadly Article 27 is applicable. It is possible to explain the decision's justification in the Bashir case.

In the Bashir case, the International Criminal Court outlined how it interprets the application of Article 27. The International Criminal Court thinks that an arrest warrant's issuance conditions are under its purview of application [7]. Additionally, this view preserves the coherence of Articles 27 and 98.

## **4. Discussion on the Scope of Application of Article 27 in the Bashir Case**

### **4.1. The Difference Between the International Status of International Criminal Court and United Nations Security Council**

The sovereign of state is the basis for the immunity, which the head of state can enjoy, as was already mentioned. Additionally, since there is already a parallel relationship between the two, it is impossible to move forward, since the International Criminal Court is located elsewhere than the United Nations Security Council. While there is a vertical relationship between states in the United Nations Security Council, there isn't one like it at the International Criminal Court right now.

### **4.2. International Criminal Court's International Status after Transfer of Bashir Case**

A query has been raised. Can the International Criminal Court make an immunity *ratione personae* exception? The International Criminal Court was given jurisdiction over the Darfur crisis in United Nations Security Council Resolution in 1593. The condition in Darfur is a part of the armed war in Sudan, which has frequently been characterized as a humanitarian crisis by various persons. The situation in Darfur includes the Bashir case. Previously, some experts thought that under Chapter VII in the United Nations Charter, the United Nations Security Council had the authority to rescind the immunity *ratione personae* of the present head of nations. To preserve global peace and security, this is a vital action. Therefore, becoming a contracting party to the United Nations Charter and agreeing to be limited by its provisions are requirements for lifting immunity. The essential issue, according to this group of experts, is whether the Security Council has repealed the immunity provisions in the United Nations Charter [8]. Since Sudan was once a member state of the United Nations, it should subject to United Nations supervision and uphold the United Nations Charter, according to several researchers who feel that the United Nations Security Council has transferred the authority of the case to the International Criminal Court. Therefore, under this accreditation relationship, the relationship between International Criminal Court and other countries is no longer parallel, but has a vertical relationship.

Resolution in 1593 of the United Nations Security Council, however, also made clear that the International Criminal Court must both confirm that non-contracting parties of the Rome Statute do not undertake the obligations of the Statute and urge all nations, pertinent regional organizations, and other organizations to fully collaborate. Therefore, even if the International Criminal Court was given the Bashir case by the United Nations, the International Criminal Court was still obligated to follow a number of Rome Statute-compliant procedures. Yes, there is an accreditation relationship here, however it solely pertains to the transfer of cases. The International Criminal Court's status has not changed because the United Nations Security Council has not formally given it any authority over and above its parallel contacts with other nations. In conclusion, any justification beyond the purview of the Rome Statute ought to be deemed invalid.

### **4.3. Applicability of Article 27 to Current Heads of State**

Returning to the subject of the scope of Article 27's application is important in order to discuss the Bashir case against the Rome Statute itself. If the scope of Article 27's application can be examined, the international standing of the International Criminal Court can be further explained.

The United Nations Security Council attempted to build a precedent in international customary law for exempting the leader of state from immunity in response to Article 27. The International Criminal Court considers the International Military Tribunals of Nuremburg and the Far East to be precedents about the elimination of immunity *ratione personae* [9]. However, either explicit or implicit approval from the state whose national leaders are being prosecuted is required. The

significance of the sovereign state “voluntarily giving up” the right of immunity when it does not take effect was also discussed in the previous article. The most convincing justification for why international tribunals can try specific state officials and ignore privileges is that they have this consent. However, Sudan did not voluntarily agree to indirect or direct waiver of immunity, which left International Criminal Court with insufficient cogent explanation to discuss.

The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia have both been used as examples by the International Criminal Court to bolster its argument.

However, because they were adopted by the United Nations Security Council under the Chapter 7 of the Charter and as such, bind all United Nations member states, the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia may deviate from customary international law about the immunity [10]. The norms of the tribunals must also take precedence over any other obligations that governments may have under Article 103 of the United Nations Charter [11]. Indirectly, all United Nations members have consented to the lifting of their immunity as a result. Therefore, the voluntary agreement to forgo immunity is also the foundation of these two cases. I talked about how the United Nations and the International Criminal Court had different levels of rights in the last essay. The International Criminal Court does not have a vertical relationship with other nations, although the United Nations Security Council does. Thus, the cases that are directly handled by the United Nations Security Council are fundamentally similar to those that are handled by the International Criminal Court. To compare matters handled by the United Nations Security Council to those of the International Criminal Court is ridiculous.

Therefore, this feature of international law does not really justify the International Criminal Court’s application of Article 27 to non-state parties. Additionally, the case support is irrational.

## 5. Conclusions

This article examines the International Criminal Court ruling in the Bashir case from the perspectives of the International Criminal Court’s position following the United Nations Security Council’s referral of the case, the conflict between Articles 27 and 98, and the rationale of Article 27’s scope of applicability.

This article first contends that the International Criminal Court must adhere to the United Nations Security Council’s directive that it handles the Darfur issue in accordance with the Rome Statute after the United Nations Security Council transfers the case to it, so the International Criminal Court’s international status in the Bashir case has not occurred. tends to cause the vertical connection to shift.

Second, this paper makes the case that, in order to be enforceable, Articles 27 and 98 should be interpreted consistently. In other words, Article 27’s effective time should not be constrained to the appeal period, and as a result, Article 98’s field of applicability is broadened.

Third, because it is impossible to show that the International Criminal Court’s precedent for revoked the immunity of the present head of nation in the Bashir case has a precedence in international customary law, this paper considers that the precedent set by the International Criminal Court is irrational.

In the end, this article contends that the International Criminal Court’s ruling in the Bashir case is irrational and insufficiently supported by the facts. Sudan is non-contracting party to the Rome Statute, and it had rights violated by the International Criminal Court’s interpretation of Article 27.

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