

## The ICC's Appeals Chamber Judgments in the Jordan Case Regarding Al Bashir and Ntaganda Case: Victories for the Fights against Impunity and Immunity for Serious Crimes

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### ***Abstract:***

*The creation of the ICC was a turning point in the fights against impunity for serious international crimes affecting mankind. Accordingly, the ICC does not recognise any form of immunities before its jurisdiction. Consequently, individuals and senior state officials cannot rely on any form of immunities if accused of any of the crimes within the jurisdiction of the Court. In the Jordan case regarding Al Bashir's immunity, the ICC's Appeals Chamber held that by ratifying the Rome Statute, states parties have consented to waive the immunity of their officials regarding proceedings before the Court. As a result of this, there is no immunity between the Court and states parties and between states parties themselves, and Sudan was bound by the Statute of the Court based on the United Nations Resolution 1593. In the Ntaganda case, the Court held there is no impunity for serious international crimes before its jurisdiction. This article examines both cases and concludes that while in the Jordan case there is victory for serious international crimes and the fights against human rights violations over immunity before the ICC, there is also victory for serious international crimes over impunity before the Court as seen in the Ntaganda case.*

### ***Keywords:***

*fights against immunities and impunity; Rome Statute of the ICC; serious international crimes; Jordan case regarding Al Bashir; Ntaganda case*

## **I. Introduction**

Omar Al Bashir has ruled Sudan for three decades. Bashir came to power in 1989 after overthrowing Sadiq al-Mahdi in a military coup. He ruled Sudan as a whole until 2011 when North Sudan split from South Sudan officially and was able to stay in power for 30 years until the 11 April 2019 military ousting (Nesrine, 2021). Al Bashir enjoyed immunity *ratione personae* as the President of Sudan, which is conferred by customary international law for both official and private acts (Frulli, 2018). Nevertheless, the ICC accused Al Bashir while a sitting President of Sudan for crimes against humanity and war crimes atrocities committed in Darfur, Sudan. (Rome Statute, 2002). Accordingly, former President Al Bashir was accused by the ICC for five counts of crimes against humanity which include; murder, extermination, torture, forcible transfer and rape (Schwartz, 2016). Al Bashir also faces three counts on genocide allegedly committed against civilians in the Darfur region from 2003 to 2008 (Kohn, 2016). Consequently, the ICC issued two warrants of arrest against Al Bashir with the first issued on 24 March 2009 and the second on 12 July 2010 (Greenawalt, 2012). Since the ICC could not try Al Bashir unless present at the ICC, the matter was referred to the UNSC by the ICC based on its relationship under Articles 2, 13(b) and 16 of the Rome Statute (Coman, 2017). The Security Council, acting under Chapter VII of the Charter of the United Nations, referred the matter to the Prosecutor of the ICC (Rome Statute, 2002 Art. 13). The Security

Council's referring of the situation of Darfur, Sudan to the Prosecutor of the ICC seems to have waived the immunity *ratione personae* of former President Al Bashir given the fact that Sudan is not a state party to the Rome Statute. Al Bashir has travelled to many countries after the issue of his arrest warrant without being apprehended. Some of these countries are states parties to the Rome Statute while others are non-states parties. One of these countries is Arab Republic of Jordan, a state party to the Rome Statute. On 6 March 2019, the Appeals Chamber held that Jordan as a state party to the Rome Statute was obligated to arrest and surrender Al Bashir to the ICC when he visited the Kingdom of Jordan for Arab summit on 28 March 2017 (Jordan case, Al Bashir, 2019, Para. 132).

Similarly, Bosco Ntaganda is a Congolese national former Deputy Chief of the Staff and commander of then Forces Patriotiques pour la Liberation du Congo (FPLC) known in English as (Patriotic Forces for the Liberation of Congo). He was born on 5 November 1973 in Rwanda. Mr Ntaganda was charged for 13 counts of war crimes and five counts of crimes against humanity allegedly committed between 2002 and 2003 in the Ituri district of the Democratic Republic of the Congo (DRC) (Ntaganda case, 2021). On 8 July 2019, the Trial Chamber VI convicted Mr Ntaganda of the various crimes against humanity and war crimes, (Ntaganda case, 2019, Para. 1), and on 9 July 2019, the Chamber notified the defence counsel of Mr Ntaganda about his verdict (Ntaganda case, 2019, Para. 2). The crimes include: (i) murder and attempted murder as a crime against humanity and a war crime; (ii) intentionally directing attacks against civilians as a war crime; (iii) rape of civilians as a crime against humanity and as a war crime; (iv) rape of children under the age of 15 considered as war crime; (v) sexual slavery of civilians as a crime against humanity and as a war crime; (vi) sexual slavery of children under the age of 15 considered as a war crime; (vii) persecution as a crime against humanity; (ix) pillage as a war crime; (x) forcible transfer of civilian population as a crime against humanity; (xi) ordering the displacement of the civilian as a war crime; (xii) conscripting and enlisting the children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime; (xiii) intentionally directing attack against protected object as war crime; and (xiv) destroying the adversary property as a war crime (Ntaganda case, 2019, Para. 246 ). On 8 July 2019 Mr Bosco Ntaganda was found guilty beyond reasonable doubt by the Trial Chamber VI of all the 18 counts of war crimes and crimes against humanity committed in Ituri, DRC (The Situation in the DRC, 2021), and on 7 November 2019 he was sentenced to a total of 30 years of imprisonment (Ntaganda case, 2021, Para. 7). It is also imperative to note while DRC is a state party to the Rome Statute, Sudan has not ratified the Rome Statute and therefore not a state party (States Parties to the Rome Statute). Accordingly, matters maybe referred before the Court in three ways as follows: (i) in a case where one or more crimes have been committed and referred to the Prosecutor by a state party to the Rome Statute ( Rome Statute, 2002, Art. 13); (ii) in a case where one or more crimes have been committed and referred to the Prosecutor by the UNSC acting under Chapter VII of the UN Charter; (iii) and in a case where the Prosecutor has initiated an investigation *proprio motu* in respect of such crimes as per Article 15 of the Rome Statute (Rome Statute, 2002 Art. 13(c)). Non-states parties to the Rome Statute may also have access to the jurisdiction of the Court by consent (Rome Statute, 2002 Art. 12(3)). Accordingly, the judgments of the Appeals Chamber in both the Jordan case regarding the immunity of Al Bashir in respect of serious international crime and Ntaganda case regarding impunity and victory for human right violations.

## II. Research Methods

The key methodological approach of this investigation will be case law, literature surveys, internet and others electronic sources from the ICC library. In addition, the study will also rely on articles and in order to examine the issue Immunity and impunity with regard to senior state officials before the ICC. In other words, a significant portion of this work is comprised of an examination of the ICC's Appeals Chamber judgments in both the Jordan case regarding former President Al Bashir in his capacity as the President of Sudan and Ntaganda case.

## III. Discussion

### 3.1 Victories for Human Rights Defenders and against Immunity for Serious International Crimes in the Jordan Case

In the Jordan case, the Appeals Chamber had to consider following grounds of appeal regarding Al Bashir's head of state immunity: (i) the application of Article 27(2) the Rome Statute; (ii) the application of Articles 27(2) and 98 of the Rome Statute and their impact on obligations between states parties; and (iii) Resolution 1593 and the applicability of Article 27(2) of the Rome Statute to Sudan. Indeed it was victorious victory for serious international violations over immunity enjoyed by state officials before the ICC.

#### a. The Application of Article 27(2) of the Rome Statute and Immunity

Article 27(2) of the Rome Statute does not recognise the immunity of state officials or any form of immunities attached to the official capacity of a person before the Court. In other words, if a person or state official is charged before the ICC, they cannot invoke any form of immunities granted under national or international law as a defence before the Court under its jurisdiction. However, immunities are recognised by foreign criminal jurisdiction as it safeguards relationship between states if the accused is a current senior state official such as heads of state. This article provides as follow:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Consequently, the Rome Statute is a treaty and immunities enjoyed the state agents of its founding members are waived. Therefore, all states parties after ratification of the Statute have consented to waive any form of immunities enjoyed by its officials before the ICC. With regard to non-states parties to the Rome Statute, the immunities of its officials could be waived by the home state if any of its officials is charged before the ICC for any of the crimes under its jurisdiction. In most cases, the personal immunity of the officials of non-states parties act as a defence before the ICC while in office, while the functional immunities protects only the official acts of the same official. This defence is applicable only to officials of non-states parties because all the immunities enjoyed by the officials of contracting parties to the Rome Statute are waived upon ratification. Consequently, immunities granted by both national and international laws to the officials of states parties are not recognise before the ICC. In other words, while state practice and opinio juris supported the existence of the immunity of senior state officials before foreign national criminal courts, the ICC's Appeals Chamber in the Jordan case notes that there is neither state practice nor opinio juris that would support the existence of such immunities before an international criminal court (Jordan case, Al Bashir, 2019, Para.113). Indeed, this is a great victory for human rights defenders and against immunity for serious international crimes before international criminal courts that has jurisdiction to prosecute such crimes.

### **b. The Application of Articles 27(2) and 98 of the Rome Statute and Immunity**

While Article 27(2) of the Rome Statute is applicable only to states parties of the Statute and does not recognise any form of immunities before the Court, Article 98 of the same Statute is applicable only to non-states officials. In other words, Article 27(2) of the Rome Statute prevents states parties from invoking any immunity under international that its officials may enjoy before the ICC in their relationship with the Court. This article also prevents states parties from invoking immunity among them belonging to their officials in matters of arrest and surrender of any suspected officials before the Court (Jordan case, Al Bashir, 2019, Para.120).

Therefore, while the vertical effect of Article 27(2) of the Rome Statute requires that all immunities; whether personal or functional immunities enjoyed by states parties' officials be waived before the ICC, the horizontal effect of Article 27(2) of the same Statute requires the waiver of all the immunities enjoyed by their officials in matters before the Court in their relationship with one another (Jordan case, Al Bashir, 2019, Para.132).

With regard to Article 98 of the Rome Statute, the immunities are only applicable to non-states parties before the ICC. This is because all states parties have consented to waive all the immunities belonging to their officials before the Court (Jordan case, Al Bashir, 2019, Para.130). Consequently, all states parties to the Rome Statute after ratification of the Statute cannot invoke any form of immunities before the Court. However, non-states parties may invoke the personal immunities of its officials before the Court if the officials are still in office. This is because personal immunity is procedural in nature and such officials may be held liable for crimes committed while in office. Accordingly, Article 98 of the Rome Statute provides as follows:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

In all, the request made by the Court as indicated in Article 98(1) of the Rome Statute is directed only to non-states parties to the Statute because there is no immunity to waive with regard to states parties to the Statute. As indicated earlier, the immunity under Article 98 is procedural in nature as the officials may still held liable for international crimes committed while in office when their mandate are terminated. This is another victory for the fight against serious crimes of international over immunity because immunity does not mean impunity. Even though some of these officials stay longer than expected in power, they will eventually be prosecuted for internationals committed while in office.

### **3.2 Victory for Human Rights defenders and Serious International Crimes over Impunity in the Ntaganda Case**

Bosco Ntaganda was the former Deputy of staff and commander of operation forces in the Democratic Republic of Congo (DRC) (Ntaganda case, 2021, Para.27). The ICC issued two arrest warrants with the first on 22 August 2006 which was unsealed on 28 April 2008 and the second on 13 July 2012 (Ntaganda case, 2021, Para.28). Mr Ntaganda was charged for 13 counts

of war crimes and five counts of crimes against humanity allegedly committed between 2002 and 2003 in the Ituri district of the DRC (Ntaganda case, 2021). On 8 July 2019, the Trial Chamber VI convicted Mr Ntaganda of the various crimes against humanity and war crimes (Ntaganda case, 2019, Para.1), and on 9 July 2019, the Chamber notified the defence counsel of Mr Ntaganda about his verdict (Ntaganda case, 2019, Para.2). The crimes include: (i) murder and attempted murder as a crime against humanity and a war crime; (ii) intentionally directing attacks against civilians as a war crime; (iii) rape of civilians as a crime against humanity and as a war crime; (iv) rape of children under the age of 15 considered as war crime; (v) sexual slavery of civilians as a crime against humanity and as a war crime; (vi) sexual slavery of children under the age of 15 considered as a war crime; (vii) persecution as a crime against humanity; (ix) pillage as a war crime; (x) forcible transfer of civilian population as a crime against humanity; (xi) ordering the displacement of the civilian as a war crime; (xii) conscripting and enlisting the children under the age of 15 years into an armed group and using them to participate actively in hostilities as a war crime; (xiii) intentionally directing attack against protected object as war crime; and (xiv) destroying the adversary property as a war crime (Ntaganda case, 2019, Para.246). On 8 July 2019 Mr Bosco Ntaganda was found guilty beyond reasonable doubt by the Trial Chamber VI of all the 18 counts of war crimes and crimes against humanity committed in Ituri, DRC, and on 7 November 2019 he was sentenced to a total of 30 years of imprisonment (Ntaganda case, 2021, Para.7). The judgment of the Trial Chamber VI was appealed by Mr Bosco Ntaganda and the Prosecutor (Ntaganda case, 2021, Para.30). However, their appeal was rejected by the Appeals Chamber which confirmed the decision of the Trial Chamber VI on 30th March 2021 (Ntaganda case, 2021, Para.1170), and maintained the 30 years imprisonment. Similarly, Mr Ntaganda also appealed against is joint sentencing decision but the Appeals Chamber once again confirmed the Trial Chamber VI joint sentence of 30 years and his appeal was rejected (Ntaganda case, 2021, Para.284). It is imperative to note that the DRC is a state party to the Rome Statute since April 2002 and this matter was referred to the ICC by the government of the DRC. Finally, the ICC's decision in the Ntaganda case was a victory in the fights against human rights violation and impunity for serious international crimes affecting the world.

#### IV. Conclusion

In the Al Bashir case, the issue regarding the immunity of senior state officials before the ICC was settled. The Court notes in here that there is neither state practice nor *opinio juris* that would support the existence of any immunity under international law enjoyed by senior state officials before an international court. In other words, no person accused of an international crime can invoke immunity before an international court if such a court has jurisdiction as the case with the ICC. This is great victory for the fight against human rights violations over immunity enjoyed by perpetrators of such crimes. It was further noted by Appeals Chamber of the ICC that states parties to the Rome Statute by virtue of its Article 27(2) have consented to waive all the immunity enjoyed by their respective officials under international law after ratifying the Statute. In this regard, there is no immunity to be waived between the Court and the states parties to the Rome Statute on the one hand; and between states parties *inter se* in matters of arresting and surrendering any suspected officials to the Court on the other hand. Consequently, while Article 27(2) of the Rome Statute is applicable only to states parties, Article 98 of the same Statute is applicable only to non-states parties of the Rome Statute. According to Appeals Chamber, Article 98 of the Statute does not itself stipulate, recognise, or preserve any immunities because it is a procedural rule that determines how the Court is to proceed where any immunity exist it could affect request for cooperation.

Finally, in the Ntaganda case, there is also victory for the fight against human rights violations over impunity before the Court. In other words, perpetrators of serious international crimes and human rights violation are held liable before the ICC and there is no room for impunity regarding such crimes. In all, while in the Al Bashir case there was victory for the fight against human rights violations and serious international crimes over immunity, there was also victory for such violations and serious crimes over impunity in the Ntaganda case. Accordingly, modern international criminal court such as the ICC does not recognise both the immunities of senior state officials and impunity in respect of serious international crimes and human rights violations. This is a great victory for the fights against human rights violation and impunity since both status-based and functional immunities are inapplicable before the Court by virtue of Article 27 of the Rome Statute.

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