

The Efficacy of Article 27 of the Rome Statute in Realizing the Criminal Responsibility of Nationals of Non-Member States

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Abstract

In the landscape of international law, the establishment of the International Criminal Court represented an effort to overcome the long-standing tension between state sovereignty and the aspiration for individual accountability for the most serious crimes. At the heart of this transformation lies Article 27 of the Rome Statute, which, by negating official immunity, introduced a substantive shift in the fight against international impunity. However, a deep and significant gap exists between this legal ideal and its practical efficacy concerning nationals of non-member states, a reality that challenges the legitimacy of the entire international criminal justice system. Accordingly, aiming to explain this effectiveness gap, this research addresses the primary question of to what extent structural and political obstacles undermine the effectiveness of Article 27 in realizing the criminal responsibility of these individuals. Employing a descriptive-analytical methodology and analyzing the Court's primary documents and secondary sources, the article tests its central hypothesis. The key findings indicate that the efficacy of Article 27 is effectively neutralized by a threetiered corrosive chain of obstacles. First, the Court's inherent jurisdictional limitations and the paralysis of the Security Council referral mechanism preclude the prosecution of many officials from the outset. Second, the Court's absolute dependence on state cooperation for enforcement reduces its judicial authority to a political request, leading to the continuation of de facto immunity for powerful accused individuals. Third, the convergence of these two obstacles results in the application of selective justice, eroding the normative power

of the principle of negating immunity globally. Ultimately, this study concludes that, given the Court's limitations, the future of the fight against impunity lies not in opposition but in a synergy between the ICC and national courts through the principle of universal jurisdiction. This approach fosters a complementary framework of accountability wherein no official, regardless of nationality or position, can evade justice.

Keywords: Article 27 of the Rome Statute, Individual Criminal Responsibility, Official Immunity, Non-Member States, Universal Jurisdiction, Selective Justice.

1. Introduction

At the dawn of the twenty-first century, the establishment of the «International Criminal Court (ICC) based on the Rome Statute revived hopes for ending the era of impunity for perpetrators of the most heinous international crimes. At the heart of this hope lies a revolutionary principle embodied in Article 27 of the Statute: the "irrelevance of official capacity" (Rome Statute, 1998: Art. 27). This provision was designed to shatter the shield of immunity that has traditionally protected "Heads of State" and "high-ranking officials" from justice. However, more than two decades after the Statute's entry into force, a key question remains: "Is this progressive principle as effective in practice as it is powerful in theory?" This research addresses precisely this query, analyzing the deep chasm between the legal ideal of Article 27 and the political realities governing its enforcement, particularly concerning nationals of states that have not accepted the jurisdiction of this accountability regime.

To understand the subject precisely, it must be noted that Article 27 comprises two complementary mechanisms: Paragraph 1 stipulates that the Statute applies equally to all persons without any distinction based on official capacity. Paragraph 2 explicitly

renders ineffective any immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law including "personal immunity"¹ or "functional immunity"² before the Court. Thus, legally, this article bars any evasion of accountability under the pretext of political status. However, the issue this research seeks to elucidate is the dimensions and causes of the "efficacy gap" regarding this article; in other words, why, despite this decisive legal text, do officials of non-member states continue to enjoy *de facto* immunity in practice? The objective of this study is to diagnose the specific obstacles undermining this principle in practice and, ultimately, to proffer a solution demonstrating how complementary capacities within the international legal system can be leveraged to aid the realization of Article 27's ultimate goal: universal accountability.

The central hypothesis of this article is that the efficacy of the principle of negating legal immunity is systematically undermined by a chain of structural and political obstacles, leading to the persistence of practical immunity for powerful officials. This study argues that this erosion is not the product of a single barrier, but the result of the interaction of three layers of limitations: First, jurisdictional obstacles which, due to the "consent-based" nature of the Statute and the paralysis of the Security Council referral mechanism, close the gates of justice to many situations from the outset (Schabas, 2016: 412). Second, executive obstacles stemming

from the Court's absolute dependence on state cooperation for the arrest and surrender of suspects, which in practice transforms judicial decisions into ignorable political requests (Cryer, Robinson, & Vasiliev, 2019: 237). Third, geopolitical obstacles that result in the application of equality as "selective justice,"³ thereby undermining the credibility of the entire system (Akanke, 2012: 348).

The significance of this analysis lies in its direct correlation with the legitimacy and future of the international criminal justice system. In an era where the Court, by intervening in sensitive situations such as Ukraine and Palestine, is exposed to political pressure more than ever before, a precise understanding of these obstacles is essential for any realistic assessment of its achievements and shortcomings. This research, employing a descriptive-analytical method and relying on the analysis of primary sources (the Rome Statute and ICC case law) and secondary sources (seminal works by international legal scholars), elaborates on these challenges. The structure of the article is designed accordingly: The first section is dedicated to explaining the foundations and theoretical dimensions of the principle of non-immunity. The second section examines the three layers of aforementioned obstacles in detail. The final section, by presenting a balance sheet of the Court's performance and assessing the capacity of alternative solutions, outlines the future landscape of accountability.

¹- Personal immunity, (immunity *ratione personae*) refers to immunity granted to holders of certain high ranking state offices (such as Heads of State, Heads of Government, and Ministers of Foreign Affairs) by virtue of "the office itself" and for the duration of their "term of office." This immunity covers all their acts (whether official or private).

²- Functional or material immunity, (immunity *ratione materiae*) relates to acts performed by "state officials"

within the framework of their "official functions." This immunity may persist for those specific acts "even after leaving office."

³- Selective Justice is a critical legal concept used to critique the international criminal justice system, suggesting that criminal prosecution is focused solely on weaker states lacking political backing, while powerful violators of international law remain immune from accountability.

2. Theoretical Foundations and Scope of Article 27 of the Rome Statute

Article 27 of the Rome Statute, aiming to end the immunity of official authorities, instituted a substantive transformation in international criminal law. However, the efficacy of this article in practice, particularly regarding "nationals of non-member states," faces serious ambiguities and challenges. To precisely understand the dimensions of this issue, this section first elucidates the principle of non-immunity and its scope of application. Subsequently, by differentiating between traditional types of immunities, it analyzes how this article renders them ineffective. Finally, by positioning this principle within the broader constellation of individual criminal responsibility, it clarifies its substantive status and complementary role.

This analytical trajectory, moving from the definition of the principle to its function and then to its existential philosophy, provides a comprehensive understanding of the theoretical foundations of this provision. This understanding paves the way for entering the next section and evaluating the structural and political obstacles that challenge this legal ideal in practice.

2.1. The Principle of Non-Immunity of Official Authorities

The principle of negating the criminal immunity of official authorities, enshrined in Article 27 of the International Criminal Court (ICC) Statute, is more a normative proposition than a self-executing legal rule; its efficacy in practice, especially when confronting "nationals of non-member states," is challenged by jurisdictional hurdles and geopolitical realities.

This article decisively rejects any distinction based on "official capacity" in the exercise of the Court's jurisdiction, stipulating that: "This

Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament... shall in no case exempt a person from criminal responsibility" (Rome Statute, 1998: Art. 27(1)).

This approach represents a manifest departure from traditional customary international law and many domestic legal systems that grant extensive immunities to "high-ranking officials" (Cassese, 2008: 301-305). The objective of this innovation is to ensure that "no individual," regardless of political status, can evade accountability for committing the most serious international crimes. This pivotal rule is reinforced by the second paragraph of the same article, which provides: "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" (Rome Statute, 1998: Art. 27(2)). This provision effectively neutralizes any attempt to invoke "personal immunity" or "functional immunity" before the Court, ensuring that justice is administered equally to all (Mir Mohammad Sadeghi, 1400 [2021]: 285-290; Gaeta, 2019: 815-818).

However, the primary challenge emerges when this principle encounters political realities and the Court's jurisdictional limitations regarding "officials of non-member states." In other words, although Article 27 itself does not distinguish between "officials of member and non-member states," its practical application depends on the fulfillment of jurisdictional preconditions mentioned in Articles 12 and 13 of the Statute. In this context, a key pathway for activating the Court's jurisdiction over officials of a non-member state is the commission of a crime within the "territory of a member state." Based

on this jurisdictional basis, the Court can adjudicate crimes committed on the territory of a member state, "even if the accused is a national of a non-member state" (Rome Statute, 1998: Art. 12(2)(a)). This interpretation was confirmed by the Court's Pre-Trial Chamber in the Situation in the State of Palestine (itself a member state), declaring that the Court's territorial jurisdiction extends to crimes committed in the Palestinian territory (including by nationals of non-member states) (International Criminal Court, Pre-Trial Chamber I, 2021: para. 116). While this legal interpretation appears robust, in practice, it faces severe political opposition from powerful non-member states and their allies, confronting the administration of justice with serious obstacles (Cryer, Robinson, & Vasiliev, 2019: 235-239).

Another pathway for establishing the Court's jurisdiction arises when crimes occur within the "territory of a non-member state." In this case, the sole recourse is a referral of the situation by the United Nations Security Council (UNSC) pursuant to Article 13 of the Statute (Rome Statute, 1998: Art. 13(b)). A prominent example of this scenario is the case of Omar al-Bashir, the then-President of Sudan (a non-member state), where the Security Council, through Resolution 1593 (2005), referred the "Situation in Darfur, Sudan"¹ to the Court. This action allowed the Prosecutor to initiate investigations and issue an arrest warrant for him (International Criminal Court, Pre-Trial Chamber I, 2009: paras. 25-28). Furthermore, the Court clarified in this case that a "Security Council referral" creates an obligation to cooperate even for

"non-member states," and that "Head of State immunity" cannot bar the Court's jurisdiction. Nevertheless, this mechanism is heavily influenced by political considerations and the "veto power of permanent Security Council members," fueling widespread criticism regarding the application of "selective justice" (Schabas, 2016: 410-415). The failure to refer situations where "officials of powerful non-member states" are accused of international crimes is viewed as an instance of this selectivity, undermining the Court's credibility as an impartial judicial institution (Akande, 2012: 345-350).

Ultimately, although Article 27 provides a solid legal framework for negating immunity and holding officials accountable, its effectiveness regarding heads of non-member states depends on the realization of one of the two aforementioned jurisdictional conditions. If neither condition is met, the Court, despite the clarity of Article 27, lacks inherent jurisdiction to prosecute officials of non-member states. This limitation poses a serious challenge to the ideal of universal criminal justice. Moreover, even if jurisdiction is established, the Court's dependence on state cooperation for the arrest and surrender of suspects especially in the face of refusal by powerful non-member states can practically stalemate the administration of justice (Broomhall, 2003: 155-160).

Therefore, while the existence of the principle of non-immunity is accepted as an established legal rule, a closer examination of how both personal and functional immunities are

¹ This situation refers to the armed conflict that began in the Darfur region of Sudan in 2003, leading to the commission of widespread crimes against "civilians." Consequently, in 2005, the Security Council referred the situation in Darfur to the International Criminal Court, ultimately leading to the issuance of an arrest warrant for

the then-President of Sudan on charges of genocide, war crimes, and crimes against humanity. For further information, see: UN Security Council, Resolution 1593 (2005) [on the Situation in Darfur, Sudan], S/RES/1593 (31 March 2005).

rendered ineffective in practice reveals more complex dimensions of this legal innovation.

2.2. Nullification of Personal and Functional Immunities

The logic of contemporary international criminal law is based on a transition from "absolute state responsibility" to "individual criminal responsibility of natural persons," a principle explicitly stated in Article 25 of the Rome Statute of the International Criminal Court, which limits the Court's jurisdiction exclusively to "natural persons" (Rome Statute, 1998: Art. 25). This distinction is the cornerstone for prosecuting leaders who were previously immune from accountability behind the shield of state sovereignty. In this regard, Article 27(2) of the Statute acts as a decisive legal instrument, stipulating that "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" (Ibid: Art. 27(2)). This provision specifically renders both traditional types of immunity—namely, "personal immunity" and "functional immunity"—ineffective before the Court, demonstrating the institution's jurisdictional supremacy over traditional customary rules (Mir Mohammad Sadeghi, 1400 [2021]: 285-290). Thus, the Statute creates an independent judicial sphere wherein no official, regardless of status, can invoke immunity as a shield against prosecution.

This decisive approach by the Court creates a deep rift between the power of this institution and the limitations existing within national judicial systems, even when exercising "universal jurisdiction." Universal

jurisdiction, based on obligations such as the principle of "prosecute or extradite"¹ in the Geneva Conventions, allows states to prosecute perpetrators of certain grave international crimes regardless of the "place of commission" or the "nationality of the perpetrator and victim" (Geneva Convention IV, 1949: Art. 146). Furthermore, the International Court of Justice (ICJ) in the case of *Belgium v. Senegal* emphasized the binding nature of this obligation under the Convention against Torture (ICJ, *Belgium v. Senegal*, 2012: para. 99). Nevertheless, the most significant legal obstacle facing domestic courts is the issue of "immunity of official authorities." In this vein, the ICJ, in its famous judgment in the *Arrest Warrant Case* (*Democratic Republic of the Congo v. Belgium*), ruled that personal immunity for Heads of State, Heads of Government, and Ministers of Foreign Affairs during their term of office grants them absolute immunity from prosecution in the domestic courts of other countries (ICJ, *Arrest Warrant Case*, 2002: para. 58).

This ruling illustrates a significant legal dichotomy: while the ICC, by virtue of the explicit text of its Statute, can itself prosecute a serving Foreign Minister, a national court in another country is barred from doing the same. This situation creates a kind of "hierarchy of accountability," where the nullification of immunity, instead of being a universal rule in customary international law, has become an exclusive privilege for the International Criminal Court. Consequently, a "high-ranking official" from a "non-member state" who commits a crime on the "territory of a member state" and falls under the ICC's jurisdiction will have no immunity; however,

¹- Aut Dedere Aut Judicare ("Extradite or Prosecute") is an obligation in international law requiring states to either "prosecute" persons accused of serious

international crimes found within their territory in their domestic courts or "extradite" them to another state with jurisdiction for prosecution.

if the same official is found on the territory of a third state intending to exercise universal jurisdiction, they can evade prosecution by invoking personal immunity. This contradiction demonstrates that the nullification of immunities has not yet transformed into a binding customary rule for all states, and its efficacy remains largely confined to the Court's jurisdictional sphere (Bassiouni, 2001: 53-58).

Therefore, although Article 27(2) of the Rome Statute is revolutionary within its scope of operation, this judicial revolution has not yet permeated all dimensions of international law. By nullifying personal and functional immunities, this article merely removes obstacles facing the "Court itself" and has no direct impact on states' obligations under customary international law regarding the immunity of foreign officials in their domestic courts. This distinction between the function of Article 27 within the Statute and the limitations existing at the national level illustrates how this article serves not only as a procedural rule but also as a substantive pillar in completing and ultimately realizing the principle of individual criminal responsibility in contemporary international law.

2.3. The Position of Article 27 in Completing Individual Criminal Responsibility

Article 27 of the Rome Statute is more than merely a procedural rule for removing obstacles to prosecution; it is a substantive pillar that breathes life into the principle of "individual criminal responsibility," transforming it from an abstract norm into an enforceable judicial reality against "holders of power."

The contemporary international criminal law system is founded on the shift from state responsibility to holding "natural persons"

accountable; a principle crystallized in Article 25 of the Statute by limiting the Court's jurisdiction to "natural persons" (Rome Statute, 1998: Art. 25). This distinction is the basis for prosecuting commanders and leaders who, in the past, took refuge behind the shield of state sovereignty. Within this framework, Article 27 acts as a logical and necessary complement to Article 25 to ensuring that no official position can impede the realization of justice.

This article explicitly declares that "official capacity as a Head of State or Government... shall in no case exempt a person from criminal responsibility under this Statute," thereby rendering both types of traditional immunity—namely "personal immunity" and "functional immunity"—ineffective before the Court (Mir Mohammad Sadeghi, 1400 [2021]: 285). In truth, if the principle of individual criminal responsibility (Article 25) is considered the "goal," the principle of non-immunity (Article 27) is the essential "tool" for achieving that goal; for without it, prosecuting high-ranking officials, who are often responsible for planning and executing international crimes, would be practically impossible. This inseparable link is the essence of the Statute's innovation in completing the cycle of accountability, placing the individual, regardless of any political status, at the center of criminal responsibility.

The practical manifestation of this legal link is clearly visible in the recent practice of the Court. The ICC Prosecutor's move to request arrest warrants for senior Israeli leaders, such as Benjamin Netanyahu and Yoav Gallant, and simultaneously Hamas leaders, such as Yahya Sinwar and Ismail Haniyeh, on charges of committing "war crimes" and "crimes against humanity," demonstrates how the legal logic of the Statute prioritizes individual criminal responsibility over any other consideration.

The main challenge, however, arises when this exercise of jurisdiction targets "nationals of non-member states." Opponents argue that a treaty cannot create obligations for a third state; whereas the ICC's legal basis in these cases is not the imposition of an obligation on the non-member state, but the exercise of "territorial jurisdiction"¹ delegated to the Court by the member state (Rome Statute, 1998: Art. 12(2)(a)). In fact, the Court exercises jurisdiction "on behalf of" the "member state" on whose territory the crime occurred, and this action is the implementation of a pre-existing jurisdiction, not the creation of a new obligation (Schabas, 2016: 301).

Nevertheless, the strength of these theoretical foundations alone does not guarantee the realization of justice. The efficacy of the principle of individual responsibility, completed by Article 27, heavily depends in practice on "state cooperation" for the arrest and surrender of suspects; an obligation emphasized in Articles 86 and 88 of the Statute. The refusal of a non-member state to cooperate and the Court's lack of an independent enforcement force can practically paralyze this advanced legal framework. In such circumstances, the only alternative solution is a "referral of the situation by the United Nations Security Council (UNSC),"² which can impose the Court's jurisdiction even on "non-member states." However, due to the existence of the "veto power,"³ this path is also highly political and selective, often leading to a gap in accountability (Aghaei Jannat Makan, 1390 [2011]: 120).

¹- Territorial Jurisdiction refers to the authority by which a state (and here, the Court on its behalf) exercises its jurisdiction over all crimes committed within its "sovereign territory," regardless of the perpetrator's nationality.

¹- According to Article 13(b) of the Rome Statute (Rome Statute, 1998: Art. 13(b)), the Security Council, acting under Chapter VII of the Charter of the United Nations

In conclusion, Article 27, by stripping away the immunity of official authorities, plays a vital role in completing and operationalizing the principle of "individual criminal responsibility," and these two articles together form the backbone of the international criminal justice system. This article ensures that responsibility for committing international crimes is directly attributed to the individual perpetrator, regardless of their official mantle. However, as observed, this complete legal framework faces significant structural and political obstacles in the implementation phase that challenge its effectiveness. A detailed examination of these obstacles, beginning with the Court's jurisdictional limitations regarding non-member states, will be the subject of the next section.

3. Structural and Political Obstacles in Implementing Article 27

Following the elucidation of the theoretical foundations of Article 27 of the Statute, it is now time to evaluate the real obstacles that limit the efficacy of this legal principle in practice. The main challenge in this section is the confrontation between the universal ideal of justice and the structural and political realities of the international system. To analyze this dilemma, this section follows a three-stage logical sequence: First, it examines the initial barriers to the Court's entry into a case, namely its jurisdictional limitations over non-member states. Then, it analyzes the second-stage obstacle, the challenge of enforcing decisions and the Court's absolute

(United Nations Charter, 1945: Ch. VII), can refer a situation to the ICC Prosecutor. This referral serves as the basis for the Court's jurisdiction, regardless of the relevant state's membership.

²- Veto Power is the right allowing the five permanent members of the Security Council (USA, Russia, China, UK, and France) to block any substantive resolution of the Council, even if it has a majority of votes.

dependence on state cooperation. Finally, it demonstrates how the confluence of these two barriers leads to the intrusion of geopolitical considerations and the formation of selective justice.

This tripartite analysis, by illustrating the chain of obstacles from jurisdiction to enforcement and its political consequences, draws a realistic picture of the Court's limitations. Understanding these structural weaknesses is a necessary prerequisite for entering the final section to critically evaluate the Court's performance in existing case law and assess the future landscape of accountability for international crimes.

3.1. The Court's Jurisdictional Limitations Over Non-Member States

The efficacy of Article 27 of the Rome Statute in negating official immunity is directly dependent on the ability of the International Criminal Court (ICC) to exercise its jurisdiction; however, the Court's jurisdictional framework is inherently based on "state consent," creating a profound structural limitation in holding "nationals of non-member states" accountable.

The Statute recognizes two primary bases for the Court's automatic jurisdiction: first, "territorial jurisdiction," and second, "personal jurisdiction based on the nationality of the perpetrator" (Rome Statute, 1998: Art. 12). When a crime is committed by a "national of a non-member state" on the "territory of that same state or another non-member state," the Court faces an absolute jurisdictional void, and the Prosecutor cannot even utilize their "proprio motu"¹ powers to initiate investigations. This legal gap is the first and most fundamental obstacle to realizing

international criminal justice, indicating that the international community's will to combat grave crimes remains constrained by the principle of state sovereignty.

Nevertheless, the Statute's system has designed two exceptional mechanisms to bypass this obstacle, each facing its own limitations. The first solution is the "exercise of territorial jurisdiction over crimes committed on the territory of a member state," even if the perpetrator is a national of a non-member state (Ibid: Art. 12(2)(a)). Non-member states, citing the principle that "a treaty does not create obligations for a third state" (United Nations, 1969: Art. 34), reject this jurisdictional basis. However, this argument overlooks the nature of the Court's function; in such circumstances, the Court does not impose a new obligation on the "non-member state" but exercises jurisdiction "on behalf of the member state" on whose territory the crime occurred (Aghaei Jannat Makan, 1392 [2013]: 36; Schabas, 2016: 301). In essence, by joining the Statute, the member state has delegated the authority for criminal prosecution within its territory to the Court. While legally sound, the efficacy of this approach in practice is tied to the geographical location of the crime, failing to provide a comprehensive solution for all situations and rendering justice contingent upon location.

The second mechanism designed to cover this very gap is the referral of a situation by the "United Nations Security Council" under Article 13(b) of the Statute. This mechanism is the most powerful tool for overcoming jurisdictional limitations, as it can establish the Court's jurisdiction regardless of state membership; as seen in the "Situation in

¹- Proprio Motu is the power that allows the ICC Prosecutor to initiate preliminary examinations into crimes within the Court's jurisdiction on their own

initiative, based on information received, without a referral from a "State Party" or the "Security Council".

Darfur, Sudan,"¹ this action led to the issuance of an arrest warrant for the then-President of a non-member state (Rome Statute, 1998: Art. 13(b)). However, in practice, this legal tool has become leverage in the hands of political powers and subject to "geopolitical considerations." Furthermore, the total dependence of this path on the political will of the "five permanent members of the Security Council" and their instrumental use of the "veto power" has turned it into an obstacle to justice, fueling serious criticism regarding the application of "selective justice" (Akande, 2012: 348). Consequently, numerous critical situations involving the interests of permanent members are never referred to the Court, undermining its credibility as an impartial judicial body and sterilizing its preventive function (Dehghanpour, 1402 [2023]: 55).

Therefore, to hold nationals of non-member states accountable, the Court is caught between two constraints: on one hand, territorial jurisdiction, which is a limited tool dependent on the geography of the crime; and on the other, Security Council referral, a powerful mechanism paralyzed by political interests. This structural deadlock demonstrates that the international criminal justice system has not yet fully liberated itself from the power-based logic of international relations. Consequently, even in cases where these jurisdictional obstacles are overcome and the Court's jurisdiction is lawfully established, a larger structural barrier emerges: the Court's absolute dependence on state cooperation to enforce its decisions, particularly regarding the arrest and surrender

of suspects, which will be addressed in the next section.

3.2. The Challenge of State Cooperation in Arrest and Surrender

After traversing the complex hurdle of jurisdiction, the efficacy of Article 27 in realizing criminal responsibility faces a significantly larger structural challenge: the "Court's absolute dependence on state cooperation for the arrest and surrender of suspects." The International Criminal Court has been aptly described as a "judicial giant without enforcement leverage"; while it possesses the legal authority to issue arrest warrants and judicial decisions, it relies entirely on the political will and practical action of states to enforce these decisions from conducting investigations in a country to arresting a high-ranking official. This inherent dependence constitutes the Achilles' heel of the international criminal justice system, as it shifts the realization of justice from the realm of the rule of law to the arena of political calculations, challenging the "principle of non-immunity of official authorities" in practice.

This challenge can be examined at two different levels. For States Parties to the Statute, cooperation with the Court is an explicit and binding legal obligation, emphasized in Part 9, particularly Articles 86 and 88 of the Statute. However, practice shows that this legal obligation is highly vulnerable to state political interests. In this regard, the case of "Omar al-Bashir" stands as a prominent example of this confrontation; despite the existence of an international arrest

¹ The Situation in Darfur, Sudan refers to the catastrophe following an armed conflict in this region that began in 2003, leading to widespread international crimes. Furthermore, in 2005, the Security Council referred this situation to the Court, leading to the issuance of an arrest warrant for the then-President of

Sudan on charges of "genocide," "war crimes," and "crimes against humanity." For further information, see: UN Security Council, Resolution 1593 (2005) [on the Situation in Darfur, Sudan], S/RES/1593 (31 March 2005).

warrant, his numerous travels to the territories of certain member states and their refusal to arrest and surrender him revealed the failure of the cooperation regime and the Court's impotence against the political will of states (Cryer, Robinson, & Vasiliev, 2019: 237). This situation is far graver when dealing with non-member states, as they generally have no legal obligation to cooperate with the Court unless the situation has been referred by the "Security Council." The refusal of powerful non-member states to offer any cooperation, a prime example being the "active opposition of the United States to the Court's investigation into the situation in Afghanistan," demonstrates how a state can rely on its political power to create an insurmountable barrier to the administration of justice.

In the meantime, some states attempt to evade the obligation to cooperate by instrumentally using the Statute's own legal mechanisms. In this context, the "principle of complementarity,"¹ designed to respect state judicial sovereignty, can become a shield for evading accountability. A state (whether member or non-member) can challenge the Court's jurisdiction and halt international proceedings by claiming it is conducting "genuine" investigations or prosecutions against the same suspects. Although the Court has the authority to assess the genuineness of these domestic proceedings and proceed with its jurisdiction if it identifies "sham proceedings,"² this legal process is time-consuming and complex, potentially blocking the path to justice for years.

Ultimately, the executive deadlock resulting from non-cooperation degrades the principle of non-immunity from a legal rule to a theoretical ideal. When an arrest warrant is issued for a high-ranking official but no state has the will to execute it, the immunity that was ushered out the legal door by Article 27 effectively returns through the window of political realities. This absolute dependence on cooperation leads to a situation where justice is distributed not based on legal evidence, but on the balance of power and geopolitical considerations. This bitter reality fuels the perception that the Court is a tool in the hands of great powers operating "selectively" an impact that targets the legitimacy of the entire international criminal justice system and will be analyzed in the final section of this chapter.

3.3. The Impact of Geopolitical Considerations and Selective Justice

The aforementioned structural obstacles namely "jurisdictional limitations" and the "challenge of state cooperation" ultimately converge to produce a far more destructive phenomenon: the profound impact of "geopolitical considerations" on the judicial process and the formation of "selective justice." This situation, where judicial decisions are influenced by "strategic interests and power balances" rather than evidence and law, challenges the Court's independence and impartiality, threatening the credibility of the entire international criminal justice system. In such a framework, criminal accountability transforms from a universal standard into a

¹- The Principle of Complementarity, stated in the Preamble and Article 17 of the Rome Statute, stipulates that the Court is only competent to adjudicate when national judicial systems are "unwilling" or "unable" to genuinely prosecute the same crimes at the national or international level.

²- The determination of Sham Proceedings by the Court is based on Article 17 of the Rome Statute. Under this

article, the Court deems national investigations or prosecutions "non-genuine" or "sham" if they are undertaken for the purpose of shielding the person from criminal responsibility, or if they are not conducted independently or impartially, or are inconsistent with an intent to bring the person to justice.

tool primarily wielded against "weaker states lacking political support," while guaranteeing practical immunity for great powers and their allies.

The primary conduit for this political influence is the "Security Council referral" mechanism. The veto power allows the five permanent members to block the referral of critical situations to the Court based on purely political motives, thereby shielding themselves and their allies from any prosecution (Schabas, 2016: 412). This influence is not limited to the exercise of a formal veto; the "pocket veto"¹ or the mere threat of a veto is sufficient to deter the Prosecutor or other states from pursuing sensitive situations. This political filter creates a blatant double standard and has been the root cause of criticisms leveled against the Court, such as the accusation of "anti-African bias"² in its first decade of operation; for non-African situations in which great powers had interests never passed this barrier (Akanke, 2012: 348). The impact of geopolitical considerations is evident even when the Court acts independently. Intense political pressure and media campaigns against the Court following the confirmation of its jurisdiction over the State of Palestine serve as an example of "lawfare" aimed at discrediting an independent judicial institution. These pressures can also cast a shadow over "prosecutorial discretion"; decisions regarding the prioritization of investigations or even the

use of the "interests of justice"³ clause under Article 53 of the Statute to decline pursuing a case cannot be entirely divorced from realistic calculations regarding the likelihood of state cooperation and the political costs of prosecution. Indeed, when state cooperation itself becomes a foreign policy tool for exerting pressure or supporting allies, the Court unwittingly becomes entangled in the web of political interests it was established to escape.

Ultimately, this double standard and the intrusion of politics into justice deeply tarnish trust in the international criminal system. When the most powerful international judicial institution is incapable of addressing some of the gravest crimes, the legitimacy of the entire global justice project is called into question. This geopolitical deadlock creates a permanent "accountability vacuum" that deprives victims of crimes in regions under the influence of great powers of access to justice. This legitimacy crisis underscores the necessity of critically assessing the Court's performance in existing case law and seeking alternative solutions to ensure that justice is accessible to all, free from the political calculations of great powers.

4. Assessing the Court's Performance and the Future Landscape of Accountability

Having comprehended the theoretical foundations of the principle of non-immunity and analyzed the obstacles to its implementation, this final section proceeds to

¹- Pocket Veto is a situation where the mere knowledge of definitive opposition by one or more permanent members and the likelihood of a veto causes a resolution never to be put to a vote. This category is an informal but highly effective mechanism for blocking Security Council actions.

²- The criticism of "Anti-African Bias" refers to the perception in the Court's first decade that the institution selectively targeted only African leaders; while rooted in the exclusive focus of all investigations during that period on the African continent, this view ignored the

reality that such a pattern was largely the product of factors such as "self-referrals by African states themselves" and the "political filter governing Security Council referrals".

³- Interests of Justice is a term in Article 53 of the Rome Statute allowing the ICC Prosecutor to decline initiating an investigation or prosecution, even if there is sufficient evidence, if they believe it would not serve the "interests of justice" (e.g., due to harming a peace process). Furthermore, this clause is susceptible to political influence due to its ambiguous nature .

evaluate the ultimate efficacy of this principle and outline the future landscape of accountability. The central challenge in this section is moving from theoretical critique to presenting a practical scorecard and a forward-looking perspective. This assessment is conducted through a three-stage analytical process: First, with a realistic view of existing case law, the Court's performance in various cases is weighed. Second, the consequence of this dual performance on the principle of non-immunity itself is examined, and its practical erosion is elucidated. Finally, considering the Court's limitations, the capacity of alternative solutions, particularly universal jurisdiction, to fill the existing gaps is explored.

This logical progression, moving from performance evaluation to consequence diagnosis and then to solution prescription, provides a comprehensive analysis of the current situation. The ultimate goal is to achieve a realistic summary of achievements and shortcomings and to present a vision wherein the fight against immunity continues through a combination of international and national mechanisms, making the ideal of accountability realizable in practice.

4.1. Analysis of the Court's Performance in Existing Case Law

An analysis of the International Criminal Court's (ICC) performance in existing case law presents a complex and dual image of the institution's successes and failures. The assessment of the Court's efficacy cannot be limited solely to the number of convictions; rather, it must be measured in broader dimensions such as the "development of

international law," "impact on national judicial systems," and the "extent of justice realization for victims" (Stahn, 2018: 45-48). The Court's case law over the past two decades, on one hand, demonstrates its capacity to hold some perpetrators of grave crimes accountable, but on the other hand, its failures against powerful defendants clearly display structural limitations and susceptibility to political realities (Schabas, 2016: 980-985).

In the column of successes, the Court has achieved tangible results in cases accompanied by a reasonable level of "state cooperation." The conviction of militia commanders such as Thomas Lubanga Dyilo¹ and Bosco Ntaganda² from the Democratic Republic of the Congo not only brought justice for thousands of victims but also significantly contributed to the development of case law regarding crimes such as the "use of child soldiers." Furthermore, in some instances, the Court has had an indirect but significant impact through the "principle of complementarity." The mere existence of ICC monitoring or preliminary examinations (such as the situation in Colombia) has acted as a benchmark, encouraging national judicial systems to conduct domestic prosecutions and combat impunity. This "positive complementarity"³ is one of the less visible but strategic successes in the Court's performance (Burke-White, 2008).

Conversely, the Court's record is also marked by prominent failures that have challenged its credibility and judicial reach. The most significant of these failures occurred in cases involving high-ranking political officials. The

¹-Thomas Lubanga Dyilo is the first person convicted by the International Criminal Court in 2012 for the crime of "conscripting and enlisting children under the age of 15 into armed conflict".

²- Bosco Ntaganda, known as "The Terminator," is a militia commander who was sentenced to 30 years in prison in 2019 for committing "eighteen counts of war

crimes and crimes against humanity," the longest sentence ever issued in the Court's history.

³- Positive Complementarity is a concept in international criminal law whereby the Court, instead of focusing solely on criminal prosecution, encourages and supports states to "strengthen their domestic judicial capacities" and "conduct credible national trials".

collapse of cases against Uhuru Kenyatta,⁴ the then-President of Kenya, due to "state non-cooperation" and "witness intimidation," as well as the acquittal of Laurent Gbagbo,⁵ the former President of Côte d'Ivoire, reinforced the perception that the Court lacks sufficient tools to confront political leaders who enjoy state protection. These failures, alongside the case of "Omar al-Bashir," which despite two arrest warrants never led to his arrest due to pervasive state non-cooperation, highlight the Court's greatest weakness: the "deep chasm between legal authority and executive capability" (Cryer, Robinson, & Vasiliev, 2019: 237).

The Court's performance in recent years indicates an attempt to learn from these experiences and adopt a bolder approach. The actions of the current Prosecutor, Karim Khan, in simultaneously requesting arrest warrants for senior officials in the situations of Ukraine (against the leader of a permanent Security Council member) and Gaza (against leaders of a powerful non-member state and its allies), despite retaliatory measures, signify a strategic shift to directly confront the accusation of "selective justice" (Ambos, 2023: 15-18). It should be noted, however, that while retaliatory measures and countermeasures are inherently deemed "illegitimate," in exceptional circumstances and as a last resort following diplomatic efforts, they might be accepted as defenses precluding criminal responsibility under Article 30 of the Draft Articles on State Responsibility (Dehghanpour, 1403: 2024). This new practice has shifted the Court's performance from a cautious stance to an

active and confrontational position against political powers. Nevertheless, this judicial courage does not guarantee the Court's ultimate success and only intensifies the confrontation between legal ideals and political realities.

Ultimately, this dual performance, where success against weaker perpetrators stands alongside failure against the powerful, directly leads to the practical erosion of the principle of non-immunity; for it transmits the message to the world that, in practice, justice remains a function of power.

4.2. The Erosion of the Principle of Non-Immunity in Practice

An analysis of the three obstacles (jurisdictional limitations, the challenge of state cooperation, and the impact of geopolitical considerations) reveals that these are not merely executive problems in individual cases, but collectively lead to the systematic erosion of the "principle of non-immunity" itself in practice. This erosion does not imply the invalidation of the text of Article 27 of the Rome Statute, but rather points to the creation of a deep gap between the prohibition of "legal immunity" and the persistence of "de facto immunity" for powerful officials. In essence, these structural and political barriers have created a new, informal shield that neutralizes the efficacy of the Statute's most revolutionary principle in practice, turning it into an unattainable ideal for the most significant accused of international crimes.

The first dimension of this erosion occurs through the creation of "judicial safe havens." As previously analyzed, the Court's jurisdictional regime, based on "state

⁴- Uhuru Kenyatta, the then-President of Kenya, was prosecuted for "crimes against humanity" in the post-election violence of 2007, but his case was terminated in 2014 due to "non-cooperation of the Kenyan government" and "insufficient evidence".

⁵- Laurent Gbagbo is the first former Head of State to be tried at the Court, but was ultimately acquitted of charges of crimes against humanity in 2019 .

consent," and the "Security Council referral" mechanism, paralyzed by the "veto power," effectively place vast parts of the world beyond the reach of international criminal justice (Bassiouni, 2010: 785-790). The crisis in Syria is a stark symbol of this reality; where, despite more than a decade of documenting war crimes and crimes against humanity, the repeated use of the veto by Russia has created a complete jurisdictional deadlock for the Court, granting permanent practical immunity to the perpetrators.¹ This situation transforms the principle of non-immunity from a universal norm into a rule whose application depends on political geography, where an official's immunity is determined not by their legal status, but by their nationality and political alliances.

The second factor of erosion is the transformation of "judicial authority" into a "political request." The Court's absolute dependence on state cooperation for the arrest and surrender of suspects gives states the practical power to "veto" the Court's judicial decisions. When an arrest warrant for a high-ranking official (like Omar al-Bashir) is ignored for years, the message is sent to the world that the Court's decisions "lack enforcement guarantees." This pattern was repeated even more prominently in the case of the arrest warrant issued for Vladimir Putin, the President of Russia; in this instance, the Court's legal authority directly clashed with the political reality of a permanent Security Council member, rendering the arrest warrant in practice a symbolic and unenforceable statement. This executive deadlock weakens the Court's legal authority and downgrades the principle of non-immunity from a binding rule to a moral recommendation.

The deepest dimension of this erosion lies in weakening the "normative power" of the principle itself. Selective justice, a direct product of geopolitical influence on the Court, transforms the principle of non-immunity from an impartial legal principle into a tool in the hands of great powers to manage their rivals (Akande, 2012: 348). This duality reached its peak in international reactions to the Court's investigations: while the investigation into the situation in Ukraine was met with extensive political and financial support from Western states, the parallel investigation into the situation in Palestine faced condemnation and even threats of sanctions from some of the same states. This blatant double standard destroys the legitimacy and global acceptance of the principle of non-immunity, promoting the dangerous perception that accountability is not a global standard, but a cost that only "states lacking political support" must pay.

Ultimately, this erosive process has placed the Court in a paradoxical position: an institution created to challenge the immunity of the powerful has, in practice, become a stage for displaying that very immunity. This accountability vacuum created at the heart of the Court's operation reveals the vital necessity of seeking alternative solutions. If the most important international judicial institution has failed to fully realize this principle, one must ask whether other capacities, particularly "universal jurisdiction" in national courts, can fill this void.

4.3. The Capacity of Alternative Solutions (Universal Jurisdiction)

In circumstances where the practical erosion of the principle of non-immunity challenges

¹- Since the beginning of the Syrian crisis in 2011, numerous draft resolutions to refer the situation in this country to the International Criminal Court have faced

veto by Russia and China in the Security Council, preventing any ICC action regarding the widespread crimes committed in that country.

the Court's efficacy against the powerful, the international legal system has provided an alternative, decentralized solution to combat the accountability gap regarding international crimes: the principle of "universal jurisdiction." This exceptional principle, based on the idea of crimes that shock the conscience of humanity, allows a country's domestic courts to adjudicate the most serious international crimes regardless of the "place of commission" or the "nationality of the perpetrator and victim." When international institutions are incapacitated due to political or jurisdictional deadlocks, universal jurisdiction becomes the last resort for justice and the only remaining hope for victims, playing a vital role in completing the international criminal justice system.

The legal foundations of this principle are rooted in "customary and treaty-based international law." The four Geneva Conventions (1949) oblige States Parties to implement the principle of "prosecute or extradite" regarding perpetrators of "grave breaches" (Geneva Convention IV, 1949: Art. 146). This fundamental obligation was reinforced by the famous judgment of the International Court of Justice in the case of *Belgium v. Senegal*; in this case, the Court emphasized the binding nature of this principle under the Convention against Torture (ICJ, *Belgium v. Senegal*, 2012: para. 99). Nevertheless, the exercise of this jurisdiction faces two major obstacles. First, the legal obstacle of "immunity of official authorities"; unlike the ICC, which has overcome this barrier through Article 27 of the Statute, domestic courts still face the ICJ judgment in the *Arrest Warrant Case* (Democratic Republic of the Congo v. Belgium), which recognizes "personal immunity of high-ranking heads of state during their term of office" (ICJ, *Arrest Warrant Case*, 2002: para. 58). Second, the

practical obstacle of "the necessity of the accused's presence in that state's territory," which makes the administration of justice contingent upon the travel and accidental arrest of suspects.

Despite these obstacles, recent years have witnessed a "renaissance of universal jurisdiction," especially in countries that have established specialized judicial units for international crimes. German courts, with an expansive interpretation of this principle, have become global pioneers in this field. In this regard, the historic conviction of Anwar Raslan, a former senior Syrian intelligence official, for crimes against humanity in the Koblenz Higher Regional Court in Germany, was a turning point demonstrating how national courts can fill the void caused by the paralysis of the Security Council. These cases prove that universal jurisdiction has transformed from a theoretical concept into a practical tool for administering justice, creating a network of accountability where no one, nowhere, can consider themselves completely immune.

In conclusion, looking to the future of the fight against official immunity should not be limited to a confrontation between the International Criminal Court and universal jurisdiction. These two are not rivals, but complementary components of an "accountability ecosystem." The ICC, as an international institution, plays the role of setting legal standards, adjudicating the most significant cases, and exerting political pressure on states, while national courts, using universal jurisdiction, act as the executive arms of this system, implementing justice at the national level. The erosion of the principle of non-immunity before the ICC doubles the importance of this alternative solution. The path forward lies not in weakening one for the benefit of the other, but in "strengthening

cooperation and synergy between these two arms of justice" to ensure that the vital principle of "criminal responsibility," as embodied in Article 27 of the Rome Statute, transforms from a legal ideal into a lasting reality for all.

5. Conclusion

This research began with the aim of analyzing the efficacy of Article 27 of the Rome Statute in realizing "criminal responsibility for nationals of non-member states." The central question was premised on: "Why, despite the legal clarity of this article in negating immunity, do officials of non-member states remain practically immune from accountability?"

The findings of this research provide a clear answer to this question and confirm the central hypothesis; based on these findings, it was determined that the efficacy of Article 27 in practice is systematically undermined not by a single factor, but through the destructive and synergistic impact of a three-layered chain of structural, executive, and political obstacles. In this regard, the first result is that the Court's jurisdictional limitations, which are based on state consent and exacerbated by the veto power in the Security Council, strip away the possibility of prosecuting many officials from the outset. The second result demonstrated that the Court's absolute dependence on state cooperation to enforce its decisions has downgraded its judicial authority to a mere political request, leading to the persistence of *de facto* immunity for powerful suspects. Finally, the third result confirmed that the confluence of these two obstacles has resulted in the formation of selective justice and eroded the normative power of the principle of non-immunity at the global level.

The findings of this study possess high generalizability, as they are not limited to one

or a few specific cases, but rather depict the structural weaknesses governing the Court's relationship with non-member states. The resulting outcomes have direct applications for "policymakers," "jurists," and "human rights activists," as by providing a realistic assessment of the Court's limitations, they create the understanding that relying solely on this institution to combat impunity is insufficient. This research demonstrated that a deep gap exists between the "removal of legal immunity" and the "continuation of practical immunity," and bridging this gap requires complementary and operational solutions.

Based on the above results and with the aim of translating analytical findings into a practical roadmap, the following proposals are offered. Instead of focusing on far-reaching reforms in the structure of the Court or the Security Council, these suggestions concentrate on strengthening existing capacities at the national and inter-state levels:

1. Legal Strengthening of Universal Jurisdiction at the National Level: Given the Court's limitations regarding officials of non-member states, states must amend their domestic laws to fully recognize the principle of universal jurisdiction for all core international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression). These amendments must explicitly remove any obstacles based on "official immunity," at least for crimes committed "outside their term of office" or "outside the scope of official functions," to pave the way for prosecution in national courts.
2. Establishment of Specialized Judicial Units: National judicial systems should emulate the successful experiences of countries like Germany by establishing specialized units within their prosecution services and courts dedicated exclusively to investigating and

prosecuting international crimes. By concentrating technical knowledge, resources, and necessary expertise, these units can bring complex cases based on universal jurisdiction to fruition with greater efficiency.

3. Development of International Cooperation Among States: To overcome the challenge of non-cooperation faced by the Court, states committed to justice must strengthen a network of bilateral and multilateral cooperation for mutual legal assistance in universal jurisdiction cases. This cooperation can include the "creation of joint investigation teams," "facilitation of evidence collection," and "information exchange" to form a united and decentralized front against impunity and immunity.

In conclusion, this research determines that although Article 27 of the Rome Statute is a significant normative achievement, its efficacy in practice is severely limited. The future of the fight against immunity lies not in confrontation, but in "synergy" between the International Criminal Court and national courts. The Court, as a symbolic and norm-setting axis, and national courts, as the executive arms of justice through universal jurisdiction, can complement each other to realize an "accountability ecosystem" wherein no official, regardless of nationality and status, can escape justice.

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