

Assessing The Jurisdictional Legitimacy of International Criminal Court (ICC) in Arresting Head of State from Non-Party States to The Rome Statute (Case Study: The Problematics of Arresting Benjamin Netanyahu)

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Abstract. *The issuance of an arrest warrant by the ICC for Israel Prime Minister Benjamin Netanyahu presents a fundamental juridical problem, given Israel's status as a non-State Party and Netanyahu's status as an active head of state. This research aims to (1) analyze the legal basis and legitimacy of the ICC's jurisdiction, and (2) analyze the resolution of the legal antinomy between the ICC's authority (Article 27) and the doctrine of head of state immunity (Customary International Law). This study employs a normative juridical methodology, utilizing statute, case, and conceptual approaches. The analysis reveals that the ICC's jurisdiction is legally valid, as it is not based on the perpetrator's nationality (ratione personae), but on the territorial delegation of jurisdiction (ratione loci) by Palestine as a State Party (Article 12(2)(a)), a basis confirmed by the 2021 Pre-Trial Chamber I decision. Furthermore, the study finds that the legal antinomy regarding immunity is resolved in favor of international criminal law. Head of state immunity (immunity ratione personae), rooted in the par in parem non habet imperium principle and the ICJ's 2002 Arrest Warrant case, is found to be inapplicable in the vertical relationship vis-à-vis an international court. This resolution is supported by Paragraph 61 of the Arrest Warrant decision itself and the ICC Appeals Chamber's 2019 judgment in the Al-Bashir (Jordan Referral) case. Thus, Article 27 (irrelevance of official capacity) prevails, and the ICC's legal basis for the arrest warrant is sound.*

Keywords: Arresting; Jurisdictional; International Criminal Court (ICC).

1. Introduction

The Israel–Palestine conflict constitutes one of the most enduring and complex issues in contemporary international law and global politics. The escalation of armed violence in the Gaza Strip since October 2023 has generated severe humanitarian consequences, including thousands of civilian casualties and the

destruction of essential infrastructure. A series of Israeli military operations has given rise to strong allegations of serious violations of International Humanitarian Law (United Nations Office for the Coordination of Humanitarian Affairs, 2025). These alleged violations include the use of starvation of civilians as a method of warfare and intentional attacks directed against civilian populations, acts that fall within the legal classification of crimes against humanity and war crimes as codified under Article 5(1)(b) and (c) of the Rome Statute of the International Criminal Court (1998).

As a permanent international judicial institution mandated to prosecute the most serious crimes of concern to the international community, the International Criminal Court (hereinafter referred to as the ICC) plays a pivotal role in advancing global justice. Nonetheless, a fundamental legal and political debate persists concerning the scope of the ICC's jurisdiction, particularly when it seeks to exercise authority over individuals who are nationals of non-State Parties to the Rome Statute (International Criminal Court, 2024). This issue raises intricate questions regarding the limits of treaty-based jurisdiction, the binding effect of international criminal accountability mechanisms, and the relationship between consent and enforcement in international law.

The controversy became particularly salient when Pre-Trial Chamber I of the ICC, upon the application of Prosecutor Karim A.A. Khan, issued an arrest warrant on 21 November 2024 against Israeli Prime Minister Benjamin Netanyahu. The warrant was issued following the Chamber's rejection of Israel's jurisdictional objections in Decision No. ICC-01/18-374 dated 21 November 2024. The Court found reasonable grounds to believe that Netanyahu bears individual criminal responsibility for war crimes, including the use of starvation as a method of warfare, as well as crimes against humanity in the form of murder and persecution committed in Gaza (Olaniyi, Folashade, dan Adewumi, 2022).

Despite the issuance of the arrest warrant, no effective arrest has been executed to date, notwithstanding the binding nature of cooperation obligations imposed upon States Parties under Article 86 of the Rome Statute. This enforcement gap illustrates the structural tension between the ICC's claim to universal accountability and the enduring principle of state sovereignty. It further intensifies debates concerning head of state immunity within contemporary international criminal law. The principle of sovereign equality of states, enshrined in Article 2(1) of the United Nations Charter, is frequently invoked by non-State Parties as a legal justification to resist external judicial intervention against their high-ranking officials (Hidayat, Tambayong, dan Haris, 2025).

Moreover, the ICC's exercise of jurisdiction is constrained by the principle of complementarity, as articulated in Article 17 of the Rome Statute. Under this principle, the Court may exercise jurisdiction only when national legal systems are unwilling or genuinely unable to prosecute alleged perpetrators (Cassese, 2008).

The Israeli–Palestinian situation presents a doctrinal paradox: while the alleged crimes occurred within the territory of Palestine—a State Party to the Rome Statute—the alleged perpetrator is a national of Israel, a non-State Party (Hadi et al., 2025). This configuration raises complex jurisdictional debates concerning *ratione loci* (territorial jurisdiction), *ratione personae* (personal jurisdiction), and *ratione materiae* (subject-matter jurisdiction) within the ICC framework.

From the perspective of international criminal law theory, the extension of jurisdiction over perpetrators of grave international crimes is grounded in the concept of *hostis humani generis*—“enemy of all humankind.” Originally developed to justify universal jurisdiction over piracy, this doctrine has evolved into a foundational moral and philosophical justification for holding individuals criminally accountable for atrocities that threaten the international community as a whole (Duff, 2018). In this context, a head of state who knowingly orders, authorizes, or facilitates crimes against humanity cannot shield himself behind official capacity, as such crimes violate peremptory norms (*jus cogens*) and generate obligations *erga omnes* binding upon all states.

In light of the foregoing, this research seeks to assess the legal strength and legitimacy of the ICC’s jurisdiction over individuals originating from non-State Parties to the Rome Statute, with particular emphasis on the arrest warrant issued against Benjamin Netanyahu. Furthermore, this study aims to examine the normative tension (legal antinomy) between the ICC’s jurisdictional authority and the principles of state sovereignty and head of state immunity. Through this analysis, the research endeavors to identify a proportionate legal position that reconciles the pursuit of international justice with the preservation of sovereign equality within the contemporary international legal order.

2. Results and Discussion

3.1 Legal Basis and Legitimacy of The International Criminal Court Over Individuals from Non-State Parties to The Rome Statute

The International Criminal Court (ICC) was established by the 1998 Rome Statute as a permanent judicial institution mandated to prosecute individuals responsible for the most serious crimes of concern to the international community as a whole. The creation of the ICC marked a significant institutional development in international criminal law and reflected a paradigm shift in criminal accountability that has been progressively recognized since the eighteenth century (Atmasasmita, 2021). By institutionalizing individual criminal responsibility at the international level, the Rome Statute reinforced the erosion of absolute state-centered immunity in cases involving grave international crimes.

Pursuant to the Preamble and Article 1 of the Rome Statute, the ICC operates as a *court of last resort*, meaning that its jurisdiction is complementary to national

criminal jurisdictions. Under Article 17 of the Rome Statute, the Court may exercise jurisdiction only when a State with primary jurisdiction is unwilling or genuinely unable to carry out the investigation or prosecution. This principle of complementarity serves as a structural safeguard, ensuring that the ICC does not replace domestic courts but intervenes only in situations where national accountability mechanisms fail.

Conceptually, ICC jurisdiction is structured around four principal dimensions: *ratione materiae* (subject-matter jurisdiction concerning the crimes enumerated in Article 5), *ratione personae* (personal jurisdiction over natural persons), *ratione temporis* (temporal jurisdiction), and *ratione loci* (territorial jurisdiction). For the purpose of establishing initial jurisdiction, Article 12(2)(a) of the Rome Statute provides that the Court may exercise jurisdiction if the alleged conduct occurred on the territory of a State Party. Accordingly, the legal foundation of ICC jurisdiction does not rely exclusively on the nationality of the accused (*ratione personae*), but may also derive from the delegation of territorial jurisdiction by a State Party to the Court (Cormier, 2020).

In the present context, Palestine has ratified the Rome Statute and thereby provides the territorial basis for ICC jurisdiction over alleged crimes committed within its territory. This territorial delegation finds a clear legal basis under Article 12(2)(a). Doctrinal scholarship supports this interpretation, affirming that a State Party may validly delegate its territorial jurisdiction to the ICC, even when such delegation results in the prosecution of nationals of a non-State Party (Vagias, 2014). As Monique Cormier observes, “delegation of territorial jurisdiction by a State Party provides a valid legal basis for the ICC to exercise jurisdiction over nationals of non-States Parties, even if those States have not consented to the Court’s jurisdiction” (Cormier, 2020). This doctrinal position confirms that territorial nexus, rather than nationality, constitutes the primary jurisdictional anchor in such cases.

Nevertheless, territorial legitimacy is not absolute or self-sufficient. Its application must be interpreted in conjunction with the principle of complementarity, which functions as the principal operational limitation within the Rome Statute system. As stipulated in Article 17, the ICC may only proceed where relevant national jurisdictions fail to act genuinely (Nsereko, 2013). Complementarity therefore operates as a limiting mechanism, preserving the balance between state sovereignty and the global mandate of the ICC (Putri, Lestarika, dan Sary, 2025). The principle was designed to ensure that domestic judicial systems retain primary responsibility while preventing the emergence of an “impunity gap,” namely a situation in which perpetrators of international crimes escape accountability due to state inaction (Triyana, 2014).

Beyond its formal statutory foundation, the ICC’s jurisdiction over core international crimes—such as genocide, crimes against humanity, and war

crimes—derives additional normative support from the existence of *jus cogens* norms, which are non-derogable and universally binding (Linderfalk, 2020). Violations of such peremptory norms generate *erga omnes* obligations owed to the international community as a whole (Cimiotta, n.d). Consequently, ICC jurisdiction in these contexts acquires not only treaty-based legitimacy but also moral and normative legitimacy rooted in the protection of universal humanitarian values. The prosecution of grave international crimes thus transcends purely consensual jurisdictional logic and aligns with the broader objective of safeguarding humanity.

In cases involving nationals of non-State Parties, such as Israel, the ICC may exercise jurisdiction where two cumulative conditions are satisfied: first, the alleged crimes occurred on the territory of a State Party (territorial nexus); and second, the relevant national authorities are unwilling or unable genuinely to prosecute. The convergence of these two elements provides a *prima facie* jurisdictional basis for ICC intervention, consistent with established doctrinal analysis and ICC practice (Akande, 2003). Thus, the chain of jurisdiction based on *ratione loci* remains robust at the preliminary stage, although subsequent issues—such as head of state immunity and enforcement challenges—require separate legal examination.

It is noteworthy that Palestine's capacity to trigger ICC jurisdiction was initially contested in political discourse. However, the ICC adopted a strictly legal approach in determining that, for the purposes of the Rome Statute, Palestine qualifies as a State Party. In its Decision No. ICC-01/18-143 of 5 February 2021, entitled *Decision on the Prosecution's Request for a Ruling on the Court's Territorial Jurisdiction in Palestine*, Pre-Trial Chamber I held that "the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem" (International Criminal Court, 2021). Through this ruling, the Court separated political recognition debates from its legal assessment and affirmed that territorial nexus may be determined judicially without reliance on broader political consensus.

The territorial legitimacy of ICC jurisdiction was further consolidated in Decision No. ICC-01/18-374 dated 21 November 2024. In this ruling, Pre-Trial Chamber I formally rejected Israel's jurisdictional challenge submitted pursuant to Article 19 of the Rome Statute. The Chamber reaffirmed that ICC jurisdiction is grounded not in the nationality of the accused (*ratione personae*), but in the location where the alleged crimes were committed (*ratione loci*). The rejection of Israel's objection confirms that non-State Party status cannot serve as a legal shield where a State Party has validly delegated territorial jurisdiction to the Court.

Additionally, the admissibility dimension was addressed in Decision No. ICC-01/18-375 issued on the same date. In that ruling, the Chamber dismissed Israel's procedural request for renewed notification of investigation under Article 18 of

the Rome Statute. The Court held that the complementarity framework had already been respected by providing opportunity for national proceedings since 2021. By rejecting Israel's request, the ICC underscored that procedural formalities cannot be invoked to obstruct accountability where due process standards have been satisfied. This demonstrates that the ICC fulfilled international due process requirements prior to issuing coercive measures, including the arrest warrant against Benjamin Netanyahu.

In summary, the juridical reasoning may be articulated as follows: (1) where the requirement of *ratione loci* is satisfied because the alleged crimes occurred within the territory of a State Party (Palestine), and (2) where complementarity indicates that national jurisdiction is ineffective or unwilling to prosecute, the ICC acquires a *prima facie* legal basis to proceed, notwithstanding the suspect's nationality as a citizen of a non-State Party. Therefore, objections grounded solely in non-State Party status must be addressed by clarifying that ICC jurisdiction in such cases derives from territorial delegation by a State Party rather than from the nationality of the accused. Subsequent issues, including potential conflicts with head of state immunity and challenges relating to enforcement, constitute distinct legal questions that warrant separate and detailed analysis.

3.2 Legal Antinomy Between The Jurisdiction of The International Criminal Court and The Principle of State Sovereignty and Head of State Immunity in The Problematic Arrest of Benjamin Netanyahu

The jurisdiction of the International Criminal Court (ICC) to prosecute individuals for serious international crimes gives rise to a fundamental tension within public international law, particularly when confronted with the principle of state sovereignty and the doctrine of head of state immunity. These two principles constitute classical pillars of the conventional international legal order, whereas the ICC represents a paradigmatic shift toward the supremacy of individual criminal responsibility for crimes that shock the conscience of humanity (Paust, 2000). Conceptually, the relationship between ICC jurisdiction and state sovereignty is dialectical in nature. On the one hand, the ICC functions to enforce *jus cogens* norms, including the prohibitions of genocide, war crimes, and crimes against humanity. On the other hand, the exercise of such jurisdiction potentially encroaches upon the foundational principles of non-intervention and immunity of high-ranking state officials protected under customary international law.

a. State Sovereignty and the Limits of ICC Intervention

The principle of state sovereignty, as enshrined in Article 2(1) of the United Nations Charter, affirms the sovereign equality of all states and safeguards them from external interference. Sovereignty encompasses a state's exclusive jurisdiction over its territory and population, including authority to enforce its domestic criminal law. However, the establishment of the ICC through the 1998

Rome Statute introduced a model of “delegated sovereignty,” whereby States Parties voluntarily transfer part of their international criminal jurisdiction to the Court. In this respect, the ICC cannot be regarded as a violation of sovereignty, as its authority derives from treaty-based consent among States Parties (Hiariej, 2009).

Nevertheless, complications arise when ICC jurisdiction is asserted over individuals from non-States Parties, such as Israeli Prime Minister Benjamin Netanyahu. Israel has not ratified the Rome Statute and therefore has not provided express consent to ICC jurisdiction. From the standpoint of classical customary international law, ICC action against Israeli nationals may be framed as inconsistent with the principles of state consent and non-intervention. Arguments grounded in the doctrine of *pacta tertiis nec nocent nec prosunt*—that treaties neither impose obligations nor confer rights upon third states—are frequently invoked to support this position.

However, such arguments often overlook a critical juridical distinction. The principle of *pacta tertiis* releases non-party states only from treaty-based procedural obligations; it does not exempt them from substantive obligations arising under customary international law (Wenqi, 2006). Even if a state is not a party to the Rome Statute, it remains bound by fundamental norms of customary international law and general principles of international law. Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) recognizes customary international law as a primary source of binding law applicable to all states, irrespective of treaty ratification. Core international crimes—particularly war crimes and crimes against humanity—are widely recognized as codifications of customary international law and have attained the status of *jus cogens*, that is, peremptory norms from which no derogation is permitted. Consequently, Israel remains substantively bound by these prohibitions. The ICC’s assertion of jurisdiction in such circumstances does not amount to retroactive application of new law, but rather enforcement of pre-existing fundamental norms.

The modern framework of international criminal law increasingly departs from a rigid consent-based sovereignty model and instead emphasizes accountability for violations of *jus cogens* norms that give rise to *erga omnes* obligations owed to the international community as a whole. In the present case, the ICC grounds its jurisdiction not in Israeli sovereignty, but in the territorial sovereignty of Palestine, a State Party that has validly delegated territorial jurisdiction to the Court. This generates a legal tension between two equally valid principles: sovereign equality on the one hand, and enforcement of universal obligations through individual criminal responsibility on the other. This structural conflict constitutes a form of legal antinomy—where two valid norms collide and cannot be simultaneously applied without juridical contradiction.

b. Head of State Immunity and Individual Criminal Responsibility

Beyond sovereignty, a further normative conflict arises with respect to the doctrine of head of state immunity. Under classical customary international law, an incumbent head of state enjoys absolute personal immunity (*immunity ratione personae*) from foreign criminal jurisdiction. This doctrine is rooted in the principle *par in parem non habet imperium*, which posits that equals have no authority over one another (Sharma, 2021). The International Court of Justice reaffirmed this principle in the *Arrest Warrant (Democratic Republic of the Congo v. Belgium)* case (2002), holding that incumbent heads of state, heads of government, and foreign ministers enjoy full immunity from prosecution before foreign national courts during their term of office (International Court of Justice, 2002). The ICJ further clarified that such immunity persists even in cases involving allegations of serious international crimes, subject to specific exceptions.

However, the Rome Statute introduces a transformative paradigm. Article 27 expressly removes immunity based on official capacity, stating that immunities attached to official position, whether under national or international law, shall not bar the Court from exercising its jurisdiction. Article 27 embodies the principle of individual criminal responsibility and reflects the normative weight of *jus cogens* values that place accountability above official status. This provision does not represent a radical innovation, but rather codifies precedents established after World War II. Both the Nuremberg and Tokyo Charters rejected the defense of official position as grounds for immunity. The Nuremberg precedent thus laid the foundation for the customary rule that *immunity ratione personae* does not apply before international criminal tribunals.

In the context of the arrest warrant against Benjamin Netanyahu, the ICC maintains that his position as head of government cannot shield him from prosecution for alleged war crimes. Nonetheless, practical enforcement remains challenging, as non-States Parties, including Israel and certain political allies, are not bound by the Rome Statute's cooperation obligations. This creates a gap between normative legitimacy—derived from the Rome Statute and *jus cogens*—and practical enforceability.

The structural legal antinomy is therefore evident: Israel invokes customary international law, reinforced by the ICJ's *Arrest Warrant* decision, and relies on Article 98(1) of the Rome Statute to argue that States Parties must respect immunities under customary law. This reflects a Westphalian sovereignty paradigm. Conversely, the ICC relies on Article 27, which nullifies immunities before the Court and reflects a post-Westphalian justice paradigm (Killingsworth, 2024). The conflict symbolizes the broader evolution of international law from a state-centered system toward one recognizing individuals as direct subjects of international legal responsibility.

Resolution of this antinomy may be discerned in three authoritative legal sources. First, the ICJ itself in *Arrest Warrant* acknowledged an exception, stating in paragraph 61 that immunity does not bar prosecution before “certain international criminal courts,” implicitly referencing tribunals such as the ICC (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002). Thus, the ICJ recognized that immunity before national courts differs from immunity before international tribunals.

Second, the ICC Appeals Chamber definitively addressed this issue in the *Al-Bashir (Jordan Referral)* judgment of 2019. The Appeals Chamber held that no rule of customary international law grants head of state immunity before an international criminal court (ICC Appeals Chamber, 6 May 2019). The principle *par in parem non habet imperium* applies only horizontally between states, not vertically between the international community, represented by the ICC, and an individual accused of international crimes. Accordingly, Article 98(1) does not bar arrest in such circumstances because no conflicting customary obligation exists.

Third, in Decision No. ICC-01/18-374 dated 21 November 2024, Pre-Trial Chamber I rejected Israel’s jurisdictional objections and reaffirmed that once territorial jurisdiction is validly established through Palestine’s delegation, no waiver of immunity from Israel is required. The Chamber confirmed that Article 27 overrides official capacity defenses before the Court and clarified the cooperation obligations of States Parties.

From a theoretical perspective, this conflict may be examined through Hans Kelsen’s Stufenbau theory and monist conception of international law. Kelsen conceived of law as a unified normative system deriving validity from a hierarchical structure culminating in a fundamental norm (*Grundnorm*). Within this framework, international law occupies a superior hierarchical position and confers validity upon national legal orders (Samekto et al., 2025). Applying this hierarchical logic, *jus cogens* norms prohibiting war crimes and crimes against humanity occupy a higher normative status than rules of immunity rooted in sovereign equality. As non-derogable norms protecting the fundamental interests of the international community, *jus cogens* norms must prevail in cases of normative conflict.

Accordingly, where a clash arises between head of state immunity and *jus cogens*-based accountability, hierarchical resolution demands prioritization of the higher norm. This reflects the constitutionalization of international law, in which fundamental humanitarian values increasingly supersede classical doctrines of absolute sovereignty.

In conclusion, the tension between ICC jurisdiction, state sovereignty, and head of state immunity in the Netanyahu case exemplifies a legal antinomy between two normative systems: the classical sovereignty-based order and the modern

responsibility-based international criminal regime. While political and practical obstacles remain significant, the ICC's jurisdiction rests on a robust normative foundation grounded in territorial delegation, complementarity, the rejection of immunity under Article 27, and the supremacy of *jus cogens* norms within the contemporary international legal order.

4. Conclusion

Based on the normative juridical analysis conducted, two principal conclusions may be drawn in response to the research questions: The legal basis and legitimacy of the International Criminal Court's (ICC) jurisdiction over individuals from non-States Parties (in the case study of Benjamin Netanyahu) are juridically valid. This authority is not grounded in the nationality of the accused (*ratione personae*), but rather derives from territorial delegation of jurisdiction (*ratione loci*) by Palestine as a State Party, pursuant to Article 12(2)(a) of the Rome Statute. The validity of this territorial jurisdiction was judicially confirmed by the Pre-Trial Chamber I Decision No. ICC-01/18-143 (5 February 2021). This authority is further strengthened by the fulfillment of the complementarity principle under Article 17, whereby the state of nationality (Israel) is considered unwilling or unable genuinely to carry out investigations or prosecutions concerning the alleged serious international crimes. The normative conflict (legal antinomy) between ICC authority and the doctrine of head of state immunity is resolved in favor of the supremacy of international criminal law. It is established that personal immunity (*immunity ratione personae*), rooted in the *principle par in parem non habet imperium* and reaffirmed in the ICJ's Arrest Warrant decision (2002), applies only within the horizontal framework of inter-state relations, particularly before national courts. Such immunity does not apply within the vertical framework vis-à-vis an international criminal tribunal such as the ICC. This juridical resolution is grounded on two considerations: (a) the exception expressly acknowledged by the ICJ itself in paragraph 61 of the Arrest Warrant judgment, which refers to prosecution before certain international criminal courts; and (b) the definitive ruling of the ICC Appeals Chamber in the Al-Bashir (Jordan Referral) case (2019), which affirmed that head of state immunity under customary international law cannot bar ICC jurisdiction. Accordingly, Article 27 of the Rome Statute (irrelevance of official capacity) applies fully, reinforced by the *jus cogens* status of the crimes alleged.

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