

**JURISDICTION OF INTERNATIONAL CRIMINAL COURT (ICC) AND CRIMINAL
LIABILITY OF HEADS OF STATE**

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Abstract: The International Criminal Court (ICC) plays a pivotal role in upholding international humanitarian law by addressing grave crimes that challenge global justice. Understanding International Criminal Court jurisdiction is essential for grasping how international accountability is pursued across borders. Established to prosecute serious breaches, the ICC has evolved in its jurisdictional reach. This article will illuminate key aspects of ICC jurisdiction, and the significant crimes under its mandate. This study seeks to examine the jurisdictional structure of the International Criminal Court, the scope of Head-of-State immunities under both customary and treaty-based international law, as well as relevant judicial decisions and academic perspectives that illustrate how these principles operate in practice. It also intends to explore the broader consequences for the development of international criminal justice and the strengthening of the rule of law.

Key words: International Criminal Court (ICC), jurisdiction, Rome Statute, declaration, head of state, immunity, Arrest Warrant, Al-Bashir case, complementarity, customary international law, individual criminal responsibility, state cooperation, international justice, rule of law, locus delicti, *ratione materiae*, *ratione temporis*, *ratione personae*.

I. INTRODUCTION

Established by the Rome Statute in 2002, the International Criminal Court (ICC) operates on the principle of complementarity. This means it intervenes only when national jurisdictions are unable or unwilling to prosecute individuals for crimes that fall within its purview. The court's jurisdiction extends to crimes committed by member states or individuals of those states, emphasizing the importance of cooperation between national and international legal systems.

The ICC's jurisdiction covers four core crimes according to Rome Statute¹: genocide, war crimes, crimes against humanity, and the crime of aggression. Each of these crimes poses a significant threat to international peace and security, warranting a collective response from the global community. Understanding the limits and scope of the International Criminal Court Jurisdiction is crucial for assessing its effectiveness in addressing severe violations of international humanitarian law.

The International Criminal Court (ICC) operates under three primary types of jurisdiction: territorial, nationality, and a residual category known as "universal jurisdiction." Each type plays

¹ Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, 2187 U.N.T.S. 3, Art. 5.

a distinct role in determining the court's authority over specific cases. Territorial jurisdiction occurs when crimes are committed within the borders of a state that is a party to the Rome Statute², the ICC's founding treaty. This allows the ICC to prosecute individuals for serious offenses that take place in signatory nations, reinforcing accountability on a regional level.

Nationality jurisdiction is based on the principle that states may prosecute their own nationals for crimes committed anywhere in the world. For instance, if a citizen of a state party commits a crime abroad, the ICC may exercise jurisdiction if that country refers the case to the court.³

Universal jurisdiction, although not explicitly defined in the Rome Statute, allows for the prosecution of serious crimes under international law, such as genocide, by any state regardless of nationality or location. This type of jurisdiction is important as it enables the ICC to address egregious offenses that transcend national borders, ensuring that perpetrators cannot escape justice.

Moreover, Article 12(3) of the Rome Statute provides a unique mechanism through which a non-State-Party may voluntarily accept the jurisdiction of the International Criminal Court.⁴ It allows such a State to lodge a formal declaration with the ICC Registrar, thereby consenting to the Court's jurisdiction over crimes committed on its territory or by its nationals. The accepting State must be the territorial sovereign over the locus delicti at the time of the declaration since the Court has inherent jurisdiction and the accepting State merely authorizes the Court to exercise its jurisdiction on its territory. By ratifying the RS or accepting the Court's jurisdiction pursuant to Art. 12(3) RS, the States authorize the Court to exercise its inherent jurisdiction in lieu of their jurisdictional titles accepted by the RS, namely Art. 12(2)(a), (b) RS.⁵ The inherent jurisdiction of the Court is grounded on the universal interest of the international community to prosecute the core crimes of the RS.⁶ The Court therefore exercises its jurisdiction on behalf of the international community.

Under the Article 12(3) of the Rome Statute, the Court may only apply its jurisdiction depending on the capacity of the entity making the declaration to act as a State for the purposes of this Statute. And the declaration serves as an authorization for the Court to claim its jurisdiction only over crimes committed in the territory of that State as well as nationals. Through accepting the Court's jurisdiction, the State authorizes the Court to act within its territory instead of its own national jurisdiction over crimes under the Statute.⁷ This article aims to analyze the jurisdictional framework of the ICC, the immunities of Heads of State under customary international law and treaty law, and the jurisprudence and scholarly debate on how these issues play out in practice. It will further address the implications for international justice and the rule of law.⁸

II. METHODOLOGY

² Rome Statute, Art. 12.

³ Ibid, art. 12.

⁴ Ibid, art 12(3).

⁵ Cassese (1999) 160; Sadat/Carden (2000) 412; Scharf (2001) 77; Rastan (2012) 20; Stahn (2016) 448.

⁶ Inazumi (2002) 166; Stahn (2016) 448.

⁷ Situation in the State of Palestine (ICC-01/18-143), Pre-Trial Chamber I, 5 February 2021, paras. 100–102.

⁸ Al-Bashir Appeal [115]; Al-Bashir Concurring Opinion [53f., 58, 61].

This article adopts a doctrinal (legal-dogmatic) methodology. It reviews primary legal sources (treaties, statutes and judgments) and secondary literature (books, articles) concerning: (i) the jurisdiction of the ICC; (ii) the rules of immunity of sitting and former Heads of State; (iii) the interplay of jurisdiction and immunities in key cases; and (iv) scholarly analyses of the practical and normative challenges of prosecuting Heads of State. Key case law examined includes the ICJ's Arrest Warrant case, and the ICC's jurisprudence (the Pre-Trial Chamber and Appeals Chamber decisions on the warrant for Omar al-Bashir of Sudan). The study also draws on contemporary scholarship on immunity and the ICC (Kiyani's "Al-Bashir & the ICC: The Problem of Head of State Immunity") and Yash Singhi's article on Head of State immunity as a major obstacle to the ICC.⁹ The analysis compares and contrasts the rules of functional and personal immunity under customary international law (as articulated by the ICJ) with the treaty regime of the Rome Statute. It then evaluates how the ICC's jurisdiction is operationalized in relation to Heads of State and identifies obstacles to enforcement (such as lack of state cooperation). While this method does not involve empirical data collection (e.g., surveys or interviews), it is sufficient for normative legal analysis and for outlining doctrinal developments and their practical implications.

III. RESULTS

The Rome Statute establishes the ICC's jurisdiction *ratione materiae* (genocide, crimes against humanity, war crimes, aggression), *ratione temporis* (after 1 July 2002 for States Parties), and *ratione personae* (natural persons). One critical provision is Article 27 which states:

"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, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 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".¹⁰

This means that, at least in the context of the ICC governed by the Rome Statute, the Court's jurisdiction is not to be blocked by the fact someone is a Head of State. Moreover, Article 98(1) must be considered: "The Court may not proceed with a request for surrender 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 ... of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."¹¹

This provision shows a limitation: the ICC itself cannot request surrender from a State if doing so would force that State to violate its obligations towards immunities of third States.¹² In the ICC's own jurisprudence, it has recognized that Article 27(2) applies such that a Head of State cannot claim immunity as a bar to ICC jurisdiction. In the case of Al Bashir, the Appeals Chamber held that immunities under customary international law "operate in the context of

⁹ Chinese Journal of International Law, Volume 12, Issue 3.

¹⁰ Rome Statute, Art. 27.

¹¹ Ibid, art 98.

¹² ANNEX I Confidential EX PARTE only available to the Prosecution ICC-01/22-89-Anx 24-10-2024 1/36 PT

relations between States” (horizontal relations) and that Article 27 removes such immunities in respect of the Court’s exercise of jurisdiction.¹³

Under customary international law, as reaffirmed by the ICJ in Arrest Warrant of 11 April 2000 in case of DRC vs. Belgium, serving Heads of State, Heads of Government and Foreign Ministers enjoy criminal immunity (immunity *ratione personae*) from the criminal jurisdiction of other States (foreign domestic courts) and enjoy personal inviolability while in office. The ICJ held: “In international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”¹⁴

In addition, the UN International Law Commission commentary notes this immunity protects officials against acts of another State which would hinder the performance of their duties.¹⁵ However, the ICJ also observed (*obiter*) that immunity may not exist before “certain international tribunals”— thus indicating a possible exception for tribunals such as the ICC.¹⁶ Scholarship acknowledges that the historical norm of Head of State immunity is eroding in the context of international criminal justice. For example, Yash Singhi argues that Head of State immunity is “the ICC’s biggest impediment”.¹⁷

Putting the above together, the key result is that, as a matter of treaty law, the ICC claims jurisdiction over Heads of State for eligible crimes and places official capacity beyond a bar to prosecution. Yet, customary international law continues to afford immunity to Heads of State in inter-state relations (horizontal) which may impact state cooperation (via Article 98). Practically, this means:

“A sitting Head of State of a State Party to the Rome Statute is theoretically subject to arrest and prosecution by the ICC, regardless of official capacity”.

A Head of State of a non-State-Party (i.e., whose State is not a party to the Rome Statute) presents a more complicated case: while Article 27 applies to persons of States Parties, the ICC may still have jurisdiction in some cases (e.g., when State Party refers the situation or UN Security Council refers it). Some argue immunity remains for non-State-Parties.¹⁸ The case of Al-Bashir is illustrative: the ICC issued arrest warrants; however, many States did not arrest him when he travelled. Issues of immunity, state non-cooperation, and non-State-Party status of Sudan complicated enforcement.¹⁹

IV. DISCUSSION

¹³ Al-Bashir Appeal

¹⁴ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, I.C.J. Reports 2002

¹⁵ Preliminary report on immunity of State officials from foreign criminal jurisdiction, by Roman Anatolevich Kolodkin, Special Rapporteur A/CN.4/601

¹⁶ Dapo Akande, ‘The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?’ (2009) 7 Journal of International Criminal Justice 333

¹⁷ Singhi, Y. Head of State immunity: The ICC’s biggest impediment. Indian Journal of International Law 59, 391–410 (2021).

¹⁸ <https://globalsecuritywire.com/policy-governance/2025/03/20/why-the-icc-should-respect-immunities-of-heads-of-third-states?utm>

¹⁹ Chinese Journal of International Law, Volume 12, Issue 3, pages 467–508.

Article 27 of the Rome Statute marks a major shift in international criminal law: official capacity cannot bar prosecution. This principle derives from the post-Nuremberg legacy and has been reaffirmed in ICC cases such as Prosecutor v. Al-Bashir, where the Appeals Chamber ruled that sitting Heads of State have no immunity before the ICC.²⁰ Similar reasoning guided the Special Court for Sierra Leone in Prosecutor v. Charles Taylor (2004). As van Sliedregt notes, this development confirms that “individual criminal responsibility lies at the core of modern international law”.²¹

At the same time, the ICJ’s articulation of immunity in the Arrest Warrant case reveals that in the realm of State-to-State relations the norm of immunity persists. The tension between the horizontal (state-state) and vertical (court-to-individual) dimensions is real. Scholars such as Kiyani argue that the ICC’s assertion of jurisdiction over Heads of State remains controversial because it may conflict with customary immunities.²²

Dapo Akande and Ramona Pedretti argue that the ICC’s vertical jurisdiction justifies lifting immunities within its framework, whereas Yash Singh highlights that such immunity remains “the ICC’s greatest impediment.”²³ Scholars including Kirsten Fisher and Johannes Block emphasize the need for stronger cooperation mechanisms and domestic implementation to ensure that accountability is more than symbolic.²⁴

V.CONCLUSION

In sum, the ICC’s jurisdictional framework explicitly rejects official capacity as a bar to prosecution of Heads of State (Rome Statute Art. 27). At the same time, customary international law — as affirmed by the ICJ in Arrest Warrant — still recognises immunities for serving Heads of State in horizontal state-to-state relations. The tension between these two norms means that while the ICC legally may prosecute Heads of State, the practical ability to do so depends on state cooperation, the status of the state concerned, and clear waiver of immunity or a normative shift. For the international criminal law regime to meaningfully hold Heads of State accountable, the normative commitments must be matched by political will and operational mechanisms for arrest and surrender.

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²⁰ Al-Bashir Appeal

²¹ Elies van Sliedregt, Individual Criminal Responsibility in International Law.

²² Chinese Journal of International Law, Volume 12, Issue 3

²³ Singh, Y. Head of State immunity: The ICC’s biggest impediment. Indian Journal of International Law 59.

²⁴ Kirsten Fisher, Moral Accountability and International Criminal Law (Routledge 2012).



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