
FROM NUREMBERG TO ROME: CONSENT, JUS COGENS, AND THE RETREAT OF UNIVERSAL CRIMINAL JURISDICTION

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ABSTRACT

This article interrogates the structural tension between the universal prohibition of jus cogens crimes and the consent-based jurisdictional framework of the International Criminal Court. Taking the Nuremberg Tribunal as a doctrinal baseline, it argues that the foundational premise of international criminal law lies in the inherent accountability of individuals for crimes that offend the conscience of humanity, independent of the consent of the offending state. By contrast, the Rome Statute conditions the exercise of jurisdiction primarily on territorial, nationality, or Security Council predicates, thereby reintroducing sovereignty as a procedural gatekeeper to the enforcement of peremptory norms.

Through a hierarchical analysis of jus cogens and obligations erga omnes, supported by the jurisprudence of the International Court of Justice and contemporary theories of constitutionalization, the article demonstrates how the ICC's consent-centric design produces a disjunction between the universality of substantive prohibitions and the conditionality of their enforcement. This disjunction is shown to generate structural impunity gaps, particularly for powerful non-party states, and to expose the Court to political pressures that erode both deterrence and institutional legitimacy.

The article further engages counterarguments grounded in sovereignty, realism, and systemic stability, acknowledging the political constraints that shaped the Rome Statute while rejecting the view that procedural consent can coherently subordinate non-derogable norms. It concludes by advancing pragmatic doctrinal pathways for realigning enforcement with normative hierarchy, including strengthened domestic universal jurisdiction, an assertive reinterpretation of complementarity through a jus cogens lens, and targeted institutional reforms. In doing so, the article reclaims Nuremberg's enduring premise that the authority of international criminal law rests not on the will of states, but on the legal supremacy of norms that bind power itself.

Keywords: International Criminal Court (ICC); jus cogens; universal jurisdiction; state consent; international legal hierarchy

I. Introduction:

The Enduring Question of Accountability Without Consent

In November 2024, the International Criminal Court issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Defense Minister Yoav Gallant, charging them with crimes against humanity and war crimes in the State of Palestine.¹ Slightly over a year later, enforcement remained elusive. Israel, a non-party to the Rome Statute, rejected the Court's authority, while the United States imposed sanctions on ICC judges in December 2025, characterizing the investigations as illegitimate targeting.² This deadlock, in which allegations of grave crimes encounter institutional paralysis due to sovereign resistance, exposes a central fragility of international criminal justice. It raises a fundamental question: can international criminal law bind states and their leaders in the absence of consent?

The twentieth century revealed the consequences of unrestrained power with exceptional clarity. Viktor Frankl, a survivor of Nazi concentration camps including Auschwitz, provided firsthand testimony of systematic dehumanization and industrialized mass killing that resulted in the murder of six million Jews and millions of others during the Holocaust.³ *"So, let us be alert, alert in a twofold sense: Since Auschwitz we know what man is capable of. And since Hiroshima we know what is at stake,"* he said. His reflections document how bureaucratic organization enabled extreme violence under the guise of legality.⁴ Similarly, the atomic bombings of Hiroshima and Nagasaki on August 6 and 9, 1945, introduced a new scale of destruction, killing over 200,000 civilians and inaugurating nuclear warfare as a tool of total annihilation.⁵ These events represent not abstract moral failures but historically verified limits

¹Situation in the State of Palestine, ICC-01/18, Warrant of Arrest for Benjamin Netanyahu (Pre-Trial Chamber I Nov. 21, 2024), <https://www.icc-cpi.int/news/situation-state-palestine-pre-trial-chamber-i-issues-warrants-arrest>; Situation in the State of Palestine, ICC-01/18, Warrant of Arrest for Yoav Gallant (Pre-Trial Chamber I Nov. 21, 2024), <https://www.icc-cpi.int/news/situation-state-palestine-pre-trial-chamber-i-issues-warrants-arrest>.

²Press Release, U.S. Dep't of State, Sanctioning ICC Judges Directly Engaged in the Illegitimate Targeting of Israel (Dec. 2025), <https://www.state.gov/releases/office-of-the-spokesperson/2025/12/sanctioning-icc-judges-directly-engaged-in-the-illegitimate-targeting-of-israel>.

³United States Holocaust Memorial Museum, Introduction to the Holocaust, Holocaust Encyclopedia, <https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust> (last visited Oct. 23, 2025).

⁴Viktor E. Frankl, *Man's Search for Meaning* 1–110 (Ilse Lasch trans., Beacon Press 2006) (1946).

⁵John Hersey, *Hiroshima* 1–118 (Vintage Books 1989) (1946); see also *The Atomic Bombings of Hiroshima and Nagasaki*, Atomic Heritage Found. (June 5, 2014), <https://www.atomicheritage.org/history/atomic-bombings-hiroshima-and-nagasaki>.

of human conduct under unchecked authority.

International criminal law emerged in direct response to these catastrophes. Its foundational premise was that certain crimes are so grave that their perpetrators must be held individually accountable, regardless of official position. The Nuremberg Tribunal articulated this principle with clarity, holding that crimes against international law are committed by individuals and that official capacity does not shield responsibility.⁶ In doing so, Nuremberg rejected traditional doctrines of state immunity and affirmed accountability independent of sovereign consent.

Yet a deep tension persists within the contemporary legal order. Nuremberg exercised jurisdiction over Nazi leaders without Germany's consent. No treaty ratification or prior acceptance was required to prosecute crimes against peace, war crimes, and crimes against humanity.⁷ By contrast, the International Criminal Court, established by the Rome Statute in 1998, largely conditions its jurisdiction on state consent through territorial or nationality links, with limited exceptions such as Security Council referrals for non-parties.⁸ While this framework was designed to encourage participation, it also permits sovereignty to obstruct accountability.

This divergence crystallizes a precise research question: is consent-based jurisdiction compatible with the universal accountability affirmed at Nuremberg?

This paper argues that it is not. The ICC's consent-based jurisdictional structure represents a doctrinal retreat from Nuremberg principles by subordinating the enforcement of *jus cogens* crimes to state sovereignty, thereby undermining their claim to legal supremacy.

The analysis proceeds as follows. Section II examines the legal legacy of Nuremberg as a baseline of universality independent of consent. Section III explores the nature of *jus cogens* norms, including prohibitions against genocide and torture, and evaluates their coherence within an optional jurisdictional framework. Section IV outlines the ICC's jurisdictional architecture. Section V analyzes the doctrinal conflict between universal prohibition and conditional enforcement. Section VI considers practical consequences, including selective

⁶Judgment, 22 Trial of the Major War Criminals Before the International Military Tribunal 411, 465 (1948).

⁷Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Agreement]; Charter of the International Military Tribunal art. 6, annexed to London Agreement, *supra*.

⁸Rome Statute of the International Criminal Court art. 12–13, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

enforcement and impunity for powerful non-parties, with particular reference to the 2025 U.S. sanctions. Section VII addresses counterarguments grounded in sovereignty and political realism. Section VIII proposes pragmatic avenues for restoring Nuremberg's premise without resorting to utopian assumptions. The conclusion reaffirms the central stake of the inquiry: whether international criminal law can function as a meaningful constraint on unrestrained power.

II. The Legal Legacy of Nuremberg: Universality Without Consent

The International Military Tribunal at Nuremberg, established by the London Agreement of August 8, 1945, between the Allied powers, represented the first systematic application of international criminal law to individuals for the gravest violations of humanity.⁹ The Nuremberg Charter defined the Tribunal's jurisdiction over three categories of crimes: crimes against peace, war crimes, and crimes against humanity.¹⁰ The Tribunal's Judgment, delivered on October 1, 1946, articulated foundational principles that continue to underpin modern international criminal law.¹¹

Central to Nuremberg was the establishment of individual criminal responsibility directly under international law, independent of national legal systems. The Judgment famously declared, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹² This statement rejected the traditional notion that states alone bore responsibility for international wrongs, shifting the focus to personal accountability.

The Tribunal explicitly repudiated three key defenses that had historically shielded perpetrators:

Sovereign Immunity: The Charter provided that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."¹³ The Judgment affirmed that

⁹London Agreement, *supra* note 7.

¹⁰Charter of the International Military Tribunal art. 6, *supra* note 7.

¹¹Judgment, *supra* note 6, at 411.

¹²*Id* at 465.

¹³Charter of the International Military Tribunal art. 7, *supra* note 7.

no immunity could protect individuals from prosecution for international crimes, as such acts transcend national sovereignty.¹⁴

Official Capacity: Acts performed in an official capacity were not excused. The Tribunal held that individuals acting under state authority could still be criminally liable if the acts violated international norms.¹⁵

Superior Orders: The defense of obedience to superior orders was rejected where the act was manifestly unlawful. The Charter stipulated that superior orders “shall not free [the defendant] from responsibility, but may be considered in mitigation of punishment.”¹⁶ The Judgment emphasized that following orders could not absolve responsibility for crimes such as genocide or mass murder.¹⁷

A critical aspect of Nuremberg’s legacy is its assertion of universal responsibility without dependence on the consent of the accused state. Germany had surrendered unconditionally and was under occupation. No treaty ratification or ad hoc consent from the German government was required for the Tribunal to exercise jurisdiction over its nationals. The London Agreement and Charter were imposed by the victors, yet the Tribunal framed its authority as deriving from international law itself, not mere power politics. The Judgment noted that the crimes were so egregious that they offended the conscience of mankind and warranted prosecution regardless of formal consent.¹⁸

Critics have long labeled Nuremberg “victor’s justice,” pointing to its imposition by the Allied powers on a defeated Germany without the consent of the accused state or neutral participation.¹⁹ This critique highlights the contingency of the Tribunal’s authority on post-war power dynamics. However, Nuremberg’s significance transcends its origins. The principles it articulated are individual criminal responsibility, rejection of immunity, and universality for grave crimes, all of them rapidly crystallized into customary international law, as evidenced by their unanimous endorsement in U.N.G.A. Resolution 95(I) and subsequent influence on the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the

¹⁴Judgment, *supra* note 6, at 465.

¹⁵*Id.*

¹⁶Charter of the International Military Tribunal art. 8, *supra* note 7.

¹⁷Judgment, *supra* note 6, at 466.

¹⁸*Id.* at 461–62.

¹⁹Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* 641–42 (1992).

International Criminal Tribunal for Rwanda (ICTR).²⁰ These ad hoc tribunals applied similar norms without the same victor bias, demonstrating that the substantive rules emerged as binding erga omnes obligations.

At the same time, while Nuremberg undeniably lacked German consent, it nonetheless rested on the asserted “sovereign authority” of the Allied powers acting as the de facto government of Germany in the immediate post-war period. This reliance on a form of “surrogate sovereignty” stands in sharp contrast to the International Criminal Court’s dependence on “delegated sovereignty” through state consent, a distinction that foreshadows the deeper structural comparison developed in Section V.

Nuremberg thus stands as a doctrinal baseline, asserting legal supremacy over state sovereignty and unrestrained power. It was not mere moral condemnation. The Tribunal meticulously documented evidence, applied legal standards, and rejected defenses rooted in sovereignty. Its insistence that international law must punish individuals directly, without intermediary state consent, set a precedent for accountability that transcended national borders and political compromise. This baseline provides the measure against which subsequent developments, including the consent-based framework of the International Criminal Court, must be evaluated.

III. Jus Cogens Crimes: Non-Derogable Norms and Their Implications

The concept of jus cogens, or peremptory norms of general international law, represents a category of rules so fundamental that they admit no derogation and bind all states regardless of consent. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) defines a jus cogens norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²¹ This provision codifies a principle that elevates certain norms above ordinary treaty or customary rules, ensuring their hierarchical superiority.

Jus cogens norms are closely intertwined with obligations erga omnes, duties owed to the international community as a whole. The International Court of Justice first articulated this

²⁰G.A. Res. 95 (I), at 188 (Dec. 11, 1946); S.C. Res. 827, Annex, Statute of the International Criminal Tribunal for the Former Yugoslavia (May 25, 1993); S.C. Res. 955, Annex, Statute of the International Criminal Tribunal for Rwanda (Nov. 8, 1994).

²¹Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

linkage in the Barcelona Traction case, noting that certain obligations derive “from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”²² These obligations *erga omnes* imply that all states have a legal interest in their protection, transcending bilateral relations.

Among the core *jus cogens* norms are prohibitions against genocide, crimes against humanity, torture, and certain war crimes.²³

- Genocide, as defined in the 1948 Genocide Convention and reaffirmed in the Rome Statute, involves acts committed with intent to destroy a protected group.²⁴ The ICJ has affirmed genocide’s *jus cogens* status.²⁵
- Crimes against humanity encompass widespread or systematic attacks against civilian populations.²⁶ Their *jus cogens* character stems from their violation of fundamental human dignity.
- Torture is prohibited absolutely under instruments such as the Convention Against Torture.²⁷ The ICJ and regional courts have upheld its peremptory status.²⁸
- War crimes, particularly grave breaches of the Geneva Conventions, attain *jus cogens* status when they rise to the level of universal prohibition.²⁹

The legal consequences of *jus cogens* status are profound. Non-derogability means these norms cannot be suspended, even in emergencies.³⁰ Any conflicting treaty is void *ab initio*.³¹ Non-

²²Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 32 ¶ 34 (Feb. 5).

²³Int’l Law Comm’n, Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), in Report of the International Law Commission on the Work of Its Seventy-Third Session, ¶ 32, U.N. Doc. A/77/10 (2022) [hereinafter ILC Draft Conclusions].

²⁴Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277; Rome Statute art. 6, *supra* note 8.

²⁵Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, 2006 I.C.J. 6, 31–32 ¶¶ 64, 67 (Feb. 3).

²⁶Rome Statute art. 7, *supra* note 8

²⁷Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

²⁸Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 457 ¶ 99 (July 20); *see also* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 101 ¶ 61.

²⁹*See, e.g.*, ILC Draft Conclusions, *supra* note 23, at 64 (commentary to Draft Conclusion 23, ¶ 5

³⁰Vienna Convention on the Law of Treaties art. 53, *supra* note 21.

³¹*Id.*

waivability prevents states from consenting to violations.³² Hierarchical superiority elevates jus cogens above other rules, imposing duties on all states to prevent and punish breaches.³³ As the ICJ observed in *Barcelona Traction*, these obligations create a collective interest, allowing states to invoke responsibility even without direct injury.³⁴

The core analytical pivot of this section lies here. If jus cogens norms are substantively non-derogable and hierarchically superior, can procedural jurisdiction over their violations remain optional or consent-dependent? Logically, the answer is no. Their peremptory nature demands inherent enforceability, not subject to state veto. Allowing consent to gate jurisdiction would undermine the norms' supremacy and reintroduce sovereignty as a barrier that Nuremberg rejected. Support from ICJ jurisprudence reinforces this. In the *Genocide Convention (Bosnia v. Serbia)* case, the ICJ emphasized that the prohibition's universality extends to procedural duties, including the obligation to prevent and punish.³⁵

This does not entail spontaneous jurisdiction for any tribunal absent a constitutive basis. Rather, jus cogens status imposes a doctrinal obligation on states and international institutions to establish jurisdictional pathways that align with the norms' non-derogable character. Absent such alignment, the hierarchical superiority of jus cogens remains illusory, as procedural barriers effectively derogate from substantive supremacy.

In sum, jus cogens crimes resist consent-based limits by their very definition, demanding a jurisdictional framework that mirrors their absolute and universal character. This sets the stage for critiquing the ICC's design, where enforcement often falters at sovereignty's door.

IV. The ICC's Jurisdictional Framework: A Consent-Centric Design

The International Criminal Court (ICC), established by the Rome Statute adopted on 17 July 1998 and entering into force on 1 July 2002, is a permanent institution designed to prosecute the most serious international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.³⁶ As of January 2026, 125 states are parties to the Statute, reflecting broad

³²ILC Draft Conclusions, *supra* note 23, Draft Conclusion 17.

³³*Id* Draft Conclusion 18.

³⁴*Barcelona Traction*, 1970 I.C.J. at 32 ¶

³⁵Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, 221–22 ¶¶ 425, 427 (Feb. 26).

³⁶Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

but incomplete global participation.³⁷

The Court's jurisdictional framework is structured around preconditions, trigger mechanisms, and exceptions, with state consent serving as the foundational principle for most exercises of authority. This design emerged from negotiations that balanced accountability with respect for state sovereignty, resulting in a system that prioritizes voluntary acceptance over inherent universality.

Preconditions to the exercise of jurisdiction are outlined in Article 12. A state that becomes a party to the Statute automatically accepts the Court's jurisdiction over the crimes in Article 5.³⁸ For cases initiated by state referral (Article 13(a)) or proprio motu investigation by the Prosecutor (Article 13(c)), jurisdiction requires that: (a) the conduct occurred on the territory of a state party, or (b) the accused is a national of a state party (Article 12(2)). Non-party states may accept jurisdiction ad hoc via a declaration lodged with the Registrar, obligating them to cooperate fully under Part 9 of the Statute (Article 12(3)). These preconditions reflect a deliberate emphasis on consent: jurisdiction is not universal but linked to the acceptance of the relevant state or states.

Trigger mechanisms under Article 13 provide the pathways for activating jurisdiction. The Court may proceed if: (a) a situation is referred by a state party (in accordance with Article 14); (b) a situation is referred by the United Nations Security Council acting under Chapter VII of the UN Charter; or (c) the Prosecutor initiates an investigation proprio motu on the basis of information received, subject to authorization by a Pre-Trial Chamber (Article 15). While state referrals and proprio motu investigations generally require the Article 12 preconditions, Security Council referrals can extend jurisdiction to non-party states or territories, as demonstrated by the referrals for Darfur (Sudan, 2005) and Libya (2011).³⁹ This mechanism serves as an exceptional override, bypassing direct state consent through the Council's Chapter VII powers.

A notable echo of Nuremberg appears in Article 27, which declares the irrelevance of official capacity: "This Statute shall apply equally to all persons without any distinction based on

³⁷International Criminal Court, States Parties to the Rome Statute, <https://asp.icc-cpi.int/states-parties> (accessed Jan. 3, 2026).

³⁸Rome Statute of the International Criminal Court, *supra* note 37, art. 12(1).

³⁹S.C. Res. 1593 (Mar. 31, 2005), U.N. Doc. S/RES/1593; S.C. Res. 1970 (Feb. 26, 2011), U.N. Doc. S/RES/1970.

official capacity," explicitly stating that positions such as Head of State or Government do not exempt individuals from responsibility or serve as grounds for sentence reduction (Article 27(1)). Moreover, "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" (Article 27(2)). This provision directly rejects defenses rooted in sovereignty or official status, aligning with Nuremberg's rejection of similar immunities.

The central role of state consent is evident throughout the framework. Consent is automatic for parties, optional for non-parties via ad hoc declarations, and only fully overridden via Security Council referral. This structure is reinforced by the Security Council veto power, as a permanent member can block referrals, introducing a political filter that can shield powerful non-parties or their allies. A transitional feature, Article 124, permitted states to opt out of jurisdiction over war crimes in Article 8 for up to seven years upon ratification. This provision expired in practice for new ratifiers after the 2009 Review Conference, with no active opt-outs remaining as of 2026.⁴⁰

This jurisdictional design reflects a deliberate compromise. The Rome Conference prioritized broad state participation over absolute universality, embedding consent as a structural safeguard against perceived overreach. While Article 27 preserves accountability for individuals regardless of status, the overall framework conditions enforcement on voluntary acceptance or exceptional Security Council intervention. In doing so, it distinguishes the ICC from the inherent, consent-independent authority exercised at Nuremberg. The reliance on state consent and political mechanisms creates a structural tension with the universality envisioned in Section II.

V. Doctrinal Conflict: Universality in Prohibition versus Conditionality in Enforcement

The central argument of this paper lies in the stark doctrinal contrast between the Nuremberg baseline and the International Criminal Court's (ICC) consent-based model. At Nuremberg, the International Military Tribunal asserted universal accountability for *jus cogens* crimes, crimes against peace, war crimes, and crimes against humanity without requiring the consent of the accused state.⁴¹ Jurisdiction was inherent in the nature of the violations. It was exercised by the

⁴⁰Rome Statute of the International Criminal Court, *supra* note 37, art. 124.

⁴¹International Military Tribunal, *supra* note 5, at 223.

Allied powers as representatives of the international community, independent of German ratification or voluntary submission. This reflected a claim of legal supremacy: the universality of the prohibition extended directly to enforcement, unbound by sovereignty.

By contrast, the ICC's framework, as detailed in Section IV, conditions jurisdiction primarily on state consent through territorial or nationality links (Rome Statute, art. 12).⁴² Trigger mechanisms, state referrals, proprio motu investigations, or Security Council referrals, they operate within this consent-centric structure, with Security Council referrals providing the only reliable pathway to non-party states (art. 13).⁴³ While Article 27 upholds the irrelevance of official capacity, a clear echo of Nuremberg, the overall framework subordinates enforcement to voluntary acceptance or exceptional political intervention.

This creates a fundamental contradiction. *Jus cogens* norms, such as those prohibiting genocide, crimes against humanity, and torture, are peremptory, *erga omnes* obligations that bind all states and admit no derogation (VCLT, art. 53; *Barcelona Traction*, para. 34).⁴⁴ Their hierarchical superiority demands consistent application, including in procedural matters. Yet the ICC's consent requirements reintroduce sovereignty precisely where Nuremberg eliminated it. Powerful non-party states can shield themselves and their nationals from scrutiny unless an unlikely Security Council referral occurs, making enforcement selective and politically contingent.

ICJ jurisprudence highlights how procedural rules can obstruct substantive obligations without negating them. In the *Arrest Warrant* case, the Court upheld procedural immunity for incumbent foreign ministers from foreign criminal jurisdiction, even for serious international crimes, as a customary rule designed to ensure effective state functioning.⁴⁵ This protection is strictly procedural and it does not affect underlying criminal responsibility under international law. The Court stressed that immunity may postpone prosecution but cannot eliminate liability once the procedural barrier is removed. By analogy, the ICC's consent-based preconditions function as procedural obstacles that can indefinitely delay accountability for *jus cogens*

⁴²Rome Statute of the International Criminal Court, *supra* note 7, art. 12.

⁴³Rome Statute of the International Criminal Court, *supra* note 7, art. 13.

⁴⁴Vienna Convention on the Law of Treaties, *supra* note 21, art. 53; *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, *supra* note 22, ¶ 34.

⁴⁵Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 24–26 ¶¶ 58–61 (Feb. 14).

crimes, even though the substantive prohibitions remain fully binding.

The ICJ's judgment in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* further underscores the tension. The Court affirmed that the prohibition of torture is *jus cogens*, and states parties to the Convention Against Torture bear an obligation *aut dedere aut judicare* to prosecute or extradite alleged torturers without derogation.⁴⁶ This duty arises from the *erga omnes partes* character of the obligation, creating a collective interest among states that transcends bilateral consent. The Court emphasized that peremptory norms impose enforceable duties, rejecting delays or selective non-implementation (para. 68). Applied to the ICC, this reasoning suggests that *jus cogens* crimes should entail inherent jurisdictional consequences rather than optional enforcement based on state agreement.

Christian Klabbers' analysis of the constitutionalization of international law provides additional insight. He contends that the international legal order is evolving toward a constitutional framework, where peremptory norms like *jus cogens* should influence not only substantive rules but also institutional structures and procedural arrangements.⁴⁷ If constitutionalization is underway, it becomes inconsistent to confine *jus cogens* to substantive hierarchy while allowing consent-based procedures to block their enforcement, this would undermine the very constitutional logic that elevates peremptory norms above ordinary rules.

The ICC's consent-based design revives sovereignty as a shield.⁴⁸ Non-party powerful states can avoid territorial or nationality links, making jurisdiction contingent on unlikely Security Council referrals or ad hoc declarations. This reinstates the very defenses Nuremberg dismantled: sovereign immunity in practice through non-cooperation and the ability to evade scrutiny through non-consent.

The Palestine situation exemplifies this structural paradox, where arrest warrants issued in November 2024 against Israeli officials for alleged *jus cogens* violations retain formal validity across 125 States Parties yet remain unenforced due to Israel's non-party status, sustained jurisdictional challenges, and external political pressure, including U.S. sanctions against ICC

⁴⁶Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), *supra* note 28, ¶¶ 68, 99.

⁴⁷Jan Klabbers, *The Constitutionalization of International Law* 31–45, 128–135 (Oxford Univ. Press 2009).

⁴⁸International Criminal Court, *supra* note 1

judges in December 2025.^{49, 50}

In essence, the ICC's framework subordinates the enforcement of universal prohibitions to conditional procedures, undermining the doctrinal supremacy established at Nuremberg. Where Nuremberg treated *jus cogens* violations as inherently prosecutable, the Rome Statute allows sovereignty to limit or block accountability. This tension raises urgent questions about how the ICC can reconcile universality with consent without compromising its own authority.

VI. Practical Consequences: Impunity Gaps and Legitimacy Erosion

The doctrinal retreat identified in Section V is not merely theoretical. It manifests in tangible impunity gaps that undermine both the effectiveness and perceived legitimacy of international criminal law. The ICC's consent-based jurisdictional design, while intended to foster state participation, creates structural vulnerabilities. Powerful non-party states and, in some cases, their allies can evade accountability for *jus cogens* crimes. This selective enforcement erodes trust in the Court, risks normalizing atrocity through jurisdictional voids, and perpetuates the unrestrained power that Nuremberg sought to constrain.

Structural immunity for powerful non-party states arises directly from the Rome Statute's preconditions. States that have not ratified the Statute, including the United States, Russia, China, and Israel, remain outside the Court's automatic jurisdiction.⁵¹ For these states, prosecution requires either ad hoc acceptance, which is rarely forthcoming, or a Security Council referral under Article 13(b).⁵² The veto power of permanent Council members, including the United States, renders such referrals politically improbable when the alleged perpetrators are nationals of veto-wielding or allied states. This mechanism effectively shields non-parties from scrutiny, reintroducing sovereignty as a de facto immunity despite the substantive universality of *jus cogens* prohibitions.

Returning to the Situation in the State of Palestine from an enforcement perspective, the same factual matrix underscores the operational limits of the Court's authority. Although Pre-Trial Chamber I issued arrest warrants on 21 November 2024 against Israeli Prime Minister

⁴⁹International Criminal Court, Situation in the State of Palestine: Appeals Chamber Judgment on Article 18(1) Notification (2025), <https://www.icc-cpi.int/court-record/icc-01/18-481> (accessed Dec. 19, 2025).

⁵⁰51U.S. Dep't of State, *supra* note 2.

⁵¹2Rome Statute of the International Criminal Court, *supra* note 7, art. 12; International Criminal Court, States Parties to the Rome Statute, *supra* note 38.

⁵²Rome Statute of the International Criminal Court, *supra* note 7, art. 13.

Benjamin Netanyahu and former Defense Minister Yoav Gallant for alleged war crimes and crimes against humanity, Israel's non-party status and rejection of jurisdiction have translated into a near-complete absence of practical cooperation.⁵³ Despite the warrants' formal validity across 125 States Parties and the Appeals Chamber's December 2025 confirmation of the Court's authority in the occupied Palestinian territories, arrests have not occurred and compliance has been uneven, with several states exhibiting reluctance to enforce.⁵⁴ This reiterates how political pressure and non-consent can convert legal recognition into functional impunity, even where there are reasonable grounds to establish individual criminal responsibility.

External pressures further exacerbate enforcement challenges. In 2025, the United States imposed multiple rounds of sanctions on ICC officials, including Prosecutor Karim Khan in February 2025, and judges involved in the Palestine situation in June, August, and December 2025, targeting figures such as Gocha Lordkipanidze and Erdenebalsuren Damdin for their role in upholding jurisdiction.⁵⁵ These measures, issued under Executive Order 14203, froze assets, restricted travel, and disrupted financial access for sanctioned individuals. The sanctions created a chilling effect on judicial independence. While presented as responses to "illegitimate" actions, they highlight how powerful non-parties can indirectly undermine the Court's operations, widening impunity gaps.

Legitimacy erosion follows inevitably. Selective enforcement fosters perceptions of bias. The ICC pursues cases against African leaders or smaller states more readily than those involving non-parties with geopolitical influence. This double standard risks desensitizing the international community to atrocities, as jurisdictional voids signal that accountability is contingent on power rather than law. The Court's inability to secure arrests in high-profile cases, despite 61 active warrants as of late 2025, with only partial success, undermines deterrence and victim confidence.

A carefully framed hypothetical underscores the risk. If a major non-party state, shielded by veto power and external pressures, commits mass atrocities on a scale akin to *jus cogens* violations such as systematic attacks on civilians in an occupied territory, the ICC's conditional

⁵³U.S. Dep't of State, *supra* note 2; Al Jazeera, US Sanctions More ICC Judges, Citing Ruling on Israeli War Crime Probe (Dec. 18, 2025), <https://www.aljazeera.com/news/2025/12/18/us-sanctions-more-icc-judges-citing-ruling-on-israeli-war-crime-probe> (accessed Dec. 23, 2025).

⁵⁴Rome Statute of the International Criminal Court, *supra* note 7, pmbl.

⁵⁵U.S. Dep't of State, *supra* note 2

jurisdiction would likely prevent investigation absent unlikely Security Council action. Victims would face normalization through inaction, echoing the pre-Nuremberg era when sovereignty shielded perpetrators.

Current examples reinforce this pattern. Non-cooperation extends beyond the Palestine situation. States have failed to arrest individuals like Vladimir Putin, for whom a warrant was issued in 2023, and selective non-enforcement persists in cases involving non-parties or their allies. These gaps do not reflect mere enforcement difficulties but a principled retreat from Nuremberg's universality, where consent gates accountability and power determines outcomes.

In consequence, the ICC's framework, while advancing complementarity and participation, risks rendering *jus cogens* enforcement illusory for the most powerful. This structural flaw threatens the civilizational purpose of international criminal law, which is to bind power through law, not to subordinate law to power.

VII. Counterarguments: Sovereignty, Realism, and Stability

The argument that the ICC's consent-based jurisdiction constitutes a doctrinal retreat from Nuremberg must confront robust counterarguments grounded in sovereignty, realism, and the pursuit of international stability. These perspectives defend the Rome Statute's design as a pragmatic necessity rather than a principled flaw, emphasizing that law cannot outrun power without risking greater harm.

Sovereignty and stability arguments maintain that consent ensures voluntary participation and prevents the Court from becoming an overreaching supranational authority. The Rome Statute was designed as a treaty-based institution complementary to national criminal jurisdictions, not a universal court imposing jurisdiction unilaterally.⁵⁶ Requiring state consent through ratification, territorial or nationality links, or ad hoc declarations safeguards sovereign equality and encourages broad adherence. One hundred twenty-five states are parties as of January 2026, reflecting this approach's success.⁵⁷ Without these safeguards, major powers might reject the Court entirely, as the United States has done, citing threats to national sovereignty. The Security Council referral mechanism under Article 13(b) provides a controlled exception, balancing accountability with geopolitical realities. Proponents argue that this structure

⁵⁶Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 *Crim. L.F.* 87 (2008).

⁵⁷ International Criminal Court, *States Parties to the Rome Statute*, *supra* note 37.

promotes stability because by respecting consent, the ICC avoids antagonizing major powers and encourages gradual norm internalization through complementarity, where states prosecute domestically to preempt ICC involvement.⁵⁸

The realist critique emphasizes that international law cannot exceed the distribution of power. Universal jurisdiction risks instability by provoking backlash from states that perceive it as interference. Realists view the ICC as inherently limited because it depends on state cooperation for arrests and evidence. Selective enforcement arises from power asymmetries rather than doctrinal failure. Non-party states such as the United States, China, and Israel face minimal risk absent Security Council action, which vetoes protect. Critics argue that attempting to impose Nuremberg-style universality on reluctant powers would destabilize the system, leading to withdrawals, non-cooperation, or sanctions.⁵⁹ Historical precedents, such as U.S. opposition during the Rome Statute negotiations, underscore that forcing universal jurisdiction could undermine the Court's viability because states prioritize self-interest over abstract justice.⁶⁰ In this view, the consent model is realistic. Law must accommodate power to survive, and selective enforcement is an inevitable outcome in an anarchic international order.

These arguments draw strength from the ICC's challenges in 2025 and 2026, including the persistent non-enforcement of arrest warrants against Israeli leaders and the Russian President, alongside other senior political figures, U.S. sanctions on judges, and criticisms of bias or legitimacy erosion from African states, Hungary, and Venezuela. Realists contend that pressing for inherent jurisdiction over *jus cogens* crimes would exacerbate these pressures, risking the Court's institutional fragility or marginalization.

Responses to these counterarguments emphasize that conceding supremacy to consent renders *jus cogens* norms illusory. If non-derogable norms binding all states *erga omnes* can be procedurally optional, their hierarchical superiority is undermined. Historical accountability at Nuremberg enabled rather than destabilized post-war order by demonstrating that power must answer to law, fostering deterrence and norm consolidation.⁶¹ Cassese advocated "aggressive" complementarity, arguing that the ICC's *proprio motu* powers and universal potential can

⁵⁸Stahn, Complementarity, *supra* note 56

⁵⁹See U.S. Dep't of State, *supra* note 2.

⁶⁰Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford Univ. Press 2003).

⁶¹Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589 (2003).

encourage states to act domestically, turning consent into a catalyst for accountability rather than a barrier. Distinguishing enforcement difficulty from principled jurisdictional retreat is crucial. Practical obstacles such as non-cooperation or sanctions do not justify subordinating jurisdiction. As the ICJ affirmed in *Belgium v. Senegal*, *jus cogens* duties like *aut dedere aut judicare* impose enforceable obligations that transcend bilateral consent.⁶² Allowing sovereignty to condition enforcement risks normalizing impunity for powerful states and undermines the civilizational function of international criminal law.

In sum, while sovereignty and realism raise valid pragmatic concerns, they cannot reconcile with *jus cogens* logic. If certain crimes are truly peremptory, their enforcement cannot remain optional without undermining the norms themselves. Nuremberg demonstrated that universality is possible when law asserts supremacy over power. Retreating from this precedent risks conceding that international criminal law is ultimately subordinate to might.

VIII. Reclaiming Nuremberg's Premise: Doctrinal Paths Forward

The critique developed thus far, that the ICC's consent-based jurisdiction subordinates enforcement of *jus cogens* crimes to sovereignty does not demand immediate universal enforcement or the abolition of state sovereignty. Such utopian demands would ignore the political realities that shaped the Rome Statute and continue to constrain international criminal law. Instead, the argument requires doctrinal honesty: acknowledging that *jus cogens* norms, by their non-derogable and hierarchical nature, logically demand inherent jurisdictional consequences rather than optional ones. Reclaiming Nuremberg's premise means pursuing pragmatic reforms that align procedural enforcement more closely with substantive universality without dismantling the existing system.

A. Core doctrinal demand:

Jus cogens crimes should entail inherent jurisdictional consequences. As Section III established, norms prohibiting genocide, crimes against humanity, torture, and certain war crimes are peremptory and *erga omnes*. Their enforcement cannot be gated by state consent without rendering the norms illusory. Nuremberg demonstrated that accountability for such crimes can proceed independently of the offending state's consent. The ICC's conditional model allows sovereignty to shield perpetrators, and doctrinal consistency requires interpreting or

⁶²Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), *supra* note 28, ¶ 99.

amending jurisdictional rules to reflect this supremacy, ensuring procedural barriers do not negate substantive obligations.

B. Pragmatic alternatives offer viable paths forward:

1. Strengthened universal jurisdiction in domestic courts:

States can prosecute *jus cogens* crimes independently of the ICC, bypassing consent-based limits. Post-Habré models, such as Belgium's 2003 law (later amended) and Spain's 2009 reforms, prosecuted foreign officials for torture and genocide absent territorial or nationality links. Scholarship highlights universal jurisdiction as a tool to address ICC structural impunity, particularly for non-party nationals, by integrating it into domestic law and fulfilling Geneva Convention obligations.⁶³ This approach decentralizes accountability, reducing reliance on the ICC while reinforcing norms *erga omnes*.

2. Reinterpreting ICC complementarity through jus cogens hierarchy:

Complementarity (Rome Statute, art. 17) could be reframed to prioritize enforcement of *jus cogens* crimes. Where states fail to prosecute due to unwillingness or inability, the ICC should assume jurisdiction assertively, treating consent preconditions as subordinate to peremptory duties. The Prosecutor's policy on complementarity (2023–2025) already positions the Court as a hub encouraging national action. Extending this to aggressive complementarity, which shames states into domestic prosecutions, aligns with Cassese's vision of universality as a catalyst.⁶⁴

3. Hybrid mechanisms or enhanced UNSC bypasses:

Special or hybrid tribunals combining international and national elements can bypass ICC consent gaps. Examples include the Special Tribunal for Lebanon (2007) and proposals for a Special Tribunal on the Crime of Aggression against Ukraine (established via Council of Europe agreement in 2025). These bodies derive authority from treaties or UN resolutions, offering targeted jurisdiction without requiring broad consent. Momentum for aggression

⁶³Rogier van Alebeek & Larissa van den Herik, From the Hague to National Courts: Can Domestic Universal Jurisdiction Deliver Where the ICC Cannot?, Yale J. Int'l L. (July 9, 2025), <https://yjil.yale.edu/posts/2025-07-09-from-the-hague-to-national-courts-can-domestic-universal-jurisdiction-deliver> (accessed Sep. 23, 2025).

⁶⁴Cassese, *supra* note 61

harmonization, despite the July 2025 Special Session postponing substantive consideration to 2029 (with an intersessional meeting in 2027), represents potential ICC internal reform. The proposed amendment (deposited April 2025 by Costa Rica, Germany, Sierra Leone, Slovenia, and Vanuatu) seeks to harmonize aggression jurisdiction with other core crimes, eliminating opt-outs and ratification preconditions for state referrals or proprio motu investigations.⁶⁵ Though blocked by France, the UK, and Canada, the 2029 window offers an opportunity to close this retreat.

C. Forward-Looking Model :

Ukraine's full ratification of the Rome Statute, effective January 1, 2025 (deposited October 25, 2024), provides a partial model for closing gaps. As the 125th state party, Ukraine participates fully in the Assembly of States Parties, strengthening advocacy for reforms and cooperating on ongoing investigations.⁶⁶ Combined with domestic prosecutions and hybrid tribunals, this multi-layered approach demonstrates how states can reclaim universality amid power imbalances.

These paths require neither radical overhaul nor naive optimism. They demand incremental doctrinal alignment, leveraging existing tools such as domestic universal jurisdiction and reinterpretation of complementarity, creating targeted hybrids, and pursuing strategic amendments, for example, aggression harmonization in 2029. By prioritizing jus cogens supremacy over procedural consent, international criminal law can move closer to Nuremberg's enduring premise of binding power through law without succumbing to the illusions of perfect universality.

IX. Conclusion: Binding Power in an Imperfect System

The journey from Nuremberg to Rome exposes a profound and troubling contradiction at the core of international criminal law. Nuremberg established an uncompromising baseline of universality: individuals who commit jus cogens crimes, including genocide, crimes against

⁶⁵Opinio Juris, A Historic Chance Missed: Harmonization of the ICC's Jurisdiction over the Crime of Aggression Delayed Once More (July 25, 2025), <https://opiniojuris.org/2025/07/25/a-historic-chance-missed-harmonization-of-the-iccs-jurisdiction-over-the-crime-of-aggression-delayed-once-more> (accessed Aug. 2, 2025); ICC Assembly of States Parties, Resolution on the Review of the Crime of Aggression, ICC-ASP/S-1/Res.1 (2025).

⁶⁶International Criminal Court, Ukraine Situation, <https://www.icc-cpi.int/ukraine> (accessed Nov. 9, 2025); International Criminal Court, States Parties to the Rome Statute, *supra* note 37.

humanity, and torture, must answer to the law of nations without the consent of the offending state, asserting the supremacy of law over sovereignty and unrestrained power.⁶⁷ The International Criminal Court, by contrast, subordinates that enforcement to consent-based preconditions, Security Council vetoes, and political realities, permitting non-party states to evade scrutiny even for the gravest violations.⁶⁸

This retreat is structural, not accidental. By prioritizing broad participation over true universality, the ICC undermines the legal supremacy that *jus cogens* norms inherently demand. As this paper has demonstrated, if non-derogable norms bind all states *erga omnes*, procedural enforcement cannot remain optional without hollowing out their hierarchical force and betraying the promise they represent. The result is selective impunity: powerful non-parties and their leaders exploit jurisdictional voids, while the Court proceeds primarily where cooperation is politically feasible. Viewed as part of this broader enforcement pattern, the Situation in the State of Palestine underscores the institutional limits of consent-based authority. Arrest warrants issued in November 2024 against Israeli officials for alleged war crimes and crimes against humanity remain unexecuted as of January 2026, notwithstanding repeated judicial affirmations of jurisdiction. Israel's non-cooperation, amplified by the expansion of U.S. sanctions against ICC judges in December 2025, illustrates how geopolitical leverage can convert formal legal validity into operational paralysis, thereby eroding the Court's perceived legitimacy.⁶⁹

Parallel instances of non-enforcement and Hungary's impending withdrawal from the Rome Statute (effective June 2026) further signal a widening crisis of cooperation and institutional trust.⁷⁰

Nuremberg was never a moral crusade; it was a legal turning point of historic weight. It demonstrated that international law could hold individuals accountable for crimes that offend

⁶⁷International Military Tribunal, *supra* note 5, at 223.

⁶⁸Rome Statute of the International Criminal Court, *supra* note 7, arts. 12–13.

⁶⁹See U.S. Dep't of State, *See* note 2.

⁷⁰United Nations, Depositary Notification C.N.225.2025.TREATIES-XVIII.10, Rome Statute of the International Criminal Court (Rome, 17 July 1998) – Hungary: Withdrawal (June 2, 2025), <https://treaties.un.org/doc/Publication/CN/2025/CN.225.2025-Eng.pdf> (notifying withdrawal effective June 2, 2026, per Article 127(1) of the Rome Statute); see also Int'l Crim. Ct., Pre-Trial Chamber I, Finding under Article 87(7) of the Statute on Hungary's Non-Compliance with the Court's Request to Cooperate in the Provisional Arrest of Benjamin Netanyahu and Referral to the Assembly of States Parties, ICC-01/18, ¶¶ 14, 19 (July 24, 2025), <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd180c2a33e.pdf> (finding non-cooperation during Netanyahu's April 2025 visit and confirming Hungary remains bound until June 2, 2026).

the conscience of humanity, independent of state consent.⁷¹ By subordinating *jus cogens* enforcement to sovereignty, the ICC risks reverting to a pre-Nuremberg reality, one where power dictates the boundaries of justice. The civilizational function of international criminal law is to serve as a bulwark against unrestrained atrocity and to prevent the recurrence of Auschwitz-scale terror and Hiroshima-scale destruction through binding individual responsibility. This function is imperiled when enforcement becomes selective. Deterrence weakens. Victims are denied not only justice but the dignity of recognition. The norms themselves begin to lose their binding force in the eyes of the world.

The survival of international criminal law now depends on a fundamental choice. The system can reclaim Nuremberg's premise by recognizing that *jus cogens* crimes demand inherent jurisdictional consequences through strengthened domestic universal jurisdiction, aggressive complementarity, hybrid mechanisms that bypass consent gaps, or targeted reforms such as aggression harmonization. Or it can remain subordinate to power imbalances, becoming little more than a selective instrument that the powerful can afford to ignore and the powerless can no longer trust.

In an era where mass atrocities persist and geopolitical interests routinely override legal obligations, the question is no longer merely academic: can international law still bind power, or has it become a fragile edifice that power continues to bind?

As Martti Koskenniemi has argued, international law perpetually oscillates between apology, which accommodates sovereign power, and utopia, which asserts universal ideals.⁷² The ICC's consent-based model exemplifies apology by subordinating *jus cogens* enforcement to geopolitical realities and state vetoes, while Nuremberg embodied a momentary utopian break from power's dominance. Reclaiming Nuremberg's premise requires tilting the balance toward utopia, not through naive universalism, but through pragmatic doctrinal obligations that prioritize peremptory norms over consent where hierarchy demands it.

The answer will determine whether the lessons of Auschwitz and Hiroshima endure as binding law. If not, they risk fading into unheeded historical warnings, leaving future generations to confront the same horrors without the shield of justice.

⁷¹International Military Tribunal, *supra* note 5, at 186–187.

⁷²Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 1–19, 271–293 (Cambridge Univ. Press 2005) (reissue with new epilogue).