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Head of State Immunity and the International Criminal Court: Re-Reading the Immunity Debate through Wight's Three Traditions

Abstract

The enforcement of international criminal law depends on state cooperation, yet persistent disagreements over whether sitting Heads of State from non-parties to the International Criminal Court enjoy immunity from arrest suggest a challenge that doctrinal analysis alone cannot resolve. This article undertakes an interdisciplinary, meta-doctrinal analysis, drawing on Martin Wight's three traditions of international theory (Realism, Revolutionism and Rationalism) to argue that divergent interpretations of Articles 27 and 98 of the Rome Statute are driven by fundamentally different philosophical ideas about the nature of international society. Applying this framework to state responses to arrest warrants against Al-Bashir, Putin and Netanyahu, the analysis shows how each tradition influences the assumptions on which doctrinal reasoning about the applicable law proceeds, yielding divergent, and mutually exclusive, interpretations. The immunity debate thus emerges as a permanent site of contestation, shaped by competing visions of international order embedded within the Rome Statute itself.

Keywords

International Criminal Court – head of state immunity – arrest warrants – state cooperation – international relations theory – Martin Wight

1 Introduction

When France suggested that Prime Minister Netanyahu might enjoy immunity from the arrest warrant issued by the International Criminal Court ('ICC'),¹ whilst refraining from adopting a similar position with respect to President Putin,² this contrasting approach to immunities *ratione personae* of Heads of State from non-ICC parties represented more than an inconsistent interpretation of the law. This episode raises questions about how states' understandings of their legal obligations under the Rome Statute and customary international law may be influenced by deeper philosophical ideas and tacit assumptions about the relationship between sovereignty and universal justice.

The Rome Statute appears to resolve the tension around immunity decisively. Article 27 (on the 'irrelevance of official capacity') declares that official capacity 'shall in no case exempt a person from criminal responsibility', explicitly stating that 'immunities or special procedural rules . . . shall not bar the Court from exercising its jurisdiction'.³ Yet Article 98 simultaneously prohibits the Court from requesting arrests that would require a state to 'act inconsistently with its obligations under international law with respect to . . . diplomatic immunity'.⁴ This structural ambiguity has generated extensive scholarly debate and practical challenges.⁵ As evidenced, *inter alia*, by the cases of Al-

¹ 'France says Netanyahu has "immunity" from ICC arrest warrants', France 24, 27 November 2024, available at france24.com/en/live-news/20241127-france-says-netanyahu-has-immunity-from-icc-warrants (accessed 24 March 2026).

² The state referral by over 40 states of the situation in Ukraine to the ICC took place under the French presidency of the European Union. When the ICC issued arrest warrants against President Putin, France declared that, 'True to its long-standing commitment to combat impunity, France will continue to lend its support to the essential work of the international courts to ensure that those responsible for all the crimes committed in Ukraine are held accountable': Ministère de l'Europe et des Affaires étrangères, 'Fight against impunity – issuing of arrest warrants by the International Criminal Court against Mr Vladimir Putin and Ms Maria Lvova-Belova', 17 March 2023, available at diplomatie.gouv.fr/en/french-foreign-policy/international-justice/news/article/fight-against-impunity-issuing-of-arrest-warrants-by-the-international-criminal (accessed 24 March 2026).

³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 27. It is notable that Art. 27 goes beyond other criminal statutes, including the Malabo Protocol (not currently in force), which preserves immunities for Head of State or Government, or anybody acting or entitled to act in such capacity: Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), Art. 46Abis.

⁴ Rome Statute, *supra* note 3, Art. 98(1).

⁵ D. Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (2004) 407–433; P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *Journal of International Criminal Justice* (2009) 315–332; C. Kreß, 'The International Criminal Court and Immunities under International Law', in M. Bergsmo and L. Yan (eds.), *State Sovereignty and International Criminal Law* (Torkel Opsahl, Oslo, 2012) 223–265. Gaeta has argued that 'the rules of customary international law on personal immunities of incumbent heads of state do not apply in the case of the exercise of criminal jurisdiction by an

Bashir, Putin and Netanyahu, the Rome Statute's immunity provisions have proven to be among the most contested in all of international criminal law.

This article offers a novel analytical approach to these questions by re-reading the immunity debate through Martin Wight's three traditions of international theory.⁶ Wight, who is widely regarded as an intellectual ancestor of the 'English School' of international relations,⁷ wrote long before the Rome Statute was adopted. However, his work remains relevant today because, as Yost observes, he 'incisively analysed perennial questions' and 'identified an order in interrelated ideas that clarifies the assumptions, arguments, and dilemmas associated with each of the main traditions'.⁸ His key insight has been to reclassify centuries of Western thinking on international theory into three traditions: Realism, Revolutionism and Rationalism.⁹ These are not rigid categories but 'streams, with eddies and cross-currents', explaining why states, institutions and individuals shift between different positions depending on context.¹⁰

Perhaps most significantly, Wight's framework helps us understand why the ICC generates such persistent controversy. As will be discussed, the Rome Statute incorporates fundamentally incompatible visions of what international society is and should become. This plurality of ideas, when taken together with the indeterminacy of legal argument,¹¹ explains why rules of law may generate irreconcilable interpretations: each tradition reads the Rome Statute through its own philosophical lens. As such, Wight's schema challenges us to move beyond binary frameworks (sovereignty versus cosmopolitanism, law versus politics) toward more nuanced understandings of how multiple traditions interact within single institutional spaces.¹²

international criminal court . . . even if this individual comes from a state not party to the Rome Statute': Gaeta, *ibid.*, p. 315. Akande has, conversely, maintained that 'a senior serving state official entitled to immunity *ratione personae* (for example, a head of state) is entitled to such immunity before an international tribunal that the state concerned has not consented to': Akande, *ibid.*, pp. 418–419.

⁶ M. Wight, *International Theory: The Three Traditions*, G. Wight and B. Porter (eds.) (Leicester University Press, Leicester, 1994).

⁷ D.S. Yost, 'Preface: Martin Wight's Scholarly Stature', in D.S. Yost (ed.), *International Relations and Political Philosophy* (Oxford University Press, Oxford, 2022) p. xii.

⁸ *Ibid.*, p. xv.

⁹ Wight, *supra* note 6, p. 7.

¹⁰ *Ibid.*, p. 260.

¹¹ M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge, 2006), p. 591.

¹² D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, Oxford, 2014).

It is important to clarify what this article does and does not do. It does not undertake a legal doctrinal analysis of immunity law under the Rome Statute or customary international law. Rather, it undertakes an interdisciplinary, meta-doctrinal analysis that directs our attention to what one must already assume about the nature of international society, the relationship between law and power, and the purpose of legal determination and interpretation for a given doctrinal conclusion to appear compelling.¹³ Put another way, it seeks to make more visible how the philosophical commitments embedded in each of Wight's three traditions shape, in distinct and often unacknowledged ways, what presents itself as 'neutral' doctrinal reasoning. It argues that the interpretation of immunities law by states and other stakeholders cannot be divorced from their underlying philosophical ideas on the nature of international society.

Before proceeding further, it may be helpful to remind ourselves of some of the assumptions implicit in doctrinal reasoning that this article challenges. Firstly, as Shklar observed, lawyers adopting doctrinal approaches often treat law as being 'just "there"', waiting to be discovered and interpreted through formal methodologies that aspire to be 'perfect, nonpolitical, aloof [and] neutral.'¹⁴ From this approach, legal interpretation, undertaken in good faith through such methodologies, can produce—to a greater or lesser extent—determinate legal answers.¹⁵ Secondly, a doctrinal approach to law assumes legal coherence, given that this is a requirement of the rule of law. Fuller characterised this as part of the 'inner morality' of any functioning legal order, whose demands include to 'make the law known, make it coherent and clear.'¹⁶ Thirdly, a doctrinal approach to law assumes equality before the law, such that no state or individual stands above it, because the 'essence of justice is its universality, both nationally and internationally. A decent and rational person is offended that criminal

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¹³ The relationship between legal determination and interpretation remains contentious in international law: see Special Rapporteur of the International Law Commission (Third Report), *Third Report on Subsidiary Means for the Determination of Rules of International Law* (A/CN.4/781), paras. 324–325. This article argues that Wight's philosophical traditions influence the assumptions underlying each of these processes, but the focus is on legal interpretation.

¹⁴ J.N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, Cambridge, MA, 1986), p. x.

¹⁵ See, for instance, R. Gardiner, *Treaty Interpretation* (Oxford University Press, Oxford, 2015); U. Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making', 26 *European Journal of International Law* (2015) 169, available at doi.org/10.1093/ejil/chv008.

¹⁶ L.L. Fuller, *The Morality of Law* (Yale University Press, New Haven, CT, 1969), p. 42. See also, generally, T. Bingham, *The Rule of Law* (Allen Lane, London, 2010).

laws should apply only to some people and not to others in similar situations.’¹⁷ Each of Wight’s three traditions challenges or qualifies these assumptions in distinctive ways.

The article’s contribution to knowledge is threefold. First, it offers a fresh conceptual lens for understanding the structural complexity of the Rome Statute, arguing that doctrinal analysis of Articles 27 and 98 is never philosophically neutral but always shaped by underlying theoretical assumptions. As a result, any attempts to resolve the tension between those provisions through ‘better’ legal reasoning, or through textual revision of the Rome Statute, will only ever address the symptoms of a deeper contest between the three philosophical traditions. Second, it surfaces how Wight’s three traditions shape the foundational assumptions that states and legal actors bring to Articles 27 and 98, generating patterns of cooperation and resistance that doctrinal analysis, taken alone, cannot adequately explain. From this perspective, the same legal materials, subjected to the same interpretive methods, can yield different answers depending on which tradition informs the interpreter’s starting premises. Third, the article participates in a wider revival of interest in Wight’s ideas, extending their application to international legal scholarship, where they have remained underexplored.

In the final analysis, this article does not ‘take sides’ or advocate in favour of any tradition. This is deliberate, given the article’s starting premise that the Rome Statute constitutes a microcosm of international relations in which all three traditions coexist in continual tension without ultimate resolution. To declare one tradition superior would be to claim a vantage point above this contest that the article’s own analysis shows cannot exist. What the article does is work through the implications of each tradition for how legal interpretation proceeds, showing what each tradition commits its adherents to and, no less importantly, what they give up by adopting it. As such, the article asks participants in the immunity debate to confront the often-unrecognised assumptions of their own starting premises, and in doing so it seeks to shift the terms of the debate from one of disagreement over competing legal interpretations to greater philosophical self-awareness.

¹⁷ See R. Goldstone, *For Humanity – Reflections of a War Crimes Investigator* (Yale University Press, New Haven, CT, 2000) ch 5.

The article proceeds in four parts. Section 2 discusses the methodology and key limitations. Section 3 examines how each of Wight's traditions manifests in the Rome Statute's architecture and in the immunity debate. Sections 4.1 to 4.3 trace how these traditions animate state and stakeholder responses to arrest warrants against Al-Bashir, Putin, and Netanyahu. Section 5 synthesises what Wight's framework tells us about competing legal interpretations and their implications for international criminal law.

2 Methodology

This article reviews some of the public statements made by states, international organisations and the ICC in response to the ICC's arrest warrants for Al-Bashir, Putin, and Netanyahu as primary sources of evidence of their respective interpretations of the applicable law. These three cases were selected as they represent arrest warrants for Heads of State from non-ICC parties across different geopolitical contexts. Particularly valuable for the Putin case study was Gurmendi's *Tracking State Reactions to the ICC's Arrest Warrant against Vladimir Putin*,¹⁸ and for the Netanyahu case study, Ingber's *Mapping State Reactions to the ICC Arrest Warrants for Netanyahu and Gallant*.¹⁹ These statements were subsequently coded and analysed thematically according to Wight's three traditions of international theory.

This article focuses mainly on the positions of states for two principal reasons. First, given that the ICC has no independent powers of arrest—it is 'a giant without arms and legs'²⁰—it must rely on states to execute its arrest warrants.²¹ The ICC's issuance of arrest warrants functions as a diagnostic moment where states must declare themselves on the subject and, in so doing, articulate their fundamental assumptions about the relationship between sovereignty and universal justice, assumptions that typically remain implicit in routine diplomatic practice. Second, the deep controversies over

¹⁸ A. Gurmendi, 'Tracking State Reactions to the ICC's Arrest Warrant against Vladimir Putin', *Opinio Juris*, 29 March 2023, available at opiniojuris.org/2023/03/29/tracking-state-reactions-to-the-iccs-arrest-warrant-against-vladimir-putin/ (accessed 24 March 2026).

¹⁹ R. Ingber, 'Mapping State Reactions to the ICC Arrest Warrants for Netanyahu and Gallant', *Just Security*, 6 March 2025, available at justsecurity.org/105064/arrest-warrants-state-reactions-icc/ (accessed 24 March 2026).

²⁰ A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 13.

²¹ Rome Statute, *supra* note 3, Art. 89.

whether states supported, opposed, or remained non-committal about executing ICC arrest warrants in these three case studies help surface the fundamental tension between Articles 27 and 98 of the Rome Statute. The sheer range of competing interpretations calls for a deeper examination of the theoretical ideas that animate legal reasoning in this area.

The choice of Wight's tripartite framework over other available analytical lenses in international relations theory requires brief justification. Constructivist approaches, for instance, would emphasise how norms of accountability are socially constituted and how state identities shape compliance decisions.²² Liberal institutionalist perspectives would focus on how institutional design and regime characteristics influence cooperation.²³ While both offer valuable insights, Wight's framework is uniquely suited to the immunity debate for two reasons. First, its tripartite structure captures the full spectrum of state responses, including the Rationalist middle ground of strategic ambiguity and equivocation, which binary frameworks (realist/liberal, compliance/non-compliance) tend to overlook. Second, Wight's traditions operate at the level of philosophical ideas about the nature of international society itself, rather than at the level of specific causal mechanisms. This makes them particularly apt for analysing a legal controversy where, as will be shown, the disagreement is not about what the facts are or how institutional design affects compliance, but about how different ideas influence where the line between sovereignty and accountability in international society should be drawn.

In undertaking this thematic analysis, one of the main challenges has been the fact that states have generally refrained from directly addressing the immunity law question itself in their public statements. Some have commented on whether they would execute the ICC arrest warrants on their territories, whilst others have commented on the ICC's (lack of) jurisdiction, and others still have deliberately remained non-committal. Moreover, when arrest warrants targeted multiple individuals (as with Netanyahu and Gallant in the Palestine situation), inferring a state's position on immunity was more

²² See, e.g., A. Wendt, *Social Theory of International Politics* (Cambridge University Press, Cambridge, 1999). For a constructivist account of international criminal justice, see K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton, New York, 2011).

²³ See, e.g., R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, Princeton, 1984).

complex, since many statements failed to distinguish between the personal immunity of serving Heads of State and the qualified functional immunity available to other state officials. Furthermore, in their statements, states deployed vastly different language, often embedding significant nuance, that required careful parsing to code and reclassify within Wight's three traditions. In addition, multiple actors within states frequently issued statements that either supplemented or contradicted official foreign ministry positions, creating interpretive challenges about which voice represents the 'authentic' state position. Reasonable observers might well classify the same statement differently.

It is necessary to acknowledge the limitations of this framework. There is an inherent risk of circularity: if any sovereignty-based argument is classified as 'Realist' and any accountability-based argument as 'Revolutionist', the framework may appear rather generic. This article seeks to mitigate this risk by focusing not merely on the substantive content of state positions but on the specific *interpretive strategies* states employ: the techniques of equivocation, institutional deflection and temporal displacement that characterise Rationalist responses, for instance, are analytically distinct from the definitive legal interpretations offered by Realists or the categorical moral imperatives advanced by Revolutionists. Nevertheless, some state responses resist neat classification, and the boundaries between traditions remain fluid.²⁴

This complexity and ambiguity, however, often constituted important data. Greece's statement perfectly sums up this point. When asked whether Greece would arrest Netanyahu, the Deputy Minister responded that 'the decision is being studied and the answer we gave you . . . is clear.' This is followed, in Ingber's mapping, by an editorial note stating: 'Ed: We have been unable to find an on point MFA statement answering this question.'²⁵ Furthermore, state positions have also tended to evolve over time as circumstances change. As Ingber notes, 'several states' public positions have evolved since we first started classifying them, and some have shifted categories.'²⁶ While the evolving nature of state positions added a further layer of complexity to their classification, it also constituted important data in its own right, reflecting how ideas about where the line between sovereignty and accountability should be drawn in

²⁴ Wight, *supra* note 6, p. 260.

²⁵ Ingber, *supra* note 19, entry for Greece.

²⁶ *Ibid.*

international society may evolve as circumstances change, and how this, in turn, could influence legal interpretations of the *lex lata*.

3 Wight's Three Traditions and the Immunity Debate

Wight's three traditions, Realism, Revolutionism and Rationalism, represent intellectual currents that shape how states, institutions, and individuals approach fundamental questions of order, justice and obligation. Briefly, the Realist tradition, which Wight traces from Machiavelli through Hobbes to modern theorists, begins with the premise that international relations occur in a condition of anarchy. In this view, international society does not exist; what purports to be international society, the system of international law, the mechanism of diplomacy, is fictitious.²⁷ Realists maintain that each state possesses 'the exclusive right to decide what its interests are' and consequently, 'freedom to decide what one's duties are.'²⁸ This perspective treats international law as inherently subordinate to power, as a 'peacetime convenience of sovereign states,' liable to be overridden when vital interests (*raison d'état*) so dictate.²⁹ As Wight observes, Realists believe that 'nothing is ever done by reason of [international laws or institutions] that would not have been done without them.'³⁰

The Revolutionist tradition envisions international relations through a fundamentally different lens. Rather than accepting international society as anarchic, Revolutionists attempt to actualise a *civitas maxima* ('a brotherhood of mankind') by proclaiming a world society of individuals, which overrides nations or states, diminishing or dismissing the intermediate link of state sovereignty.³¹ This cosmopolitan tradition divides humanity between a 'kingdom of light' pursuing

²⁷ H. Bull, 'Martin Wight and the Theory of International Relations', in G. Wight and B. Porter (eds.), *International Theory: The Three Traditions* (Leicester University Press, Leicester, 1994) pp. xi–xii.

²⁸ Wight, *supra* note 6, p. 112.

²⁹ Wight, *supra* note 6, p. 32. This Realist orientation corresponds to what Matwijkiw, drawing on Crawford's terminology, characterises as a 'norm-trailer' position, in contrast to 'ought-tractors' that drive the progressive development of law. As Matwijkiw observes, the mainstream outlook 'is about norm-trailers rather than, per Crawford's terminology, ought-tractors, something that leaves little or no room for (r)evolutionary progress or dynamic development': A. Matwijkiw, 'United Nations Law and Global Regionalism', in A. Acharya *et al.* (eds.), *Essays on Global Regionalism II* (Springer, Cham, 2026), pp. 25–36, p. 30. *See also* J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 *American Journal of International Law* (2002) 874–890.

³⁰ Wight, *supra* note 6, p. 141.

³¹ *Ibid.*, p. 45.

divergent moral imperatives (such as universal justice or anti-imperialism) and a ‘kingdom of darkness’ obstructing or opposing ‘progress’ towards those aims.³² Importantly, Wight distinguishes between ‘soft Revolutionists’ like Kant, who pursue transformation through institutional development and moral suasion,³³ and ‘hard Revolutionists’ who accept that violence may be necessary to achieve those moral imperatives.³⁴ In the context of debates around justice and accountability, both variants share the conviction that sovereignty represents an obstacle to humanity’s moral unity, though they differ sharply on how to transcend it.

The Rationalist tradition, associated with Grotius and the *via media*, acknowledges anarchy whilst maintaining that meaningful international society remains possible. Rationalists view international relations as ‘international intercourse, a relationship chiefly among states to be sure, but one in which there [is] not only conflict but also co-operation.’³⁵ Central to this tradition is the conviction that law emerges from both state practice and fundamental moral principles, creating binding obligations despite the absence of central authority. The principle of *pacta sunt servanda* epitomises Rationalist thinking: treaties bind not merely from reciprocal advantage but because ‘the observance of agreements represents an ethical norm; it conforms to an inherent standard of justice.’³⁶ Yet Rationalists remain acutely aware of the moral tension between the actual and the desirable, necessitating constant compromise between ideals and political realities, through what amounts to the ‘choice of the lesser evil.’³⁷

³² *Ibid.*, p. 259.

³³ For a sustained development of the morally-substantive concept of justice that underpins this soft Revolutionist orientation, see the account of Bassiouni’s natural law theory in A. Matwijkiw and B. Matwijkiw, ‘A Modern Perspective on International Criminal Law: Accountability as a Meta-Right’, in L.N. Sadat and M.P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff, Leiden, 2008), pp. 19–78. The authors argue that Bassiouni’s framework rests on the premise that ‘there exists a law that is above or higher than legally positive law’ (p. 27) from which universal accountability derives as a moral imperative. On this account, the recognition of human rights and the imposition of correlative duties ‘ought to apply equally and universally’ (p. 74), and law that fails to conform to this higher standard cannot claim full status as a rule of law.

³⁴ Wight, *supra* note 6, pp. 46–47. For a contemporary articulation of a proposal tending towards a hard Revolutionist position in legal scholarship, see G. Ziccardi Capaldo, *The Pillars of Global Law* (Routledge, London, 2008). Ziccardi Capaldo argues for an ‘integrated system of collective guarantees’ in which states, acting *uti universi* on behalf of the international community, may exercise coercive powers to enforce fundamental global values, including through punitive sanctions and extraterritorial enforcement measures that go beyond the procedures of the UN Charter. This vision of a legal order in which the enforcement of universal values overrides traditional constraints of sovereignty resonates with the hard Revolutionist conviction that transformation of the international order may require coercive means: see *ibid.*, p. 251.

³⁵ Bull, *supra* note 27, p. xii.

³⁶ Wight, *supra* note 6, p. 238.

³⁷ *Ibid.*, p. 243.

These philosophical tensions manifest starkly in the Rome Statute's immunity provisions. The tensions already existed during the Rome Statute negotiations and the resulting formulation, with Article 27 covering vertical relationships (individual to Court) and Article 98 covering horizontal ones (state to state), represents an institutional embodiment of what Wight termed a 'confluence' where different streams of thought merge without fully mixing.³⁸ The Pre-Trial Chamber's divergent approaches to this question in the Al-Bashir proceedings, culminating in the Appeals Chamber's 2019 judgment,³⁹ demonstrate precisely this phenomenon. The Appeals Chamber identified a customary international law basis for the removal of Head of State immunity before international courts,⁴⁰ yet the reasoning attracted vigorous dissent and scholarly criticism,⁴¹ underscoring that even the Court's most authoritative pronouncement has failed to settle the matter. Revolutionary readings emphasise Article 27's transformative purpose, interpreting Article 98 narrowly and aiming to progressively limit its scope. Realist interpretations insist customary immunities persist unless explicitly abrogated. Rationalist approaches seek middle ground through contextualised analysis, preferring case-by-case balancing of competing principles. The inability to resolve these tensions makes sense when viewed from within Wight's framework, as it concerns not what the law says but what different, incompatible philosophies say about the law.

4 Applying Wight's Traditions to Three Case Studies

4.1 *Al-Bashir*

³⁸ See C. Kreß, 'Article 98', in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th edn (Beck/Nomos/Hart, 2022) 2575–2610, p. 2585; P. Gaeta, 'Official Capacity and Immunities', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002).

³⁹ ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09-397-Corr, Judgment in the Jordan Referral *re* Al-Bashir Appeal, Appeals Chamber, 6 May 2019.

⁴⁰ The Chamber held that 'there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court': see *ibid.*, paras. 113–117.

⁴¹ See W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2016), p. 522. See also D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009) 333–352, p. 335.

The ICC's 2009 arrest warrant for the former President of Sudan Omar Al-Bashir marked the Court's first attempt to prosecute a sitting Head of State of a non-party.⁴² The decade-long confrontation that followed may be usefully re-read through Wight's three traditions. Looking at the Realist state responses to the Al-Bashir arrest warrant, one can discern two broad and overlapping types of Realist responses: crude and sophisticated Realism. Crude Realism manifests as direct, policy-based defiance to the Court's legal order that prioritises political alliance and vital interests over legal obligations. In contrast, sophisticated Realism harnesses international law's inherent indeterminacy to construct legally plausible justifications for states' choices.⁴³

A good example of crude Realism was Sudan's rejection of the arrest warrant. Al-Bashir's declaration that the warrant was 'not worth the ink it was written with'⁴⁴ reflected the Realist conviction that international law lacking enforcement power remains merely aspirational. For Realists, 'international law is too nebulous and too constantly violated to be understood as more than a peacetime convenience of sovereign states.'⁴⁵ In contrast, the decision of the African Union Assembly that member states 'shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute'⁴⁶ and, similarly, a resolution of the Arab League Council,⁴⁷ represented more sophisticated Realist interpretations, because they were grounded in legal arguments that prioritised the customary immunities of Heads of States from non-ICC parties.

Subsequently, some individual African states, including States Parties to the ICC, appeared to accept this interpretation and refused to arrest Al-Bashir. When Kenya, Djibouti, Chad, Malawi, Nigeria and the DRC hosted Al-Bashir, each justified non-arrest through appeals to both crude and sophisticated Realism, citing regional alliances

⁴² ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009.

⁴³ Cf. Koskeniemi, *supra* note 11, p. 591.

⁴⁴ 'Sudan: The Case against Bashir', IRIN Africa, 4 March 2009, available at web.archive.org/web/20110127062712/http://www.irinnews.org/Report.aspx?ReportID=83299 (accessed 24 March 2026).

⁴⁵ Wight, *supra* note 6, p. 32.

⁴⁶ Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13(XIII), 2009, para. 10.

⁴⁷ Arab League Council, Resolution on the Decision of Pre-Trial Chamber I to the International Criminal Court against the President of the Republic of Sudan, Hassan Ahmad Al Bashir, 2009. Cited in Akande, *supra* note 41, p. 335.

and competing legal obligations.⁴⁸ For instance, the Pre-Trial Chamber's findings of non-cooperation noted that Malawi had explained that it did not arrest Al-Bashir because he:

is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.⁴⁹

In their statements, some states prioritised 'crude' policy arguments, such as security cooperation with Sudan or 'the delicate peace processes underway,' for refusing to arrest Al-Bashir.⁵⁰ Others, however, deployed more sophisticated legal arguments, pointing to the indeterminacy of the law. For instance, Jordan held that:

The contradictions in the case law of the Pre-Trial Chambers . . . attest to the uncertainty in the legal bases relied upon to deny the immunity to which President Al-Bashir is entitled under international law as the Head of State of Sudan, and to the impropriety of maintaining that States Parties are aware of clear obligations regarding the arrest and surrender of him to the Court.⁵¹

Jordan's argument is particularly significant because it expressly identified the contradictions within the Court's own case law as a basis for non-compliance. The Pre-Trial Chambers had indeed adopted divergent approaches: Pre-Trial Chamber I in the Malawi and DRC decisions reasoned that customary international law creates an exception to Head of State immunity before international courts,⁵² whilst Pre-Trial Chamber II in the South Africa decision adopted a different reasoning based on the

⁴⁸ ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09, Amicus Curiae Observations by the Southern Africa Litigation Centre, 10 March 2017, para. 5.

⁴⁹ ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ('Decision on Malawi'), Pre-Trial Chamber I, 12 December 2011, para. 8.

⁵⁰ Assembly of the African Union, *supra* note 46, para. 3.

⁵¹ ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09-326, Hashemite Kingdom of Jordan's Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir", 12 March 2018, para. 48.

⁵² *Prosecutor v. Al-Bashir*, Decision on Malawi, *supra* note 49, paras. 41–43.

effect of the Security Council referral under Chapter VII of the UN Charter.⁵³ This doctrinal inconsistency within the Court itself provided fertile ground for sophisticated Realist arguments about legal uncertainty.

Turning now to the influence of Revolutionist ideas, it is possible to discern how the ICC, states and other stakeholders selected different aspects of universal justice to emphasise whilst claiming to speak for humanity's collective conscience. The ICC's institutional response reflected Revolutionary convictions about universal justice transcending sovereignty. In his address to the UN Security Council, former Prosecutor Luis Moreno Ocampo emphasised that 'any leader committing crimes will face justice. Power does not provide immunity.'⁵⁴ This assertion of jurisdiction regardless of official capacity reflected the Revolutionary belief in humanity's moral unity, the *civitas maxima*, superseding political divisions.⁵⁵

These ideas also influenced a number of non-compliance findings by the Court. In the 2011 Malawi decision, Pre-Trial Chamber I held that 'customary international law creates an exception to Head of State immunity when international courts seek arrests for genocide, crimes against humanity and war crimes.'⁵⁶ This sweeping assertion, which has been extensively criticised,⁵⁷ indicates how Revolutionary thinking privileges moral imperatives. The Chamber's reasoning is grounded on the assumption that maintaining immunities for state officials would defeat the purpose of universal justice and the very objectives of the Court. This Revolutionary idea thus served as the basis to interpret the law teleologically.⁵⁸ Rather than interpreting international law in an 'abstractly dogmatic' fashion, the Revolutionary tradition tends to treat law as instrumental to achieving universal transformation.⁵⁹ The Appeals Chamber's 2019 judgment in the Jordan appeal may be read through the same lens. Though its reasoning differed from the Pre-Trial Chamber's, the Appeals Chamber's conclusion that

⁵³ ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09-302, Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir ('Decision on South Africa'), Pre-Trial Chamber II, 6 July 2017, paras. 83–107.

⁵⁴ United Nations, 'Sudan's President "will face justice"; "power does not provide immunity"', International Criminal Court Prosecutor stresses in Security Council', SC/9804, 2009, available at press.un.org/en/2009/sc9804.doc.htm (accessed 24 March 2026).

⁵⁵ Bull, *supra* note 27, p. xii.

⁵⁶ *Prosecutor v. Al-Bashir*, Decision on Malawi, *supra* note 49, para. 43.

⁵⁷ Schabas, *supra* note 41, p. 522.

⁵⁸ *Prosecutor v. Al-Bashir*, Decision on Malawi, *supra* note 49, para. 41.

⁵⁹ Wight, *supra* note 6, p. 240.

customary international law recognises an exception to Head of State immunity before international courts⁶⁰ ultimately served the same Revolutionary objective of ensuring that sovereignty cannot shield those accused of the gravest international crimes.

The support for the ICC's arrest warrant against Al-Bashir expressed by the European Union and civil society also reflects Revolutionary principles. For instance, when news broke that Al-Bashir had travelled to Chad, the EU's High Representative for Foreign Affairs, Catherine Ashton, urged the state to arrest him.⁶¹ The amicus submission by the Southern Africa Litigation Centre further made the point that 'when a state fails to adhere to its international obligations to arrest a person subject to an ICC arrest warrant, it undermines the fight against impunity.'⁶² Implicit in these statements is the Revolutionist conviction that the pursuit of universal justice, as embodied by the work of international tribunals such as the ICC, must take precedence over particularist claims of sovereignty.

Between the approaches of Realism and Revolutionism, Rationalist approaches sought pragmatic accommodation. A number of Rationalist techniques may be discerned from the statements and responses of states and other stakeholders. One of the most interesting is that of equivocation, where stakeholders acknowledge their Rome Statute obligations whilst simultaneously leaving open interpretive 'escape routes.' Judge de Brichambaut's minority opinion in the Al-Bashir case exemplified this technique, advocating for an 'open debate on the issue of immunity' rather than immediate non-cooperation findings.⁶³ He warned against overly categorical language about the non-applicability of customary law to the question of immunity, preferring case-by-case analysis that balances competing principles and acknowledges nuance.⁶⁴ Another interesting Rationalist technique is that of temporal displacement, where states avoid categorical interpretation in the present in order to maintain room for manoeuvre in the future. This emerges clearly in South Africa's response when it faced ICC non-

⁶⁰ *Prosecutor v. Al-Bashir*, Judgment in the Jordan Referral, *supra* note 39, paras. 1–2 (*dispositif*).

⁶¹ 'EU Presses Chad to Arrest Bashir on Genocide Charges', France 24, 22 July 2010, available at france24.com/en/20100722-european-union-chad-arrest-omar-al-bashir-genocide-charges-sudan-darfur-icc (accessed 24 March 2026).

⁶² *Prosecutor v. Al-Bashir*, SALC Amicus, *supra* note 48, para. 5.

⁶³ ICC, *Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09-302-Anx, Minority Opinion of Judge Marc Perrin de Brichambaut, 6 July 2017, para. 97.

⁶⁴ *Ibid.*, para. 96.

compliance proceedings for failing to arrest Al-Bashir. South Africa invoked Article 97 consultations, requesting a meeting with ICC officials to address what it regarded as unclear obligations.⁶⁵ Rather than simply defying the Court or immediately complying, South Africa displaced the question temporarily, arguing that the obligation to arrest and surrender Al-Bashir was ambiguous and uncertain.⁶⁶ This procedural engagement highlights Rationalist efforts to navigate between universal principles and practical constraints through dialogue rather than confrontation.

Finally, several states took measures to ensure Al-Bashir did not visit their territory, thereby avoiding direct confrontation over arrest obligations. For instance, Malawi arranged for the AU Summit to be moved to Addis Ababa in order to avoid hosting Al-Bashir on its territory.⁶⁷ This approach reflects an ‘enlightened self-interest’ which, in the Rationalist tradition, takes into account the reactions of others and ‘seeks to avoid stirring up trouble.’⁶⁸

4.2 *Putin*

The ICC’s arrest warrant against, *inter alia*, Russian President Vladimir Putin on 17 March 2023 was the first warrant issued against the Head of State of a permanent member of the United Nations Security Council and, indeed, a nuclear weapons-possessor state. As above, the divergent responses of states and other stakeholders to this warrant may be fruitfully re-read according to Wight’s three traditions.⁶⁹

Following the confirmation of the arrest warrant, Russia’s response reflected a mix of sophisticated and crude Realist logic. Russia presented legal arguments to denounce the warrant as ‘unlawful’ and ‘legally void,’ maintaining that the ICC’s rejection of immunities in this case violated ‘generally recognized norms of international law’ and

⁶⁵ Coalition for the International Criminal Court, ‘The Low-Down: South Africa before ICC over Al-Bashir Non-Arrest’, 5 April 2017, available at coalitionfortheicc.org/news/20170405/lowdown-south-africa-icc-over-albashir-nonarrest (accessed 24 March 2026).

⁶⁶ *Prosecutor v. Al-Bashir*, Decision on South Africa, *supra* note 53, para. 31.

⁶⁷ Kreß, *supra* note 5, p. 259.

⁶⁸ Wight, *supra* note 6, p. 120.

⁶⁹ ICC, *Prosecutor v. Putin and Lvova-Belova*, Case No. ICC-02/22, Warrant of Arrest for Vladimir Vladimirovich Putin, Pre-Trial Chamber II, 17 March 2023. For a comprehensive overview of state reactions, *see* Gurmendi, *supra* note 18.

had ‘no basis in international law.’⁷⁰ This reflected a sophisticated Realist response; by engaging in substantive legal analysis, Russia advanced its preferred interpretation of immunities under international law. It concluded that the ICC’s arguments on immunities represented ‘nothing but an attempt of the Court to arbitrarily and unilaterally extend the scope of its competence while limiting the sovereign rights of states non-parties to the Rome Statute,’⁷¹ thereby indicating Russia’s preferred interpretation of the *lex lata*, namely that Heads of State from non-ICC parties continue to enjoy personal immunity under customary international law even in the context of international crimes.

However, and importantly, this sophisticated approach was underwritten by a cruder form of Realism involving power projection and the spectre of nuclear weapons.⁷² From a Realist perspective, this highlights how states may use a mix of crude and sophisticated Realism to advance their preferred legal interpretations. This approach reflects the Realist axiom that, ultimately, any interpretation of international law that is not backed by power is deficient as it lacks authority. Or, put another way, it is ‘from politics . . . that both morality and law derive their authority’ in international politics.⁷³ The implication is that if law derives its authority from the power of those who sustain it, then those very actors cannot be fully subordinated to the law they authorise, and the principle of equality before the law has to be accordingly qualified.

This pattern of deploying crude or sophisticated Realism, or a mix of the two, may be discerned in the responses of other states too. For instance, Mongolia’s decision not to arrest Putin during his state visit in September 2024, even though it is a State Party to the Rome Statute, reflected a cruder version of Realism, prioritising vital state interests, namely, energy security.⁷⁴ This prioritisation exemplified the Realist principle that ‘politics is the sphere of the non-moral,’ where vital interests prevail over moral or

⁷⁰ Ministry of Foreign Affairs of the Russian Federation, ‘Problems of Legality of the International Criminal Court’, 8 May 2024, available at mid.ru/en/foreign_policy/legal_problems_of_international_cooperation/1949021/ (accessed 24 March 2026).

⁷¹ *Ibid.*

⁷² See P. Sauer, ‘Vladimir Putin Warns West He Will Consider Using Nuclear Weapons’, *The Guardian*, 25 September 2024, available at [theguardian.com/world/2024/sep/25/vladimir-putin-warns-west-nuclear-weapons](https://www.theguardian.com/world/2024/sep/25/vladimir-putin-warns-west-nuclear-weapons) (accessed 24 March 2026).

⁷³ Wight, *supra* note 6, p. 17.

⁷⁴ ‘Mongolia Ignores an International Warrant for Putin’s Arrest, Giving Him a Red-Carpet Welcome’, Associated Press, 3 September 2024, available at apnews.com/article/mongolia-russia-putin-international-criminal-court-warrant-4c79850ecf409287924e3d96218abc78 (accessed 24 March 2026).

legal obligations.⁷⁵ In contrast, while the issue of energy security was also a significant one for Hungary,⁷⁶ it deployed a more sophisticated type of Realism that justified non-compliance with the arrest warrant on the basis of plausible, though widely criticised, legal arguments.⁷⁷

This Realist approach may be contrasted with the Revolutionary stance adopted by the ICC Prosecutor. Khan's interpretation of immunity reflects Revolutionary ideas about law's universal and even-handed aspirations. His statement that 'Article 27 of the Rome Statute makes it very clear that the official position of an individual is irrelevant to the jurisdiction of the court' is a direct invocation of the Revolutionary conviction that moral imperatives of justice override traditional sovereign immunities.⁷⁸ Similarly, his assertion that 'there's no immunity for international crimes' reflects the Revolutionary belief in the moral unity of the society of states, where universal justice transcends particularist claims of sovereign immunity.⁷⁹ Khan's further claims that 'basic principles of humanity bind everybody' and that 'Nobody should feel they have a free pass' give further expression to Revolutionary ideas about universal justice and the notion that nobody stands above the law.⁸⁰

The unprecedented collective action of 43 State Parties to the Rome Statute, including all EU members,⁸¹ referring the situation in Ukraine to the ICC in March 2022,⁸² similarly suggests a Revolutionary, moral commitment to universal justice.

⁷⁵ Wight, *supra* note 6, p. 248.

⁷⁶ See D. Csernus, 'Energy without Russia: The Case of Hungary' (Friedrich-Ebert-Stiftung, 2023), available at library.fes.de/pdf-files/bueros/budapest/20509.pdf (accessed 24 March 2026).

⁷⁷ See T. Hoffmann, 'Putin Has No Need to Fear ICC Arrest Warrant in Budapest, Orban Has Already Demonstrated That', Telex, 17 October 2025, available at telex.hu/english/2025/10/17/putin-has-no-need-to-fear-icc-arrest-warrant-in-budapest-orban-has-already-demonstrated-that (accessed 24 March 2026).

⁷⁸ C. Hu, 'Russia Scoffs but Putin Could Stand Trial for Alleged War Crimes, ICC Chief Prosecutor Says', CNN, 17 March 2023, available at [cnn.com/2023/03/17/americas/icc-karim-khan-putin-war-crimes-intl](https://www.cnn.com/2023/03/17/americas/icc-karim-khan-putin-war-crimes-intl) (accessed 24 March 2026).

⁷⁹ S. Murray, 'Putin's Position Would Not Give Him "Immunity" from Prosecution – ICC', Euronews, 12 October 2022, available at [euronews.com/my-europe/2022/10/12/putins-position-would-not-give-him-immunity-from-war-crime-prosecution-says-icc-chief-pros](https://www.euronews.com/my-europe/2022/10/12/putins-position-would-not-give-him-immunity-from-war-crime-prosecution-says-icc-chief-pros) (accessed 24 March 2026).

⁸⁰ W. Fautré, 'ICC Arrest Warrants for Vladimir Putin and Maria Lvova-Belova for War Crimes', Human Rights Without Frontiers, 22 March 2023, available at hrwf.eu/russia-icc-arrest-warrants-for-vladimir-putin-and-maria-lvova-belova-for-war-crimes/ (accessed 24 March 2026).

⁸¹ European Parliamentary Research Service, 'The International Criminal Court's 25th Anniversary and World International Justice Day', 2023, available at [europarl.europa.eu/RegData/etudes/ATAG/2023/751406/EPRS_ATA\(2023\)751406_EN.pdf](https://europarl.europa.eu/RegData/etudes/ATAG/2023/751406/EPRS_ATA(2023)751406_EN.pdf) (accessed 24 March 2026).

⁸² ICC, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation', 2 March 2022, available at [icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states](https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states) (accessed 24 March 2026).

What united these states was an uncompromising legal understanding of the *lex lata* that viewed Article 27 of the Rome Statute as admitting of no exceptions, not even for Heads of States of non-ICC parties.⁸³ However, as with all Revolutionist orientations, the understanding of ‘universal’ in universal justice remained qualified by a dualist moral framework. Those who belong to the ‘kingdom of light’ are entitled to wield universal justice, while those who belong to the kingdom of darkness are its proper subjects. The collective referral thus reflected not a ‘neutral’ interpretation of the applicable law *as such*, but a prior, value-laden judgment about who falls on which side of that divide, a judgment that, for non-referring states, may have appeared less as universal justice than as selective justice with universal aspirations.

In sharp contrast to the preferred legal interpretations of the Realists or the categorical moral convictions of Revolutionists, states within the Rationalist tradition adopted differing strategies that sought to reconcile the competing demands of Articles 27 and 98 of the Rome Statute through legal and diplomatic manoeuvre and respect for the lesser evil. For instance, South Africa’s initial position reflected equivocation, when it invited Putin to visit South Africa for the BRICS summit. It was reported that:

South Africa has indicated that it is seeking a legal loophole that would enable the country to suspend its obligation to arrest Putin without violating the Rome Statute. Analysts take this to mean that South Africa wants to try to use Article 98 of the statute to argue that they can’t arrest Putin unless Russia waives his immunity, something it is unlikely to do.⁸⁴

The solution that South Africa eventually found, that of ensuring Putin did not physically attend the BRICS summit by mutual agreement and following intense lobbying,⁸⁵ reflected what Wight identified as the Rationalist preference for choosing

⁸³ See EEAS, ‘Russia/Ukraine: Statement by the High Representative following the ICC Decision Concerning the Arrest Warrant against President Putin’, 2023, available at eeas.europa.eu/eeas/russiaukraine-statement-high-representative-following-icc-decision-concerning-arrest-warrant-against_en (accessed 24 March 2026).

⁸⁴ K. Hairsine, ‘South Africa’s Diplomatic Dilemma with Putin’, DW, 6 February 2023, available at [dw.com/en/south-africas-diplomatic-dilemma-with-putin/a-65804176](https://www.dw.com/en/south-africas-diplomatic-dilemma-with-putin/a-65804176) (accessed 24 March 2026).

⁸⁵ G. Imray, ‘Putin Was Meant to Be at a Summit in South Africa This Week. Why Was He Asked to Stay Away?’, Associated Press, 21 August 2023, available at apnews.com/article/brics-xi-jinping-putin-china-russia-963108da4d389f8e1e7775c9e002b5f9 (accessed 24 March 2026).

the lesser evil, and avoiding categorical interpretations that could result in direct confrontation.⁸⁶

Brazil's shifting stance showed similar Rationalist calculation. Initially, President Luiz Inacio Lula da Silva offered Putin an assurance that he would not be arrested if he attended the G20 Summit in Rio de Janeiro.⁸⁷ However, the Brazilian President later withdrew this assurance and deployed instead another Rationalist technique, 'institutional deflection,' where states defer ultimate responsibility for interpreting the law to other branches of governance.⁸⁸ These responses, which are far more tentative than the Realist or Revolutionist responses considered earlier, reflect an important Rationalist insight, namely that 'politics is the perpetual movement from one stage of the provisional to another,' seeking temporary accommodations rather than absolute resolution.⁸⁹

In the context of Putin's arrest warrant, the United States occupied a unique Rationalist position. President Biden's carefully calibrated, and equivocal, response exemplified this dynamic: first declaring that the warrant was 'justified,' and then going on to specify: 'But the question is – [the ICC is] not recognised internationally by us either. But I think it makes a very strong point.'⁹⁰ By endorsing the ICC's application of Article 27 to Putin without explicitly articulating its own preferred legal interpretation on immunities *ratione personae*, the US responded by seeking to extract political advantage from the ICC's actions without having to clarify its own preferred legal interpretation of the law.

4.3 Netanyahu

The ICC's arrest warrants against, *inter alia*, Israeli Prime Minister Benjamin Netanyahu in November 2024 brought to the fore fundamental disagreements about

⁸⁶ Wight, *supra* note 6, p. 244.

⁸⁷ 'Lula Says Putin Will Not Be Arrested at Brazil G20 Meeting', Al Jazeera, 10 September 2023, available at [aljazeera.com/news/2023/9/10/lula-says-putin-will-not-be-arrested-at-brazil-g20-meeting](https://www.aljazeera.com/news/2023/9/10/lula-says-putin-will-not-be-arrested-at-brazil-g20-meeting) (accessed 24 March 2026).

⁸⁸ 'Brazil's Lula Backtracks on Putin Arrest Safety at Rio G20', Al Jazeera, 11 September 2023, available at [aljazeera.com/news/2023/9/11/brazils-lula-backtracks-on-putin-arrest-safety-at-rio-g20](https://www.aljazeera.com/news/2023/9/11/brazils-lula-backtracks-on-putin-arrest-safety-at-rio-g20) (accessed 24 March 2026).

⁸⁹ Wight, *supra* note 6, p. 243.

⁹⁰ "'It's Justified": Joe Biden Welcomes ICC Arrest Warrant for Vladimir Putin', *The Guardian*, 18 March 2023, available at [theguardian.com/us-news/2023/mar/18/joe-biden-welcomes-icc-arrest-warrant-vladimir-putin](https://www.theguardian.com/us-news/2023/mar/18/joe-biden-welcomes-icc-arrest-warrant-vladimir-putin) (accessed 24 March 2026).

how personal immunities of Heads of State from non-ICC parties relate to international criminal jurisdiction.⁹¹ These disagreements, whilst present in earlier cases, manifested with particular intensity in this case, as a significant number of states and other stakeholders issued public statements. The following discussion draws extensively on Ingber's *Mapping State Reactions to the ICC Arrest Warrants for Netanyahu and Gallant*.⁹²

States within the Realist tradition employed both types of strategies to advance their preferred legal interpretation and justify non-compliance with the arrest warrants. Argentina offers a good example of crude Realism in action, prioritising policy-based justifications and declaring that the ICC decision 'ignores Israel's legitimate right to defend itself against constant attacks by terrorist organizations.'⁹³ Similarly, Hungary denounced the arrest warrant as 'brazen, cynical and completely unacceptable,' and proceeded to invite Netanyahu for an official visit where Hungary would 'guarantee his freedom and safety.'⁹⁴ These statements referenced policy arguments (such as Israel's vital security interests) for rejecting the ICC's warrants and did not directly address obligations relating to Heads of State immunities under international law.

Sophisticated Realism, by contrast, harnesses international law's indeterminacy to construct legally plausible justifications for non-compliance. Israel's response exemplified this oscillation between sophisticated legal argumentation and crude political condemnation. In its September 2024 submission, Israel challenged the Court's power to exert jurisdiction in the Situation in the State of Palestine in general, and over Israeli nationals more specifically.⁹⁵ The Israeli Attorney-General, Baharav-Miara, also deployed sophisticated legal argumentation, asserting that the ICC acted *ultra vires* and that 'the International Criminal Court's decision is baseless, regrettable, and fundamentally legally flawed. On this day, it must be stated clearly – the

⁹¹ ICC, *Situation in the State of Palestine*, Case No. ICC-01/18, Warrant of Arrest for Benjamin Netanyahu, Pre-Trial Chamber I, 21 November 2024.

⁹² Ingber, *supra* note 19.

⁹³ *Ibid.*, entry for Argentina.

⁹⁴ *Ibid.*, entry for Hungary. See also K. Than, F. Heine and K. Than, 'Orban Invites Netanyahu to Hungary as ICC Warrant Divides Europeans', Reuters, 22 November 2024, available at [reuters.com/world/europe/pm-orban-says-he-will-invite-israeli-pm-netanyahu-hungary-after-icc-move-2024-11-22/](https://www.reuters.com/world/europe/pm-orban-says-he-will-invite-israeli-pm-netanyahu-hungary-after-icc-move-2024-11-22/) (accessed 24 March 2026).

⁹⁵ ICC, *Situation in the State of Palestine*, Case No. ICC-01/18, Prosecution Response to 'Israel's Challenge to the Jurisdiction of the Court Pursuant to Article 19(2) of the Rome Statute', 27 September 2024, para. 1.

International Criminal Court lacks any jurisdiction in this matter.⁹⁶ Yet this jurisdictional challenge formed part of a broader assault on the Court's legitimacy itself. The Israeli Prime Minister's Office denounced the proceedings as an 'antisemitic decision' and compared it to 'the modern-day Dreyfus trial.'⁹⁷

The United States demonstrated the overlapping mix of sophisticated and crude Realism most clearly. In its August 2024 amicus brief and thereafter, the US focused mainly on the issue of the ICC's lack of jurisdiction, rather than the question of immunities.⁹⁸ It deployed sophisticated legal arguments to frame the ICC's issuance of the arrest warrant as based on 'troubling process errors' and, therefore, *ultra vires*. In parallel, however, President Biden denounced the warrants as 'outrageous,' declaring that 'there is no equivalence – none – between Israel and Hamas.'⁹⁹ Most strikingly, the US proceeded to back its preferred legal interpretation with power projection. In 2024 and thereafter, the US imposed a series of sanctions on the ICC Prosecutor and deputies, six ICC judges and other Court officials,¹⁰⁰ significantly undermining the work of the Court and forcing some ICC officials to resign.¹⁰¹ These sanctions reflect the Realist premise that international law and legal institutions remain subordinated to the vital interests of great powers.¹⁰² This case may be read as suggesting that sophisticated Realism represents less a distinct philosophical position than a tactical refinement of crude Realism, deploying law's ambiguities to legitimise what remains, at core, the Realist conviction that universal justice remains subordinated to sovereign interests.¹⁰³ In so doing, it qualifies the principle of equality before the law because, if law derives

⁹⁶ Ingber, *supra* note 19, entry for Israel (Attorney-General).

⁹⁷ S. Sokol, "'A Modern Dreyfus Trial': Israel Assails ICC Arrest Warrants for Netanyahu, Gallant", *The Times of Israel*, 21 November 2024, available at [timesofisrael.com/a-modern-dreyfus-trial-israel-assails-icc-arrest-warrants-for-netanyahu-gallant/](https://www.timesofisrael.com/a-modern-dreyfus-trial-israel-assails-icc-arrest-warrants-for-netanyahu-gallant/) (accessed 24 March 2026).

⁹⁸ ICC, *Situation in the State of Palestine*, Case No. ICC-01/18, Written Observations by the United States of America Pursuant to Rule 103, 6 August 2024.

⁹⁹ J. Lukiv, 'Netanyahu ICC War Crimes Arrest Warrant "Outrageous" Says Biden', BBC News, 22 November 2024, available at [bbc.com/news/articles/c704y7gwr95o](https://www.bbc.com/news/articles/c704y7gwr95o) (accessed 24 March 2026).

¹⁰⁰ ICC, 'The International Criminal Court Deplores New Sanctions from the US Administration against ICC Officials', 5 June 2025, available at [icc-cpi.int/news/international-criminal-court-deplores-new-sanctions-us-administration-against-icc-officials](https://www.icc-cpi.int/news/international-criminal-court-deplores-new-sanctions-us-administration-against-icc-officials) (accessed 24 March 2026).

¹⁰¹ See C. Hadjimatheou, 'Threat of US Sanctions over Gaza Forced Me Out, Says ICC Lawyer', *The Observer*, 29 June 2025, available at [observer.co.uk/news/international/article/threat-of-us-sanctions-over-gaza-forced-me-out-says-icc-lawyer](https://www.observer.co.uk/news/international/article/threat-of-us-sanctions-over-gaza-forced-me-out-says-icc-lawyer) (accessed 24 March 2026). See also E.U. Ochab, 'International Criminal Court Faces the Risk of Further Sanctions', *Forbes*, 24 September 2025, available at [forbes.com/sites/ewelinaochab/2025/09/24/international-criminal-court-faces-the-risk-of-further-sanctions/](https://www.forbes.com/sites/ewelinaochab/2025/09/24/international-criminal-court-faces-the-risk-of-further-sanctions/) (accessed 24 March 2026).

¹⁰² Wight, *supra* note 6, p. 141.

¹⁰³ *Ibid.*, p. 114.

its authority from power, then it cannot be applied against those who bestow that authority (and their allies).

While Realist responses to the Netanyahu warrant prioritised sovereignty and vital interests, Revolutionary states, and the ICC itself, invoked universal moral imperatives. However, both the scope of ‘universal’ and the content of the moral imperatives themselves were contested within the Revolutionist camp. With respect to the scope of ‘universal,’ the same dualist lens that characterises all Revolutionist thought operated here: ‘universal’ justice was to be wielded by those belonging to the ‘kingdom of light’ against those belonging to the ‘kingdom of darkness.’ With respect to the content of the moral imperatives themselves, some states emphasised the imperative of universal accountability for mass atrocities. For instance, Belgium declared that ‘those responsible for crimes committed in #Israel and #Gaza must be prosecuted at the highest level, regardless of who committed them,’¹⁰⁴ and Ireland’s Prime Minister held that ‘those who commit war crimes and crimes against humanity, must be held fully to account.’¹⁰⁵ Those views were echoed by the ICC Prosecutor, who held that ‘if we do not demonstrate our willingness to apply the law equally, if it is seen as being applied selectively, we will be creating the conditions for its collapse.’¹⁰⁶ Other states, however, had different moral imperatives in mind, such as anti-imperialism. For instance, Algeria welcomed warrants against ‘officials in the Zionist entity’ as ending ‘decades of immunity and the escape of the Israeli occupier,’¹⁰⁷ whilst Iraq adopted similar language.¹⁰⁸ Despite these differences, both strands converge on a shared doctrinal outcome: Article 27 is treated as a step towards achieving those moral imperatives, whilst Article 98 is interpreted narrowly so as to preserve the Court’s transformative mission. What unites them, and what gives the Revolutionist tradition its distinctive force, is the capacity to ground preferred legal interpretations of the *lex lata* in moral imperatives, and, in so doing, to frame those interpretations as the only ‘correct’ ones.

¹⁰⁴ See Belgium’s statement in Ingber, *supra* note 19.

¹⁰⁵ See Ireland’s statement in *ibid.*

¹⁰⁶ ICC, ‘Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine’, 20 May 2024, available at [icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state](https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state) (accessed 24 March 2026).

¹⁰⁷ See Algeria’s statement in Ingber, *supra* note 19.

¹⁰⁸ See Iraq’s statement in *ibid.*

It is perhaps the Rationalist responses to the Netanyahu warrant that were the most theoretically interesting. Rather than adopting conclusive legal interpretations of the *lex lata*, Rationalist states demonstrated a sophisticated spectrum of strategic responses. The UK exemplified institutional deflection by, on the one hand, affirming that ‘Israel has a right to defend itself in accordance with international law’ and, on the other, reaffirming the UK’s respect for ‘the independence of the ICC.’ When pressed on whether the UK would arrest Netanyahu, a spokesperson held, ‘if there were to be such a visit to the UK there would be a court process and due process would be followed in relation to those issues.’¹⁰⁹ Similarly, the Czech Deputy Foreign Minister explained that ‘the authorities involved in criminal proceedings would be activated . . . without any political interference.’¹¹⁰

Another Rationalist approach employed equivocation. France’s position, described as ‘legal acrobatics,’¹¹¹ best exemplified this type of Rationalist manoeuvring. France at once acknowledged its obligations to ‘comply with its international obligations’ under the Rome Statute, while also insisting that:

[a] State cannot be required to act inconsistently with its obligations under international law with respect to the immunities of States not party to the ICC. Such immunities apply to Prime Minister Netanyahu . . . and will have to be taken into account should the ICC request of us their arrest and surrender.¹¹²

This formulation represents neither outright defiance nor unconditional compliance, as France is simply warning that immunity considerations ‘will have to be taken into account.’ France was here seeking to express both respect for its obligations under the Rome Statute and avoid frontal confrontation with Israel. Foreign Minister Barrot’s additional caveat that ‘it is ultimately up to the judicial authorities to decide’ engaged

¹⁰⁹ Ingber, *supra* note 19, entry for the United Kingdom.

¹¹⁰ *Ibid.*, entry for the Czech Republic.

¹¹¹ ‘France’s Legal Acrobatics over Netanyahu’s ICC Arrest Warrant’, Tortoise Media, 4 December 2024, available at tortoisemedia.com/2024/12/04/frances-legal-acrobatics-over-netanyahus-icc-arrest-warrant (accessed 24 March 2026). See also T. McBrien, ‘France’s Convoluting and Contradictory ICC Immunity Position’, Lawfare, 2024, available at lawfaremedia.org/article/france-s-convoluted-and-contradictory-icc-immunity-position (accessed 24 March 2026).

¹¹² Ministère de l’Europe et des Affaires étrangères, ‘Israel – International Criminal Court’, 27 November 2024, available at diplomatie.gouv.fr/en/country-files/israel-palestinian-territories/news/2024/article/israel-international-criminal-court-27-11-24 (accessed 24 March 2026).

the above-mentioned institutional displacement technique, deferring resolution whilst preserving interpretive escape routes.¹¹³

Germany's response also indicates how a state's specific historical context may influence one's interpretation of the law. A German government spokesman carefully balanced competing imperatives:

The federal government was involved in the drafting of the ICC statute and is one of the ICC's biggest supporters. This position is also a result of German history . . . At the same time, a consequence of German history is that we have a unique relationship and a great responsibility to Israel.¹¹⁴

This formulation engaged history twice but for opposing purposes, first to justify ICC support, then to qualify it. Similarly, the Netherlands first held that it will 'fully comply with the Rome Statute of the ICC' but then went on to qualify that statement, suggesting 'possible scenarios, also within international law, in which [Netanyahu] would be able to come to the Netherlands without being arrested.'¹¹⁵ On its part, Romania combined support for 'the independence of the ICC' with invitations for Netanyahu to attend government meetings in Bucharest.¹¹⁶ These responses suggest that Rationalists are more ready to embrace equivocal, and potentially incoherent, legal interpretations that balance Article 27's universalist aspirations with particularist and contextualised considerations, and to favour legal interpretations that respect a state's specific historical context and special relationships.

Rationalist states also engaged in temporal displacement where they sought to avoid clear articulation of their positions by refusing to engage with hypothetical scenarios or by creating time-specific exceptions. Multiple states insisted they would address the situation 'case by case' when and if it arose. For instance, Italy held (vaguely) that, 'there are immunities and immunities must be respected' while deferring the matter by

¹¹³ France 24, *supra* note 1.

¹¹⁴ 'Merz Says Netanyahu Will Be Able to Visit Germany despite ICC Warrant', Al Jazeera, 24 February 2025, available at [aljazeera.com/news/2025/2/24/merz-says-netanyahu-will-be-able-to-visit-germany-despite-icc-warrant](https://www.aljazeera.com/news/2025/2/24/merz-says-netanyahu-will-be-able-to-visit-germany-despite-icc-warrant) (accessed 24 March 2026). In addition, the German Chancellor indicated that, while he noted Germany's obligations under the Rome Statute, it was 'a really absurd idea that an Israeli prime minister can't visit the Federal Republic of Germany.'

¹¹⁵ Ingber, *supra* note 19, entry for the Netherlands.

¹¹⁶ *Ibid.*, entry for Romania.

holding that ‘we will evaluate together with our allies what to do and how to interpret this decision.’¹¹⁷ Poland also exemplified this approach through its oscillation between initial declarations that ‘immunity and inviolability of a state leader . . . do not apply in this case’ and its subsequent guarantee of Netanyahu’s safety at Auschwitz commemorations, justified as ‘part of paying tribute to the Jewish nation.’¹¹⁸

What cuts across these diverse Rationalist approaches is their shared recognition that the legal question of whether Heads of State from non-ICC parties enjoy personal immunities, when confronted with arrest warrants issued by the ICC, is not one that can be definitively resolved without foreclosing alternative interpretive possibilities and must, therefore, always be considered on a case-by-case basis. From a Rationalist perspective, therefore, for an interpretation of international law to be authoritative, it ultimately needs to preserve—and seek not to upset—the existing balance of power in international society.

5 Conclusion

The analysis herein suggests that neither membership of the Rome Statute nor the categorical language of Article 27 is in itself determinative of how states will interpret and respond to arrest warrants issued by the ICC against Heads of State from non-ICC parties. Different states adopted varying interpretations of their obligations. Some States Parties, like South Africa, appeared to understand their legal obligations differently in different cases, whilst non-parties like Algeria and Iraq became unlikely vocal champions for the ICC in specific cases. These inconsistencies point to a deeper truth: states’ responses to immunity questions are not decided in some doctrinal-abstract manner, but are influenced by deeper ideas about how international society should work.

From a Realist perspective, international law derives its authority from the power of states willing and able to enforce it and remains subordinated to the vital interests of those powerful states. This starting point qualifies each of the key assumptions of

¹¹⁷ *Ibid.*, entry for Italy.

¹¹⁸ *Ibid.*, entry for Poland.

doctrinal analysis undertaken in a Realist framework. First, the assumption that legal interpretation, undertaken through formal and neutral methodologies, can produce determinate legal answers is qualified by the recognition that it is power, ultimately, that confers authority onto legal interpretations. From within the Realist tradition, it is only those interpretations that are backed by power that are viewed as authoritative. Other interpretations, however coherent or persuasive, are regarded as unauthoritative because they lack that essential backing. As we have seen, both crude and sophisticated Realists offer definitive interpretations of immunity law—that immunity absolutely applies to Heads of State from non-ICC parties and/or that the ICC is acting *ultra vires*—not because this is the only possible legal interpretation but because these are the interpretations favoured by states willing to back them with power. When the US combined jurisdictional objections with sanctions against ICC judges, it sent a clear message that legal interpretation under Realism is ultimately an exercise of power dressed in juridical language. Particularly in areas affecting the vital interests of powerful states, the prevailing interpretation is the one backed by the projection of power.

Second, the assumption of legal coherence is effectively deprioritised in Realist thinking. Because all authoritative legal interpretations must ultimately align with powerful states' vital interests, consistency across cases is not viewed as a necessary feature of the international legal order but an organic outcome that obtains only when such interpretations happen to reflect the interests of powerful actors. A state may support the enforcement of an arrest warrant in one case and obstruct it in another, not because the legal circumstances are materially distinguishable but because the political calculus differs. For Realism, this is neither a deficiency to be corrected nor a failure of legal reasoning; it is simply how international law operates, given its continued subordination to vital state interests.

Third, formal equality before the law is perhaps the assumption most directly challenged by the Realist tradition. Because the doctrinal assumption of generality is qualified by the Realist maxim that the states whose power endows international law with its binding force cannot themselves be fully subjected to that law. The entity that is the source of legal authority necessarily stands, in a functional sense, outside and

above the legal order it sustains (*princeps legibus solutus est*).¹¹⁹ Formal equality thus becomes a principle that powerful states may invoke rhetorically but that does not effectively constrain them, since by wielding power, they retain the capacity both to authorise or withdraw their authorisation from specific legal interpretations of international law, and to determine when and against whom it is enforced.

From a Revolutionist perspective, international law derives its authority from its conformity with moral imperatives, though the content of those imperatives varies across different strands of Revolutionist thought: for some, the animating imperative is the protection of fundamental individual rights; for others, it is anti-imperialism. What unites these strands is the conviction that law is authoritative only insofar as it serves a moral project that transcends the interests of states. The key organising distinction, from a Revolutionist lens, is between those working towards the actualisation of those imperatives (the ‘kingdom of light’) and those standing in their way (the ‘kingdom of darkness’). This starting point colours each of the key assumptions of doctrinal analysis undertaken from within a Revolutionist framework.

First, the assumption that legal interpretation can produce determinate legal answers is not so much challenged as radicalised. Legal interpretation, from a Revolutionist perspective, is never a neutral exercise but one undertaken in service of a moral imperative, and it is precisely this moral commitment that grounds interpretive certainty. As we have seen, states within the Revolutionist tradition have all been able to categorically articulate their support for the ICC’s arrest warrants against Heads of State from non-ICC parties because, for these states, the warrants constitute a step towards the *civitas maxima*, whether understood as universal justice or anti-imperialism. The diverse moral imperatives of different Revolutionist states thus lead to the same interpretive certainty, because each treats law as instrumental to its particular vision of the good. This also explains the otherwise puzzling situation where non-States Parties can be more supportive of the ICC’s arrest warrants than some States Parties. This is because, for Revolutionist states, formal legal status matters less than moral aims. The Revolutionist tradition therefore challenges a legal positivist

¹¹⁹ T.S. Taylor, ‘Princeps Legibus Solutus Est an Non? Cultures of Legality in the Roman Empire’, in E. Cowan *et al.* (eds.), *The Rule of Law in Ancient Rome* (Oxford University Press, Oxford, 2025), available at doi.org/10.1093/9780198959359.003.0011 (accessed 24 March 2026).

separation between law and morals, and instead holds that legal interpretation is always shaped by prior assumptions about law's moral purpose.¹²⁰

Second, the assumption of legal coherence is formally affirmed but subject to the dualist logic of the two kingdoms. Consistency in the application of the law is valued, but only in one direction: inconsistent enforcement is objectionable when it represents a failure to hold accountable those who belong in the kingdom of darkness. What doctrinal analysis would regard as selective enforcement may, from within this tradition, be explained as the properly targeted application of justice. The dualist framing of Revolutionist thinking reframes what counts as 'like' cases: only those within the kingdom of darkness are properly comparable, and consistency is owed only in holding them to account.

Third, formal equality before the law is the assumption Revolutionism engages with most distinctively. In theory, it insists on equality before the law more emphatically than any other tradition. It emphasises that no individual, regardless of office, may be placed beyond legal accountability. Yet this commitment is again qualified by the same dualist logic. Because law is a tool for the realisation of the *civitas maxima*, its interpretation and application is properly directed at those in the kingdom of darkness, while those in the kingdom of light are not viewed as legitimate subjects of the law's punitive reach, but rather as its rightful wielders. In so far as accountability is concerned, therefore, its 'universal' reach only extends to those on the wrong side of the moral divide.

From a Rationalist perspective, international law derives its authority from the shared rules and institutional frameworks that states, as members of an international society, have developed through reciprocal commitment (*pacta sunt servanda*) and the gradual construction of common standards. The Rationalist approach to legal interpretation is pervaded by two guiding commitments: preserving the balance of

¹²⁰ The affinity between Revolutionist thinking and natural law theory is notable in this regard. Both traditions reject the legal positivist separation between law and morality, holding instead that legal norms derive their authority, at least in part, from their conformity with prior moral commitments. For an analysis of this position in the context of international criminal law, see A. Matwijkiw and B. Matwijkiw, 'A Modern Perspective on International Criminal Law: Accountability as a Meta-Right', in L.N. Sadat and M.P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff, Leiden, 2008), pp. 19–72, especially pp. 26–31, where Bassiouni's jurisprudence is analysed as one that ascribes primacy to morality over legal positivism, treating accountability as not merely a legal matter but also a moral and ethical consideration.

power and choosing the lesser evil. In a society of sovereign states with competing interests, the task of law is not to achieve perfect justice but to manage coexistence in ways that avoid confrontation. This starting point qualifies each of the key assumptions of doctrinal legal interpretation undertaken from within a Rationalist framework.

First, the assumption that legal interpretation can produce determinate legal answers is broadly accepted in theory but qualified in practice by the assumption that any such interpretation must always be mediated by the lesser evil. As we have seen, the various techniques Rationalist states employed in response to the ICC's arrest warrants—institutional deflection, temporal displacement and equivocation—all served to avoid expressly committing to definitive legal interpretations of the *lex lata*. This suggests that the contested nature of immunity law reflects a carefully maintained condition of indeterminacy. Article 27's categorical language that immunities 'shall not bar' ICC jurisdiction becomes, from a Rationalist perspective, merely one consideration that must be read in context. An equivocal or inconclusive interpretation constitutes, within this tradition, a valid and legitimate form of legal reasoning. The law on immunity remains unsettled because Rationalist thinkers have an inherent interest in preserving indeterminacy.

Second, the assumption of legal coherence is formally affirmed but accepted as necessarily imperfect and admitting of several exceptions. Because legal interpretation, from a Rationalist perspective, should never be decontextualised but must be situated within the totality of the legal and political circumstances, with due regard for competing obligations and an eye to future implications, consistency across cases is valued but not treated as an overriding imperative. Tolerating localised incoherence is the lesser evil when the alternative is upsetting the wider balance of power. From this perspective, any authoritative interpretation of the law is always context dependent. The assumption here is that it is only those legal interpretations that sustain the equilibrium among states on which international society depends that may, ultimately, be considered authoritative.

Third, formal equality before the law is affirmed as a constitutive norm of international society. But Rationalism acknowledges that the institutional architecture through which international law is applied, including the Security Council veto and differentiated treaty obligations, introduces structural asymmetries that inevitably

qualify formal equality in practice. These inequalities are understood, and accepted, as the lesser evil required to secure the participation of powerful states, on the basis that constrained inequality in which all major actors remain engaged is preferable to a formally egalitarian system from which they withdraw. As such, Rationalist thinking qualifies the assumption of equality before the law by subordinating it to the principle of the balance of power within international society itself, accepting that, in some cases, to borrow Orwell's famous formulation, 'all animals are equal, but some are more equal than others.'¹²¹

Most significantly, this analysis suggests that the tensions between Articles 27 and 98 extend beyond contested legal interpretations of the *lex lata* to reflect fundamentally incompatible visions of international order embedded within the Rome Statute itself. The persistent controversies over immunity arise from the Statute's attempt to institutionalise what cannot be reconciled: Revolutionary transcendence of sovereignty, Realist subordination of law to power, and Rationalist perpetual balancing. Each tradition reads these provisions through its own philosophical lens, generating legal interpretations that are internally coherent but mutually exclusive. The immunity debate thus emerges as a permanent site of contestation, crystallised in the Rome Statute, where competing visions of international order are perpetually renegotiated.

¹²¹ G. Orwell, *Animal Farm: A Fairy Story* (Martin Secker & Warburg, London, 1945).