

Dissenting Opinion of Judge Iulia Antoanella Motoc

Prolegomena

1. With my regret and with great respect for my colleagues, I issue this dissenting opinion given my disagreement to refer to the Assembly of States Parties (the ‘ASP’) the Italian Republic (‘Italy’)’s non-compliance to surrender Osama Elmasry Njeem (‘Mr Njeem’) to the Court (the ‘Majority Decision’). It must be highlighted that I concur with the finding of our previous decision about the State’s failure to comply with the request to cooperate in the arrest and surrender of Mr Njeem.¹

2. Moreover (and this constitutes my main reason for writing a dissenting separate opinion), it would seem that the opinion of the majority refrains designedly from discussing the majority of arguments raised by Italy, some of which are straightforward, and others involve difficult issues which have troubled a number of those who have had to deal with them. This is the fact that the decision was made without detailed legal argument by those most directly affected by it. The opinion of the majority in short, ignores various points which appear to me to be very relevant. The majority fails to grasp an essential fact: Italy is bound by a duty to cooperate with the global community at large,² an obligation that is *erga omnes* in nature. The majority shifted the focus away from the primary goal: ensuring the arrest of suspects for atrocity crimes, norms of *jus cogens*. The majority's only argument—the comparison South Africa-Italy is inherently flawed, both in principle and in practice. In my view, the failure of the majority to examine defenses, its flawed reasoning, essential omissions, and purely formal reasoning—all these defects are contained in the majority opinion, also lead to a violation of the right to a fair trial. Another major confusion made by the majority, which goes against the Rome Statute, is that according to article 87(7) of the Statute, the situation in Libya could not be referred to the ASP. The case was initiated by the United Nations Security Council.³ It is a fundamental error of literary interpretation of

¹ Decision on Italy’s non-compliance with a request for cooperation, 17 October 2025, ICC-01/11-209.

² Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, Opinion in Mongolia, 24 October 2024, ICC-01/22-90, para. 31.

³ The United Nations Security Council unanimously referred the situation in Libya since 15 February 2011 to the ICC in Resolution 1970 (2011).

article 87(7) of the Statute, which states: 'the Court may find non-compliance and refer the issue to the Assembly of States Parties or the Security Council, depending on how the case was initiated.' This referral is evidently *contra legem*. All these are grounds to set aside the case.

3. The majority's decision rests on the argument that no judicial proceedings are currently underway—an argument that is factually incorrect, as the Italian government has demonstrated that proceedings are still ongoing. In similar cases, the Court has waited years for such proceedings to conclude, ultimately reaching conclusions that directly contradict those in our present case. Since the Court had exercised its discretion not to refer South Africa in an earlier, similar instance, it was an error to then refer Italy for the same non-compliance. This created an arbitrary application of the referral mechanism. The majority erred in its exercise of discretion under article 87(7) of the Rome Statute (the 'Statute'). In accordance with article 4 of the International Law Commission Draft Articles on State Responsibility (the 'ILC Draft Articles'),⁴ the State is viewed as a unitary entity; international responsibility is engaged regardless of which organ—including the judiciary—acts, even where a judicial decision is purportedly erroneous. It follows that in matters of international cooperation, the actions of the judiciary must be weighed with procedural symmetry. In the present case, far from being inert, some part of the Italian judiciary has demonstrated initiative, aspects that were not taken into account by the majority.

4. What is inherently problematic is the comparison already employed by the Court—a comparison lacking a *tertium comparationis*, meaning we are 'measuring weight in liters'.⁵ Furthermore, in this case, the comparison used by the majority unfolds within a methodological vacuum, given that it contrasts a mixed legal system with significant Anglo-Saxon influences (that of South Africa)⁶ with an Italian civil law system, and an administrative proceeding with criminal and constitutional proceedings. It is hardly surprising that such comparisons were historically

⁴ Article 4. Conduct of organs of a State: '1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State; 2) An organ includes any person or entity which has that status in accordance with the internal law of the State.'

⁵ This is the most "classic" framework in comparative law, popularized by Zweigert and Kötz. In this approach, the function of a legal rule—how it solves a specific social problem—serves as the *tertium comparationis*. See K. Zweigert and H. Kötz, 'An Introduction to Comparative Law' (1998).

⁶ C.G. Merwe and J.E. Plessis, 'Introduction to the Law of South Africa' (2004).

viewed through a political-diplomatic lens, given the scant legal foundation supporting them.⁷ It is understood that judicial discretion never exists in its pure form, as it is inherently influenced by certain factors. If these factors are found to cause confusion, they ought to be superseded. In lieu of juxtaposing inherently incomparable entities, the Court might find it useful to adopt a balancing test, consistent with the jurisprudence of other international tribunals.⁸ This balancing approach permits the Court to "regrade" its response, eschewing rigid punitive measures for a nuanced determination of the severity of non-compliance. Such findings facilitate efficient remedies in securing a long-term cooperation. Furthermore, this framework provides a judicial resolution for Competing Obligations. By consistently applying this balancing test, the Court progressively clarifies the parameters of national security exceptions and also shields states from shielding States from the "impossible" legal dilemma of violating one treaty to satisfy another.⁹

Differential treatment as a methodology used by the majority

5. As established in the prolegomena, we are faced with a substantial problem regarding the comparative methodology utilized. In seeking to delineate the discretionary authority conferred by article 87(7) of the Statute, the Court identified specific factors—most notably consultations (article 97 of the Statute) and the existence of domestic judicial proceedings—that may militate against a formal referral of a State to the ASP or the United Nations Security Council (the ‘UNSC’).¹⁰

6. Perhaps the majority’s most significant error lies in the fact that it ignores essential factual elements in its main argument for referring the case to the ASP. These factual elements consist of the two cases currently pending before the Italian courts: one criminal and one constitutional. There is an ongoing criminal proceeding involving a high-ranking official of the Ministry of Justice, alongside the activation of specific constitutional procedures.¹¹ As Italy has further

⁷ D. Akande, ‘ICC Issues Detailed Decision on Bashir’s Immunity (. . . At long Last . . .) But Gets the Law Wrong’, in *Blog of the European Journal of International Law* (15 December 2011).

⁸ See E. Cannizzaro, ‘Balancing Test: International Court of Justice (ICJ)’ (July 2019). See also A.S. Sweet and J. Mathews, ‘Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach’ (May 2019). See also C.H. Wheeler, ‘Fairness and the Goals of International Criminal Trials: Finding a Balance’ (April 2023).

⁹ *Ibidem*.

¹⁰ The nuances of legal reasoning and argumentation were brought into sharp focus as the Court undertook a comparative analysis of these factors. M. du Plessis and D. Tladi, ‘The ICC’s immunity debate – the need for finality’ in *Blog of the European Journal of International Law* (11 August 2017).

¹¹ See Italy’s response to the Pre-Trial Chamber’s invitation to provide information on relevant domestic proceedings – ICC-01/11-209, 31 October 2025, ICC-01/11-211-Anx, paras 6 and 12.

indicated, ‘the judiciary possesses the authority to raise a conflict of state power attribution before the Constitutional Court’.¹² The majority appears to have overlooked the availability of an effective domestic remedy within Italy—specifically, the Italian Constitutional Court.¹³ This potential was realised in practice on October 30, 2025, when the Rome Court of Appeal raised a constitutional challenge regarding the constitutional legitimacy of national rules that may allow ministerial discretion to interfere with or block judicial cooperation with the ICC, namely Law No. 237 of 2012 (Norms for adjustment of internal law to the Rome Statute of the International Criminal Court).¹⁴

7. The challenge by the Court of Appeal of Rome suggests these limitations might violate fundamental principles regarding access to justice, the independence of the judiciary, and Italy’s commitment to international human rights treaties and international law more generally. Needless to say, this decision is fundamental for cooperation with Italy. While in other cases the Court granted two-year intervals before deciding on the need or otherwise to refer a matter to the ASP or UNSC, here—after Italy provided clarifications regarding the Constitutional Court’s powers that could impact cooperation—it was not permitted to submit any more precise documentation¹⁵.¹⁶ In the present case, after Italy provided clarifications regarding the commencement of proceedings before the Italian Constitutional Court, the majority overlooked completely this argument.

8. The majority ignored these two processes, criminal and constitutional which have a real impact on cooperation.¹⁷ There are serious material omissions that warrant the immediate reversal of the ruling. I disagree with the majority which considers that ‘the South-African case must be distinguished from the present case, because, unlike Italy, South-Africa did not qualify or restrict its future cooperation with the Court’. *Emitur sola virtus, quae nequit comparari* (virtue alone is

¹² Italy’s response to the Pre-Trial Chamber’s invitation to provide information on relevant domestic proceedings – ICC-01/11-209, 31 October 2025, ICC-01/11-211-Anx, para. 11.

¹³ See V. Barsotti, P.G. Carrozza, M. Cartabia and A. Simoncini, ‘Italian Constitutional Justice in Global Context’ (26 October 2015).

¹⁴ Order of the Rome Court of Appeal, Section IV, criminal division, dated 30 October 2025, by which a question concerning the constitutionality of legislation was referred to the Constitutional Court pursuant to Article 1 of Constitutional Law No. 1/1948 and Article 23(3) of Law No. 87/1953.

¹⁵ See Italy’s Request for Leave to Submit Observations on the “Notification of new information” by the Office of the Prosecutor ICC-01/11-0216, 18 November 2025, ICC-01/11-217-Anx.

¹⁶ Even though a Constitutional Court decision takes, on average, between 8 and 12 months. See V. Barsotti, P.G. Carrozza, M. Cartabia and A. Simoncini, ‘Italian Constitutional Justice in Global Context’ (26 October 2015).

¹⁷ Decision to refer Italy’s non-compliance with a request for cooperation to the Assembly of States Parties, 26 January 2026, ICC-01/11-224, paras 11-14.

worth buying as it is beyond compare). The majority fails to account for two critical factors when performing this comparison. In the case of South Africa, the Court waited almost two years until the internal administrative proceedings were resolved.¹⁸ Conversely, regarding Italy, the majority of the Chamber refused to allow the State to update its arguments¹⁹ to reflect the new constitutional process, despite Italy's assertions that pending criminal and constitutional proceedings could impact the current case. Furthermore, to demonstrate that these situations are distinct, the majority compared a mere administrative finding in South Africa to a criminal trial involving exceptionally grave allegations.²⁰ I only need to reread and write about these comparisons to criticize their outcome; I realize that this comparison procedure in article 87(7) of the Statute is one of the most problematic legal arguments advanced by the Court also in the previous case-law.

The interpretation of article 87(7) of the Statute, especially in the light of International Law

9. The majority fails to define the applicable legal framework, and this lack of an adequate definition leads to several issues regarding legal reasoning. First and foremost, the majority ignored the necessary relationship between article 87(7) of the Statute and customary international law, despite the explicit command of article 21 of the Statute, which requires that, where appropriate, the Court apply established principles and rules of international law. By failing to interpret the obligations of State cooperation within the broader context of international law, the majority adopted a narrow, treaty-centric approach. This approach neglects that article 87(7) of the Statute does not operate in a vacuum but is constrained by the general principles of international law mandated by article 21(1)(b) of the Statute, thereby risking a misapplication of the Statute and undermining the legal foundations of cooperation requests.

10. The interaction between article 87(7) of the Statute and article 1 of the United Nations Charter (the 'UN Charter') serves as a constitutional bridge between the specialized regime of international criminal justice and the general international order. While the former provides the procedural mechanism to find a State in non-compliance, it is the latter—specifically the mandate in article 1(1) of the UN Charter to maintain international peace and security—that provides the

¹⁸ Pre-Trial Chamber II, 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, 6 July 2017, ICC-02/05-01/09-302.

¹⁹ Decision to refer Italy's non-compliance with a request for cooperation to the Assembly of States Parties, 26 January 2026, ICC-01/11-224, para. 5.

²⁰ Decision to refer Italy's non-compliance with a request for cooperation to the Assembly of States Parties, 26 January 2026, ICC-01/11-224, para. 11.

ultimate normative justification for enforcement. Consequently, the duty of ‘international co-operation’ found in article 1(3) is not merely a diplomatic aspiration but a functional necessity.²¹

11. The Court is once again faced with the delicate friction between treaty-based procedural mechanisms and the broader architecture of public international law. While article 87(7) of the Statute provides an internal remedy for non-cooperation, it does not exist in a vacuum. I write separately to emphasize that a finding of non-compliance is not merely an institutional ‘referral’ but a formal recognition of an internationally wrongful act, as articulated by the International Law Commission (the ‘ILC’). The relationship between the Court’s mandate and State responsibility is defined by the distinction between “primary” and “secondary” rules. The obligation to cooperate under the Statute is a primary rule of treaty law. However, the consequences of breaching that obligation are governed by the secondary Articles on Responsibility of States for Internationally Wrongful Acts.²²

12. When a State Party fails to execute a request to cooperate in the arrest or surrender, it commits an omission. Under article 2 of the ILC Draft Articles, this omission is (a) attributable to the State and (b) a clear breach of its international obligation. Therefore, an article 87(7) finding is the judicial “trigger” that activates the regime of international responsibility.

13. While brevity precludes an exhaustive dissection of “self-contained regimes and *lex specialis*”, it is increasingly evident that the Appeals Chambers must intervene to refine these concepts. Within international criminal law and beyond, these doctrines are frequently subjected to a degree of legal reductionism that obscures their complexity.²³ A definitive judicial clarification

²¹ See W. Friedmann, ‘The Changing Structure of International Law’ (1964).

²² See Annalisa Ciampi, ‘The obligation to Cooperate’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., (2002), p. 1621. See also G.M. Pikis, ‘The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments’ (2010). See also O. Bekou and D.J. Birkett (ed.), ‘Cooperation and the International Criminal Court: Perspectives from Theory and Practice’ (2016). See also R. Rastan, ‘Testing Co-operation: The International Criminal Court and National Authorities’, in *Leiden Journal of International Law* vol. 21, no. 2 (2008), pp. 431-456. See also Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in ‘The 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” of 12 March 2018 (ICC-02/05- 01/09-326), 18 June 2018, ICC-02/05-01/09-359.

²³ See B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, in *European Journal of International Law*, Volume 17, Issue 3 (June 2006), pp. 483–529. See also A. Peters, ‘The refinement of international law: From fragmentation to regime interaction and politicization’, in *International Journal of Constitutional Law*, Volume 15, Issue 3 (July 2017), pp. 671–704.

is now essential to ensure these frameworks are applied with the requisite sophistication and structural integrity. Also to take into account all the legal developments and unity of international law. Unity of international law is a functional necessity maintained by the dialogue between judges while the system lacks a formal supreme court, judicial actors prevent chaos through judicial cross-referencing and applying a common legal grammar and institutional deference.²⁴

14. The articulation between the specialized regime of international criminal justice and the regime of responsibility in international law is determined by the extent to which the two can be reconciled within a given domain. With regard to article 87(7) of the Statute, an article that refers to cooperation—thus an aspect of international law—the secondary norms of State responsibility are not clearly delineated; therefore, the secondary norms of international responsibility draft articles on Responsibility of States for Internationally Wrongful Acts (the ‘ARSIWA’) are absolutely necessary.

15. In this context, Circumstances Precluding Wrongfulness (the ‘CPW’) are vital for preserving legal stability and pursuing equitable outcomes. They prevent a rigid, formalistic application of international law from yielding absurd or impossible results when a State faces exceptional circumstances beyond its control, such as an event of force majeure.

16. These provisions facilitate a nuanced balancing of obligations by recognizing scenarios—particularly those involving a "state of necessity" or "distress"—where a State must prioritize its sovereign survival or the preservation of human life over competing international commitments, without such conduct being deemed illegal *ab initio*.

17. Crucially, they define the boundaries of State liability. The ILC Articles, now recognized as customary international law, provide clarity on precisely when a breach of an obligation does not trigger the standard duty of reparation. Ultimately, these clauses are indispensable for harmonizing legal theory with practice, bridging the gap between the principle of *pacta sunt servanda* and the unpredictable exigencies of international relations and global crises.

²⁴ M. Andenas and E. Bjorge, ‘A Farewell to Fragmentation: Reassertion and Convergence in International Law’ (2005).

18. Necessity must be recognized as an exculpatory ground in international law; it cannot be summarily ignored without any legal reasoning, as the majority has done.²⁵ Yet, these matters demanded rigorous deliberation taking into account article 25 and other limitations rather than total disregard as the majority has done.²⁶ For the majority to dismiss an argument, they must first prove they understand it.²⁷

The non-punitive character of article 87(7) of the Statute and the principle of complementarity

19. The International Criminal Court (the ‘ICC’ or the ‘Court’) operates on the principle of State cooperation, as it lacks its own enforcement mechanisms. Article 87(7) of the Statute addresses instances where a State Party fails to comply with a cooperation request from the Court. This provision allows the Court to make a formal finding of non-compliance and refer the matter to the ASP or, if applicable, the UNSC. A central tenet in legal analyses is that these referrals are not punitive sanctions against the non-compliant state.²⁸

20. The non-punitive essence of article 87(7) of the Statute is anchored in the foundational dichotomy between State responsibility and individual criminal accountability. Rather than serving as a penal sanction for a State’s breach of its obligation, a referral under this provision constitutes a remedial instrument designed to uphold the Court’s judicial integrity.

21. The mechanism functions as an enforcement-facilitation measure; its primary objective is to resolve procedural impasses—such as the arrest or surrender of suspects—thereby ensuring the ICC remains functional. While a failure to cooperate undeniably constitutes a violation of treaty obligations, the referral process remains forward-looking. It seeks not to punish the State for past conduct, but to catalyze compliance and dismantle the obstacles hindering the administration of international justice.

²⁵ Decision to refer Italy’s non-compliance with a request for cooperation to the Assembly of States Parties, 26 January 2026, ICC-01/11-224.

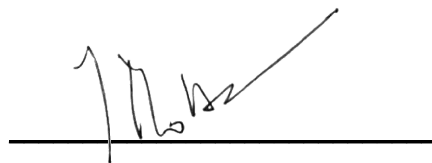
²⁶C. Kreß, ‘Reflections on the Iudicare Limb of the Grave Breaches Regime, *Journal of International Criminal Justice*’, Volume 7, Issue 4 (September 2009), pp. 789–809. See also Erdemović (IT-96-22).

²⁷ My point of disagreement is that the Majority ignores the state of necessity is a legal notion and as the Chamber found in its previous decision, where I was in majority, Italy could not advance the argument in this respect. In the previous decision where I was in majority the Chamber assessed the legal status of the state of necessity, even though it was established that Italy did not advanced convincing arguments.

²⁸ Joint Dissenting Opinion Of Judge Luz Del Carmen Ibáñez Carranza And Judge Solomy Balungi Bossa, 6 May 2019, ICC-02/05-01/09-397-Anx2, pages 5 and 91.

22. While the principle of complementarity is a staple of legal discourse, articulating its precise definition and practical application remains an elusive task. Although theoretically established as the bedrock of the ICC, contemporary legal doctrine is increasingly dominated by a cosmopolitan ethos. This perspective posits that crimes against humanity represent an assault on all of mankind, transcending the interests of any singular nation.²⁹

23. In this context, it is once again regrettable that the majority chose to disregard what was an unprecedented, genuine, and at times highly contentious debate that unfolded over several months in Italy. This dialogue engaged civil society—the cornerstone of any domestic or international order and a vital pillar for the ICC, which was established through its sustained advocacy—while also centering the voices of victims, who remain at the centre of the Court’s mandate of the Court’s mandate. The debate invoked numerous international law arguments mirroring those raised by States during the ASP’s deliberations. Consequently, in light of the doctrine and practice of complementarity, we may legitimately question whether the repetition of such arguments across different levels serves the spirit of the ICC or effectively incentives State cooperation. The court will have to answer this question when formulating a balancing mechanism, in order to avoid introducing incomparable factors into the discretionary power granted to it.



Judge Iulia Antoanella Motoc, Presiding

Dated this Monday, 26 January 2026

At The Hague, The Netherlands

²⁹ D. Luban, ‘A Theory of Crimes Against Humanity’, in *Yale Journal of International Law* (2004).