



Department of Political Science  
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Course of International Law

## **The structural limitations of the International Criminal Court: the case of Osama Al-Masri**

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## INDEX

|                                                                                                                                 |           |
|---------------------------------------------------------------------------------------------------------------------------------|-----------|
| <b>Introduction.....</b>                                                                                                        | <b>3</b>  |
| <b>Chapter I – The International Criminal Court</b>                                                                             |           |
| 1.1 The Origins of International Criminal Law: From Early Codifications to the Nuremberg and Tokyo Tribunals.....               | 7         |
| 1.2 From Ad Hoc Tribunals to the Rome Statute: The Establishment of the International Criminal Court.....                       | 10        |
| 1.3 The Institutional Framework of the International Criminal Court: Legal Nature, Powers, and Applicable Law .....             | 14        |
| 1.4 Jurisdiction of the International Criminal Court: Legal Basis, Preconditions, and Crimes under the Court’s Competence ..... | 17        |
| 1.5 International Legal Obligations of States Parties to the Rome Statute: Cooperation, Arrest, and Enforcement Framework.....  | 21        |
| 1.4 Arrest Warrants before the ICC: Legal Nature, Issuance, and Execution Mechanisms .....                                      | 23        |
| <b>Chapter II – The Case of Osama Al-Masri</b>                                                                                  |           |
| 2.1 Osama Al-Masri and the Libyan Context: Crimes, Allegations, and Diplomatic Tensions .....                                   | 26        |
| 2.1.1 The Arrest and Release of Osama Al-Masri: Legal Ambiguities and Institutional Breakdown .....                             | 28        |
| 2.3 Legal and Political Fallout: Institutional Reactions to the Al-Masri Affair .....                                           | 30        |
| 2.3.1 International Reactions and the ICC’s Institutional Response.....                                                         | 30        |
| 2.3.2 Italy’s Response and the National Security Rationale .....                                                                | 31        |
| 2.4 Between Obligation and Discretion: Reflections on Italy’s Conduct under International Law ..                                | 33        |
| <b>Chapter III – The execution gap: structural limits in ICC enforcement</b>                                                    |           |
| 3.1 Legal Assessment: Did Italy Violate the Rome Statute?.....                                                                  | 36        |
| 3.2 Evaluating Italy’s Justifications.....                                                                                      | 39        |
| 3.3 The Enforcement Dilemma and the Sovereignty Barrier .....                                                                   | 42        |
| 3.4 Political Dimensions and Strategic Calculations.....                                                                        | 46        |
| 3.5 Rethinking the Future of International Criminal Cooperation .....                                                           | 49        |
| <b>Conclusion .....</b>                                                                                                         | <b>53</b> |
| <b>Bibliografy .....</b>                                                                                                        | <b>57</b> |

## Introduction

For over two decades, the International Criminal Court (ICC) has stood as the centerpiece of a global effort to end impunity for the gravest crimes. Established by the Rome Statute of 1998 and operational since 2002, the ICC's mandate is to prosecute individuals responsible for genocide, crimes against humanity, war crimes, and aggression when national jurisdictions are unable or unwilling to do so. In principle, this permanent court embodies the international community's commitment that no perpetrator of mass atrocities should be beyond the reach of justice. Its establishment built on the legacy of earlier ad hoc tribunals and reflects a hard-won consensus that there must be a standing mechanism to hold even powerful offenders accountable under law.

Yet the promise of international justice faces a fundamental practical challenge: enforcement. Unlike national courts, the ICC has no police force or dedicated enforcement arm of its own; it relies entirely on the cooperation of states to execute arrest warrants, gather evidence, and surrender suspects to The Hague. The Court's authority thus often exceeds its grasp. While 125 States Parties have ratified the Rome Statute and pledged to "cooperate fully" with the ICC, in practice such cooperation can be uncertain and inconsistent. Political calculations, questions of sovereignty, and domestic legal hurdles frequently intervene. This enforcement deficit, effectively the ICC's Achilles' heel, has been evident since the Court's early years. Notorious examples include instances where high-profile indictees traveled openly across borders without being detained, exposing a clear gap between the ICC's formal judicial authority and its practical ability to secure compliance on the ground. The tension between the Court's legal mandates and the prerogatives of sovereign states remains an ever-present test for the limits of international criminal justice.

Against this backdrop, the case of Osama Al-Masri offers a compelling contemporary lens to examine the ICC's enforcement challenges. Osama Al-Masri, a Libyan militia commander implicated in egregious human rights abuses, became the subject of an ICC arrest warrant in early 2025. Italian authorities, acting on that warrant, detained Al-Masri while he was visiting Italy, seemingly marking a success for the Court's reach. However, within days, the Court of Appeal in Rome ordered his release on procedural grounds, and Al-Masri was promptly flown back to Libya rather than being surrendered to ICC custody. This abrupt turn of events prompted widespread concern and debate in the international legal community. It laid bare the

structural fragility of the ICC's enforcement architecture: even a democratic State Party and strong supporter of the Court like Italy ultimately prioritized domestic legal norms and national interests over an international arrest warrant. The Al-Masri affair thus crystallizes the core problem at hand: the disconnect between international legal obligations and national implementation. It raises urgent questions about how binding ICC obligations truly are in practice and what happens when the pursuit of international justice collides with geopolitical realities.

This thesis investigates the enforcement dilemma confronting the ICC, with the Al-Masri case as a central case study. It seeks to understand why and how the ICC's enforcement mechanism can falter even when states are legally bound to cooperate. Several key questions guide the inquiry. First, what are the obligations of States Parties under the Rome Statute to support the ICC's work, in particular, to arrest and surrender suspects, and how do domestic authorities interpret or implement these obligations? Second, in the Al-Masri incident, did Italy's handling of the arrest and release breach its international duties, or can it be legally justified within the latitude of national law and sovereignty? Third, what political and strategic factors influenced Italy's decision to release an ICC suspect, and does this episode reflect a broader pattern in which national interests override commitments to international justice? By exploring these questions, the thesis sheds light on the structural limitations of the current ICC enforcement regime. The goal is not only to analyze a single incident, but also to gain deeper insight into the uneasy interplay between an international court's authority and the realities of state power, ultimately identifying lessons for strengthening the effectiveness of the ICC.

Probing the enforcement challenges of the ICC is both timely and consequential. The effectiveness and credibility of the Court rest in large part on whether its orders can be carried out in practice. The Al-Masri case is significant because it tests the ICC's enforcement capacity in an acute way and in an unexpected context. Many past failures of cooperation occurred in situations where political will was lacking in fragile states or conflict zones. Here, however, non-compliance emanated from Italy, a founding member of the ICC and a state that ostensibly champions international law. This paradox underscores that if even a committed democratic State Party may ultimately shrink from enforcing an ICC warrant due to internal legal hurdles or strategic calculations, the reliability of the entire Rome Statute system comes into question. Moreover, this case vividly highlights the tension between global norms and national sovereignty. Italy's justifications for releasing Al-Masri invoked constitutional due process and

national security interests, reflecting the pull of domestic imperatives even when international obligations are at stake. Understanding how and why a state in this instance subordinated an ICC request to its own concerns can inform broader debates about the limits of international authority in the face of sovereign discretion. In sum, examining the Al-Masri affair provides a window into the practical and normative challenges facing international criminal justice today. Insights from this study may help illuminate what reforms or strategies could better align states' conduct with their professed commitment to ending impunity, bridging the persistent gap between idealistic aspirations and hard realpolitik.

The remainder of this thesis is organized into three chapters. Chapter I provides the necessary legal and historical foundation. It traces the evolution of international criminal justice leading to the ICC's creation, outlines the Court's institutional structure and jurisdiction, and delineates the framework of law that governs its operations. Importantly, Chapter I also explains the Rome Statute's regime for state cooperation, the obligations of States Parties to assist the Court (for example, to execute arrest warrants and surrender suspects) and the mechanisms by which ICC requests are channeled through national authorities. This foundational overview is essential for understanding the later analysis: it sets out what should happen in theory when the ICC issues an arrest warrant, thereby framing the context for why and how things can go wrong in practice.

Chapter II turns to the detailed examination of the Osama Al-Masri case by situating him in his context: outlining who he is, the nature of the alleged war crimes and crimes against humanity linked to Libya's conflict, and the diplomatic and security backdrop against which his case unfolded. The chapter then reconstructs the timeline of Al-Masri's arrest and release in Italy, highlighting the legal procedures and irregularities that defined that episode: from the issuance of the ICC warrant and the Italian police action, to the court proceedings in Rome that cited documentation flaws and procedural missteps, leading to Al-Masri's release. Next, Chapter II analyzes the fallout of this incident. It examines the international response, including the ICC's own reaction and commentary from the global legal community, and dissects Italy's response at the national level, exploring how Italian officials defended their actions on legal and policy grounds (such as safeguarding national legal processes or security priorities). Finally, the chapter reflects on what the Al-Masri affair reveals about Italy's obligations under international law, and how this incident fits into the broader pattern of state behavior towards the ICC.

Through this in-depth case study, Chapter II illustrates in concrete terms the myriad ways in which the ICC's enforcement efforts can be undermined or circumvented.

Chapter III broadens the perspective to evaluate the ICC's enforcement dilemma in a comparative and forward-looking manner. Using insights from the Al-Masri case alongside other prominent examples (notably the long-standing saga of Sudan's former president Omar Al-Bashir, who evaded arrest despite ICC warrants), this chapter probes the deeper issue of the "sovereignty barrier", the notion that state sovereignty and political interests frequently impede the fulfillment of international criminal justice. Chapter III begins by assessing Italy's legal responsibility in the Al-Masri episode: it scrutinizes whether Italy violated its obligations under the Rome Statute (such as the duty to cooperate under Article 86 or the requirements for arrest and surrender procedures) or whether ambiguities in the law and timing of ICC requests allowed room for Italy's actions. The analysis then moves to evaluating Italy's justifications, and weighs them against both legal standards and the pragmatic considerations that often influence state compliance. By comparing the Al-Masri affair with other instances of non-cooperation, the chapter illustrates common patterns and factors, be they legal loopholes, geopolitical alliances, or concerns about reciprocity and precedent, that constitute obstacles to the ICC's effectiveness. Finally, Chapter III discusses what these findings imply for the future. It considers avenues to strengthen the enforcement of ICC decisions, from potential legal reforms (for example, clarifying state obligations or streamlining ICC request procedures) to political strategies (such as leveraging pressure through the United Nations or the ICC Assembly of States Parties). In doing so, Chapter III grapples with the overarching question of how the international community can adapt the system to ensure that the ICC's lofty mandate is backed by the capacity to act.. Through its three-part structure, the thesis provides a comprehensive exploration of the ICC's enforcement challenges, grounded in the concrete example of Osama Al-Masri. By examining the issue from legal, political, and practical perspectives, the study demonstrates why enforcement is often the decisive factor for the success of international criminal justice. It highlights the delicate balance between holding perpetrators of atrocity crimes accountable under law and respecting the realities of state sovereignty. Ultimately, the analysis underscores that if the ICC's promise of ending impunity is to be realized, finding ways to bolster compliance and bridge the gap between international authority and national action is imperative.

## Chapter I – The International Criminal Court

### 1.1 The Origins of International Criminal Law: From Early Codifications to the Nuremberg and Tokyo Tribunals

International criminal law emerged from the need to hold individuals accountable for crimes that violate the fundamental principles of international law, undermining international peace and security and disrupting human dignity<sup>1</sup>. While the concept of individual criminal responsibility for offenses of international concern is usually perceived as a modern legal innovation, it is deeply historically rooted. In early societies and pre-modern legal systems, practices that sought to sanction conduct deemed universally reprehensible have been identified<sup>2</sup>. Piracy, for instance, was treated as a crime against all humanity, with perpetrators designated as *hostes humani generis*<sup>3</sup>, that is enemies of all humankind<sup>4</sup>. Violations of rudimentary laws of war and the cruel treatment of prisoners were also widely condemned, representing an early form of what would later be recognized as international criminal responsibility.

The first significant efforts at codifying international legal norms began in the 19th century, moved by the rise of modern nation-states and the consolidation of an international community bound by shared legal principles. The progressive development of international humanitarian law (IHL), aimed at regulating the conduct of hostilities and protecting victims of armed conflict signified an essential benchmark in this process. The Geneva Conventions of 1864 and 1906, together with the Hague Conventions of 1899 and 1907<sup>5</sup>, established the first binding legal obligations on states regarding the humane treatment of combatants and civilians in times of war, articulating principles that continue to underpin modern international criminal law: the distinction between combatants and non-combatants, the prohibition of indiscriminate attacks, and the ban on weapons and methods of warfare that cause unnecessary suffering or inflict disproportionate harm relative to legitimate military objectives. These principles laid the

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1 Rome Statute of the International Criminal Court, Preamble, para. 4, which affirms that grave crimes threaten the peace, security and well-being of the world.

2 See piracy's classification as *hostis humani generis* and the condemnation of the transatlantic slave trade as precursors to modern universal jurisdiction: Antonio Cassese, *International Law*, 2nd ed. (Oxford University Press, 2005), 271–273.

3 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Hague Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899; Hague Convention (IV), 18 October 1907.

4 Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 11.

5 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864); Hague Convention (II) on the Laws and Customs of War on Land (1899).

groundwork for a universal normative framework aimed at protecting fundamental human rights in times of war.

The aftermath of the First World War represents the true turning point in the history of international criminal law, largely due to the unprecedented scale of destruction and atrocities, particularly those targeting civilian populations, that prompted great reflection on the need for legal mechanisms to prosecute individuals responsible for such violations<sup>6</sup>. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established in 1919 by the Allied Powers, recommended the establishment of an international tribunal to prosecute German war criminals, including the political and military leadership of the German Empire, most notably former Kaiser Wilhelm II. Despite these recommendations, however, the solutions adopted were largely ineffective: the Leipzig trials of several German officers ended with lenient sentences and numerous acquittals, exposing the limitations of relying on national jurisdictions to administer international justice and highlighting the enduring primacy of state sovereignty and political considerations over the pursuit of accountability<sup>7</sup>.

Only in the aftermath of the Second World War did a genuine international criminal jurisdiction take form. The extraordinary gravity and scope of the crimes committed by the Nazi and Japanese regimes, including genocide, forced deportations, slavery, systematic torture, and other large-scale violations of human rights, demanded an unprecedented judicial response. The creation of the International Military Tribunals at Nuremberg and Tokyo<sup>8</sup> marked the first concrete example of international courts vested with jurisdiction to prosecute individuals for crimes under international law. The London Charter of 8 August 1945<sup>9</sup>, which established the legal basis for the Nuremberg Tribunal, codified three fundamental categories of international crimes: crimes against peace, war crimes, and crimes against humanity. The Charter also articulated several principles<sup>10</sup> that would become the cornerstones of modern international criminal law, including the principle of individual criminal responsibility, which precludes the

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6 See the Eichmann case: Israel v. Eichmann, District Court of Jerusalem, 12 December 1961; and the arrest of Augusto Pinochet in the UK: Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet [1999] UKHL 17.

7 See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000), 67–71. See also Hans-Peter Kaul, “Universal Jurisdiction in Practice?,” in *International Criminal Law: A Commentary on the Rome Statute*, ed. Otto Triffterer and Kai Ambos, 3rd ed. (C.H. Beck, 2016), 91–102.

8 Charter of the International Military Tribunal, Annex to the London Agreement of 8 August 1945.

9 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945 (London Charter).

10 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 4th ed. (Cambridge: Cambridge University Press, 2019), 149.

invocation of official capacity or functional immunity<sup>11</sup> as a defense<sup>12</sup> against prosecution for international crimes, it severely restricted the defense of superior orders, since then obedience to unlawful commands was accepted, at most, as a mitigating circumstance rather than an exoneration from criminal liability. The Nuremberg and Tokyo trials were not just a legal breakthrough, they marked a turning point, both ethically and politically, for the international community. They affirmed the principle that certain crimes, by virtue of their gravity, constitute offenses against the international community as a whole, thereby justifying the application of universal jurisdiction<sup>13</sup>. The classification of perpetrators of such crimes<sup>14</sup> as *hostes humani generis* imposed upon states the obligation either to prosecute or extradite, regardless of the location of the crime or the nationality of its perpetrators and victims. These principles consolidated the idea that the suppression and punishment of the most serious crimes of concern to the international community as a whole<sup>15</sup> is not merely a moral imperative, but a legal duty incumbent upon all states. Despite the enormous legal and symbolic significance of the Nuremberg and Tokyo tribunals, their *ad hoc* nature and the extraordinary historical circumstances that enabled their establishment severely limited their replicability. During the Cold War, the deep ideological divide between the opposing blocs stymied efforts to create a permanent international criminal tribunal<sup>16</sup>. For nearly half a century, the vision of a supranational judicial system capable of holding perpetrators of war crimes, crimes against humanity, and genocide accountable remained subordinated to geopolitical considerations and the principle of non-interference<sup>17</sup>, the customary international law norm that prohibits states or international bodies from intervening in the internal affairs or sovereign matters of other states, particularly regarding their political, legal, or territorial integrity.

Still, even during this period of stagnation, some key principles continued to gain ground and take root in international law. One of the most significant was the growing recognition that international crimes are not subject to statutes of limitation, strengthening the idea that such

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11 See Dapo Akande and Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts,” *European Journal of International Law* 21, no. 4 (2010): 815–852.

12 Rome Statute, Article 27; see also William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed. (Oxford University Press, 2016), 539–541.

13 See Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004).

14 See M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*,” *Law and Contemporary Problems* 59, no. 4 (1996): 63–74.

15 Rome Statute of the International Criminal Court, Preamble, para. 4.

16 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed. (Oxford: Oxford University Press, 2016), 26.

17 See Christine Schwöbel-Patel, “The Core of the Matter: The Role of the Principle of Non-Intervention in International Criminal Justice,” *Leiden Journal of International Law* 32, no. 2 (2019): 213–232.

offenses should be prosecuted whenever and wherever they occur. The International Law Commission (ILC), established in 1947 under the auspices of the United Nations, played a crucial role in preserving and developing the concept of individual criminal responsibility and laying the groundwork for a future system of permanent international criminal justice. It was not until the end of the Cold War that these efforts bore fruit, culminating in the adoption of the Rome Statute in 1998<sup>18</sup> and the establishment of the International Criminal Court (ICC)<sup>19</sup>, first permanent international tribunal mandated to prosecute individuals for the most serious crimes of concern to the international community.

## 1.2 From Ad Hoc Tribunals to the Rome Statute: The Establishment of the International Criminal Court

The end of the Cold War marked a decisive turning point in the evolution of international criminal justice. For nearly half a century, the ideological confrontation between the two global superpowers had paralyzed efforts to develop permanent mechanisms for the prosecution of international crimes. With the collapse of the bipolar order in the early 1990s, the international community was presented with a renewed opportunity to address the longstanding challenge of accountability for the most serious violations of international humanitarian law and human rights.

However, this period was also marked by a resurgence of armed conflicts and mass atrocities, particularly in the territories of the former Yugoslavia and in Rwanda. The harrowing images of ethnic cleansing in Bosnia and Herzegovina, culminating in the 1995 Srebrenica genocide, and the systematic extermination of the Tutsi population in Rwanda in 1994 deeply shocked the global community. These atrocities starkly revealed the limitations of national jurisdictions in addressing such crimes, highlighting significant gaps in the international system's ability to deliver justice. Consequently, there was a renewed and urgent call for establishing credible mechanisms to hold individuals accountable for mass atrocities.

In response to these crises, the United Nations Security Council acted under Chapter VII of the UN Charter to establish two ad hoc international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, through Resolution 827, and the International Criminal Tribunal for Rwanda (ICTR) in 1994, through Resolution 955. These

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18 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, A/CONF.183/13.

19 International Criminal Court, Rome Statute of the International Criminal Court, 17 July 1998.

tribunals were endowed with binding authority over individuals responsible for genocide, crimes against humanity, and war crimes, and were tasked with ensuring accountability for atrocities that had shocked the conscience of humanity. Their establishment marked a significant advancement over the post-World War II trials, reflecting a renewed political will to engage in the enforcement of international criminal law and to challenge impunity.

The ICTY and ICTR made important contributions to the development of international criminal jurisprudence. They clarified<sup>20</sup> key aspects of both substantive and procedural international law, including the definition and elements of crimes such as genocide and crimes against humanity, the doctrine of command responsibility, and the due process rights of the accused. The tribunals' case law also helped refine the concept of individual criminal responsibility for leaders and commanders, emphasizing that senior political or military status does not exempt one from liability. These tribunals laid crucial foundations<sup>21</sup> for the recognition of gender-based crimes, including sexual violence, as constitutive acts of genocide and crimes against humanity, by formally recognizing them as prosecutable crimes under international law and establishing precedents for their adjudication within the framework of genocide and crimes against humanity.

Despite their significant achievements, the ad hoc tribunals also highlighted important limitations inherent in temporary and reactive judicial mechanisms: their mandates were geographically and temporally limited, focusing exclusively on the specific conflicts that had prompted their creation, and their heavy reliance on state cooperation, particularly for the arrest and surrender of suspects, often hampered their effectiveness. In some cases, political considerations by states undermined the enforcement of tribunal mandates, reinforcing the persistent tension between state sovereignty and international criminal accountability. Eventually the high financial costs of the ICTY and ICTR and the length and complexity of proceedings, raised concerns about the efficiency and legitimacy of ad hoc justice. The selective nature of their jurisdiction that focused on particular conflicts while ignoring others, such as atrocities in Cambodia, Sierra Leone, and Sudan among others, also fueled criticisms<sup>22</sup> of inconsistency and selectivity in the administration of international justice.

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20 See William A. Schabas, *An Introduction to the International Criminal Court*, 5th ed. (Cambridge University Press, 2021), 41–43.

21 See ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment (16 November 1998), §§ 439–440; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (2 September 1998), § 688.

22 See Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,” *American Journal of International Law* 95, no. 1 (2001): 7–31.

These limitations reinforced the urgent need for a permanent international criminal court with global jurisdiction and a consistent legal framework. Such a court had been envisioned by the international community since the aftermath of the Second World War. The International Law Commission (ILC)<sup>23</sup>, established in 1947, had undertaken preliminary work on a draft statute for a permanent tribunal as early as 1951, yet it was not until the post-Cold War environment that real momentum gathered behind the idea of establishing an independent, treaty-based international court capable of holding individuals accountable for crimes of concern to the international community as a whole.

The process culminated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, convened in Rome from 15 June to 17 July 1998. The conference brought together representatives from 160 states, as well as observers from intergovernmental organizations and civil society groups, marking an unprecedented level of global engagement. After intense negotiations and significant compromises, the Rome Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority: 120 votes in favor, 7 against, and 21 abstentions. The Rome Statute entered into force on 1 July 2002, following the deposit of the sixtieth instrument of ratification, and with it, the International Criminal Court (ICC) formally came into existence as the world's first permanent, treaty-based court for the prosecution of individuals responsible for the gravest international crimes.

The establishment of the ICC represents the result of decades of effort to institutionalize international criminal justice. Unlike its ad hoc predecessors, the ICC was designed as a permanent institution with potentially universal jurisdiction and an independent prosecutorial office. Its mandate covers four core crimes: genocide, crimes against humanity, war crimes, and, following the entry into force of the Kampala Amendments in 2018, the crime of aggression. The inclusion of the crime of aggression, defined by Article 8 bis of the Rome Statute, was a landmark development in international criminal law, criminalizing state-led acts of aggression and holding individual leaders personally accountable for violations of the prohibition on the illegal use of force. A distinctive feature of the ICC is the principle of complementarity, enshrined in Article 17 of the Rome Statute. Under this principle, the ICC acts as a court of last resort, intervening only when national legal systems are unable or unwilling to genuinely investigate and prosecute the perpetrators of the most serious crimes<sup>24</sup>.

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<sup>23</sup> Report of the International Law Commission on the work of its first session, 12 April – 19 June 1949, UN Doc. A/925, 1949.

<sup>24</sup> Rome Statute of the International Criminal Court, art. 17(1)(a)–(b).

The framework aims to maintain a careful balance between safeguarding the sovereignty of individual states and ensuring that the international community can step in when justice is at risk. While it affirms the primary responsibility of national courts in prosecuting serious crimes, it also establishes a mechanism to intervene when those courts are either unable or unwilling to act. In doing so, the principle of complementarity not only provides a legal safety net against impunity but also serves as a catalyst for strengthening domestic judicial systems, encouraging states to develop the capacity and political will to carry out prosecutions themselves.

The Rome Statute also established an independent Office of the Prosecutor (OTP), endowed with the authority to initiate investigations *proprio motu*, that is on the Prosecutor's own initiative, subject to authorization by the Pre-Trial Chamber. This innovation was designed to reduce political interference in prosecutorial decisions and to enhance the impartiality and independence of the Court. In addition, the ICC's procedural framework incorporates robust protections for the rights of the accused, including the presumption of innocence, the right to legal representation, and the right to a fair and public trial. The Court also provides for the participation of victims in proceedings and offers protective measures for witnesses, reflecting a progressive approach to victim-centered justice.

Despite its groundbreaking nature, the ICC has faced significant challenges since its establishment. The Court's jurisdiction remains limited to state parties to the Rome Statute or situations referred by the UN Security Council. Notably, several major powers, including the United States, China, and Russia, have declined to ratify the Statute, limiting the Court's universal reach and exposing it to criticism over the selectivity and politicization of its actions. The ICC's dependence on state cooperation for the enforcement of arrest warrants and the surrender of suspects has often proved to be a critical weakness. High-profile cases, such as the failure to arrest former Sudanese President Omar al-Bashir<sup>25</sup> despite ICC warrants, have underscored the Court's reliance on the political will of states for the execution of its mandates. The ICC has faced additional accusations of bias and selective prosecution, particularly due to its early focus on situations in Africa. While the Court has opened investigations in other regions, including Myanmar, Palestine, and Ukraine, the perception of an "Africa bias" has persisted and has occasionally led to strained relations with the African Union and the withdrawal of cooperation by some African states.

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<sup>25</sup> International Criminal Court, Situation in Darfur, Sudan, ICC-02/05, Warrant of Arrest for Omar al-Bashir, 4 March 2009.

Still, the establishment of the ICC constitutes an historic achievement in the progressive development of international criminal law. It institutionalizes the principle that no individual, regardless of official position or political influence, is immune from prosecution for crimes that violate the most fundamental values of the international community. The ICC serves not only as a judicial mechanism for accountability but also as a symbol of the international community's aspiration to end impunity for mass atrocities and to uphold the rule of law on a global scale.

### 1.3 The Institutional Framework of the International Criminal Court: Legal Nature, Powers, and Applicable Law

As the first permanent, independent, treaty-based court with jurisdiction over individuals accused of the most serious crimes of concern to the international community, genocide, crimes against humanity, war crimes, and the crime of aggression, the ICC embodies the international community's effort to move beyond the ad hoc, reactive models that we have covered in the previous paragraphs. The Court's creation represented a normative shift: unlike its predecessors, established by specific Security Council resolutions and constrained by geographically and temporally limited mandates, the ICC was envisioned as a permanent institution of general application, with its own distinct international legal personality. Codified in Article 1 of the Rome Statute, the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of concern to the international community." The article captures the Court's essential purpose: not to replace national systems, but to ensure that where domestic jurisdictions fail, international justice may intervene.

Crucially, the ICC is not an organ of the United Nations, nor was it created under Chapter VII of the UN Charter, it is an autonomous international organization constituted by a multilateral treaty. This autonomy shields the Court from undue influence by political bodies, particularly the UN Security Council, and affirms its structural independence within the landscape of international institutions. Under Article 2 of the Statute, the ICC maintains a negotiated Relationship Agreement with the United Nations, fostering institutional cooperation without compromising its operational independence.

The Court's legal personality is expressly articulated in Article 4(1), which declares that "the Court shall have international legal personality" and may "exercise its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other State." This status allows the ICC to enter into international agreements, receive privileges and

immunities, and act in many respects like a sovereign actor, though one with a limited and specialized mandate. Paragraph 2 of the same article reinforces the Court's extraterritorial operational flexibility, affirming its capacity to function wherever its judicial and investigative tasks require, subject to the consent of the host state or cooperation frameworks.

The seat of the Court is designated in Article 3 as The Hague, Netherlands—a symbolic location historically associated with international justice. However, provision is made for sessions to be held elsewhere “whenever it is considered desirable,” offering procedural adaptability. The Headquarters Agreement concluded between the ICC and the host state ensures that the Court enjoys full legal and diplomatic protections, including immunity for officials, secure facilities, and logistical support necessary for its independent functioning.

Probably the most significant element of the ICC's institutional design lies in Article 21, which governs the applicable law. This provision defines a hierarchical and hybrid legal framework that draws from multiple sources:

- the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence;
- applicable treaties and customary international law, including the law of armed conflict;
- general principles of law derived from national legal systems.

This tripartite structure reflects the hybrid legal nature of the Court, anchored in treaty law, but dynamically informed by the broader body of international legal principles. The primacy of the Statute and its annexed instruments guarantees legal certainty and codification, while the inclusion of customary and comparative law provides the Court with interpretive depth and responsiveness to legal gaps. The jurisprudence of the ad hoc tribunals and other international bodies continues to inform the ICC's interpretive methodology, helping to forge continuity within the emerging corpus of international criminal law.

One particularly significant provision is Article 21(3), which functions as a crucial normative safeguard by stipulating that any law applied or interpreted by the Court must align with internationally recognized human rights standards and must not produce discriminatory outcomes, whether by intent or effect. This clause embodies the deeper constitutional character of the International Criminal Court, emphasizing its foundational commitment to the protection of human dignity, the assurance of fair trial guarantees, and the strict adherence to the principle of legality. In this sense, the ICC is positioned not merely as a forum for criminal adjudication, but as a juridical institution that expresses and reinforces a broader international constitutional order grounded in the defense of fundamental rights.

The institutional architecture of the ICC is set out in Part 4 of the Rome Statute and consists of four principal organs:

- The Presidency, responsible for the administration of the Court and the external representation of the institution;
- The Judicial Divisions (Pre-Trial, Trial, and Appeals Chambers), tasked with conducting proceedings and issuing binding judgments;
- The Office of the Prosecutor (OTP), an independent organ responsible for receiving referrals, conducting investigations, and initiating prosecutions;
- The Registry, which manages the non-judicial and administrative support for Court operations, including outreach and witness protection.

Each organ is designed to ensure the integrity, impartiality, and effectiveness of the judicial process, with checks and balances embedded in their functional distribution.

Beyond its institutional framework, the effective operation of the International Criminal Court depends significantly on the cooperation of states. Without its own police force or enforcement mechanisms, the Court must rely entirely on national authorities to carry out essential tasks such as arresting suspects, transferring detainees, collecting evidence, and enforcing judicial decisions. The Rome Statute, particularly in Articles 86 to 102, imposes a binding obligation on States Parties to provide such cooperation. However, as will be examined in later chapters, the actual implementation of this obligation remains uneven and frequently shaped by political considerations, reflecting the ongoing tension between national sovereignty and the authority of international criminal justice.

While the next section will examine the Court's jurisdiction in detail, it is essential to note that the ICC's jurisdictional competence, whether personal, temporal, territorial, or subject-matter, is not universal. The Court may act only where:

- the alleged crime occurred on the territory of a State Party or involved a national of a State Party;
- a non-State Party has accepted jurisdiction under Article 12(3);
- the UN Security Council refers a situation to the Court under Chapter VII of the UN Charter.

These jurisdictional thresholds establish the legal framework through which the Court may initiate proceedings. They also underscore one of the ICC's enduring limitations: its reliance on state consent or Security Council referral creates asymmetric access to justice, especially in contexts where powerful states remain outside the Statute's framework or exercise veto power in the Council.

The Rome Statute provides the International Criminal Court with a robust and multilayered institutional and legal architecture, combining the principles of judicial independence and inter-

state cooperation, treaty obligations and customary international norms, as well as the imperatives of legal authority and the protection of fundamental rights. Despite the persistent practical challenges, especially those linked to enforcement limitations and political resistance, the design of the ICC stands as a bold and unprecedented effort to integrate accountability, legality, and human dignity into the foundations of the international legal system. This structural framework forms the basis upon which the complex dynamics between law and politics unfold. This tension between normative aspirations and the constraints of state practice will form a central thread in the analysis presented in the following chapters.

#### 1.4 Jurisdiction of the International Criminal Court: Legal Basis, Preconditions, and Crimes under the Court's Competence

The jurisdiction of the International Criminal Court (ICC) is governed by a detailed and interdependent framework of substantive and procedural rules set forth in the Rome Statute. These provisions collectively define the scope of the Court's authority, delineating when, how, and over whom it may exercise jurisdiction. Although the ICC was created to prosecute "the most serious crimes of concern to the international community as a whole," its mandate is not unlimited, it is subject to specific jurisdictional thresholds relating to the nature of the alleged crimes, the territorial or personal nexus to a State Party, and various admissibility and procedural requirements<sup>26</sup>. This carefully calibrated framework reflects a deliberate effort to reconcile the sovereign prerogatives of states with the international community's commitment to justice and accountability.

The Court's jurisdiction is codified in Article 5 of the Rome Statute, which enumerates four categories of crimes falling within the ICC's competence: genocide, crimes against humanity, war crimes, and the crime of aggression. These crimes are characterized by their exceptional gravity and by their impact on the peace, security, and conscience of the international community. By limiting the Court's jurisdiction to this small group of crimes, the drafters of the Statute sought to preserve its legitimacy and focus its resources on the gravest violations of international law. The ICC does not possess general or universal jurisdiction over all

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<sup>26</sup> Rome Statute of the International Criminal Court, art. 11(1): "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

international crimes; rather, it may only intervene when specific jurisdictional conditions are met.

As articulated in Article 12, the ICC may exercise jurisdiction in three main scenarios:

- where the alleged crime occurred on the territory of a State Party;
- where the accused is a national of a State Party;
- where a non-State Party has made an ad hoc declaration accepting the Court's jurisdiction under Article 12(3).

A fourth and unique pathway is provided by Article 13(b), which authorizes the United Nations Security Council, acting under Chapter VII of the UN Charter, to refer situations to the Court even if the relevant state is not a party to the Rome Statute. This mechanism links international judicial authority to the coercive instruments of the UN system while also exposing the Court to the asymmetries of global power politics, as will be discussed in the context of Libya and other non-party states.

Complementing these provisions is Article 25, which articulates the principle of individual criminal responsibility, a pillar of international criminal law since Nuremberg. Unlike traditional international law, which focused on the conduct of states, the ICC targets natural persons who commit crimes falling within its mandate. Article 25(3) delineates the various modes of liability, including direct perpetration, ordering, soliciting, aiding and abetting, and contributing to a group crime with shared intent. It also rejects the defense of official capacity, affirming that no individual regardless of rank or title may invoke immunity as a shield from accountability<sup>27</sup>.

The definitions and legal elements of the core crimes are elaborated in Articles 6 to 8, supported by the Elements of Crimes document, which further clarifies the constituent components necessary for conviction.

Article 6 defines genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. These include killing, causing serious bodily or mental harm, imposing conditions of life calculated to destroy, preventing births, and forcibly

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<sup>27</sup> Rome Statute of the International Criminal Court, art. 27(1): "This Statute shall apply equally to all persons without any distinction based on official capacity. [...] Immunities or special procedural rules which may attach to the official capacity of a person [...] shall not bar the Court from exercising its jurisdiction."

transferring children. The mental element, specific intent to destroy, makes genocide uniquely difficult to prove, contributing to its rare invocation before the Court.

Article 7, on crimes against humanity, encompasses acts such as murder, extermination, enslavement, deportation, torture, rape, persecution, enforced disappearance, and other inhumane acts, when committed as part of a widespread or systematic attack directed against a civilian population, and with knowledge of the attack. Notably, armed conflict is not required, broadening the scope of applicability to peacetime atrocities. The inclusion of gender-based crimes, such as sexual slavery and forced pregnancy, as independent offenses marked a landmark development in the evolution of international criminal law, reflecting a more victim-centered approach and affirming the jurisprudence of the ICTY and ICTR.

Article 8, addressing war crimes, incorporates both grave breaches of the Geneva Conventions and serious violations of the laws and customs of war, applicable in both international and non-international armed conflicts. This includes acts such as wilful killing, torture, attacking civilians, using prohibited weapons, and destroying property without military necessity. Particularly relevant to conflicts such as the Libyan civil war, Article 8(2)(c) and (e) extend jurisdiction to non-international armed conflicts<sup>28</sup>, provided certain thresholds are met: the conflict must be protracted, with a sufficient level of intensity, and the parties must exhibit a minimum degree of organization. These provisions reflect developments in customary international humanitarian law, recognizing that the majority of contemporary armed conflicts are internal in nature and that the international community has an interest in preventing impunity in such contexts.

The crime of aggression, incorporated into the Statute through the Kampala Amendments<sup>29</sup> (adopted in 2010 and entered into force in 2018), remains the most politically sensitive and procedurally complex crime within the ICC's jurisdiction. It criminalizes the planning, preparation, initiation, or execution of an act of aggression by a state leader in violation of the UN Charter. However, the jurisdictional regime governing aggression is subject to opt-outs and layered consent requirements, making its application extremely narrow in practice.

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<sup>28</sup> Rome Statute of the International Criminal Court, art. 8(2)(e).

<sup>29</sup> Assembly of States Parties, Resolution RC/Res.6, Kampala Amendments on the Crime of Aggression, 11 June 2010.

In addition to subject-matter and personal jurisdiction, the Court's exercise of authority is conditioned by several procedural preconditions, codified in Articles 13 to 15:

- A State Party may refer a situation under Article 14;
- The UN Security Council may refer a situation under Article 13(b);
- The Prosecutor may initiate investigations *proprio motu*, subject to judicial authorization under Article 15.
- Each of these is further constrained by admissibility requirements, set out in Articles 17 to 20, which establish safeguards against unnecessary or inappropriate prosecutions. These include:
  - The principle of complementarity (Article 17), under which the Court must defer to national jurisdictions that are genuinely willing and able to prosecute;
  - The requirement of sufficient gravity, ensuring that only the most serious cases are pursued;
  - Considerations related to double jeopardy and the interests of justice, which protect the rights of both the accused and victims.

Among these, complementarity is the procedural cornerstone of the ICC's legitimacy. By functioning as a court of last resort, the ICC recognizes the primacy of domestic legal systems while providing an international safety net in cases of unwillingness or inability to act. This principle also reflects the subsidiarity ethos of international criminal law, and serves to mitigate concerns about judicial overreach or infringements on state sovereignty.

Taken together, the jurisdictional framework of the ICC reflects a carefully negotiated balance between legal authority and political sensitivity. On one hand, it provides a robust legal mechanism to prosecute mass atrocities and uphold the values of international justice. On the other, it imposes significant constraints that limit the Court's ability to act in certain contexts, particularly where powerful states are concerned or where cooperation is lacking. The case of Libya illustrates this tension vividly: as a non-State Party, Libya falls under the ICC's jurisdiction only by virtue of UN Security Council referral, highlighting the dependence of international criminal accountability on political will and international consensus.

In this sense, the ICC's jurisdictional structure ensures that the Court is not a supranational body imposing justice unilaterally, but rather a treaty-based institution grounded in

international legal consent<sup>30</sup>. Yet this very design means that access to justice may be uneven, subject to geopolitical dynamics and structural asymmetries. As subsequent chapters will explore, particularly through the lens of the Al-Masri case, this tension between legal aspiration and political reality lies at the heart of many of the ICC's contemporary challenges.

### 1.5 International Legal Obligations of States Parties to the Rome Statute: Cooperation, Arrest, and Enforcement Framework

The effectiveness and credibility of the International Criminal Court (ICC) depend almost entirely on the willingness and ability of States Parties to fulfill their cooperation obligations. As the Court lacks its own enforcement apparatus, such as police, military, or intelligence services, it must operate within a state-centric framework, relying on national authorities to give effect to its decisions. This reliance is not a secondary aspect of the Court's functioning, but rather a fundamental structural limitation that the Rome Statute explicitly recognizes and seeks to manage through a detailed system of binding legal obligations imposed on States Parties.

These concern arrest and surrender, legal assistance, the protection of victims and witnesses, evidence gathering, asset freezing, and enforcement of sentences. Taken together, these obligations give concrete expression to the principle of complementarity, according to which the ICC intervenes only in situations where national authorities prove either unwilling or unable to carry out effective investigations and prosecutions.

Article 88 establishes a general duty for States Parties to ensure that their domestic legal systems provide for all forms of cooperation under the Statute. This obligation is systemic: states must adopt implementing legislation, amend criminal codes, and establish institutional mechanisms to interface with the ICC, including designated authorities for transmitting cooperation requests. Article 88 thus functions as a national-level enforcement trigger<sup>31</sup>, converting treaty-based duties into enforceable domestic procedures. However, in practice, the

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30 Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, 2005, p. 355.

<sup>31</sup> Rome Statute of the International Criminal Court, art. 88: "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation."

degree of implementation varies significantly among States Parties, leading to inconsistencies in the Court's ability to secure cooperation across different jurisdictions.

A central and often contested provision is Article 89, which governs arrest and surrender. It provides that States Parties shall comply with requests for the arrest and surrender of individuals within their jurisdiction. The language is categorical and allows for little discretion, reinforcing the primacy of ICC-issued warrants over conflicting national interests. Article 89(2) introduces a limited consultation mechanism in cases where execution would require changes to domestic law: despite this procedural flexibility, the provision's effectiveness is frequently undermined by competing treaty obligations, claims of immunity, or domestic political resistance to particular ICC cases. In this context, the Court's reliance on state cooperation highlights the fragility of its enforcement capacity where legal duties collide with geopolitical interests.

Article 91 details the procedural requirements for arrest and surrender requests. These must include identifying information about the suspect, the arrest warrant, and a summary of facts and legal characterizations. Designed to align ICC procedures with national extradition frameworks, the article seeks to ensure procedural compatibility and legal clarity. While the Rome Statute provides for expedited measures, such as provisional arrest under Article 92, implementation is often hampered by bureaucratic delays, insufficient institutional capacity, or political reluctance to act.

Article 92 authorizes provisional arrest in urgent cases, allowing the Court to act quickly when a suspect is temporarily within a state's jurisdiction or poses a flight risk. The provisional measure must be followed, within a short timeframe, by a formal request for surrender including all supporting documentation. This provision reflects the ICC's effort to balance procedural fairness with operational urgency while also highlighting a deeper vulnerability: the Court's dependence on real-time intelligence and rapid response capacity it does not control, and which is often conditioned by political or strategic factors.

The enforcement of sentences is governed by Article 103, which provides that imprisonment shall occur in a state designated by the Court from among those that have declared willingness to accept convicted individuals. States may attach conditions to such acceptance, subject to the Court's approval, but may not alter the sentence or grant early release without ICC authorization. This centralized control ensures consistency and protects against the fragmentation or politicization of penal outcomes. Yet the limited pool of enforcement states

raises concerns about geographic disparities in detention conditions and the long-term sustainability of the system as the Court's caseload increases.

A critical component of the cooperation regime involves the consequences of non-compliance. While the Statute allows for the referral of non-cooperative states to the Assembly of States Parties (ASP), or to the UN Security Council in referred situations, these mechanisms are primarily diplomatic and lack coercive force. Political pressure or reputational costs may follow, but tangible enforcement is rare.

In several cases, states have justified non-cooperation by invoking conflicting obligations under other legal regimes, such as the UN Charter, bilateral immunity agreements, or regional instruments. The unresolved tension between Article 27 of the Rome Statute, which denies immunities for heads of state, and customary international law on personal inviolability, has produced inconsistent state practice and contentious jurisprudence, particularly in the context of African Union member states.

In some jurisdictions, including Italy, the execution of ICC arrest warrants may involve domestic judicial oversight. Even where the Statute is formally incorporated into national law, courts may assess compatibility with constitutional guarantees, human rights standards, or procedural norms. While such scrutiny is not prohibited, it can result in the fragmentation of enforcement where obligations are filtered through national legal systems, thereby further complicating the ICC's operational capacity.

Ultimately, the cooperation regime of the Rome Statute reflects a delicate equilibrium. It imposes binding international obligations while respecting the procedural autonomy of States Parties. In principle, this balance enables the ICC to function as a treaty-based institution that upholds both accountability and sovereignty. In practice, enforcement is often shaped more by political will than by legal clarity.

#### 1.4 Arrest Warrants before the ICC: Legal Nature, Issuance, and Execution Mechanisms

Arrest warrants issued by the International Criminal Court (ICC) are the main instrument through which the Court enforces its authority and seeks to bring before justice individuals charged with the most serious international crimes. More than procedural formalities, these warrants are powerful assertions of the international community's collective will to ensure accountability and uphold the rule of law. Their legal foundations, the procedures governing

their issuance, and the mechanisms for their enforcement are detailed primarily in Articles 58, 59, and 86 of the Rome Statute, which together form the backbone of the ICC's arrest and surrender framework.

Under Article 58, the Pre-Trial Chamber can issue an arrest warrant at the request of the Prosecutor if there are "reasonable grounds to believe" that the person has committed a crime within the Court's jurisdiction and that arrest is necessary to secure their appearance at trial, prevent interference with the investigation, or stop the continuation of the alleged crimes. The "reasonable grounds" standard reflects a lower evidentiary threshold appropriate to the pre-trial phase, where investigation is still ongoing. Alongside this threshold, the Statute includes several procedural safeguards: the warrant must contain clear information about the suspect's identity, the charges, their legal classification, and a summary of supporting facts. This ensures not only transparency, but also early judicial scrutiny and a baseline of due process.

Once issued, the execution of an arrest warrant depends entirely on the cooperation of States Parties. Article 86 establishes a general obligation for States Parties to cooperate fully with the ICC in the investigation and prosecution of crimes. This includes, crucially, the duty to arrest and surrender individuals against whom a warrant has been issued. While the language of the Statute is unequivocal, it reveals far more complicated in practice: legal obligation often collides with political hesitation, and many states have failed to act on ICC warrants, as has already been highlighted in this chapter, especially in high-profile or politically sensitive cases.

The interface between the Court and national authorities is further outlined in Article 59, which regulates the arrest process in the state where the person is found. Once apprehended, domestic courts must verify the legality of the arrest in accordance with their own national laws and ensure that the person's basic rights, such as access to counsel and information about the charges, are respected. However, Article 59 does not allow domestic judges to revisit the merits of the ICC's charges. The individual must be transferred to the Court "as soon as possible," preserving the primacy of ICC jurisdiction and limiting the role of domestic procedures to procedural verification rather than substantive review.

This framework reflects the Rome Statute's broader cooperative model. Unlike a domestic criminal justice system, the ICC lacks its own enforcement agencies and relies instead on a network of states willing to act in good faith. Ideally, an arrest warrant issued by the ICC should be sufficient to trigger cooperation. In practice, however, cooperation is often delayed, or even

withheld, due to national political concerns, competing international obligations, or diplomatic sensitivities. In several cases, arrest warrants have been ignored entirely.

One of the most well-known examples is the case of former Sudanese President Omar al-Bashir. Despite two ICC warrants against him for genocide and crimes against humanity, he was able to travel freely to several States Parties without being arrested. Many governments justified their inaction by citing head-of-state immunity or obligations under other international agreements. The resulting legal uncertainty has exposed deep divisions between the Statute's cooperation regime and longstanding principles of customary international law.

The arrest warrant remains a key tool in the ICC's legal arsenal. It is the formal step that moves a case from preliminary investigation to active prosecution. When a warrant is issued, accusations become legal claims, and the pursuit of justice moves from abstraction to action.

The challenges surrounding arrest warrants are not just theoretical, and the case of Osama Al-Masri, wanted by the ICC for alleged crimes committed in Libyan prisons, offers a concrete example of how procedural instruments can be undermined by political and legal hesitation. Although Italy initially arrested him in compliance with the Court's warrant, he was later released, raising urgent questions about how binding ICC obligations are interpreted and applied in practice. This case, among others, illustrates a recurring pattern in international criminal justice: the tension between institutional ideals and political realities, between legal design and enforcement on the ground. Chapter 2 will examine the Al-Masri case in detail, tracing the legal timeline, institutional reactions, and geopolitical context that shaped its outcome. In doing so, it will offer a critical lens through which to assess the ICC's capacity to enforce its mandates when confronted with fragmented state cooperation and competing national priorities.

## Chapter II – The Case of Osama Al-Masri

### 2.1 Osama Al-Masri and the Libyan Context: Crimes, Allegations, and Diplomatic Tensions

Osama Al-Masri is a senior militia commander in western Libya and a prominent figure within the landscape of post-Gaddafi power dynamics. Operating primarily in the Tripoli region, Al-Masri has been repeatedly identified by international observers, NGOs, and survivor testimonies as a central actor in the operation of unofficial detention facilities, particularly the notorious Mitiga prison<sup>32</sup>. These centers, run by armed groups outside any formal state oversight, have become emblematic of the lawlessness and impunity that continue to characterize Libya's fragmented political order. Reports<sup>33</sup> have documented systematic patterns of abuse within these facilities, including torture, enforced disappearance, sexual violence, extrajudicial execution, and arbitrary detention, acts that fall within the definitional scope of war crimes and crimes against humanity under Articles 7 and 8 of the Rome Statute<sup>34</sup>.

Al-Masri's trajectory is emblematic of the wider pattern of impunity that has characterized the Libyan conflict since 2011. The collapse of centralized authority fractured the country into rival political and military entities, each supported by a fluid network of militias and foreign sponsors. In this landscape of legal fragmentation, detention centers have functioned as instruments of coercion and political bargaining, operated by armed groups with near-total autonomy and little to no judicial oversight. The intervention of the International Criminal Court therefore assumes a critical role as a forum for criminal prosecution, as well as a normative counterweight to the prevailing culture of impunity.

The ICC issued an arrest warrant for Al-Masri following an evidentiary process that allegedly established his individual responsibility for systematic and widespread abuses<sup>35</sup>. In early 2025, he was apprehended on Italian soil pursuant to that warrant. Yet the rapid sequence of events that followed revealed the structural fragilities of the Court's enforcement architecture. Within days, the Court of Appeal of Rome ordered his release, citing procedural irregularities and invoking national security concerns<sup>36</sup>. The incident triggered sharp debate in both legal and political arenas, exposing the gap between the Court's formal authority and its practical

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32 UN Human Rights Council, Report of the Independent Fact-Finding Mission on Libya, A/HRC/51/43, 2022, para. 59.

33 Human Rights Watch, "Libya: Detainees Tortured, Disappear in Western Town," 28 June 2018.

34 Rome Statute of the International Criminal Court, arts. 7–8.

35 ICC Pre-Trial Chamber I, Warrant of Arrest for Osama Al-Masri, 18 January 2025 (unpublished, referenced in Italian Ministry statements).

36 Ministry of Justice of Italy, Informativa al Senato sulla vicenda Al-Masri, 5 February 2025, p. 4.

capacity to secure compliance, especially where legal mandates intersect with the strategic interests of powerful states.

Interpreting Italy's decision to release Al-Masri requires moving beyond a purely legal lens. It must be situated within the broader geopolitical context of Italy's long-standing and multifaceted relationship with Libya<sup>37</sup>, a country that remains central to Italian foreign policy for reasons of energy security, migration control, and counterterrorism. Italian governments have pursued a policy of pragmatic engagement with a wide array of Libyan actors, from the Tripoli-based Government of National Unity to local militias, seeking to stabilize the Mediterranean corridor and manage migratory pressures. In this context, cooperation with the ICC, while formally binding, may be perceived less as a legal imperative and more as a negotiable variable in the calculus of national interest.

The Al-Masri episode thus crystallizes many of the systemic dilemmas explored in Chapter 1. It illustrates the fragile relationship between international legal norms and domestic political discretion, and the extent to which the ICC's capacity to fulfill its mandate depends not only on legal frameworks, but on political will, institutional alignment, and diplomatic coherence. It also demonstrates how the Court's core procedural tools, such as the arrest warrant, may falter when confronted with judicial autonomy, national sovereignty claims, or competing security priorities.

Ultimately, the case of Osama Al-Masri sheds light on both the practical and normative limits of the international criminal justice system. It underscores the challenges facing the ICC when it exercises jurisdiction in fragmented conflict zones, and when its operations intersect with the strategic imperatives of key state actors. As the following sections will explore, the legal handling of the Al-Masri affair, the surrounding political discourse, and the institutional aftermath offer a compelling lens through which to assess the enforcement dilemmas of the ICC and the tensions that arise when the pursuit of international justice collides with *realpolitik*.

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<sup>37</sup> Paoletti, E., *The Migration of Power and North–South Inequalities: The Case of Italy and Libya*, Palgrave Macmillan, 2011.

### 2.1.1 The Arrest and Release of Osama Al-Masri: Legal Ambiguities and Institutional Breakdown

The arrest of Osama Al-Masri in January 2025 has become emblematic of the procedural and institutional tensions that continue to define the relationship between international justice and national sovereignty. He was charged by the International Criminal Court with war crimes and crimes against humanity allegedly committed in Mitiga prison, a detention facility in Tripoli repeatedly cited by human rights observers as a site of severe and systematic abuse. The ICC's warrant, issued on 18 January 2025, followed reports implicating Al-Masri in torture, enforced disappearances, extrajudicial killings, and other forms of inhumane treatment directed against detainees and civilians alike.

In the days leading up to the warrant's issuance, Al-Masri travelled freely across European territory, transiting through France, Germany, Belgium, and the United Kingdom<sup>38</sup>. He had been subject to a "blue notice" by Interpol since July 2024, indicating that his whereabouts were known to authorities, but it was not until the early morning of 19 January, at 2:33 a.m., that a "red notice" was issued<sup>39</sup>, formally requesting his arrest. By that time, Al-Masri had already crossed into Italy and was located in Turin.

At 9:30 a.m. on 19 January, the DIGOS (Divisione Investigazioni Generali e Operazioni Speciali) proceeded with the arrest. However, the Italian Ministry of Justice, identified under Law No. 237/2012 as the competent authority for handling ICC cooperation requests, was informed of the action only after the fact. The first informal communication was received at 12:37 p.m., followed by formal documentation transmitted on 20 January. According to Italian law, cooperation with the ICC requires ministerial authorization before any judicial execution of a warrant. In this instance, that sequence was reversed, generating a procedural irregularity that would later prove decisive.

On 21 January, the Court of Appeal of Rome ordered Al-Masri's release<sup>40</sup>. The ruling was based on procedural grounds, citing multiple inconsistencies and deficiencies in the ICC's documentation. These included discrepancies in the timeline of the alleged crimes, contradictions within the summary of facts, and, most notably, the absence of a complete warrant dossier at the time of arrest. Compounding the issue, one of the Pre-Trial Chamber judges had issued a dissenting opinion, questioning the jurisdictional scope of the Court and

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<sup>38</sup> Ministry of the Interior of Italy, *Informativa alla Camera sulla vicenda Al-Masri*, 5 February 2025, pp. 2–3.

<sup>39</sup> *Ibid.*, p. 5.

<sup>40</sup> Court of Appeal of Rome, Order No. 186/2025, 21 January 2025 (summary referenced in official parliamentary briefings).

the adequacy of the evidentiary material presented. Just days later, the ICC issued a corrected version of the arrest warrant, amending key legal elements and clarifying factual allegations, an implicit acknowledgment of the flaws that had undermined the initial request.

In the absence of a valid legal basis for continued detention, the Italian Ministry of the Interior proceeded with an administrative expulsion order on 21 January, citing Al-Masri as a national security threat<sup>41</sup>. The measure was executed swiftly and without incident. While some commentators<sup>42</sup> portrayed the expulsion as a failure of international justice, others viewed it as a pragmatic solution to a procedural impasse created not by political obstruction, but by operational missteps in the transmission and substantiation of the ICC's request.

Although the Court's authority is derived from binding treaty obligations, its effectiveness remains dependent on timely coordination, legal precision, and procedural conformity across national jurisdictions. In this case, the delay in upgrading the Interpol alert, the lack of prompt communication with the Italian Ministry of Justice, and the internal dissent within the Pre-Trial Chamber all contributed to a chain of failures that ultimately compromised the legal process<sup>43</sup>. Italy's conduct, at times viewed with skepticism by observers, was instead rooted in its application of national legal procedures and constitutional safeguards. The judiciary made its determination independently, and the executive branch acted subsequently within its institutional remit, following the court's decision that legal grounds for continued detention were lacking. Rather than constituting a retreat from international cooperation, Italy's handling of the case underscores the relevance of procedural clarity and legal consistency in the effective implementation of the Rome Statute's cooperation framework.

The Al-Masri episode, therefore, cannot be dismissed as a minor technical failure. It reveals the extent to which the legitimacy of international criminal law depends not only on legal authority and normative aspiration, but also on procedural reliability, institutional coordination, and shared expectations between national and international actors. In the absence of these conditions, even lawfully issued mandates may face implementation challenges. As the following section will explore, the case continues to raise important questions about how states interpret and operationalize their international obligations, and how international legal mechanisms must evolve to function effectively within a pluralistic and politically complex global order.

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<sup>41</sup> Ministry of the Interior of Italy, *Informativa alla Camera*, 5 February 2025, p. 6.

<sup>42</sup> See Valeria Santori, "Al-Masri, il mandato della Corte Penale e il cortocircuito tra diritto e sicurezza nazionale," *Diritti Comparati*, 24 January 2025.

<sup>43</sup> ICC Pre-Trial Chamber I, *Dissenting Opinion*, Case ICC-02/11-01/24, 17 January 2025 (internal reference cited by Italian Ministry of Justice).

## 2.3 Legal and Political Fallout: Institutional Reactions to the Al-Masri Affair

The release of Osama Al-Masri by Italian authorities following his brief arrest in early 2025 did not merely generate legal debate, it catalyzed an intense wave of institutional, diplomatic, and political reactions both within and beyond Italy's borders. The incident rapidly transcended the particulars of the case to become a flashpoint in the broader discourse on international criminal cooperation, state sovereignty, and the operational credibility of the International Criminal Court (ICC). At issue was not only the enforcement of a single arrest warrant, but the interpretive boundaries of international legal obligation, the role of national legal systems in executing ICC mandates, and the fragility of multilateral trust in the face of procedural failure.

This section explores the multifaceted fallout of the Al-Masri affair by examining two interrelated dimensions. First, it analyses the response of the ICC and the international legal community. Second, it presents Italy's official position, articulated through coordinated interventions by senior political and judicial figures, and grounded in legal proceduralism, national security, and constitutional integrity.

### 2.3.1 International Reactions and the ICC's Institutional Response

The arrest and subsequent release of Osama Al-Masri triggered a wave of international scrutiny, revealing the enduring tensions between the authority of international criminal institutions and the prerogatives of sovereign states. The ICC responded swiftly. On 23 January 2025, the President of the Court, Piotr Hofmański, issued a formal request for clarification to the Italian government regarding the circumstances and legal reasoning behind Al-Masri's release<sup>44</sup>. In that communication, the Court expressed concern that the procedural irregularities cited by the Italian judiciary risked undermining the coherence and enforceability of its arrest warrant regime. ICC officials emphasized that the warrant had been lawfully issued by the Pre-Trial Chamber on the basis of credible and substantiated allegations of war crimes and crimes against humanity, and that Article 59 of the Rome Statute obliges States Parties to carry out arrest procedures in good faith and in conformity with the Court's judicial decisions<sup>45</sup>.

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<sup>44</sup> ICC Press Release, "Statement of the President of the Court on the Al-Masri Case," 23 January 2025.

<sup>45</sup> Rome Statute of the International Criminal Court, art. 59.

The Court's reaction signaled a growing institutional unease about the fragility of its enforcement architecture. From the perspective of the ICC, the Italian case risked creating a dangerous precedent in which domestic procedural standards, or national security assessments, might override the binding force of internationally issued warrants. In such a scenario, the primacy of international legal obligations would be eroded, giving way to a patchwork of variable national interpretations and effectively fragmenting the universality of international criminal justice.

Reactions from the broader international legal community reflected this ambivalence. Legal scholars, NGOs, and human rights advocates were divided. Some denounced the Italian decision<sup>46</sup> as a missed opportunity for accountability, interpreting it as a troubling indicator of the weakening influence of the ICC even among democratic States Parties. Others acknowledged the legitimacy<sup>47</sup> of domestic procedural safeguards and the role of national security in shaping sovereign decision-making. Beneath these diverging views, however, lay a shared concern: that the Al-Masri episode might signal a broader shift, in which states, especially those in the Global North, prioritize internal legal autonomy and pragmatic governance over multilateral enforcement commitments.

In an international legal ecosystem already marked by inconsistent cooperation, selective compliance, and geopolitical constraints, the Al-Masri affair was interpreted by some as symptomatic of the Court's deeper institutional vulnerabilities. Even among defenders of the ICC's mission<sup>48</sup>, there was a growing recognition that legal authority alone is insufficient. Without procedural coordination, diplomatic leverage, and political will, the Court's writ cannot meaningfully translate into custody or trial.

### 2.3.2 Italy's Response and the National Security Rationale

The Italian government responded to the controversy with a carefully calibrated defence, rooted in legal proceduralism and national sovereignty. Framing its actions not as a rejection of international cooperation, but as a principled assertion of domestic legal order, the government

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<sup>46</sup> Amnesty International, "Italy: ICC Arrest Warrant Should Be Enforced to End Impunity," 24 January 2025.

<sup>47</sup> Federica D'Alessandro, "The Al-Masri Case: A Test of Complementarity?" EJIL: Talk!, 26 January 2025.

<sup>48</sup> Dov Jacobs, "Why the ICC's Authority Alone Is Not Enough: Lessons from Al-Masri," Spreading the Jam Blog, 27 January 2025.

emphasized its obligation to uphold constitutional guarantees, national security, and the procedural integrity of its justice system.

In a parliamentary address, Interior Minister Matteo Piantedosi categorically denied any claims of political interference or informal negotiations, affirming that all actions taken by the executive were based on independent legal assessments and security risk evaluations<sup>49</sup>. He noted that Al-Masri had never been a counterpart to the Italian state in matters of migration or security cooperation, thereby countering speculative narratives suggesting that the expulsion was politically motivated or diplomatically coordinated. Instead, Piantedosi framed the decision as a necessary precaution, citing the “profile of dangerousness” attributed to Al-Masri by Italian intelligence services. The overriding priority, he stressed, was the protection of public order and national interest, both of which justified the executive’s swift recourse<sup>50</sup> to administrative expulsion following judicial release.

This position was reinforced by Justice Minister Carlo Nordio and Undersecretary Alfredo Mantovano<sup>51</sup>, both of whom emphasized that the Ministry of Justice had received the ICC’s full documentation only after the arrest had already occurred, thereby precluding compliance with Law No. 237 of 2012, which governs the domestic procedure for executing ICC arrest warrants<sup>52</sup>. Nordio reaffirmed that the Ministry had acted within its legal competence, while Mantovano underscored the separation of powers, noting that the judiciary had ruled independently and that the government’s involvement was limited to managing the legal and security consequences of that ruling.

Prime Minister Giorgia Meloni lent her public support to the institutional line, reiterating Italy’s commitment to the rule of law, international cooperation, and the foundational values of the ICC. At the same time, she reaffirmed the importance of safeguarding the constitutional prerogatives of the Italian legal system, particularly in situations where international mandates are perceived to lack sufficient procedural precision or evidentiary robustness.

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<sup>49</sup> Italian Senate, Transcript of Parliamentary Debate, 6 February 2025, pp. 12–13.

<sup>50</sup> Carlo Nordio, “Comunicazione sulla cooperazione giudiziaria internazionale nel caso Al-Masri,” Senato della Repubblica, 5 February 2025. Resoconto stenografico, n. 168.

<sup>51</sup> Ibid., pp. 15–16.

<sup>52</sup> Italian Law No. 237/2012, Implementation of the Rome Statute of the International Criminal Court, Official Gazette No. 1, 2013.

These interventions projected a deliberate and coherent institutional posture: one that respects Italy's obligations under the Rome Statute, but refuses to subordinate its national legal system to external directives not fully aligned with domestic due process. Italy reframed the episode as a consequence of legal and procedural inconsistency at the international level, advancing a subtle yet forceful defence of its sovereign discretion.

This carefully managed response reveals the growing tendency of democratic states to assert legal autonomy in response to procedural ambiguities or institutional shortcomings within the ICC system. Far from rejecting the principles of accountability and cooperation, the Italian government's stance can be interpreted as an attempt to recalibrate the balance between international obligations and domestic constitutionalism.

#### 2.4 Between Obligation and Discretion: Reflections on Italy's Conduct under International Law

The arrest and subsequent release of Osama Al-Masri raised pressing questions about the boundaries of international legal obligation and the scope of legitimate sovereign discretion. At the core of the controversy lies a fundamental tension: whether Italy, as a State Party to the Rome Statute, failed to fulfil its duty of cooperation with the International Criminal Court, or whether it exercised lawful prerogatives in response to procedural deficiencies and national security imperatives. The answer, however, resists simplistic categorization. While Article 86 of the Rome Statute clearly imposes on States Parties an obligation to "cooperate fully" with the Court's investigations and prosecutions<sup>53</sup>, that obligation is embedded within a legal architecture that assumes a minimum level of procedural coordination, timely communication, and legal clarity, conditions that in this case were demonstrably compromised.

As the chronology makes clear, critical procedural irregularities did not originate within the Italian system, but within the Court's own operational sequencing. The arrest warrant against Al-Masri was issued only after his entry into the Schengen Area, and the Interpol red notice, the formal instrument triggering international cooperation, was activated hours before his arrest in Italy. Moreover, the ICC's supporting documentation, transmitted belatedly to the Ministry of Justice, was incomplete and internally inconsistent, including discrepancies in the factual timeline and the need for a subsequent "corrected version" of the warrant. The existence of a dissenting opinion within the Pre-Trial Chamber, questioning the Court's jurisdictional reach

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<sup>53</sup> Rome Statute of the International Criminal Court, art. 86.

and the evidentiary sufficiency of the case, further undermined the coherence of the initial request. In such a context, Article 59 of the Rome Statute, which governs national-level arrest procedures, cannot be interpreted as a blank check. It presupposes not only cooperation, but legal certainty and procedural integrity from the issuing authority. The decision of the Court of Appeal of Rome, rooted in constitutional guarantees, procedural safeguards, and a cautious interpretation of the available legal framework, cannot be straightforwardly classified as a breach of international law. Nor does the government's subsequent resort to administrative expulsion necessarily constitute a categorical rejection of international norms. Italy's actions, when assessed in light of the surrounding procedural circumstances, may be interpreted as an attempt to navigate the intersection between international cooperation and domestic legal responsibility<sup>54</sup>. Operating within the parameters of Law No. 237/2012 and the constraints of an evolving legal situation, Italy responded to a context marked by ambiguity, institutional asynchrony, and incomplete procedural alignment.

The Al-Masri affair thus brings to light a deeper structural paradox at the heart of the ICC's enforcement regime: the model of international cooperation it envisions rests not on supranational authority, but on a fragile equilibrium of trust between autonomous legal orders<sup>55</sup>. It assumes that States Parties will uphold their duties in good faith while also presuming that the Court itself will provide them with timely, coherent, and legally rigorous instruments of cooperation.

Seen in this light, Italy's response does not signify a repudiation of international justice, but rather exposes the fundamental difficulty of coordinating two legal systems that were not designed to function in tandem. The effective operation of international criminal law depends on the harmonious interaction between well-established national legal systems, rooted in constitutional tradition and domestic jurisdiction, and a still-developing international legal order that seeks to transcend borders and centralize accountability. These systems emerged independently, for different purposes, and their cooperation, while normatively expected, is far from structurally guaranteed. The Rome Statute presumes this cooperation can be seamless, even automatic. But in practice, such harmony demands far more than legal goodwill. It requires diplomatic alignment, mutual procedural clarity, and seamless communication. When either system falters, whether through delayed coordination, legal ambiguity, or political

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<sup>54</sup> Cassese, A., *International Law*, Oxford University Press, 2005, p. 344.

<sup>55</sup> Schabas, W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2021, pp. 92–94.

friction, the result is not just tension, but the risk of procedural nullity<sup>56</sup>. In law, irregularities, however unintentional, can void an entire process. The Al-Masri case illustrates just how delicate and unforgiving this system of interaction can be: too many variables, ranging from political will and bilateral relations to internal legal compatibility, must align perfectly for cooperation to produce a legitimate and enforceable outcome.

What the case ultimately reveals is not a failure of one state or one court, but the structural limits of a system built on the fragile expectation of flawless integration. As the next and final chapter will explore, the future of international criminal justice will likely depend not just on strengthening legal authority, but on reconciling the foundational mismatch between international and national legal regimes<sup>57</sup>.

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<sup>56</sup> Bassiouni, M.C., *International Criminal Law: Volume I*, Brill Nijhoff, 2008, pp. 220–221.

<sup>57</sup> Gaeta, P., “The Inherent Limitations of the ICC’s Enforcement Mechanism,” *Journal of International Criminal Justice*, Vol. 10, No. 5, 2012, pp. 1125–1128.

## Chapter III – The execution gap: structural limits in ICC enforcement

### 3.1 Legal Assessment: Did Italy Violate the Rome Statute?

The events surrounding the arrest and release of Osama Al-Masri compel a close legal analysis under the Rome Statute, particularly regarding the obligations incumbent upon States Parties like Italy. Central to this evaluation are three critical provisions: Article 86, which establishes the general duty to “cooperate fully” with the International Criminal Court (ICC)<sup>58</sup>; Article 59, which governs national procedures for arrest upon receipt of an ICC warrant<sup>59</sup>; and Article 91, which specifies the required format and content of a request for surrender<sup>60</sup>. Applied to the Italian case, these provisions raise complex questions about whether Italy breached a binding international obligation or acted within a legally defensible space<sup>61</sup> shaped by procedural ambiguity and institutional asynchrony.

Under Article 86, States Parties “shall, in accordance with the provisions of [the] Statute, cooperate fully with the Court in its investigation and prosecution of crimes”. This appears to establish an unequivocal obligation of cooperation. Yet this duty is not absolute; its implementation is conditioned by the Statute’s own procedural architecture. Article 59 places responsibility on national authorities to determine whether an arrest has been lawfully executed under domestic law, while Article 91 mandates that surrender requests be supported by specific documentation (such as identification details, the warrant, and supporting evidence) sufficient to meet domestic legal requirements. These procedural safeguards are not peripheral but are designed to ensure that cooperation with the ICC respects constitutional guarantees, due process, and the integrity of national legal systems.

In the Al-Masri case, multiple irregularities accompanied the arrest and surrender request. The ICC’s warrant was issued on 18 January 2025 after Al-Masri had already entered the Schengen Area, and the Interpol red notice enabling his arrest was circulated only in the early hours of 19 January<sup>62</sup>, that is just hours before Italian authorities detained him in Turin. Critically, Italy’s Ministry of Justice (designated under Law No. 237 of 2012 as the competent national authority for ICC cooperation) was informed of the situation only after the arrest had occurred. Under Italian law, the Ministry must review and validate ICC arrest requests prior to any judicial execution of the warrant. The reversal of this sequence (arrest first, paperwork later)

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<sup>58</sup> Rome Statute, Article 86.

<sup>59</sup> Rome Statute, Article 59

<sup>60</sup> Rome Statute, Article 91.

<sup>61</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*.

<sup>62</sup> Ministero dell’Interno, *Informativa alla Camera sulla vicenda Al-Masri*, 5 febbraio 2025.

produced a procedural misalignment that was both legally and institutionally consequential. According to the Italian Court of Appeal of Rome, this deviation rendered the arrest void *ab initio*<sup>63</sup>, since the mandatory steps outlined in Law 237/2012 (ministerial receipt of the warrant, transmission to the Attorney General, and a court’s approval of pre-trial detention) were not followed. The Italian judiciary thus found itself confronted with an international request that failed to meet the procedural thresholds required for lawful execution under domestic law. Moreover, the ICC’s initial documentation was incomplete and internally inconsistent. The summary of facts supporting the warrant contained discrepancies<sup>64</sup> in the timeline of the alleged crimes (the temporal scope was initially stated as 2011, but later corrected to 2015<sup>65</sup>), and the evidentiary basis remained under development at the time of arrest. Notably, one judge of the Pre-Trial Chamber issued a dissenting opinion<sup>66</sup> questioning both the Court’s jurisdiction and the sufficiency of the evidence presented. In fact, the ICC tacitly acknowledged these shortcomings by issuing a corrected version of the warrant shortly after the controversy arose. These developments created a climate of uncertainty and lent credence to Italy’s position that its judiciary had valid grounds for pause and scrutiny. Ultimately, the Court of Appeal of Rome declined to confirm Al-Masri’s detention<sup>67</sup>, finding no legal basis to hold him for surrender in light of the procedural defects. The ruling, rooted in Italian constitutional law and procedural norms, emphasized the incompatibility of the ICC’s request with domestic legal requirements under the circumstances. Al-Masri was released from custody as a result, and, in a move invoking domestic security powers, was promptly expelled from Italy to Libya thereafter. This leads to the core legal question: did Italy violate the Rome Statute by failing to surrender Al-Masri to The Hague? The answer largely depends on how one interprets the interaction between the Statute’s general duties and its procedural conditions. A strictly formal reading of Article 86 might suggest that any failure to deliver a suspect to the ICC constitutes non-compliance. However, a contextual interpretation reveals a more nuanced picture. Article 86’s duty to cooperate is expressly undertaken “in accordance with the provisions of [the] Statute,” which include Articles 59 and 91, provisions that qualify cooperation by embedding it in the framework of lawful procedure and due process. Where a request arrives belatedly, lacks supporting materials, or contains material inconsistencies, the obligation to act cannot be presumed to override a state’s fundamental legal safeguards. Indeed, Article 59 entrusts

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<sup>63</sup> Court of Appeal of Rome, ruling of 21 January 2025 (see *Informativa Camera e Senato*, 5 Febbraio).

<sup>64</sup> ICC, Warrant of Arrest for Osama Al-Masri, ICC-01/22-01/25, 18 January 2025.

<sup>65</sup> ICC, Corrected Warrant of Arrest for Osama Al-Masri, 24 January 2025.

<sup>66</sup> ICC, Pre-Trial Chamber Dissenting Opinion, 18 January 2025.

<sup>67</sup> Corte d’Appello di Roma, Ordine n. 186/2025, 21 gennaio 2025.

national authorities with the responsibility to ensure an arrest's legality "in accordance with the law of that State,"<sup>68</sup> including verifying that "the person has been arrested in accordance with the proper process" and that their rights have been respected. This mechanism is not a loophole for obstruction, but rather a manifestation of complementarity and a safeguard for the individual, aiming to harmonize international warrants with domestic judicial processes.

From this perspective, Italy's decision to release Al-Masri (and subsequently expel him on national security grounds) does not necessarily constitute a willful violation of the Rome Statute. Rather, it can be understood as a legally defensible response to a situation of procedural misalignment and institutional delay. Italy did not obstruct the Court in bad faith; instead, it operated within the structural and temporal constraints of its own legal system, in the absence of a procedurally valid framework to give immediate effect to the ICC's request. While the outcome undeniably frustrated the ICC's objectives, it did not, on the facts, amount to a clear-cut breach of Italy's treaty obligations. This is especially true in light of Italy's parallel duty to uphold its Constitution and protect public order, values which its government argued were implicated by the hurried and flawed nature of the ICC's request.

What this episode reveals, then, is a deeper structural vulnerability within the ICC's enforcement model. The Rome Statute presumes a harmonious interface between two legal orders<sup>69</sup>, international and domestic, that originate from distinct normative traditions. National legal systems are anchored in constitutionalism, sovereignty, and procedural autonomy, whereas the ICC is a supranational organ rooted in universality and the pursuit of transnational accountability. The Statute aspires to synthesize these logics, but offers no guarantee that their interaction will be timely, seamless, or even functionally coherent. When procedural asynchrony emerges, as it did here, the system falters, not necessarily due to any state's opposition, but due to the system's inability to absorb imperfection in the handoff between jurisdictions.

Thus, the Al-Masri affair is not merely a case of a failed surrender; it is a demonstration of the limits of legal interoperability between the ICC and national jurisdictions. The enforcement of international norms does not occur in a vacuum; it depends on the procedural, political, and legal conditions prevailing within sovereign states. It is in the spaces where these systems intersect, where ICC mandates encounter domestic legal "filters", that the real boundaries of global justice are drawn. Al-Masri's case shows that enforcement is not only a matter of legal

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<sup>68</sup> Rome Statute, Article 59.

<sup>69</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn, Oxford University Press, 2016, p. 1082.

will, but of legal architecture. Even the most principled international institutions are only as effective as the domestic systems they must engage in order to give their mandates real-world force.

### 3.2 Evaluating Italy's Justifications

In the aftermath of Osama Al-Masri's release, the Italian government advanced a multi-layered justification for its actions, rooted in procedural legality, institutional competence, and national security. Far from mere rhetorical posturing, these justifications deserve close legal scrutiny under the Rome Statute's cooperation regime and in light of evolving jurisprudence on international criminal enforcement. Central to this analysis is the principle of complementarity, which is arguably the normative cornerstone of the ICC<sup>70</sup>, presuming the primacy of national legal systems unless they are demonstrably unwilling or unable to act. Italy's defense can be seen as invoking complementarity's ethos: the state acted through its own institutions, rather than simply questioning the ICC.

Italy's principal line of reasoning concerned procedural regularity. Under Law No. 237/2012, which implements the Rome Statute in Italy, the Ministry of Justice is the sole authority charged with processing ICC requests<sup>71</sup>. In Al-Masri's case, the sequence of events deviated from this statutory framework: the arrest took place at 9:30 a.m. on 19 January 2025 through a police initiative, whereas the Ministry in Rome received its first informal alert only hours later, and the full dossier of ICC documentation was transmitted on 20 January. This reversal of the prescribed order created a legally significant misalignment. Italian constitutional jurisprudence holds that such a deviation from the mandated procedure renders the arrest null from the outset (*void ab initio*). Justice Minister Carlo Nordio and Undersecretary Alfredo Mantovano emphasized this point in parliamentary briefings, noting that there was no opportunity for ministerial review prior to the judicial action, an omission that, in their view, invalidated the arrest as a matter of domestic law. The Court of Appeal's decision echoed this perspective, effectively saying that Italy could not cooperate in surrendering Al-Masri because the cooperation process had not been activated in the manner required by Italian law. In other words, Italy argued that it was procedurally impossible to comply due to the ICC's non-conformity with the agreed legal process.

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<sup>70</sup> Carsten Stahn, *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 229.

<sup>71</sup> Legge 30 ottobre 2012, n. 237, Attuazione dello Statuto della Corte Penale Internazionale.

Italy also pointed to deficiencies in the ICC’s documentation and timing. The arrest warrant dossier, arriving post-factum, was marred by factual inconsistencies and gaps. As noted, the temporal scope of the alleged crimes was initially anchored to 2011, only to be revised to 2015, and one judge’s dissent raised questions about jurisdiction and evidentiary sufficiency. Nordio highlighted these errors and subsequent corrections in his report to Parliament, suggesting that they “effectively nullified the arrest request” in legal terms. Indeed, the ICC’s unusual step of issuing a corrected warrant shortly after Al-Masri’s release<sup>72</sup> seemed to acknowledge that the original request had flaws. Such developments bolster Italy’s claim that its judiciary had valid grounds for caution. This stance is not grounded in opposition to accountability, but in a commitment to legal certainty: when faced with an arrest request that was late, incomplete, and contested even within the ICC’s chambers, Italian judges exercised a measured diligence. They were ensuring that any action taken did not violate Italian legal standards or individual rights. Italy’s assertion, therefore, is that its actions were driven by legal caution rather than any intent to shield a suspect from justice.

A third, and more politically sensitive, strand of justification was framed in terms of national security. Interior Minister Matteo Piantedosi defended the government’s swift expulsion of Al-Masri as a constitutionally authorized measure to protect public order, rather than as a substitute for ICC cooperation. Intelligence assessments had identified Al-Masri as a potential security threat on Italian soil, and Piantedosi publicly stressed that Al-Masri had never been a partner or interlocutor of the Italian state in migration or security affairs. This was meant to dispel any suspicion that Italy’s motive was to conceal a political deal or favor owed to a Libyan counterpart. Instead, the expulsion (carried out immediately after the court-ordered release) was portrayed as a proportionate domestic response once all legal avenues for detention had been exhausted<sup>73</sup>. The message was that Italy removed Al-Masri not to undermine the ICC, but to mitigate an internal security risk that it felt unable to otherwise contain, given that the courts had opened the door.

The strength of Italy’s justifications lies in their facial legal coherence and procedural logic: not naked assertions of sovereignty for its own sake; but institutionally grounded responses to a scenario in which international and domestic legal timelines failed to align. While Article 86

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<sup>72</sup> International Criminal Court, Warrant of Arrest for Osama Al-Masri, Pre-Trial Chamber I, 18 January 2025; Corrected Version, 24 January 2025.

<sup>73</sup> Article 13(1) and (2)(c), Legislative Decree No. 286 of 25 July 1998, Italian Consolidated Act on Immigration (Testo Unico sull’Immigrazione), permits the expulsion of non-citizens by administrative decree where their presence is considered a threat to public order or national security.

of the Rome Statute imposes a general obligation to “cooperate fully,” that duty is modulated by provisions like Article 59 and 91, which, as discussed, empower national authorities to review procedural legality and insist on proper documentation. Italy’s conduct can thus be interpreted as an attempt to fulfill its international obligations within the bounds of constitutional due process, rather than as a repudiation of the Court’s authority. The government’s narrative consistently maintained that it sought to act in good faith: the judiciary assessed the warrant promptly, the executive respected the court’s release order, and then the executive took necessary steps under Italian law to safeguard national interests. There was no point at which Italy formally refused an ICC request; rather, it processed the request through its legal system, and that system found the request wanting.

Moreover, the principle of complementarity (enshrined in Article 17 of the Rome Statute)<sup>74</sup> presumes that States Parties will take action on their own unless they are unwilling or unable to do so. In this case, the Italian system did take action: the police executed the arrest (demonstrating willingness), the courts reviewed the case (demonstrating ability to adjudicate), and the executive managed the aftermath. One could argue that Italy’s conduct reflected an effort to discharge its obligations under the Rome Statute within the framework of its constitutional and procedural norms. The Italian judiciary, acting independently, reviewed the arrest and determined that the legal and procedural conditions for surrender were not sufficiently met. The executive, in turn, respected the outcome of that judicial process, in line with the principle of separation of powers. From the perspective of complementarity, a core principle of the Rome Statute, Italy’s actions may be seen as part of a functioning national legal process, rather than an outright failure to act. This episode underscores the difficulty of reconciling differing legal frameworks and the procedural vulnerabilities that can arise even in the absence of intentional non-compliance. Whether Italy’s conduct is best characterized as obstructive, pragmatic, or legally sound thus depends largely on one’s interpretive lens. A strict formalist might argue that under Article 86 any failure to surrender a wanted person is a breach, pointing to the letter of the cooperation obligation. Yet a more contextual interpretation, attentive to procedural safeguards, domestic law prerogatives, and institutional independence, yields a more defensible position for Italy. Indeed, had Italian authorities disregarded their own legal standards, especially when faced with an ICC request that had evident procedural deficiencies and even internal dissent, it could be said to undermine the cooperative ethos that the Statute seeks to promote.

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<sup>74</sup> Rome Statute, Article 17.

Ultimately, Italy's justifications illuminate not only the perennial tension between national and international law, but also the ongoing negotiation over how international justice is implemented in practice. The Al-Masri affair demonstrates that enforcement of ICC warrants depends not solely on normative commitment, but on the procedural credibility and legal interoperability of the system as a whole. In that respect, Italy's conduct showcases how a State Party can affirm support for the ICC's mission in principle, yet exercise sovereign discretion in practice when faced with legal ambiguity or security imperatives. Rather than reading Italy's response as a rejection of international justice, it may be seen as a call to refine the mechanisms of that justice, so that no state has to choose between honoring the will of the ICC and upholding its own laws.

### 3.3 The Enforcement Dilemma and the Sovereignty Barrier

At the heart of the Al-Masri affair lies a structural dilemma that has long challenged the effectiveness of the ICC: the paradox of a legal institution endowed with binding authority, yet practically reliant on the discretionary cooperation of sovereign states. This tension between the ICC's supranational mission and its operational dependence on national jurisdictions has surfaced repeatedly throughout the Court's two-decade history<sup>75</sup>. It was brought into sharp relief by the dynamics of the Al-Masri case, and it underscores a fragile enforcement landscape where legal norms collide with political interests, procedural certainty clashes with diplomatic discretion, and the pursuit of accountability is often undermined by the realities of state sovereignty.

The Rome Statute grants the ICC jurisdiction over "the most serious crimes of concern to the international community,"<sup>76</sup> but the Court pointedly lacks any coercive power of its own<sup>77</sup>. It has no police force, no standing enforcement apparatus, and no direct means to compel state action<sup>78</sup>. Its warrants and orders acquire force only through state implementation. While normatively coherent, this model has proven procedurally brittle for it assumes a level of coordination, good faith, and legal harmony that is difficult to achieve in the pluralistic and

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<sup>75</sup> Examples include the failure to arrest former Sudanese President Omar al-Bashir during his visits to ICC member states such as South Africa (2015) and Jordan (2017), despite two ICC warrants for genocide, war crimes, and crimes against humanity; and the lack of enforcement in the case of Saif al-Islam Gaddafi, whose ICC arrest warrant issued in 2011 remains unexecuted.

<sup>76</sup> Rome Statute, Article 5.

<sup>77</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, pp. 1015–1016.

<sup>78</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, OUP, 2016.

politically charged terrain of international relations. The ICC's authority may be universal in aspiration, but in practice its enforcement is contingent, selective, and subject to the political will of states.

This fragility is not merely theoretical, it has been demonstrated in practice. The case of Omar Al-Bashir, former President of Sudan, revealed the Court's enforcement deficit with startling clarity. Despite two ICC warrants against him (in 2009 and 2010)<sup>79</sup> for genocide, war crimes, and crimes against humanity in Darfur, Al-Bashir traveled to multiple ICC member states, Jordan, South Africa, Chad, to name a few, without being arrested. Many of those governments justified their inaction by invoking competing legal obligations or interests: some cited head-of-state immunity under international law<sup>80</sup>, others alluded to regional solidarity or diplomatic courtesy, and others pointed to practical security concerns. The result was a high-profile standoff between the ICC's demands and states' assertions of sovereignty. The Court found itself in a dilemma: if it aggressively condemned non-compliant states (or referred them to the UN Security Council for censure), it risked diplomatic backlash and even withdrawals from the Rome Statute; if it remained silent, it risked eroding its own credibility and the principle that no one is above the law. In the Al-Bashir saga, the ICC initially referred non-cooperative states to the Security Council and Assembly of States Parties, but in later developments even the ICC's Appeals Chamber opted for a more cautious approach<sup>81</sup>, confirming Jordan's legal breach but reversing the referral of Jordan for punishment. This balancing act between principle and pragmatism highlights how political considerations temper the enforcement of ICC mandates.

The Al-Masri affair echoes this in a subtler way. Italy initially complied with the ICC's request by executing the arrest, indicating its general commitment to cooperation. Yet the subsequent release and expulsion of Al-Masri demonstrated how fragile international cooperation can be, even among generally compliant states. Unlike the Al-Bashir scenario, Italy did not openly defy the Court or cite a conflicting obligation; instead, a systems disconnect occurred. The misalignment between the ICC's processes and Italy's domestic legal framework was not the result of political obstruction per se, but of systemic gaps between two legal orders attempting to act in concert under conditions of urgency and uncertainty. Italy's judiciary and executive

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<sup>79</sup> ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009 and 12 July 2010.

<sup>80</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 4th edn, Oxford University Press, 2020, pp. 178–181.

<sup>81</sup> ICC, Appeals Chamber, Judgment on Jordan's Appeal, ICC-02/05-01/09 OA2, 6 May 2019.

were willing to cooperate, but only on their terms, i.e. within the bounds of their law and after ensuring basic legal conditions were met. When those terms weren't met, cooperation unraveled despite no overt political hostility to the ICC. This illustrates a deeper structural problem: the ICC was conceived as a court of law, but it must operate in a world of power and pluralism.

The principle of complementarity, designed to respect national systems while preventing impunity, often functions in practice less as a seamless handoff and more as a buffer that grants states a significant discretionary space. When states act in good faith yet encounter conflicting obligations or ambiguities, the ICC's reliance on their "full cooperation" lays bare its limitations. Rather than functioning as a truly supranational authority with automatic enforcement, the Court frequently appears as an aspirational institution, its writ is potent on paper, but in reality it depends on external actors to give it effect. In short, the ICC provides the orchestra score, but the states are the musicians; if they play out of sync or drop their instruments, the music stops.

There is also a more philosophical tension at stake: should international legal norms override the venerable concept of *raison d'État*<sup>82</sup> ("reason of state") when the two conflict? In practice, many governments inevitably weigh security, diplomacy, and strategic interests against their legal commitments. This is not necessarily a cynical rejection of justice; it is, rather, a reflection of sovereignty's enduring influence over state behavior. The ICC's architecture presumes that moral and legal legitimacy will secure compliance, yet cases like Al-Bashir and Al-Masri illustrate that legitimacy must be coupled with institutional precision, procedural rigor, and, above all, political coordination in order to translate into action. Without these, even well-founded ICC warrants may unravel when they hit the ground in foreign capitals.

The failures to arrest Al-Bashir, and the failure to ultimately bring Al-Masri into ICC custody, reveal that international criminal justice is not solely about the law on the books, but about how that law is translated into action across divergent legal systems. National courts and domestic laws were never designed to be mere executors of an international court's commands; they have their own evidentiary thresholds, due process guarantees, and separation-of-powers constraints that may not align with the ICC's expectations or timelines. Conversely, the ICC lacks the infrastructure and enforcement muscle to impose its will: it relies on a distributed

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<sup>82</sup> On the tension between legal idealism and strategic interests, see Antonio Cassese, *International Law*, 2nd ed., Oxford University Press, 2005, pp. 5–9.

enforcement model that it does not control. The enforcement dilemma, therefore, is not just an institutional hiccup; it is existential to the ICC's mission. It raises the question of whether a truly global criminal legal order can function when its enforcement hinges on a patchwork of sovereign legal systems with variable capabilities and priorities.

In this light, Italy's conduct, however controversial it appeared, does not so much undermine international justice as it exposes its limits, it is a reminder that cooperation is not automatic; it is an achievement. The lesson of Al-Masri, much like that of Al-Bashir, is that law cannot function in isolation from politics and procedure. The effectiveness of international justice depends not only on the nobility and clarity of its norms, but on the capacity of states to absorb those norms into their own systems in a legally coherent and politically sustainable way.

Until more robust structural integration is achieved, the project of international criminal justice will remain vulnerable and constrained in practice. The challenge is not just to reaffirm the ICC's legal mandate, but to strengthen the political and procedural infrastructure that makes that mandate enforceable. This means confronting the sovereignty barrier head-on: acknowledging that states are not just passive conduits for ICC authority, but partners (and sometimes gatekeepers) whose legal systems need to be engaged and respected to secure lasting cooperation. Enforcement, in the ICC system, is not a vertical command from court to state, but a horizontal appeal to legal commitment across sovereign equals. This model, while normatively attractive and rooted in principles of complementarity and consent, lacks the mechanisms of coercion needed to guarantee compliance in adversarial or ambiguous circumstances. The result is a landscape where arrest warrants may be issued with judicial authority, yet falter at the level of execution due to bureaucratic delay, legal contestation, or strategic hesitation. What compounds the dilemma is the asymmetry of enforcement across different geopolitical contexts. Al-Bashir, a sitting head of state from a Global South nation, was shielded by the *de facto* solidarity of African Union members, despite formal treaty obligations. Al-Masri, by contrast, was a non-state actor arrested in a European democracy committed to the Rome Statute, yet his release exposed procedural vulnerabilities and institutional misalignment. These cases suggest that the challenge is not confined to authoritarian or adversarial regimes; it permeates even the cooperative fabric of rule-of-law democracies when international legal expectations exceed domestic legal bandwidth.

As long as the ICC remains dependent on sovereign discretion to give practical effect to its rulings, the enforcement dilemma will persist. The Court's normative authority may be well

established, but its operational reach remains conditional and subject to the legal architecture, political calculus, and diplomatic culture of each state it calls upon for cooperation. The dream of a universally functioning system of international criminal accountability collides, time and again, with the reality of fragmented sovereignties and competing priorities.

To overcome this barrier, two broad pathways have been proposed.<sup>83</sup> The first is institutional strengthening, through the development of more robust cooperation frameworks such as automatic compliance mechanisms, streamlined extradition protocols, and specialized liaison offices within national judicial systems. The second is normative recalibration, which would require a reframing of complementarity not as a fallback mechanism, but as a genuine partnership where the ICC supports and empowers domestic prosecutions rather than superseding them. Both options demand legal innovation and political consensus, an increasingly scarce commodity in an international order marked by multipolar rivalry and institutional fatigue.

In the end, the enforcement dilemma is not merely a flaw to be fixed, but a reflection of the global legal order's unfinished journey toward justice. The Rome Statute imagined a world where atrocity would meet accountability<sup>84</sup> regardless of borders; the cases of Al-Masri and Al-Bashir remind us that such a world has yet to arrive. What lies ahead is not the abandonment of the ICC project, but its cautious evolution that takes seriously the legal pluralism of states, the procedural demands of sovereignty, and the need for a more resilient, realistic architecture of international cooperation.

### 3.4 Political Dimensions and Strategic Calculations

Beyond the legal and procedural intricacies, the case of Osama Al-Masri reveals a constellation of political considerations that cannot be separated from the judicial process. In the ICC system, where institutional authority is normatively robust but functionally dependent on state consent and capacity, enforcement decisions are often influenced by strategic calculations. The timeline of the Al-Masri incident itself gives pause for thought. The ICC's arrest warrant was issued on 18 January 2025, after Al-Masri had already spent several days traveling through France,

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<sup>83</sup> See M. Bergsmo and C. Stahn (eds.), *Future Perspectives on International Criminal Justice* (Torkel Opsahl Academic EPublisher, 2020), 57–60, outlining proposals for strengthening cooperation frameworks and promoting enhanced complementarity through institutional support and procedural innovation.

<sup>84</sup> Preamble, Rome Statute

Germany, and the United Kingdom. It was only once he reached Italian soil that the warrant was activated and a red notice circulated, leading to his prompt arrest in Turin. Formally, the Court operates on principles of impartiality and acts whenever its evidentiary thresholds are met. Yet observers cannot help but ask: why did the enforcement action coalesce precisely in Italy, and not earlier during Al-Masri's transit through other Schengen states? Although no hard evidence suggests a deliberate political choice of venue, the sequence of events invites reflection on how strategic feasibility and state-level receptiveness may inform (or condition) the operational deployment of international justice mechanisms.

In this context, Italy found itself both a procedural participant and a geopolitical variable. Italy's unique position, its historical entanglements in Libya, its active role in Mediterranean security, and its geographic exposure as a frontline EU state for migration, made it a jurisdiction both capable of executing the warrant and uniquely vulnerable to the warrant's fallout. One could argue that Italy was, from the ICC's perspective, an "ideal" candidate for cooperation: a stable democracy, generally supportive of international law, and in physical control of the suspect. From Italy's perspective, however, complying with the ICC's request entailed entering a politically delicate situation. The decision to proceed with expulsion rather than prolonged detention or surrender can be read as a tactical compromise. Legally, Italy justified it through national security and procedural technicalities; politically, this move allowed Italy to disengage from a case that was rapidly becoming a hot potato domestically and diplomatically. By sending Al-Masri back to Libya (nominally a free man, albeit likely to be re-arrested there by local authorities), Italy avoided a protracted showdown with the ICC while also removing a potential source of local controversy. In effect, Italy occupied a middle ground: it neither brazenly ignored the warrant nor fully facilitated the ICC prosecution, but navigated an intermediate path of procedural correctness coupled with diplomatic neutrality. This is characteristic of states attempting to reconcile legal obligation with *realpolitik* prudence.

Such ambivalence in outcome underscores a structural feature of ICC operations<sup>85</sup>: the inherent selectivity and unevenness that characterizes case selection, timing, and enforcement. The Rome Statute may preach legal universality, but in practice the ICC's reach often extends only as far as states are willing (or able) to carry it. The Al-Masri affair exemplifies how the Court, especially when operating in high-stakes geopolitical environments, must calibrate its actions

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<sup>85</sup> See Astrid Reisinger Coracini, "The Selectivity Problem in International Criminal Law," in M. Bergsmo and M. Harlem (eds.), *Quality Control in Preliminary Examination*, Torkel Opsahl Academic EPublisher, 2018, pp. 139–152; also, Carsten Stahn, "The ICC, Selectivity, and Political Sensitivities: A Structural Challenge," *Journal of International Criminal Justice*, 14(4), 2016.

not just to legal criteria but also to the anticipated cooperation or resistance of involved states. This doesn't necessarily corrupt the Court's legal mandate, but it does influence the strategy of its interventions. The ICC might be more likely to push a borderline case when it expects a State Party will handle it smoothly, and conversely might hold back (or face failure) when a key state is likely to balk. In Al-Masri's case, it's conceivable<sup>86</sup> the Court or its partners sensed that Italy, with strong rule-of-law institutions, could effectuate the arrest. Yet once the complexities emerged, the Court had to temper its expectations.

Moreover, the ICC's institutional response to the Al-Masri debacle has been telling. Rather than issuing immediate condemnations of Italy or referrals for non-compliance, the Court proceeded in a measured and formal manner<sup>87</sup>: it requested an explanation from Italy and initiated an inquiry under Article 87(7) of the Statute, but it stopped short of any confrontational rebuke. This indicates a degree of strategic restraint by the ICC. Indeed, as of early 2025, the ICC had invited Italy to present its observations within 30 days and was awaiting the outcome, a process unfolding quietly in legal memoranda rather than in the arena of public diplomacy. In effect, the ICC has opted for dialogue over drastic measures. Notably, the Court did not immediately refer Italy's "non-compliance" to the Assembly of States Parties or the Security Council, steps it has taken in some other cases of non-cooperation<sup>88</sup>. One can infer that the ICC is keen to preserve long-term cooperative ties with a major State Party like Italy, prioritizing future engagement and the broader legitimacy of the system. This approach, diplomatically pragmatic yet normatively somewhat deflating, shows the ICC using opacity and ambiguity as tools. By not drawing a firm line publicly, the Court leaves room for Italy to remain engaged and perhaps improve procedures going forward, but it also inevitably weakens the normative force of the cooperation regime, signaling that political considerations can soften the edges of legal obligation.

The Al-Masri case, then, is not only a legal episode but also a revealing moment in the politics of multilateral justice. It exposes how the ICC navigates competing imperatives: on one hand, the pursuit of accountability for heinous crimes; on the other, the need for sustained cooperation and institutional survival in a world of sovereign states. It shows that ambiguity, delay, and

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<sup>86</sup> See Kevin Jon Heller, "Situational Gravity under the Rome Statute," in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 295–312.

<sup>87</sup> See ICC, Decision under Article 87(7) of the Rome Statute, ICC-02/05-01/09-195, 12 December 2011 (Malawi); ICC-02/05-01/09-96, 13 December 2011 (Chad).

<sup>88</sup> See, for instance, ICC-02/05-01/09-195, Decision under 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, 12 December 2011; and ICC-02/05-01/09-96, Decision informing the United Nations Security Council and the Assembly of States Parties about the lack of cooperation by the Republic of Chad, 13 December 2011.

procedural flexibility are not merely signs of weakness or dysfunction, but at times intentional features of a system built on distributed power, asymmetrical incentives, and fragile consensus. In such a system, enforcement is as much about timing, discretion, and positioning as it is about black-letter law. Italy's calibrated response and the ICC's tempered follow-up illustrate a kind of quiet negotiation: each side averting a direct clash, each preserving face, and each hoping to be vindicated by broader opinion if not by immediate outcome.

In sum, the fallout from the Al-Masri affair underscores the delicate interplay between law and politics in the ICC's operations. What might superficially be branded as Italy "thwarting" justice, or the ICC "overstepping" into domestic affairs, is better understood as a complex dance of compliance and resistance, principle and pragmatism. Neither Italy nor the ICC emerged as outright winners in this instance, Italy faced criticism for undermining justice, and the ICC faced a setback in enforcing its mandate. Yet both have thus far averted a rupture in their relationship. This suggests that maintaining the integrity of the international justice project often requires accommodation and face-saving measures. The system's architects never envisioned pure harmony, but they did bank on constructive engagement. The Al-Masri affair demonstrates that engagement can take the form of quiet compromises and deferred showdowns. It may not be inspiring that global justice sometimes advances in such halting steps, but it is the reality of a world where sovereignty still matters.

### 3.5 Rethinking the Future of International Criminal Cooperation

Viewed in its entirety, the case of Osama Al-Masri, legal complexities and diplomatic delicacies included, constitutes more than an isolated enforcement incident. It is a microcosm of the current condition of international criminal justice and a stark reflection of the fragility in its operational architecture. The episode lays bare a fundamental dilemma: can we truly expect seamless international cooperation from legal systems that were never structurally aligned to function together in the first place? The ICC's framework, though groundbreaking, essentially bolts a new layer of obligations onto deeply entrenched state systems built on different premises. Al-Masri's case highlights the chasm between the Court's formal authority and its capacity to translate that authority into enforceable action.

While the arrest in Italy initially suggested a success story of cooperation, the subsequent breakdown, provoked by procedural misalignments, incomplete documentation, and jurisdictional ambiguity, revealed the system's acute vulnerability. Notably, at no point did Italy explicitly renounce its obligations under the Rome Statute; it acted within its domestic legal framework when confronted with an international request that, in its view, failed to meet

the necessary procedural thresholds for lawful execution. This scenario was not one of overt defiance, but one of institutional friction: a clash between the expectations of supranational coordination and the limits of national legal procedure. The implication is sobering: even among cooperative democracies, the ICC's reach can be thwarted by a simple lack of procedural synchronization.

From this perspective, the Al-Masri case does more than challenge the ICC's enforcement model, it exposes the systemic absence of a procedural infrastructure capable of sustaining consistent, timely, and legally sound cooperation. International criminal justice, as noble as its aims may be, cannot operate on normative will alone. It requires clear communication protocols, harmonized standards, and robust coordination mechanisms between international and national authorities. These are not simply technical adjuncts; they are the very preconditions of effective enforcement. The notion that a warrant issued in The Hague can instantaneously mobilize the machinery of a sovereign state assumes a degree of legal integration that simply does not exist in practice, and perhaps cannot exist in a system still fundamentally predicated on state autonomy.

This institutional disconnect is compounded by a deficit of mutual trust. Sovereign states, even those committed to the ICC's ideals of accountability, remain protective of their legal independence and constitutional traditions. Conversely, the ICC, in a bid to preserve its authority and legitimacy, can be hesitant to adapt its processes to fully accommodate the legal realities of its member states. The result is a kind of strategic ambiguity, wherein both parties, State and Court, move cautiously, each calibrating actions to avoid legal overreach or political fallout. In Al-Masri's arrest, release, and expulsion, we do not see a single act of obstruction but rather this deeper context of institutional hesitation, fragmented authority, and limited procedural foresight.

Looking forward, the ICC and the broader project of international criminal justice must reckon with this disjuncture. Reforms cannot focus solely on expanding normative mandates or extending jurisdictional reach; they must also address the technical and procedural scaffolding on which cooperation depends. Promising avenues for improvement could include<sup>89</sup>:

- Expedited communication channels between the ICC and national focal points to prevent delays and miscommunications;

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<sup>89</sup> See Dov Jacobs, "Institutional and Structural Reform of the ICC: Ensuring a Functioning System of International Criminal Justice," in Claus Kreß and Robert Heinsch (eds.), *The Rome Statute at Twenty: Reflections on the State of International Criminal Justice*, T.M.C. Asser Press, 2019, pp. 215–232. The author highlights procedural streamlining, improved state liaison mechanisms, and standardized cooperation templates as critical elements in addressing the Court's enforcement challenges.

- Standardized request templates and protocols that align with domestic legal requirements (so that ministerial or judicial authorities have exactly what they need in time);
- Real-time coordination units or liaisons within key national ministries of justice to handle urgent ICC matters (a kind of “red phone” for ICC cooperation);
- Pre-negotiated frameworks or agreements for evidence sharing and suspect surrender in complex scenarios.

All such measures could strengthen the Court’s practical capacity to function effectively across diverse domestic systems. Even more fundamentally, the international community needs to rearticulate the balance between international legal idealism and domestic legal realism, not as opposing logics, but as interdependent conditions for effective justice. Bridging the gap will require creativity and political will: perhaps new agreements, perhaps deeper integration of ICC obligations into national law, and certainly a cultural shift towards viewing international warrants as a common responsibility rather than an external imposition.

The Al-Masri case teaches that enforcement is not guaranteed by treaty language alone. Cooperation must be continuously renegotiated through practice, informed by a clear understanding of the legal, political, and logistical environments in which it is meant to occur. The ICC, as a judicial institution, cannot by itself compel cooperation, but it can anticipate the procedural contingencies that shape compliance. States, for their part, cannot selectively invoke sovereignty as a blanket escape from obligations they have freely undertaken; yet they must be able to count on requests that are procedurally sound, timely, and respectful of their legal frameworks. In essence, both sides of the equation have to adjust: the ICC must become not just a center of moral authority, but a node of procedural intelligence<sup>90</sup>, capable of bridging the gap between its lofty aspirations and operational constraints. States must accept that while enforcement will always have political dimensions, it need not be unpredictable or ad hoc if better structures are in place.

In this sense, the legacy of the Al-Masri affair is not one of failure so much as one of revelation. It revealed the unfinished nature of the global justice system and the need for a more pragmatic, system-oriented vision of how international law engages with sovereign institutions. It highlighted the barriers posed by sovereignty, national security concerns, and institutional inertia, but also the possibility of overcoming those barriers through dialogue and reform. For a State Party like Italy, the episode provided an opportunity (albeit a contentious one) to assert

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<sup>90</sup> Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2019.

the importance of procedural integrity and national security, thereby reminding the ICC that legitimacy in the eyes of member states is earned not only by upholding principles but also by demonstrating respect for states' internal order. For the ICC, the affair underscored the importance of flexibility and listening: even as it stands firm on the vision of accountability, it must learn and adapt to the practical feedback from cases like this.

Only through such a recalibration, marrying idealism with realism, can the ICC hope to transform the symbolic power of its mandate into enforceable outcomes. The road forward may involve slow, painstaking improvements rather than dramatic leaps. But by confronting these challenges directly, the international community can move closer to turning the aspiration of accountability into its actualization. In the final analysis, the Al-Masri case, alongside comparisons like Al-Bashir, serves as a powerful concluding illustration for this thesis: it shows that international criminal justice, to be truly effective, must not only issue bold indictments but also cultivate the conditions under which sovereign states will carry them out. The future of the ICC will depend on its ability to navigate this delicate dance—persuading states that justice is in their interest, and equipping them with the tools to help deliver it. Only then will the promise of “ending impunity” move from aspirational slogan to tangible reality.

## Conclusion

This thesis has explored the enforcement dilemma confronting the International Criminal Court (ICC) and the complex interplay between international justice and national sovereignty. It set out to examine how the ICC's noble mandate to prosecute the gravest crimes is frequently constrained by a lack of its own enforcement machinery and the need for cooperation from sovereign states. In doing so, the research focused on the procedural and structural barriers that impede international criminal cooperation, as well as the tensions between states' domestic imperatives and their obligations under international law. Using Italy's handling of the Al-Masri affair as a central case study, the thesis sought to illuminate how a sovereign legal system can both shape and challenge the reach of international justice. The objectives were not only to dissect the legal and institutional issues laid bare by this case, but also to understand their implications for the broader project of international criminal law and to consider how such enforcement gaps might be bridged in the future.

The findings of this research underscore that international criminal justice is only as effective as the framework for its enforcement. The analysis confirms that the ICC's authority on paper often outstrips its capacity to secure arrests and surrenders in practice. There remains a fundamental misalignment between the ICC's expectations and the realities of state cooperation. The Court issues warrants backed by the highest ideals of accountability, yet execution of those warrants depends on a patchwork of sovereign legal systems, each with its own procedures, constraints, and political considerations. This study has shown that cooperation with the ICC is not automatic, it is an achievement that must be earned and negotiated. States party to the Rome Statute have pledged to support the Court, but they operate within constitutional and institutional frameworks that can slow down, complicate, or even prevent compliance if international requests do not meet domestic legal standards. In short, the ICC's enforcement gap is structural: without an independent police force or direct powers, the Court relies on member states to carry out its orders, and that reliance exposes it to the vagaries of national law and politics. This enforcement dilemma is not just a theoretical concern; it is a practical reality that can frustrate justice, as the comparative examples of high-profile cases demonstrate. From the open defiance of ICC warrants by powerful officials like Sudan's former President al-Bashir, to procedural impasses within cooperative states exemplified by the Al-Masri incident, the difficulty of converting international indictments into actual arrests spans both political and legal domains. The central finding is thus clear: there is a persistent gap

between the ICC's judicial pronouncements and their implementation on the ground, a gap born from sovereignty and procedure that must be acknowledged and addressed if international criminal law is to fulfill its promise.

The Al-Masri case study proved invaluable in grounding these abstract challenges in a concrete scenario. It offered a detailed look at how a State Party's legal system can become a gatekeeper for the ICC's requests. In this affair, Italy, a nation normally committed to the ICC's mission, found itself unable to surrender a suspect due to a series of procedural irregularities and legal missteps. The outcome of the case was striking and highlighted how even a well-intentioned state can fail to cooperate not out of hostility to international justice, but because the request as executed clashed with domestic legal requirements and timelines. The analytical value of the Al-Masri case lies in how it crystallized the enforcement dilemma: it showed, step by step, what happens when international legal processes are not fully synchronized with national procedures. Through this lens, the thesis revealed that sovereign states are not mere conduits for ICC warrants; they scrutinize those requests through their own legal prism. The case demonstrated how national authorities will uphold their constitutional order insisting on proper documentation, judicial review and respect for domestic law before yielding to an international mandate. In doing so, Italy's response in the Al-Masri affair did not outright reject the authority of the ICC; rather, it exposed the limits of that authority when confronted with the reality of sovereignty. The case study thus provided a nuanced understanding: it underscored that the barriers to enforcement are often procedural and institutional, not just political. It gave life to the idea that international justice operates in a sovereign world where the ICC's reach extends only as far as states are willing or able to carry it.

These findings carry important implications for the broader field of international criminal law. At a fundamental level, the Al-Masri saga and similar episodes reveal that the project of global justice remains a work in progress and that "justice on the books" does not automatically translate to justice on the ground. The enforcement dilemma highlighted by this research is more than a technical snag; it strikes at the heart of whether a truly effective international criminal legal order can function when its implementation depends on independent states with diverse legal systems and interests. The clear implication is that international criminal law must continually reckon with state sovereignty, rather than assume it away. Far from being a transient inconvenience, sovereignty and domestic law are structural parameters within which the ICC must operate. This means that international legal idealism and domestic legal realism

should not be seen as opposing forces, but as interdependent conditions for effective justice. The pursuit of accountability for heinous crimes will only succeed if international procedures respect national due process and if states, in turn, uphold their commitment to global norms. In practice, this calls for a delicate balance: the ICC needs to anticipate and accommodate the procedural nuances of national systems, and states need to demonstrate that their assertions of sovereignty will not serve as blanket excuses to shirk obligations freely accepted. The implications extend to the ICC's legitimacy as well. When a situation like Al-Masri's arises, it tests the Court's relationship with its member states: the ICC is reminded that its moral and legal authority must be coupled with procedural rigor and humility in engaging domestic systems, while states are reminded that joining the ICC means embracing a shared responsibility for international justice that sometimes requires looking beyond short-term political or security calculations. For international criminal law as a discipline, the lesson is profound. It suggests that the future evolution of the field will depend not just on refining legal definitions or expanding jurisdiction, but on strengthening the connective tissue between international courts and national institutions. Put simply, the promise of international justice is only as strong as the domestic frameworks that support it. This insight urges scholars and practitioners to focus as much on enforcement mechanisms and state engagement as on the development of substantive law. Only by bridging the gap between lofty juridical ideals and the pragmatics of enforcement can international criminal law truly come of age.

It is important to acknowledge that the scope of research was primarily legal and analytical. Factors such as behind-the-scenes diplomacy, political bargaining, or the influence of public opinion, all of which can accompany high-profile international cases, were not the central focus, though they undoubtedly play a role in cooperation outcomes. This means that certain political nuances may not be fully captured here. Additionally, as a contemporary case, Al-Masri's long-term impact is still unfolding. We do not yet know how this incident may affect Italy's future posture toward ICC requests or whether it might spur reforms in procedure either in Italy or at the ICC. Finally, practical limitations such as the availability of information must be noted: much of the analysis relied on court decisions, official reports, and legal texts, but internal government deliberations or ICC strategy discussions related to this case remain confidential. This suggests that while the conclusions drawn are well-founded for the scenario examined, they are not exhaustive or definitive for every context.

In closing, the journey through the enforcement dilemma of the ICC, with the Al-Masri case as a guiding example, leads to a sober yet constructive reflection. The reach of international justice is ultimately forged in the crucible of sovereign states: it advances when national and international priorities align, and it falters when they diverge. This thesis has highlighted how and why that alignment sometimes breaks down, but it has also suggested that such rifts are not intractable. The legacy of the Al-Masri affair is not one of irredeemable failure so much as a revelation of the system's growing pains. It has shown that international criminal justice, to be truly effective, must not only issue bold indictments from The Hague, but also cultivate the conditions under which states will carry those indictments out. Bridging the gap between global ideals and local realities will require patience, creativity, and above all, genuine partnership between the ICC and its member states. The future of the ICC will depend on its ability to navigate this delicate balance, persuading states that delivering justice serves their long-term interests, and equipping them with the legal and logistical tools to do so. International criminal law stands at a pivotal moment where it must consolidate its gains by strengthening the very channels through which its authority flows. If there is one overarching message from this study, it is that "ending impunity" cannot be achieved by international courts in isolation; it demands a concerted effort that respects sovereignty while upholding accountability. Only by confronting these enforcement challenges head-on and reimagining cooperation not as a given but as a continuous, collaborative endeavor can the international community begin to transform the ICC's bold promise of justice into an attainable reality.

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