

# Cooperation Without Consequence: The Rome Statute's Mandatory Optatives and International Criminal Justice's Fragility

By Bhavya Johari - 20 January 2026

## INTERNATIONAL LAW AND HUMAN RIGHTS



*Bhavya Johari calls on States Parties to the Rome Statute to confront the institutional reality that voluntary cooperation cannot sustain international criminal justice when major powers coordinate to punish judicial independence, demanding urgent structural reform before the cooperation regime unravels entirely.*

Three converging developments in mid-December 2025 exposed what twenty-three years of the International Criminal Court's (ICC) operation had obscured: the Rome Statute's cooperation architecture rests on a false premise that normative commitment would sustain voluntary state cooperation when politically inconvenient. On 12 December, Russia's Prosecutor General [sentenced ICC Prosecutor Karim Khan to fifteen years' imprisonment](#), with eight judges receiving 3.5 to 15 years for issuing [arrest warrants for Putin](#). Three days later, the [ICC Appeals Chamber rejected Israel's challenge](#) to Article 18 of the [Rome Statute](#) by a three-to-two vote, upholding the Gaza investigation. Within seventy-two hours, US Secretary Rubio [sanctioned Judges Gocha Lordkipanidze and Erdenebalsuren Damdin](#) for their votes. When major powers criminalize judicial functions while States Parties host fugitives under valid warrants, the Rome Statute confronts an enforcement crisis that the treaty cannot remedy.

### Mandatory Optative: Article 87(7)'s Enforcement Vacuum

The Rome Statute's cooperation regime appears textually robust. Part 9 employs imperative language: Article 86 declares that States Parties *shall cooperate fully*, Article 89 requires *compliance with arrest and surrender requests*, and Article 87(7) authorizes the referral of non-compliance to the Assembly of States Parties or the Security Council. Yet, the operation reveals a fundamental weakness: the ICC lacks a [dedicated enforcement mechanism](#) and must rely entirely on states, possessing no police force, contempt powers, or coercive mechanisms.

The [24th Assembly session](#) held its first dedicated plenary on non-cooperation on December 01, 2025, addressing [Hungary's deliberate hosting](#) of Netanyahu despite valid warrants. Available responses remained diplomatic expressions lacking enforcement. Hungary [withdrew from the Rome Statute](#) under Article 127, demonstrating that States Parties can exit from inconvenient

obligations without consequence. Security Council referrals fare worse. Despite [multiple judicial findings of non-compliance](#) in Council-referred situations involving Malawi, Chad, DRC, Uganda, Djibouti, South Africa, Jordan, Sudan, and Libya, the Council produced minimal enforcement response. For Sudan, [only one presidential statement](#) was issued despite repeated ICC requests for action. For Libya, [the Council has failed to respond](#) to ICC judges' requests for support on cooperation.

This reflects structural impediments: Russia and China wield veto power protecting aligned states, while the United States obstructs the Palestine investigation. The *shall* provisions function as *mandatory optatives*: grammatically imperative but practically discretionary.

### Weaponized Sanctions as Judicial Intimidation

Article 87(7)'s enforcement vacuum confronts an additional dimension: major powers actively punish judicial independence. Following the Appeals Chamber's [rejection on 15 December](#) of Israel's jurisdictional challenge, US Secretary Rubio [sanctioned the two judges](#) who voted with the majority, citing their votes as grounds for economic punishment under [Executive Order 14203](#), which declares ICC investigations an *extraordinary threat to the United States (US) national security*. Multiple ICC judges and prosecutors [now face sanctions](#). The mechanism operates through financial infrastructure exclusion: French Judge Nicolas Guillou reported immediate loss of access to Amazon, Airbnb, PayPal, Visa, and MasterCard. Professor Kai Ambos characterizes this as [a form of civil death](#) because sanctioned individuals cannot participate in the global economy.

Russia employs parallel mechanisms through criminal law. It's [12 December convictions](#) charged Prosecutor Khan and eight judges with *preparing an attack on persons under international protection to provoke war*. These build upon [Russia's May 2023 legislation](#), which [criminalizes domestic cooperation with the ICC and imposes criminal liability on ICC officials](#). When both major military powers simultaneously punish judges for performing mandated functions, institutional space for independent adjudication contracts.

### State Party Defection and Cascade Effects

Major power sanctions, combined with the willingness of States Parties to defy obligations without consequence, create cascading effects. Hungary's April 2025 visit by Netanyahu illustrates this. Orbán [personally assured Netanyahu](#) of *safety and freedom* despite valid ICC warrants. When Netanyahu arrived, the ICC had transmitted a provisional arrest request, which Hungary was obligated to execute under Article 59. Hungary neither sought consultations under Article 97 nor acted on the request. The [13 June 2025 finding](#) held that *Hungary failed to consult*, thereby preventing the Court from exercising its functions. The Pre-Trial Chamber referred the matter to the Assembly under Article 87(7), which prompted expressions of concern from several member states. Hungary responded by [withdrawing from the Rome Statute](#) under Article 127.

This pattern of non-compliance extends beyond Hungary. Mongolia [hosted Putin in September 2024](#), despite outstanding warrants, and received findings of non-cooperation; however, no further enforcement followed. Italy [released Elmasry in January 2025](#) on procedural grounds, prompting a subsequent decision of non-compliance. The Al-Bashir case similarly documents [findings of non-cooperation](#) against Malawi, Chad, DRC, Uganda, Djibouti, South Africa, and Jordan from 2011 to 2019. The cooperation regime, thereby, suffers from the *absence of enforcement mechanisms* when states determine that non-cooperation serves their interests.

The viability threat operates through demonstration effects. States Parties observe that Hungary defied its obligations, received censure, withdrew, and faced no consequences, recalibrating the cost-benefit analysis for others facing inconvenient cooperation demands. When defection carries no penalty beyond diplomatic expressions, Article 86's mandate transforms from a binding obligation into a discretionary choice.

## Structural Dependence on Voluntary Compliance

These pressures expose the Rome Statute's flawed structural premise. Drafters assumed normative commitment to ending impunity would sustain cooperation despite political inconvenience. This functioned when ICC investigations targeted weak states without great power patronage, but collapses when major powers or their allies face accountability. The Rome Statute contains no enforcement mechanism calibrated for this scenario. Article 87(7) presumes the Assembly or Council will enforce cooperation.

When permanent Council members are investigation targets or defend close allies, veto power creates structural barriers. [Russia's veto](#) has blocked Ukraine accountability resolutions; [US opposition to the ICC's Palestine investigation](#) and [China's consistent support for Russia](#) make Council enforcement unattainable. Assembly oversight presumes member consensus will pressure compliance, but when States Parties defect, and withdrawal operates as an escape valve, mechanisms produce only expressions of concern. The ICC's [18th December statement](#), asserting *continued independence*, cannot overcome structural dependence on voluntary cooperation, which is now optional when accountability threatens powerful interests.

Domestic courts operate within vertical hierarchies that possess coercive capacities, including police forces, penal institutions, and the power to issue contempt orders. The ICC possesses none. It was designed as a [complementary institution](#), presuming states would either prosecute domestically or cooperate with investigations. Complementarity provides no mechanism when states refuse to cooperate on both.

## Conclusion: Treaty-Based Justice Without Enforcement

The institutional crisis forces a resolution of a question drafters had hoped to avoid: can treaty-based international criminal justice survive when cooperation obligations prove unenforceable against states that calculate non-compliance as strategically rational, while major powers coordinate in opposition? Historical precedent offers pessimism. The [League of Nations collapsed](#) after collective security failures as aggression in Manchuria and Abyssinia went unpunished. The ICC now confronts this vulnerability.

What distinguishes the current moment is coordinated punishment of compliance. US sanctions penalize judicial independence for specific votes. Russian prosecutions criminalize ICC exercise, sentencing judges to prison and equating warrant issuance with acts of war. When both major powers target judges for performing mandated functions, *participation carries costs the Rome Statute cannot offset*. In that environment, the 124 remaining States Parties face urgent choices. They can strengthen the ICC's [Contingency Fund](#), providing resources to withstand politically motivated funding squeezes, or pursue enforcement mechanisms requiring treaty amendment under Article 121.

Alternatively, they can watch the cooperation regime unravel as the ICC risks becoming a court that issues warrants powerful states ignore, while weak states comply or withdraw.

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