

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/11
Date: 21 February 2025

PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc, Presiding Judge
Judge María del Socorro Flores Liera
Judge Reine Alapini-Gansou

SITUATION IN LIBYA

PUBLIC

With Under Seal, *EX PARTE*, Annex I
Available only to the Prosecution and Registry

Public redacted version of the "Prosecution's request for a finding of non-compliance under article 87(7) against the Republic of Italy for the release of Osama Elmasry / Almasri NJEEM", 21 February 2024, ICC-01/11-163-US-Exp

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

☒ The Office of the Prosecutor

☐ Counsel for the Defence

☐ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☐ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

☐ States' Representatives

☐ Amicus Curiae

REGISTRY

Registrar

Osvaldo Zavala Giler

☐ Counsel Support Section

☐ Victims and Witnesses Unit

☐ Detention Section

☐ Victims Participation and
Reparations Section

☐ Other

A. INTRODUCTION

1. On 17 February 2025 Pre-Trial Chamber I (“Chamber”) found that the arrest, release and transfer of Mr Osama Elmasry / Almasri NJEEM (“NJEEM”) to Libya by the Republic of Italy (“Italy”) “warrants a determination [...] of whether it is appropriate to make a formal finding of non-compliance” pursuant to article 87(7) of the Rome Statute.¹

2. Italy failed to comply with the Court’s requests for cooperation:² it failed to implement the Chamber’s request for provisional arrest and surrender under article 92 for NJEEM,³ as well as the request for search and seizure of materials found on or with NJEEM.⁴ Italy’s failure to cooperate prevented the Court from exercising its functions and powers under the Statute.

3. The Prosecution respectfully requests the Chamber to consider these submissions and make a formal finding of non-compliance against Italy and to refer the matter to the Assembly of States Parties (“ASP”) and/or the United Nations Security Council (“UNSC”) pursuant to article 87(7) of the Rome Statute.

B. CLASSIFICATION

4. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, this filing is filed under seal, *ex parte*, only available to the Registry and the Prosecution since it refers to documents and decisions marked with the same classification.

C. BACKGROUND

5. On 2 October 2024, the Prosecution applied under seal for a warrant of arrest for NJEEM.⁵ On 9 October 2024, the Prosecution further submitted a request for the search and seizure of NJEEM and for the identification, tracing and freezing or seizure of his property and assets.⁶

¹ ICC-01/11-162, para. 10.

² ICC-01/11-162, para. 7, fn. 5; [REDACTED].

³ ICC-01/11-162, para. 3, fn. 3; [REDACTED].

⁴ ICC-01/11-162, para. 4, fn. 4; [REDACTED].

⁵ ICC-01/11-162, para. 2, fn. 2; [REDACTED].

⁶ [REDACTED]..

6. On 18 January 2025, the Chamber issued a warrant of arrest for NJEEM (“ICC Arrest Warrant”),⁷ as well as an order regarding his search and seizure of any evidence or device that may contain evidence and its transmission to the Court (“Search and Seizure Order”).⁸

7. On 18 January 2025, the Registry transmitted via e-mail to Italy the Request for Provisional Arrest under article 92 along with copies of the ICC Arrest Warrant and the Search and Seizure Order (“Requests”). The Registry also transmitted information describing and identifying the person sought and relevant provisions of the Rome Statute in Arabic for transmission to the person upon arrest as well as a readout of Regulation 77 of the Regulations of the Registry. The transmission was executed through the designated channels as indicated by Italy on the basis of prior consultation and coordination, namely through the Embassy [REDACTED] (“Embassy”).⁹

8. Soon after, as requested by the Italian authorities, the Registry forwarded the transmission e-mail to [REDACTED].¹⁰

9. In the morning of 19 January 2025, alerted by the Department of Public Security, Central Directorate of Criminal Police of the Ministry of Interior,¹¹ and acting pursuant to the ICC Arrest Warrant, the Italian police arrested NJEEM in Turin.¹² [REDACTED].¹³

10. [REDACTED].¹⁴ [REDACTED].

11. Also in the morning of 19 January 2025, [REDACTED].¹⁵

⁷ ICC-01/11-162, para. 3, fn. 3; [REDACTED].

⁸ ICC-01/11-162, para. 4, fn. 4; [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED]; [Camera dei Deputati, Resoconto Stenografico, Seduta di Mercoledì 5 febbraio 2025, https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf, p. 14.](https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf)

¹² ICC-01/11-162, para. 6; [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

12. In the afternoon of 19 January [REDACTED].¹⁶ [REDACTED].¹⁷

13. In the evening of 19 January 2025, [REDACTED].¹⁸

14. In the morning of 20 January 2025, and since the news of the arrest was reported in Arabic social media, [REDACTED].¹⁹

15. In the afternoon of 20 January 2025, [REDACTED].²⁰

16. [REDACTED], the Registry asked whether, other than the provision of a revised Italian translation, there were any other obstacles or impediments that the Embassy foresaw and of which the Court should be aware. None were identified. [REDACTED].²¹

17. In the afternoon of 20 January 2025, [REDACTED].²²

18. In the evening of 20 January 2025, [REDACTED].²³

19. On 21 January 2025, [REDACTED].²⁴

20. In the afternoon of 21 January 2025, [REDACTED].²⁵

21. In the same afternoon, the Ministry of Justice issued a press release stating: “We received the ICC’s request to arrest Najeem Osema Almasri Habish. In light of the complexity of the dossier, the Minister is considering the formal transmission of the ICC’s request to the General Prosecutor Office in Rome under article 4 of the Law 237/2012.”²⁶ At that time the Falcon 900 airplane of the Italian Government that would

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ <https://www.gnewsonline.it/corte-penale-internazionale-nordio-valuta-invio-atti-al-procuratore-generale-di-roma-sul-caso-habish> (last reviewed on 13 February 2025).

fly NJEEM to Tripoli had already left Rome and had landed in Turin, where NJEEM was detained.²⁷

22. Also on 21 January 2025 (time unclear), the Court of Appeal of Rome ordered the release of NJEEM upon a request filed by his Defence Lawyer Asa Peronace. The Court of Appeal (with the agreement of the General Prosecutor) found: first, that it could not validate the arrest executed on 19 January 2025 because it was carried out without the “mediation” of the Minister of Justice; second, that it could not order NJEEM’s detention anew (*applicazione di misura cautelare*) under article 11 of the Law n. 237/2012, because the Minister of Justice had failed to transmit to the General Prosecutor the Requests, as invited by the General Prosecutor on 20 January 2025.²⁸

23. In the evening of 21 January 2025, the Italian authorities released NJEEM and returned him to Tripoli, Libya, on a State-owned flight.²⁹ The Minister of Interior expelled NJEEM from Italy under article 13(1) of the Immigration Law (D. Lgs. 286/1998).³⁰ He subsequently explained that he had concluded that NJEEM was too dangerous to remain on Italian territory based on the ICC Arrest Warrant. His urgent transfer was ordered to prevent “risks that his stay in Italy would have entailed, especially with regard to assessments concerning the safety of Italian citizens and the interests of our country abroad, in scenarios of significant strategic value, but, at the same time, of enormous complexity and delicacy”.³¹ Under article 13(1) of the Immigration Law, the decision of the Minister of Interior must have been communicated in advance to the Prime Minister (*Presidente del Consiglio*) and the Minister for Foreign Affairs.

²⁷ <https://x.com/scandura/status/1881836176010821747> (last reviewed on 13 February 2025).

²⁸ See Corte d’Appello di Roma, Sezione IV Penale, Ordinanza in materia di consegna ex lege 237/2012 corte penale internazionale, Prc n. 11/2025, on 21 January 2025.

²⁹ ICC-01/11-162, para. 7; [REDACTED].

³⁰ Art. 4 D. Lgs. 286/1998 reads as follow “*For reasons of public order or state security, the Minister of the Interior may order the expulsion of a foreigner, even if not resident in the territory of the State, by giving prior notice to the President of the Council of Ministers and the Minister of Foreign Affairs*” (informal translation).

³¹ See Camera dei Deputati, Resoconto Stenografico, Seduta di Mercoledì 5 febbraio 2025, <https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf>, pp. 10-11 (“*In buona sostanza, si è reso necessario agire rapidamente proprio per i profili di pericolosità -à riconducibili al soggetto e per i rischi che la sua permanenza in Italia avrebbe comportato, soprattutto con riguardo a valutazioni concernenti la sicurezza dei cittadini i enorme complessità e delicatezza.*”).

24. After learning of NJEEM's release from an article published in the Italian news, [REDACTED].³²

25. On 24 January 2025, the Chamber issued a corrected version of the Warrant of Arrest and re-classified it as public.³³

26. On 28 January and on 19 February 2025 the Italian Ministry of Justice sent two *note verbale* to the Registry.³⁴

27. On 17 February 2025 the Chamber found that Italy's arrest and subsequent release of NJEEM, as well his transfer to Libya, "warrants a determination [...] of whether it is appropriate to make a formal finding of non-compliance"³⁵ pursuant to article 87(7) of the Rome Statute and invited Italy to provide submissions regarding its failure under regulation 109 of the Regulations of the Court.³⁶

D. SUBMISSIONS

28. In the exercise of its discretion under article 87(7), the Chamber should determine "(i) whether to make a finding of a failure to comply with a request for cooperation by a State, which prevents the Court from exercising its functions and powers under the Statute; and (ii) [...] whether it is appropriate to refer the matter to the ASP [Assembly of State Parties] or the UNSC [United Nations Security Council] in order to seek external assistance to obtain cooperation with the request at issue or to otherwise address the lack of cooperation by the requested State."³⁷ The Chamber can also choose to refer the State to both the ASP and the UNSC.³⁸

29. The Prosecution submits that Italy failed to comply with a request for cooperation. Such failure prevented the Court from exercising its functions and powers under the Statute. The Prosecution further submits that it is appropriate to refer the matter to the

³² [REDACTED].

³³ ICC-01/11-152; ICC-01/11-152-Anx; ICC-01/11-153.

³⁴ ICC-01/11-162, paras. 8-9; [REDACTED].

³⁵ ICC-01/11-162, para. 10.

³⁶ ICC-01/11-162, para. 11.

³⁷ *Prosecutor v. Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11-1032 OA 5, 19 August 2015, para. 55.

³⁸ ICC-02/05-01/09-309, paras. 25, 51, 55 and disposition on pp. 21-22.

ASP and/or the UNSC to address the non-compliance of Italy and to enhance the effectiveness of future cooperation.

a. Italy failed to comply with a request for cooperation preventing the Court from exercising its functions and powers

30. The factual prerequisite under the first clause of article 87(7) consists of two cumulative conditions, namely, (i) that the State concerned failed to comply with a request to cooperate; and (ii) that this non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute.³⁹ Both conditions are met in this case.

31. *First*, Italy was properly notified of the Request for Provisional Arrest under article 92, the ICC Arrest Warrant and the Search and Seizure Order on the evening of Saturday 18 January 2025, before the arrest of NJEEM. The transmission was executed through the designated channels as indicated by Italy on the basis of prior consultations, namely the Embassy [REDACTED].⁴⁰

32. Italy submits that [REDACTED] the Minister of Justice received the Requests [REDACTED] only on Monday 20 January [REDACTED], after the arrest of NJEEM and in violation of article 2 and 4 of the Law n. 237/2012.⁴¹ Even accepting Italy's interpretation of the Law n. 237/2012, an interpretation that has been disputed by most academic commentators,⁴² whether the Embassy [REDACTED] transmitted the

³⁹ *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, 6 May 2019, para. 184.

⁴⁰ See above.

⁴¹ [REDACTED]. Camera dei Deputati, Resoconto Stenografico, Seduta di Mercoledì 5 febbraio 2025, <https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf>, p. 6.

⁴² C. Meloni, M. Caianiello, *Caso Almasri : una discutibile interpretazione della legge di cooperazione dell'Italia con la CPI ha portato alla scarcerazione del primo ricercato arrestato sul suolo europeo nell'ambito della indagini in Libia* (Almasri case: a questionable interpretation of Italy's law on cooperation with the ICC has led to the release of the first suspect arrested on European soil in the context of investigations on Libya), in *Sistema penale*, 24 January 2025, <https://www.sistemapenale.it/it/opinioni/caianiello-meloni-una-discutibile-interpretazione-della-legge-di-cooperazione-dellitalia-con-la-cpi-commento-allordinanza-di-scarcerazione-nel-caso-almasri-davanti-alla-corte-dappello-di-roma>; G. Vanacore, *La scarcerazione del générale libico Elmasry, Nota critica sulla interpretazione resa dalla Corte di Appello di Roma sull'art. 11 della legge di cooperazione tra l'Italia e la CPI* (The release of Libyan General Elmasry. Critical note on the interpretation given by the Court of Appeal of Rome of art. 11 of the law on cooperation between Italy and the ICC), in *Sistema penale*, 27 January 2025, <https://www.sistemapenale.it/it/opinioni/caianiello-meloni-una-discutibile-interpretazione-della-legge-di-cooperazione-dellitalia-con-la-cpi-commento-allordinanza-di-scarcerazione-nel-caso-almasri-davanti-alla-corte-dappello-di-roma>; E. Greppi, A. Gavattini and others, Italian Society of International and European Law, *On*

Requests to the [REDACTED] Minister of Justice only on Monday 20 January [REDACTED] after the arrest of NJEEM, is immaterial under article 87(7): “the fact that the relevant authorities have not taken the necessary internal coordination steps is not in itself a valid justification for not taking the required action”.⁴³

33. The delayed transmission of the Requests to the Ministry of Justice and the unsuccessful internal coordination among relevant authorities amounts to a failure to comply with the request for cooperation under article 87(7).

34. *Second*, even if the Appeals Chamber in Rome was correct not to validate NJEEM’s arrest on 19 January 2025— again, a conclusion based on an interpretation of the Law n. 237/2012 which is disputed by most academic commentators—⁴⁴ the Ministry of Justice should have addressed the General Prosecutor’s request and transmitted the Requests on 20 January 2025. As of 12:40 pm on 20 January 2025, the Minister was in possession and in the process of reviewing the Requests.⁴⁵ The transmission (required under articles 4 and 11 of the Law n.237/2012) would have allowed the Court of Appeal

the release and repatriation of Osama Elmasry, 26 January 2025, https://www.sidi-isil.org/wp-content/uploads/2025/01/ISIL-Board-on-the-release-and-repatriation-of-Osama-Elmasry_.pdf; V. Bolici, A. di Martino, *La pagliuzza e la trave* (The Mote and the Beam), in *Questione Giustizia*, 25 January 2025, <https://www.questionegiustizia.it/articolo/la-pagliuzza-e-la-trave-il-caso-almasri>; C. Meloni, *Italy, Libya, and the failure of State Cooperation with the ICC in the Elmasry arrest Case*, in *Just Security*, 30 January 2025, <https://www.justsecurity.org/107175/italy-libya-icc-cooperation-elmasry-arrest/>; M. Crippa, M. Colorio, *As Rome mutinies, justice for Libya fades*, in *Opinio Juris*, 31 January 2025, <https://opiniojuris.org/2025/01/31/as-rome-mutinies-justice-for-libya-fades/>; G. Della Morte, *Almasri e CPI: ora l'Italia rischia di essere deferita all'ONU* (Almasri and the ICC: now Italy risks being referred to the UN), in *Il Sussidiario*, 7 February 2025, <https://www.ilsussidiario.net/news/almasri-e-corte-penale-internazionale-il-giurista-ora-litalia-rischia-di-essere-deferita-allonu/2799229/>; A. Nappi, *Fare chiarezza sul caso Almasri*, (Clarifying the Almasri case), *Questione Giustizia*, 3 February 2025, <https://www.questionegiustizia.it/articolo/fare-chiarezza-sul-caso-almasri>; M. Chiavario, *Amarezza e sconcerto per Almasri libero*, 23 January 2025, <https://www.avvenire.it/opinioni/pagine/amarezza-e-sconcerto-per-almasri-libero>; A. di Martino, *La decisione ministeriale di non consegnare un sospetto criminale internazionale come legittimo atto politico discrezionale?* (The ministerial decision not to hand over an international criminal suspect as a legitimate discretionary political act?), in *Questione Giustizia*, 5 February 2025, <https://www.questionegiustizia.it/articolo/la-decisione-ministeriale-di-non-consegnare-un-sospetto-criminale-internazionale-come-legittimo-atto-politico-discrezionale-una-postilla-in-replica>; L. Parisi, *La Corte d'Appello di Roma ordina la scarcerazione di Al Masri: alcune riflessioni sull'esecuzione da parte delle autorità italiane dei mandati d'arresto emessi dalla CPI* (The Court of appeal of Rome orders Al Masri’s release from prison: reflections on Italian Authorities’ execution of ICC arrest warrants, *Giustizia Insieme*, 25 January 2025, <https://www.giustiziainsieme.it/it/processo-penale/3373-un-volo-di-stato-chiude-il-caso-al-masri-lavinia-parsi>. [REDACTED].

⁴³ *Prosecutor v. Abdel Raheem Muhammad Hussein*, Decision on the cooperation of the Central African Republic regarding Abdel Raheem Muhammad Hussein’s arrest and surrender to the Court, ICC-02/05-01/12-21, 13 November 2013, para. 12.

⁴⁴ See above fn.42.

⁴⁵ [REDACTED]. Camera dei Deputati, Resoconto Stenografico, Seduta di Mercoledì 5 febbraio 2025, <https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf>, p. 6.

in Rome to order anew the detention (*misura cautelare*) of NJEEM under art. 11 of the Law n. 237/2012 and to ultimately fulfil Italy's duty to cooperate with the Court.

35. The Ministry of Justice's decision not to transmit the Requests to the General Prosecutor on 20 January 2025 as required under the Statute as well as articles 4 and 11 of the Law n. 237/2012 amounts to a failure to comply with a request for cooperation under article 87(7).

36. *Third*, [REDACTED].⁴⁶ Italy identified two purportedly critical issues: the alleged uncertainty regarding the time of the commission of the crimes and, the "perplexities" raised in her dissenting opinion by Judge María del Socorro Flores Liera.⁴⁷

37. Even assuming these critical issues existed, which they do not, Italy failed to consult with the Court in order to resolve them. Under article 97 of the Statute "[w]here a State Party receives a request [...] in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter." Italy not only failed to promptly contact the Court to resolve the alleged problems, but failed to mention the existence of any issue when specifically asked by the Court.

38. As a way of example:

- on 20 January 2025 afternoon [REDACTED];⁴⁸
- On the same afternoon [REDACTED];⁴⁹
- On 21 January 2025 [REDACTED];⁵⁰
- On the same afternoon [REDACTED].⁵¹

⁴⁶ [REDACTED].

⁴⁷ [REDACTED]. Camera dei Deputati, Resoconto Stenografico, Seduta di Mercoledì 5 febbraio 2025, <https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf>, p. 6.

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

39. Had Italy consulted the Court as required by law, the supposed identified issues would have been clarified and solved on 20 January 2025. The Ministry of Justice would have had the time to transmit the Requests to the General Prosecutor and the Court of Appeal could have ordered anew the detention of NJEEM under article 11 of the Law n. 237/2012.

40. Italy's failure to engage constructively with and promptly consult the Court as soon as it identified the supposed critical issues as requested under article 97 of the Rome Statute, amounts to a failure to comply with a request for cooperation under article 87(7).

41. *Fourth*, Italy's decision to expel NJEEM under article 13(1) of the Immigration Law (D. Lgs. 286/1998) because, in light of the ICC Arrest Warrant, he was too dangerous to remain on the Italian territory, was never communicated to the Court, although the decision was taken already on the morning of 21 January, hours before NJEEM was released that evening. As the Minister of Interior explained "[t]he preparation of the plane already on the morning of January 21st is part of those preventive initiatives, and therefore open to any scenario".⁵² Had Italy been open to *any scenario* it should have consulted with the Court under article 97 and made reasonable efforts to resolve the problem by identifying a third country of destination.⁵³

42. Italy's transfer of NJEEM to Libya without any consultation with the Court as requested under article 97 of the Statute amounts to a failure to comply with a request for cooperation under article 87(7).

43. Italy's non-compliance is grave enough to prevent the Court from exercising its functions and powers. While the Prosecution will continue in its endeavour of bringing NJEEM to justice, it is apparent that Italy's non-compliance with the ICC Arrest

⁵² Italian Ministry of Interior explained: "The preparation of the plane already on the morning of January 21st is part of those preventive initiatives, and therefore open to any scenario" ("*La predisposizione dell'aereo già la mattina del 21 gennaio rientra tra quelle iniziative a carattere preventive, e quindi aperte ad ogni scenario*"), see Camera dei Deputati, Resoconto Stenografico, Seduta di Mercoledì 5 febbraio 2025, <https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf>, p. 11.

⁵³ Article 13(1) of the Italian Immigration Law (D. Lgs. 286/1998) refers to *expulsion* from the Italian territory, and not *repatriation* in the country of origin.

Warrant, including the transfer of NJEEM to his own country where he can enjoy extensive networks of protections, has prevented and will prevent the Court from exercising its functions and powers. Further, Italy's failure to execute the Search and Seizure Order impaired the Court's ability to investigate the Libya situation more broadly, including the network of NJEEM's potential accomplices and financial resources and from obtaining additional information of relevance to NJEEM's prosecution by the ICC. Finally, Italy's non-compliance exposed victims and witnesses, as well as their families, to the potential serious risk of harm.

44. Based on these facts, the Prosecution respectfully requests the Chamber to make a finding of non-compliance pursuant to article 87(7) against the Republic of Italy because it has failed to implement the Court's Arrest Warrant for NJEEM, thereby preventing the Court from exercising its functions and powers under the Statute.

45. The Prosecution remains available to the Chamber to provide additional information and to address other matters including:

- Why under Italian Law n. 237/2012 the Minister of Justice's "mediation" for provisional arrest under article 92 is not required;⁵⁴
- Why under Italian Law n. 237/2012 the Minister of Justice has no discretion as to whether to transmit the Court's request to the General Prosecutor;⁵⁵
- Why the minor corrections to the Arrest Warrant decided by the Chamber on 24 January 2025⁵⁶ do not "change half the structure" of the Arrest Warrant, nor do they render the Arrest Warrant, as issued on 18 January 2025, null and void.⁵⁷

b. Italy's failure to comply should be referred to the Assembly of States

⁵⁴ See contra [REDACTED].

⁵⁵ See contra [REDACTED].

⁵⁶ ICC-01/11-152.

⁵⁷ See contra Camera dei Deputati, Resoconto Stenografico, Seduta di Mercoledì 05/02/2025, <https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf>, pp. 3, 7; [REDACTED].

Parties and/or the United Nations Security Council.

46. The Prosecution submits that Italy's failure to comply with its duty to cooperate with the Court should be referred to the ASP and/or the UNSC under article 87(7). Italy's non-compliance was particularly grave and could be best addressed by the ASP and/or the UNSC.

47. First, the non-compliance appears to have involved multiple branches of the executive power (including the Ministry of Justice, the Ministry of Foreign Affairs and the Ministry of Interior) at different hierarchical levels (both at operational and leadership levels). Second, Italy failed to provide key information—or provided erroneous information—to the Court along the process in what appeared to be a concerted effort to ensure NJEEM's quick release and transfer to Libya. Finally, after the release of NJEEM, the Italian Government failed to acknowledge any responsibility and rather blamed the Court for not properly ensuring NJEEM to justice.

48. Whether to refer a non-compliance to the ASP and/or the UNSC is a matter of the Chamber's discretion. It is a response that *may* be sought when the Chamber concludes that it is the most effective way of obtaining future cooperation in the concrete circumstances at hand.⁵⁸ In this case, given the gravity of the multiple failure to comply and the apparent political nature of Italy's decision to release and transfer NJEEM to Libya, it is the Prosecution's position that referring the matter to the ASP and/or the UNSC is the most effective course of action to promote the functions of the Court and protect the integrity of the proceedings and the wider interests of justice. It would show victims and witnesses that the Court takes these matters seriously, as these individuals provided important information to the Court despite potential risk to their security and that of their families. Entrusting the matter to the ASP and/or the UNSC is the most appropriate path to address the breach and encourage Italy's compliance with its international obligations towards the Court in the future.

⁵⁸ *Prosecutor v. Kenyatta*, Judgment on the Prosecutor's Appeal on Non-compliance under Article 87(7), ICC-01/09-02/11-1032 OA5, 19 August 2015, para. 51.

E. RELIEF SOUGHT

49. For the above reasons, the Prosecution requests the Chamber to make a finding of non-compliance by Italy pursuant to article 87(7) and notify its decision to the President of the Court for transmission to the ASP and/or the UNSC.



Karim A. A. Khan KC, Prosecutor

Dated this 21st day of February 2025

At The Hague, The Netherlands