

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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**No. ICC-01/11
Date: 17 October 2025**

PRE-TRIAL CHAMBER I

Before:

**Judge Iulia Antoanella Motoc, Presiding
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera**

SITUATION IN LIBYA

Public

Decision on Italy's non-compliance with a request for cooperation

Decision 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**

Italian Republic

☐ **Amicus Curiae**

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

☐ **Counsel Support Section**

☐ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations
Section**

☐ **Other**

PRE-TRIAL CHAMBER I (the ‘Chamber’) of the International Criminal Court (the ‘Court’), issues the present decision entering a finding of non-compliance by the Italian Republic (‘Italy’) under article 87(7) of the Rome Statute (the ‘Statute’) in relation to Italy’s failure to surrender an arrested suspect to the Court.

I. Procedural history

1. On 2 October 2024, as part of the situation in the Libyan Arab Jamahiriya since 15 February 2011 (the ‘*Libya Situation*’), the Prosecution applied, under seal, and on a non-urgent basis for a warrant of arrest for Osama Elmasry / Almasri Njeem (‘Mr Njeem’).¹

2. On 17 January 2025, the Prosecution became aware that Mr Njeem was present within the Schengen zone, in a country other than Italy, and informed the Chamber. That same day, the Chamber expedited its ongoing assessment of the application pursuant to article 58 of the Statute and on 18 January 2025, it issued, by majority, a warrant of arrest for Mr Njeem (the ‘Arrest Warrant’).²

3. On 18 January 2025, the Chamber issued an order pursuant to article 57(3)(a) of the Statute instructing the Registrar to send requests for cooperation in accordance with articles 93(1)(h) and 99(1) of the Statute to any State where Mr Njeem was present or has recently been located, *inter alia*, to seize any evidence or devices carried by the suspect that may contain evidence and to transmit such evidence to the Court.³

4. Also on 18 January 2025, as it was unknown where Mr Njeem was located when the Arrest Warrant was issued, the Registrar sent urgent requests for provisional arrest of Mr Njeem, pursuant to article 92 of the Statute, to six European States, where it was believed the suspect could be present. One of these six States was Italy. The request for cooperation (i.e. the request to provisionally arrest Mr Njeem) was sent to the formal channel of communication for such requests designated by Italy, i.e. the Italian embassy in The Hague.⁴

¹ Prosecution’s application under article 58 for a warrant of arrest against Osama Elmasry / Almasri NJEEM (“Osama NJEEM”), ICC-01/11-140-US-Exp.

² Warrant of arrest for Mr Osama Elmasry / Almasri Njeem, ICC-01/11-149-US-Exp. Unsealed on 24 January 2025 by way of ICC-01/11-152-Anx, containing the corrected version of the ‘Warrant of arrest for Mr Osama Elmasry / Almasri Njeem’ (pp 2-35) and ‘Dissenting Opinion of Judge Socorro Flores Liera’ (pp 36-42).

³ Order to the Registrar regarding the search and seizure in relation to Osama Elmasry / Almasri Njeem, ICC-01/11-150-US-Exp.

⁴ Report of the Registry on the Status of the Execution of Requests for Provisional Arrest of Mr Osama Elmasry / Almasri Njeem, 24 January 2025, ICC-01/11-151-US-Exp (‘Registry Report’).

5. On 19 January 2025, Mr Njeem was arrested in Turin by the Italian authorities.
6. In the following days, the ICC Registry made several requests to the Italian Ministry of Justice, and made multiple inquiries regarding a hearing on Mr Njeem's arrest that would take place at the Court of Appeal in Rome, according to media reports. The Italian Ministry of Justice did not confirm to the Court when the hearing would take place.⁵
7. Between 19 and 21 January 2025, the ICC Registry raised the option to enter into consultations pursuant to article 97 of the Statute multiple times as part of its communications with Italy, including with the Italian Ministry of Justice.⁶
8. On 21 January 2025, Mr Njeem was returned to Libya by Italy.⁷
9. On 24 January 2025, the Registry submitted a report to the Chamber on the status of the execution of the requests for provisional arrest of Mr Njeem (the 'Registry Report').⁸
10. On 27 January 2025, in response to the Registry's *note verbale* sent on 24 January 2025, the Italian Ministry of Justice communicated to the Registry, *inter alia*, Mr Njeem's release and return to Libya and specified that these matters do not fall within its competence. It noted that a release order is notified to the director of the detention centre where a suspect is detained, and that Mr Njeem's return falls under the exclusive competence of the Minister of the Interior.⁹
11. On 12 February 2025, another *note verbale* by the Italian Ministry of Justice on the arrest of Mr Njeem was transmitted to the Chamber by the Registry.¹⁰
12. On 17 February 2025, the Chamber, recalling regulation 109 of the Regulations of the Court ('the Regulations') which mandates that 'the Chamber shall hear from the requested State' prior to any finding on non-compliance being made, invited Italy to provide submissions on its failure to surrender Mr Njeem to the Court following his arrest.¹¹

⁵ Registry Report, paras 24-36. When directly asking the Italian authorities about whether a hearing would be held on 21 January 2025, the Italian authorities either stated that no information could be provided or made it appear as if no such hearing would yet take place.

⁶ Registry Report, paras 24-36.

⁷ Registry Report, para. 38.

⁸ Registry Report.

⁹ Namely, on 27 January 2025. See the Addendum to the "Report of the Registry on the Status of the Execution of Requests for Provisional Arrest of Mr Osama Elmasry / Almasri Njeem", 28 January 2025, ICC-01/11-154-US-Exp ('Addendum to the Registry Report').

¹⁰ Annex II to Second Addendum to the "Report of the Registry on the Status of the Execution of Requests for Provisional Arrest of Mr Osama Elmasry / Almasri Njeem", ICC-01/11-157-US-Exp-AnxII.

¹¹ Invitation to the Italian Republic to provide submissions concerning its failure to surrender Osama Elmasry / Almasri Njeem to the Court following his arrest, ICC-01/11-162.

13. On 25 February 2025, the Prosecution requested the Chamber to make a finding of non-compliance by Italy pursuant to article 87(7) of the Statute.¹²

14. On 6 May 2025, following two requests for an extension of time limit which were granted by the Chamber,¹³ Italy provided the Registry with its submissions in hard copy and on 7 May 2025, the Registry transmitted Italy's submissions ('Italy's Submissions').¹⁴

15. On 12 May 2025, the Prosecution requested leave to submit observations on Italy's submissions (the 'Prosecution's Request').¹⁵

16. On 12 June 2025, the Chamber granted the Prosecution's Request.¹⁶

17. On 25 June 2025, the Prosecution submitted its observations (the 'Prosecution's Observations'),¹⁷ requesting the Chamber 'to make a formal finding of non-compliance against Italy and to refer the matter to the Assembly of State Parties (the 'ASP') and/or the United Nations Security Council (the 'UN Security Council') pursuant to article 87(7) of the Rome Statute'.¹⁸

18. On 9 July 2025, Italy requested leave to the Chamber to make submissions on the Prosecution's Observations (the 'Italy's Request').¹⁹

19. On 10 July 2025, the Prosecution filed a response to Italy's Request submitting that 'its Observations do not raise any new issue which could not reasonably have been anticipated, as required under regulation 24(5) of the Regulation[s] of the Court'.²⁰ However, the Prosecution did not object to Italy's Request.

¹² 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", 25 February 2024, ICC-01/11-163- US-Exp, ICC-01/11-163-Red2.

¹³ Decision on the extension of time limit to present submissions, ICC-01/11-171; and Second decision on the extension of time limit to present submissions, ICC-01/11-176.

¹⁴ Third Registry Transmission of "Invitation to the Italian Republic to provide submissions concerning its failure to surrender Osama Elmasry / Almasri Njeem to the Court following his arrest. Submissions by the Italian Republic pursuant to regulation 109 of the Regulations of the Court", ICC-01/11-177.

¹⁵ Prosecution's Request for Leave to Submit Observations on the "Submissions by the Italian Republic pursuant to regulation 109 of the Regulations of the Court", ICC-01/11-177-Conf-Exp-AnxII, ICC-01/11-178.

¹⁶ Decision on the Prosecution's request to submit observations, ICC-01/11-181.

¹⁷ Prosecution's Observations on the Italian Republic's Submissions under Regulation 109, ICC-01/11-184. It was filed as confidential and reclassified as public on 5 August 2025.

¹⁸ Prosecution's Observations, para. 43.

¹⁹ Annex I to the Transmission of "Italy's Request for Leave to Submit Observations on the 'Prosecution's Observations on the Italian Republic's Submission under regulation 109' ICC-01/11-184-Conf", ICC-01/11-187-AnxI.

²⁰ Prosecution's Response to "Italy's Request for Leave to Submit Observations on the 'Prosecution's Observations on the Italian Republic's Submission under regulation 109' ICC-01/11-184-Conf" ICC-01/11-187-AnxI; ICC-01/11-190, para. 3.

20. On 18 July 2025, the Chamber granted Italy's Request in part and authorised Italy 'to reply solely to the arguments presented in paragraphs 11 to 15 of the Prosecution's Observations'.²¹

21. On 28 July 2025, Italy submitted its reply to the Prosecution's Observations (the 'Reply').²²

II. Analysis

A. Preliminary matter

22. By replying to the entirety of the Prosecution's Observations, Italy's Reply²³ significantly exceeded the scope authorised by the Chamber in its decision of 18 July 2025.²⁴ As the Chamber granted Italy leave to reply to a specific and limited part of the Prosecution's Observations, it will only take into consideration those arguments that are related to the relevant part, namely 'paragraphs 11 to 15 of the Prosecution's Observations'.

B. Applicable law

23. The Chamber notes article 87(7) of the Statute which establishes that '[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the [UN] Security Council referred the matter to the Court, to the [UN] Security Council'.

24. The aforementioned provision has been interpreted by the Appeals Chamber as follows:

'[t]he first clause of article 87(7) of the Statute 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. It is only when the Chamber has established that both conditions are met that it may proceed to consider whether to refer the State to the Assembly of States Parties [...] following a finding of non-compliance'.²⁵

²¹ Decision on Italy's request for leave to provide observations, ICC-01/11-193, para. 11.

²² Italy's additional Observations the "Prosecution's Observations on the Italian Republic's Submissions under Regulation 109" ICC-01/11-187, ICC-01/11-197-Anx.

²³ Italy's additional Observations the "Prosecution's Observations on the Italian Republic's Submissions under Regulation 109" ICC-01/11-187, ICC-01/11-197-Anx.

²⁴ Decision on Italy's request for leave to provide observations, ICC-01/11-193, para. 11, limiting the leave granted to reply to paragraphs 11 to 15 of the Prosecution's Observations.

²⁵ Appeals Chamber, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, para. 8.

25. In light of the above, the Chamber will proceed to analyse (i) whether Italy failed to comply with the request to cooperate in the arrest and surrender of Mr Njeem contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute; and, if so, (ii) whether a referral of the matter to the ASP or the UN Security Council is warranted.

26. Furthermore, the Chamber also notes regulation 109(4) of the Regulations which establishes that '[w]here a finding under article 87, paragraph 7, has been made, the President shall refer the matter to the [ASP] or the [UN] Security Council in accordance with that provision and, as regards the [UN] Security Council, in accordance with the agreement to be concluded under article 2'.

C. Determination

1) Whether Italy failed to comply with the Request for Cooperation contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute

27. Pursuant to article 86 of the Statute, a State Party 'shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Article 87(1)(a) of the Statute provides that '[t]he Court shall have the authority to make requests to States Parties for cooperation', including requests for the arrest and surrender of a person pursuant to article 89 of the Statute, as was done in the present case.

28. The answer to the second part of the question, namely whether Italy's non-compliance has affected the exercise of the Court's functions and powers under the Statute, which is a prerequisite to determining whether to make a finding under article 87(7) of the Statute, is straightforward. Italy arrested, as it was requested to, a suspect for whom an application for a warrant of arrest was made by the Prosecution and a warrant of arrest was issued by the Chamber. However, rather than surrendering the suspect, who is alleged to have committed several crimes against humanity and war crimes, to the Court, Italy released him and flew him back to Libya. It did so without informing the Court about either the outcome of the proceedings before the Court of Appeal of Rome or the return of the suspect to Libya. By

failing to surrender Mr Njeem, Italy prevented the Court from exercising an important power and fundamental function, namely securing the presence of the suspect before the Court.²⁶

a. Failure to consult with the Court

29. When requested to arrest and surrender Mr Njeem, Italy, as regulated by article 59(1) of the Statute, took immediate steps to arrest the suspect, in accordance with the provisions of Part IX of the Statute. Yet, it subsequently released Mr Njeem and returned him to Libya, without informing the Court thereof, despite the Court's attempts to engage with Italy.

30. At the outset, the Chamber notes that Italy advanced different and contradicting arguments in its different submissions presented first to the Registry²⁷ and then before the Chamber.²⁸ In its various submissions Italy puts forward alleged justifications for not surrendering Mr Njeem to the Court, including purported concerns about the Arrest Warrant. The Chamber notes, however, that Italy does not, in any of its submissions, explain why it did not communicate with the Court about either its concerns or any domestic legal obstacles, prior to returning Mr Njeem.

31. In this regard, the Chamber notes that the Italian Ministry of Justice ceased its communication with the Court shortly after notifying it of Mr Njeem's arrest by the Italian police. Despite having been repeatedly asked about it, the Ministry did not inform the Court when the hearing before the Court of Appeal of Rome would take place. It also did not timely inform the Court about the outcome of the hearing or of its intention to return Mr Njeem to Libya following the decision of the Court of Appeal of Rome.²⁹

32. Article 97 of the Statute provides, in relevant part, that '[w]here a State Party receives a request under this Part 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.' Yet, although there was ample time to do so and the Court continuously tried to engage with the Italian Ministry of Justice, Italy did not enter in consultations with the Court upon identifying any perceived obstacles that could impede or prevent the execution of

²⁶ See Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, para. 190 (*Al-Bashir* Appeal Judgment).

²⁷ See ICC-01/11-154-US-Exp-AnxI; ICC-01/11-157-US-Exp-AnxII.

²⁸ See Third Registry Transmission of "Invitation to the Italian Republic to provide submissions concerning its failure to surrender Osama Elmasry/Almasri Njeem to the Court following his arrest. Submissions by the Italian Republic pursuant to regulation 109 of the Regulations of the Court", ICC-01/11-177; Italy's additional Observations the "Prosecution's Observations on the Italian Republic's Submissions under Regulation 109" ICC-01/11-187, ICC-01/11-197-Anx.

²⁹ Registry Report, paras 24-36.

the cooperation request. What is more, Italy did not even inform the Court that it had already taken action that would make consultations impossible (i.e. the rushed return of Mr Njeem, by Italian government plane, to Libya) until several days after its actions.

33. Italy thus violated its obligation under in article 97 of the Statute.

34. Although Italy does not explain why it failed to consult with the Court, it does put forward other arguments that, according to Italy, justified its actions. The Chamber will now address these arguments in turn.

b. Purported obstacles under Italian domestic law

35. In its submissions, Italy argues that the Appeal Court of Rome found that the arrest of Mr Njeem by the Judicial Police was unlawful and that it ordered his release because the arrest violated the provisions of Law 237/2012, which do not foresee the possibility for the Judicial Police to carry out such arrest *motu proprio*.³⁰

36. The Prosecution responded that Italy lawfully arrested Mr Njeem and that the ‘Court of Appeal’s order to release [Njeem] is premised on an erroneous interpretation of the law n. 237/2012’.³¹ In this regard, the Prosecution sustains that ‘while law n. 237/2012 does not expressly provide for the arrest *proprio motu* by the Judicial Police, it does not exclude it either. The law is simply silent about it’.³² Second, the Prosecution alleges that ‘[e]ven if the Court of Appeal was correct in its conclusion that [Njeem]’s arrest was affected by procedural errors, the [Minister of Justice] could (and should) have remedied them by transmitting the requested documentation to the General Prosecutor’.³³

37. In its Reply, Italy submits that, according to Law 237/2012, the Court of Appeal of Rome is ‘entitled to rule on restrictive measures on liberty based on surrender or arrest requests from the ICC’ and that ‘the Statute itself mandates and internal review (article 59(2) of the Statute) of the legality of the arrest by the competent Judicial Authority of the detaining State (in this case, Italy), “which shall determine in accordance with the law of that State, that [...] the person has been arrested in accordance with the proper process”’.³⁴ Italy further argues that the argument advanced by the Prosecution in relation to the fact that, according to Law

³⁰ Italy’s submissions, para. I ‘The chronological reconstruction shows that the Court of Appeal of Rome correctly detected procedural violations’.

³¹ Prosecution’s Observations, para. 11.

³² Prosecution’s Observations, para. 12.

³³ Prosecution’s Observations, para. 16.

³⁴ Reply, para. 8.

237/2012, the Court of Appeal of Rome could validate the provisional arrest of Mr Njeem, ‘supports the position taken by the Italian government, according to which it did not interfere, in any way with the Italian Judicial Authority – which, within its own independent judgment, was also allowed to validate the provisional arrest’.³⁵ Therefore, Italy argues that ‘the release of the Libyan citizen cannot be attributed to a lack of coordination among State organs, but rather to the outcome of a proper judicial review’.³⁶

38. The Chamber recalls that Article 88 of the Statute obliges State Parties to ‘ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part IX of the Statute]’. Therefore, Italy is responsible to ensure that such legislation is in place and any obstacles under domestic law are for Italy to manage and do not justify non-compliance.

39. Italy claims that for it to have been in a position to comply with the cooperation request for arrest and surrender the Arrest Warrant should have been directly sent to the Italian Minister of Justice. In this regard, the Chamber observes that Italy did not inform the Court of this purported requirement. The Italian embassy in The Hague has been designated by Italy itself as the formal channel of communication between the Court and Italy, including for requests for cooperation such as the one now being considered.³⁷ The Court therefore sent the warrant to the Italian embassy in The Hague. In addition, the Chamber notes that the Court at the earliest opportunity, and well before the hearing took place, also directly provided the Ministry of Justice with the Arrest Warrant and the request to arrest Mr Njeem.³⁸

c. Purported competing request for extradition

40. Italy submits that there was a simultaneous, competing extradition request made by Libya (the ‘Extradition Request’) and that therefore ‘pursuant to [a]rticle 2(2) of the Law 237/2012, Italy’s Minister of Justice had the duty to assess the priority order of the requests for

³⁵ Reply, para. 10.

³⁶ Reply, para. 12.

³⁷ When depositing its instruments of ratification, Italy stated: “Italy hereby specifies that it would like to receive the requests for cooperation provided for by Article 87 of the Rome Statute through diplomatic channels” (see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en). Although States are free to designate a different channel of communication pursuant to rule 180 of the Rules of Procedure and Evidence, Italy never modified its designation.

³⁸ Registry Report, paras 32-36. The Registry provided the Italian Ministry of Justice on 20 January 2025 with the Arrest Warrant and an Italian translation thereof. An instruction from the Italian Ministry of Interior to the police in Turin dated 19 January 2019 indicates that the Italian Ministry of Interior already had a copy of the Arrest Warrant on that day (see Annex II to the Prosecution’s Observations).

international cooperation as per [a]rticle 90 of the Rome Statute'.³⁹ Italy further alleges that Libya indicated in the Extradition Request that it is investigating Mr Njeem 'for the same charges brought against him by the International Criminal Court'.⁴⁰ In this regard, Italy argues that '[...] in the absence of preliminary interactions or communications with the Libyan authorities, the arrest warrant issued by the ICC violates the principle of complementarity [...]'.⁴¹

41. According to the Prosecution, Italy should have notified the Court about the existence of the Extradition Request. The Prosecution submits that Italy's failure to do so constitutes a breach of its obligations under articles 97 and 90(1), respectively, of the Statute.⁴² It states that 'Italy failed to comply not only with the Court's request for surrender but also with Libya's extradition request, by releasing and transferring [Mr Njeem] to Libya in full freedom'.⁴³ In this regard, the Prosecution further submits that 'Libya is to be treated as if it were a State Party for the purpose of part 9 of the Statute, due to the effect of UNSC Resolution 1970 (2011)' and thus Italy could not extradite Mr Njeem until a determination of the Chamber that the case was inadmissible.⁴⁴

42. It is not clear to the Chamber what Italy intends to argue in relation to a request by Libya made for Mr Njeem's extradition. Italy refers to the principle of complementarity, admissibility and competing requests pursuant to article 90 of the Statute, but it is clear from the information before the Chamber that Italy did not actually extradite Mr Njeem to Libya pursuant to the purported extradition request. Mr Njeem was not handed over to the Libyan authorities but returned as a free man. Indeed, Italy does not even claim in its submissions that it extradited Mr Njeem.

43. According to article 90(1) of the Statute, '[a] State Party which receives a request from the Court for the surrender of a person under article 89, shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court [...] of

³⁹ Italy's submissions, para. 2.1 'The extradition request made by the State of Libya and the powers of Italy's Minister of Justice in the event of competing requests'.

⁴⁰ Italy's submissions, para. 2.1 'The extradition request made by the State of Libya and the powers of Italy's Minister of Justice in the event of competing requests'.

⁴¹ Italy's submissions, para. 2.1 'The extradition request made by the State of Libya and the powers of Italy's Minister of Justice in the event of competing requests'.

⁴² Prosecution's Observations, para. 18.

⁴³ Prosecution's Observations, para. 20.

⁴⁴ Prosecution's Observations, para. 20.

that fact'. Italy did not 'notify the Court' about having received a request from Libya, as it was obliged to do pursuant to the aforementioned provision. Indeed, Italy did not refer to any purportedly competing request for extradition in its earlier explanations for its failure to surrender Mr Njeem, and only mentioned the existence of the request for the first time on 7 May 2025. In its submissions of that date, Italy misrepresents the Rome Statute's complementarity system and shows a misunderstanding of the concept of admissibility pursuant to articles 17, 18, and 19 of the Statute.

44. In addition, in case of a competing request for extradition for a person whose surrender the Court has requested, a clear procedure is set out in article 90 of the Statute for situations that concern extradition requests made by State Parties and by non-State Parties. Italy has not complied with any element of this procedure and its actions have been wholly contrary to the requirements, spirit and purposes of article 90.

45. Italy did not cooperate with the Court to solve the issues arising from the formulation of the Arrest Warrant and the purported competing extradition request. By neither informing the Court of the existence of the extradition request nor consulting with the Court about any possible issues of admissibility, Italy violated its obligations under articles 90 and 97 of the Statute.⁴⁵

d. Alleged errors in the Arrest Warrant

46. Italy contends that the warrant against Mr Njeem 'shows some inconsistencies', namely 'the reported time reference of Mr. Njeem's alleged crimes (reference: year 2011), which differs from what indicated in the Prosecutor's requests laid down in the *incipit* and in the body of the same warrant (reference: year 2015)' and it argues that '[t]his resulted in the Pre-Trial Chamber I having to meet again in order to correct the warrant'.⁴⁶

47. The Prosecution maintains that Italy should have consulted the Court to address any procedural errors. It also submits that there were no inconsistencies in the Arrest Warrant as it alleges that it was 'apparent "*ictu oculi*" from the arrest warrant that the indication of the year 2011 in the three closing paragraphs was only a minor typographical error the correction of

⁴⁵ See also Prosecution Observations, para. 18.

⁴⁶ Italy's submissions, para. 2.2 'Inconsistencies between the section on the crimes alleged and the conclusions with regard to the identification of the time frame when the crime was perpetrated'.

which was a simple formality [and that there] was no uncertainty regarding the *tempus commissi delicti*'.⁴⁷

48. Regarding the argument raised by Italy in multiple submissions that the Court issued a 'second version' of the Arrest Warrant, the Chamber emphasises that the Arrest Warrant was issued on 18 January 2025⁴⁸ and it clearly set out the alleged crimes and the basis for criminal responsibility. A corrigendum of the Arrest Warrant was issued on 24 January 2025.⁴⁹ The corrections were limited to minor typographical errors that did not affect the alleged crimes, scope of the allegations, or individual criminal responsibility of the suspect, or indeed the validity of the Arrest Warrant. As a result of the Arrest Warrant having been leaked into the public domain, the corrected version was issued as a public annex to a decision in which the Chamber decided to unseal the Arrest Warrant. This annex also included the dissenting opinion of Judge Flores Liera. The existence of the dissent was already reflected in the Arrest Warrant and the fact that the Court may issue decisions by majority does not impact on their legal effect.

49. Italy cannot, in good faith, question the validity of a decision that was issued in accordance with the Court's legal framework merely because the decision was not unanimous.

50. The Chamber further recalls that Mr Njeem was returned to Libya on 21 January 2025. This predates the issuance of the corrigendum. Therefore, the corrigendum could not have been a factor motivating Italy's decision to return Mr Njeem to Libya. Italy's submissions in this regard thus appear to be an attempt to retrospectively justify its actions.

e. Expulsion order

51. Finally, Italy avers that Mr Njeem expulsion from the Italian territory, ordered by the Minister of Interior, was necessary 'for reasons of public policy and national security'.⁵⁰

52. Italy also appears to invoke a state of necessity justification, by averring in its Reply that 'the violation of the obligation to cooperate with the ICC must be verified in the same way as per article 25 of the Responsibility of States for International Wrongful Acts (2001) of the International Law Commission of the United Nations.' According to Italy, '[w]hat happened in Libya in the months following the Almasri case, which also led to the exodus of several

⁴⁷ Prosecution's Observations, paras 31-34.

⁴⁸ Warrant of arrest for Mr Osama Elmasry / Almasri Njeem, ICC-01/11-149-US-Exp.

⁴⁹ Corrected version of the 'Warrant of Arrest for Mr Osama Elmasry / Almasri Njeem' dated 18 January 2025 (ICC- 01/11-149-US-Exp), including Dissenting Opinion of Judge Socorro Flores Liera, ICC-01/11-152-Anx.

⁵⁰ Italy's submissions, para. 3 'Legitimacy of the expulsion decree issued by the Italian Minister of the Interior'.

Italians, proves the rightfulness of such assessment.’⁵¹ Annexed to its initial submissions Italy provided a few paragraphs of confidential information, which it summarises in its Reply: ‘[A]t the time of Almasri’s arrest, as indicated in the Memorandum dated 30 April 2025, there were concrete risks that retaliatory acts could be perpetrated against Italian citizens in Libya.’⁵²

53. The Chamber observes that if Mr Njeem, based on the allegations contained in the Arrest Warrant, was deemed a danger and for this reason needed to be expelled from Italian territory, it is not clear why he needed to be flown to Libya. With regard to Italy’s general argument that it was necessary to return Mr Njeem to Libya, the Chamber observes that Italy only provides very limited information in support of its contention. Furthermore, as noted above under section C.1.b, matters of domestic law cannot be invoked by a State Party to justify non-compliance. Therefore, Italy arguments in this regard are dismissed.

f. Conclusion

54. On the basis of the foregoing, the Chamber unanimously finds that Italy did not act with due diligence and did not use all reasonable means at its disposal to comply with the request for cooperation. Italy has not advanced any argument to explain its failure to communicate and cooperate with the Court to resolve any issues arising from the formulation of the Arrest Warrant or the national procedure for surrender. Italy has also not provided any valid legal reason or reasonable justification for having immediately transferred Mr Njeem back to Libya, instead of first consulting with the Court or seeking to rectify any perceived flaws in the process to arrest. Consequently, Italy failed to comply with the Request for Cooperation contrary to the provisions of the Statute. As found above, in doing so, Italy prevented the Court from exercising its functions and powers under the Statute.

2) Whether a referral of the matter to the Assembly of States Parties and/or the United Nations Security Council is warranted

55. Having determined that Italy failed to comply with the Court’s request to cooperate thereby preventing the Court from exercising its functions and powers under the Statute, the majority of the Chamber will now consider whether referring the non-compliance to the ASP or UNSC pursuant to article 87(7) of the Statute is warranted.

56. In this regard, it is recalled that article 87(7) of the Statute ‘aims at enhancing the effectiveness of the cooperation regime under Part IX of the Statute, by providing the Court

⁵¹ Reply, para. 31.

⁵² Reply, para. 31.

with the possibility of engaging certain external actors to remedy cases of non-compliance'.⁵³ Indeed, a referral under this provision is 'not intended to be the standard response to each instance of non-compliance, but only one that may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand'.⁵⁴ Furthermore, as clarified by the Appeals Chamber:

Since the ultimate goal is to obtain cooperation, a Chamber has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain the cooperation requested taking into account the form and content of the cooperation; whether the referral would provide an incentive for cooperation by the requested State; whether it would instead be beneficial to engage in further consultations with the requested State; and whether more effective external actions may be taken by actors other than the ASP or the UNSC, such as third States or international or regional organisations. In conclusion, the Appeals Chamber considers that it is clear that, in determining whether a referral is appropriate, a Chamber will often need to take into account considerations that are distinct from the factual assessment of whether the State has failed to comply with a request to cooperate. The Appeals Chamber therefore considers that a referral is not an automatic consequence of a finding of a failure to comply with a request for cooperation, but rather this determination falls within the discretion of the Chamber seized of the article 87 (7) application.⁵⁵

57. Guided by the above considerations, the majority of the Chamber, Judge María del Socorro Flores Liera dissenting, is of the view that in the circumstances of this case, its determination as to whether a referral of Italy's non-compliance to the ASP or UNSC is warranted must be deferred. In this regard, the majority of the Chamber notes that domestic proceedings that could have an impact on Italy's prospective cooperation in the arrest and surrender of suspects sought by the Court were initiated soon after Italy failed to comply with the Court's request for cooperation. Based on the information in the record, Italy indicated that as early as March 2025

the case under examination [was] being investigated in the context of proceedings before the Tribunal of Rome – Section for Ministerial Crimes, against the President of the Council of Ministers of Italy, as well as the Italian Minister of the Interior, the Italian Minister of Justice, and [the Undersecretary of State to the Presidency of the Council of Ministers of the Italian Republic].⁵⁶

⁵³ *The Prosecutor v. Uhuru Muigai 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', 19 August 2015, ICC-01/09-02/11-1032 ('*Kenyatta Appeal Judgment*'), para. 51.

⁵⁴ *Kenyatta Appeal Judgment*, para. 51.

⁵⁵ *Kenyatta Appeal Judgment*, paras 49 and 53.

⁵⁶ ICC-01/11-167-Anx1.

58. In the proceedings concerning South Africa's non-compliance with a request to cooperate in the arrest and surrender of Mr Al-Bashir, Pre-Trial Chamber II considered of particular relevance the domestic proceedings that had been carried out in that State to address the non-cooperation to its determination as to whether the non-compliance should be referred to the ASP or UN Security Council.⁵⁷ In particular, Pre-Trial Chamber II noted the ruling by the Supreme Court of Appeal of South Africa 'conclud[ing] that the conduct of the Government of South Africa was "inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful"'. It further considered it important to observe that 'this ruling has become final as the Government of South Africa has withdrawn its previously lodged appeal against it', demonstrating that the Government of South Africa appeared to have 'accepted its obligation to cooperate with the Court under its domestic legal framework'.⁵⁸

59. Based on the foregoing, the majority of the Chamber deems it appropriate to receive further information on any relevant domestic proceedings addressing Italy's non-compliance given its crucial importance to assess whether a referral of the matter to the ASP or UN Security Council would fulfil its objective of fostering future cooperation.

60. In addition, the majority of the Chamber notes the complexity of the situation in which Italy found itself, namely the fact that the presence of Mr Njeem in its territory was rather sudden, the apparent confusion of the different intervening organs and the fact that it was the first time that Italy was requested by the Court to cooperate in the arrest and surrender of a suspect. While these circumstances cannot justify Italy's failure to comply as found above, they are nonetheless relevant for the assessment of whether a referral to the ASP or UN Security Council is necessary, and militate in favour of seeking further information from Italy as explained above.

61. In light of the foregoing and recalling that a determination as to whether a referral of 'a State's failure to comply with a request for cooperation to the ASP or UN Security Council is at the core of the relevant Chamber's exercise of discretion',⁵⁹ the majority of the Chamber deems it appropriate to request Italy to inform the Chamber on any domestic proceedings

⁵⁷ Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302 (the '*South Africa Decision*'), paras 136-137.

⁵⁸ *South Africa Decision*, para. 136.

⁵⁹ *Kenyatta Appeal Judgment*, para. 64.

relevant to the present case, and to indicate the impact that these proceedings could have on Italy's future cooperation with the Court in the execution of cooperation requests for the arrest and surrender of suspects, by Friday, 31 October 2025.

III. Conclusion

62. By not properly executing the Court's request for the arrest and surrender of Mr Njeem while he was on Italian territory, and by not consulting and cooperating with the Court to solve any purported issues arising from the formulation of the Arrest Warrant and the purported competing request for extradition, Italy failed to comply with its obligations under the Statute, and this non-compliance prevented the Court from exercising its functions and powers under the Statute.

63. Prior to determining whether Italy's non-compliance should be referred to the ASP or UN Security Council, the majority of the Chamber, Judge María del Socorro Flores Liera dissenting, finds it opportune to receive information from Italy on any domestic proceedings relevant to the present case, and an indication of the impact that these proceedings could have on Italy's future cooperation with the Court in the execution of cooperation requests for the arrest and surrender of suspects, by Friday, 31 October 2025.

FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that Italy failed to comply with its international obligations under the Statute preventing the Court from exercising its functions and powers under the Statute.

IN ADDITION, THE CHAMBER, BY MAJORITY, JUDGE FLORES LIERA DISSENTING,

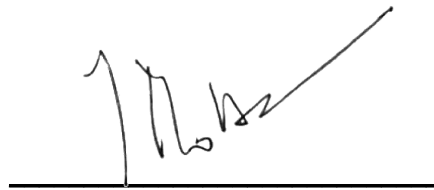
DEFERS its determination as to whether the matter of Italy's non-compliance with the request for arrest and surrender of Mr Njeem should be referred to the Assembly of States Parties or to the United Nations Security Council; and

INVITES Italy to provide information on any domestic proceedings relevant to the present case, and an indication of the impact that these proceedings could have on Italy's future

cooperation with the Court in the execution of cooperation requests for the arrest and surrender of suspects, by Friday, 31 October 2025.

Judge Flores Liera appends a partially dissenting opinion.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Iulia Antoanella Motoc, Presiding



Judge Reine Adélaïde Sophie Alapini-Gansou



Judge María del Socorro Flores Liera

Dated this Friday, 17th of October 2025

At The Hague, The Netherlands