

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/11
Date: 12 May 2025

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

Confidential

Ex parte only available to the Prosecution and Registry

**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**

Source: Office of the Prosecutor

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

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- ☐ Counsel for the Defence
- ☐ Legal Representatives of the Victims
- ☐ Legal Representatives of the Applicants
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- ☐ The Office of Public Counsel for Victims
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M. Zavala Giler, Osvaldo

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A. INTRODUCTION

1. The Prosecution respectfully seeks leave to provide observations on the “Submissions by the Italian Republic pursuant to regulation 109 of the Regulations of the Court” (“Italy’s Submissions”).¹ These submissions represent the first time that Italy officially explained to the Court why it failed to surrender Mr Osama Elmasry / Almasri NJEEM (“NJEEM”) following his arrest by the Italian police pursuant to an ICC arrest warrant. As such, they raise new issues of law and fact which the Prosecution wishes to address to assist the Chamber in making its determination pursuant to article 87(7) of the Statute.

2. Specifically, the Prosecution requests leave to provide observations regarding key issues arising from Italy’s Submissions, as further detailed below. The Prosecution could not reasonably have anticipated these issues when requesting that the Chamber make a finding of non-compliance by Italy pursuant to article 87(7).² If leave were granted, the Prosecution would file observations on the identified issues succinctly and expeditiously.

B. CLASSIFICATION

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

C. BACKGROUND

4. On 2 October 2024, the Prosecution applied under seal for a warrant of arrest for NJEEM.³ On 9 October 2024, the Prosecution further submitted a request for the search and seizure of NJEEM.⁴ On 18 January 2025, the Chamber issued a warrant of arrest for NJEEM⁵ as well as an order to the Registrar regarding his search and seizure.⁶

5. On 19 January 2025, acting pursuant to the ICC’s arrest warrant, the Italian police arrested NJEEM⁷ and searched his person, rental vehicle, and hotel room.⁸ On 21 January 2025, the Italian authorities released NJEEM and returned him to Tripoli, Libya.⁹ On 24 January 2025, the Chamber issued a corrected version of the warrant of arrest and re-classified it as public.¹⁰

¹ ICC-01/11-177-Conf-Exp-AnxII.

² ICC-01/11-163-US-Exp.

³ ICC-01/11-140-US-Exp.

⁴ ICC-01/11-142-US-Exp.

⁵ ICC-01/11-149-US-Exp.

⁶ ICC-01/11-150-US-Exp.

⁷ ICC-01/11-151-US-Exp, para. 24.

⁸ ICC-01/11-151-US-Exp-AnxXIII, pp. 60-63, 82-84.

⁹ ICC-01/11-151-US-Exp, para. 38.

¹⁰ ICC-01/11-152-US-Exp, ICC-01/11-152-Anx, and ICC-01/11-153.

6. On 17 February 2025, the Chamber invited the Italian Republic to provide, by 17 March 2025, submissions concerning its failure to surrender NJEEM to the Court following his arrest.¹¹ On 21 February 2025, the Prosecution requested 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 Assembly of States Parties ("ASP") or the United Nations Security Council ("UNSC").¹²

7. On 25 March and 17 April 2025, the Chamber granted two requests¹³ by Italy for extensions of the time limit to file its submissions, ultimately allowing it to file these submissions until 16:00 on 6 May 2025.¹⁴ On 7 May 2025, the Registry transmitted¹⁵ the "Submissions by the Italian Republic pursuant to regulation 109 of the Regulations of the Court",¹⁶ together with two annexes.¹⁷

D. SUBMISSIONS

8. As a preliminary matter, the Prosecution notes that the Chamber recently held that the issue of Italy's alleged non-cooperation currently before it "is a separate and ancillary procedure to the proceedings against Mr Njeem"¹⁸ and that it is not clear whether it may automatically respond to Italy's Submissions. In similar situations before the Court, different Chambers have either accepted and taken into consideration a Prosecution response to a government's submissions¹⁹ or granted a Prosecution's request for leave to reply to such submissions.²⁰ In an abundance of caution, the Prosecution seeks the Chamber's leave to provide further observations. It further notes that Pre-Trial Chamber II has recognised that the Prosecution, as the source of the arrest warrant application, has a relevant role in non-compliance proceedings.²¹ The Prosecution believes that observations on the new issues raised by Italy will assist the Chamber in making its determination pursuant to article 87(7) of the Statute.

9. The Prosecution seeks leave to respond to Italy with respect to the following issues arising from Italy's submissions:

¹¹ ICC-01/11-162.

¹² ICC-01/11-163-US-Exp.

¹³ ICC-01/11-167-Anx1 and ICC-01/11-175-Anx2.

¹⁴ ICC-01/11-171 and ICC-01/11-176.

¹⁵ ICC-01/11-177.

¹⁶ ICC-01/11-177-Conf-Exp-AnxII.

¹⁷ ICC-01/11-177-AnxIII and ICC-01/11-177-SECRET-Exp-AnxIV.

¹⁸ ICC-01/11-170, para. 8.

¹⁹ See ICC-02/05-01/09-303 and ICC-02/05-01/09-309.

²⁰ See ICC-01/09-02/11-891.

²¹ ICC-02/05-01/09-286, para. 6.

- (1) As the first time article 90 has been invoked in such cases, whether Italy handled the alleged competing extradition request for NJEEM by the Libyan authorities on 20 January 2025 in accordance with article 90 of the Statute when it neither notified the Court of the existence of Libya's request pursuant to article 90(1), nor waited for the Court to make a determination on the admissibility of the case pursuant to article 90(3), and instead appears to have acted on its own assessment of "circumstances likely to affect the admissibility of the case" relying solely on partial and vague information received from the Libyan authorities that it was investigating the same person and the same conduct;
- (2) Whether, as apparently claimed by Italy, Libya's assertion that the ICC violated the principle of complementarity enshrined in the Statute by failing to communicate ahead of time to the Libyan authorities its intention to issue a warrant of arrest for NJEEM was a factor relevant to determining whether or not to surrender the suspect to the Court;
- (3) Whether Libya could correctly state on 20 January 2025 that it was investigating NJEEM for "the same charges brought against him by the International Criminal Court" when, at that time, it was not aware of the substance of the warrant of arrest, which remained under seal until 24 January 2025;
- (4) Whether Libya's alleged competing extradition request is relevant for the Chamber's determination under article 87(7) when, in fact, it was not executed by Italy which did not surrender him to Libya for the purpose of any ongoing Libyan investigation or prosecution, but instead urgently expelled him due to his "social dangerousness";
- (5) Whether Italy was correct in apparently basing its decision not to execute the Court's request to surrender NJEEM in part on its own interpretation of the Court's (temporal) jurisdiction in Libya;
- (6) Whether any alleged errors or irregularities in the internal arrest procedures followed by Italy justified its decision not to surrender NJEEM to the Court;
- (7) Italy's reference to an extradition order only now, as opposed to its previous reference to a deportation order;

(8) Whether any “particular circumstances” as described by Italy²² justified Italy’s lack of consultations with the Court, let alone attempts to resolve any potential issues, prior to expelling NJEEM to Libya.

10. Italy’s first official explanation for not surrendering NJEEM to the Court contains new issues of law and fact that have not been addressed before. Its claim that it had to assess a competing extradition request from Libya dated 20 January 2025 is entirely new and was never communicated to the Prosecution until Italy filed its submissions on 7 May 2025. To assist the Chamber, the Prosecution wishes to make submissions on the above issues which are of high relevance to the procedure currently before the Chamber. As the source of the arrest warrant application for NJEEM and an entity that was actively involved in the arrest operation and attempts to have NJEEM surrendered to the Court, the Prosecution is well placed to provide relevant submissions to the Chamber on this matter, and believes it can assist it in its determination pursuant to article 87(7).

E. CONCLUSION

11. For the reasons set out above, the Prosecution respectfully requests leave to provide further submissions on the above issues arising from Italy’s submissions.



Karim A. A. Khan KC
Prosecutor

Dated this 12th day of May 2025

At The Hague, The Netherlands

²² ICC-01/09-02/11-880-Conf, p. 12.