

Partially Dissenting Opinion of Judge Maria del Socorro Flores Liera

1. While I concur with my colleagues on the finding that Italy failed to comply with the Court's request for the arrest and surrender of Mr Njeem thereby failing to comply with its obligations under the Statute, and preventing the Court from exercising its functions and powers under the Statute, I respectfully disagree with the remainder of the decision, namely the view of the majority that it is appropriate to delay the referral of the matter to the Assembly of States Parties (the 'ASP'). I see no reason to do so because there is no information whatsoever before the Chamber to justify such delay. In the circumstances of the current case, I consider that a referral is the only appropriate measure to follow and the only available tool to obtain cooperation in the future. I disagree with the extremely wide interpretation given by the majority to the exercise of the discretionary powers of the Chamber and I reaffirm that, in the specific circumstances of this case, the standard provided in article 87(7) of the Statute was met. Not referring the issue to the ASP is inconsistent with the practice of the Court and, importantly, with the objectives of the cooperation regime established in the Statute.

2. The Appeals Chamber has considered that a referral under article 87(7) of the Statute 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'.¹ I agree that a referral shall not be the standard response given the ample variety of acts and forms of cooperation included in Part IX of the Statute. Indeed, the gravity of the failure to comply with a request for cooperation by the Court would generally depend on the impact that such non-compliance has on the Court's proceedings and overall mandate to end impunity for the most serious crimes of concern to the international community. Given the very detrimental impact of a failure to comply with a request to cooperate in the arrest and surrender of a suspect, it is clear that a referral is the response that must follow when a formal finding of non-cooperation is made in this regard. In the specific circumstances of this case, the Chamber unanimously found that Italy has failed to comply with the Court's request to arrest and surrender Mr Njeem. As fully developed

¹ *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.

in the decision rendered by the Chamber, the circumstances surrounding this finding are grave and clear and there is no information before the Chamber that could possibly justify a delay.

3. The Appeals Chamber has also referred to issues that a chamber should consider when deciding whether a referral is an appropriate measure to either seek assistance from external actors to obtain the requested cooperation or otherwise address the lack of cooperation from the requested State.² Such guidance has been followed in other cases. Indeed, in deciding whether to refer an instance of non-compliance to the ASP or the UN Security Council, the competent chambers have given particular weight to (i) requests for consultations set out in article 97 of the Statute; and (ii) the way the concerned State Party had approached its obligation to cooperate. In the current case, Italy decided not to consult with the Court notwithstanding the repeated requests made from the Registry to this effect, and further provided different and contradicting arguments to justify its actions; arguments which were fully addressed and unanimously rejected by the Chamber. Nowhere in its submissions before the Chamber has Italy acknowledged its failure to cooperate. Instead, Italy maintains that it acted correctly.
4. The majority considers 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 in that State.³ Based on this information and on the precedent concerning South Africa's non-compliance,⁴ the majority concludes that it is appropriate to receive further information on any relevant domestic proceedings to assess whether a referral of the matter to the ASP or the UN Security Council would fulfil its objective of fostering future cooperation.
5. I disagree with the majority's view. Contrary to the precedent relied upon, namely, the decision rendered in relation to South Africa's non-compliance, Italy never raised any concrete arguments regarding any national proceedings.⁵ Furthermore, Italy, has

² *Kenyatta Appeal Judgment*, para. 53.

³ Majority, para. 57.

⁴ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 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.

⁵ National proceedings that commenced after Italy's failure to surrender Mr Njeem to the Court, i.e. different proceedings than those before the Court of Appeal of Rome taking place before Italy returned Mr Njeem to Libya.

indicated that it ‘does not deem itself to have failed in its obligations to th[e] Court’⁶ and, unlike South Africa, did not enter into consultations under article 97 notwithstanding several requests from the Court to this effect. Therefore, it is inapposite to compare the situations of South Africa and Italy.

6. On 13 March 2025, Italy referred to national proceedings only with the objective of requesting a delay of two months to present its submissions, but never provided any additional information to the Court in this regard. In these circumstances, it is not for the Court to enquire into any national proceedings absent any arguments presented by the concerned State to this effect.
7. In this context, the majority has not provided any objective basis for delaying the referral nor have they provided any explanation as to how delaying it would achieve cooperation. On the contrary, further delays in this case can only diminish rather than increase the prospect of future cooperation. In my view, it is necessary, on the basis of the information before the Chamber, to refer the matter to the ASP and/or the UN Security Council as the most and only appropriate and effective way to promote future cooperation; namely, cooperation by the requested State or more generally. While the opportunity for Italy to surrender Mr Njeem to the Court has disappeared, it is important to ensure that future arrest and surrender opportunities, by Italy or other States, in relation to the same suspect, the *Situation in Libya*, or any other warrant of arrest, are not equally lost.

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



Judge María del Socorro Flores Liera

Dated this Friday, 17th of October 2025

At The Hague, The Netherlands

⁶ ICC-01/11-167-Anx1.