

Pursuant to Pre-Trial Chamber I's order, dated 24 February 2025, this document has been reclassified as "Public"

Annex I

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Almasri case: a questionable interpretation of Italy's law on cooperation with the ICC has led to the release of the first wanted man arrested on European soil in the context of investigations in Libya

Chantal Meloni, Michele Caianiello, Sistema Penale, 25 Gennaio 2025

Informal Translation

1. After the arrest and release of Mohammed Abedini Najafabadi, another case of judicial cooperation aimed at the delivery of an individual has once again shaken Italian public opinion. This time the case involves legal relations with the International Criminal Court and the person involved is General Najeem Osema Almasri Habish, head of the Libyan judicial police, in relation to whom, on 18 January, the International Criminal Court had issued an arrest warrant for war crimes and crimes against humanity relating to acts committed in the prison of Mitiga from 15 February 2015 onwards[1]. Specifically, Almasri is charged with war crimes consisting of outrages upon personal dignity under Article 8(2)(c)(ii) of the ICC Statute, cruel treatment under Article 8(2)(c)(i), torture under Article 8(2)(c)(i), rape and sexual violence under Article 8(2)(e)(vi) and murder under Article 8(2)(c)(i). He is also alleged to have committed crimes against humanity consisting of murder under Article 7(1)(a), unlawful detention under Article 7(1)(e), torture under Article 7(1)(f), rape and sexual violence under Article 7(1)(g) and persecution (Article 7(1)(h)) under Article 7(1)(h) of the Statute.

At the same time as the arrest warrant was issued and the six countries involved, including Italy, were notified, at the request of the ICC, Interpol issued a red notice, so that all the competent law enforcement agencies in the national jurisdictions involved were alerted. Arrested on January 19 by Digos police officers in Turin, while he was there for personal reasons (having reportedly attended the match between Juventus and Milan), Almasri was released from prison on Tuesday January 21 following the order of the Court of Appeal of Rome (attached here), and was then immediately transferred to Libya, on an Italian military plane.

The case, inevitably, has sparked heated political and diplomatic controversy, given that, with this decision, Italy has not fulfilled the obligation of cooperation to which it subjected itself by ratifying the Statute of the International Criminal Court. It is worth remembering that art. 86 of the Statute obliges all States that have ratified it[2] to fully cooperate with the Court in conducting investigations and prosecuting crimes that fall under its jurisdiction. Furthermore, the choice not to hand over Almasri, expelling him from the territory of the State to send him back to Libya, places our country in a critical position also with the United Nations. It should be remembered that the Court's investigation in Libya began at the instigation of the UN Security Council which reported the situation, pursuant to art. 13(b) of the Statute, with resolution no. 101 of 26 February 2011. 1970. Since Libya has not ratified the Statute of the Court, the jurisdiction of the ICC over this situation is therefore based on the resolution in question, which brought to the attention of the Court's Prosecutor's Office the crimes committed in that State, in particular those that began in 2011, in conjunction with the fall of Colonel Muammar Gaddafi and the violent, massive and systematic attacks against the civilian population. The duty to cooperate with the Court therefore derives firstly directly from the Rome Statute, as provided for

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in Chapter IV (Articles 86 et seq.), but also, secondly, indirectly from the aforementioned resolution of the Security Council, pursuant to Chapter VII of the UN Charter. While the investigation into the Libyan situation in general has been ongoing since 2011, it should be noted that at least since 2017 the Prosecutor's Office has reported that it has also included a specific line of investigation relating to serious crimes committed against migrants and refugees, who, as is known, are subjected to torture, violence and actual forms of slavery, particularly in Libyan detention centres. Among these, the Mitiga centre, near Tripoli, the subject of this story, as widely documented by UN sources, appears to be one of those where detainees, including migrants and refugees from various African countries, for a variety of reasons that include religious, ideological or political issues in a broad sense, were subjected to cruel treatment in a context of systematic attacks against the civilian population[3].

2. Central to this delicate affair is the release order adopted by the judges of the Court of Appeal of Rome. The order is based on the premise that Law no. 237 of 2012, which regulates the cooperation relations between Italy and the CPI, would provide for procedures different from those that were followed in the specific case. In particular, according to the interpretation given by the judges, the law in question would provide that only the Minister of Justice is competent to take initiatives concerning the arrest of persons subject to an arrest warrant of the ICC, the police not being able to act *motu proprio*. In this case, therefore, the arrest of Almasri, captured on the basis of an autonomous initiative of the police authority (which acted following the red notice of Interpol), should be considered irregular. In the opinion of the judges, although it is true that such an option is possible, in general, through art. 716 c.p.p. (as occurred, for example, in the Abedini case), such general discipline of the code cannot be applied here, since the special legislation (art. 11 of law 237 /2012) would be complete in itself and, therefore, would not allow integrations through reference to the procedural code and the ordinary rules on extradition. Such a choice, to invoke the general legislation, observes the Court of Appeal of Rome, would conflict with the principle of legality-specificity, postulated by art. 13 of the Constitution, which, as is natural, must also be observed in cases of deprivation of liberty that take place in proceedings of a broadly extraditorial nature. In essence, *dura lex, sed lex*: if the legislator had wanted otherwise, he should have said so: *ubi noluit, tacuit*.

3. The arguments put forward by the Court, certainly not without some reason on a literal level, are in truth open to possible criticism. Before examining them, it makes sense to highlight how the law of cooperation between Italy and the International Criminal Court appeared inadequate from the outset, because it was not in step with the times. In the midst of a climate of facilitated, strengthened cooperation, of mutual recognition (all these developments, which at different times have marked the development of judicial cooperation within the Council of Europe and the European Union), the legislator has chosen to regulate relations with the ICC by drawing inspiration from the most classic, almost, one might say, nineteenth-century extradition model. Indeed, the mandatory passage through the Minister appears even more frequent than it does in the Code of Criminal Procedure, which also regulates relations with those legal systems with which the Italian State has no conventions or *ad hoc* treaties (and therefore, it is presumed, the relationship of trust is not, from the outset, particularly significant). The choice appears even more paradoxical if one considers that the crimes over which the ICC has jurisdiction are always subject to mutual recognition in the sources of the European Union (a logical consequence of the close relationship of collaboration that exists between the latter and the ICC[4]): if, hypothetically, Almasri had been drawn from a German or

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French arrest warrant, the surrender procedure, under the aegis of the European arrest warrant, would have been expedited in time and directed in the contact between judicial authorities, while the Minister would not have been able to play any role on a legal level (except to facilitate the exchange of information, where necessary)[5]. An apparent paradox.

That said, it is worth checking whether, in light of the legislation in force, a different decision was possible. The keystone of the reasoning of the Court of Appeal is, as has been said, entirely focused on the presumed completeness of the legislation contained in law 237 of 2012, in particular with reference to the *motu proprio* initiatives of the police. In that regulation, postulated as exhaustive, there would be no room for police initiatives outside the prior control of the Minister of Justice. Precisely this passage, the crucial one, since the decision on immediate release starts precisely from this premise, is not very convincing. By reasoning in this way, the Court of Appeal of Rome ends up precluding any possibility of on-the-spot arrest by the police, precisely for those wanted for the most serious crimes, the people who are affected by an arrest warrant adopted by the International Criminal Court[6].

It is true that law 237/2012 says nothing about this scenario. Article 11, which deals with the ordinary application of precautionary measures, that is, outside of cases of urgency, and on the basis of an initiative of the Attorney General, does not deal with it. Nor does Article 11 mention it. 14, concerning the provisional application of precautionary measures, which takes into consideration the case in which the request for surrender has not yet been received, but does not examine the case in which the police take action on their own initiative. Must we conclude from this, as the Court of Appeal does, that this is a sign of the choice, by the legislator, that it was not intended to attribute to the police this prerogative, the arrest in cases of urgency of a wanted person of the ICC? In truth, it seems to us that there is an alternative reading to this conclusion, which revolves around another provision of the same law, namely art. 3 paragraph 2 of law 237/2012. This provision fills any gap, referring to the code of criminal procedure for everything that is not provided for therein. In this case, therefore, the reference, not only possible but also necessary, is to art. 716 c.p.p., on extradition, in whose discipline the more specific legislation of law 237/2012 systematically fits, as recognized by the judges themselves in the order in question.

Arguments in this sense are also drawn on the systematic level of coherence of the system: the preclusion, in these cases, to the autonomous action of the police would lead to paradoxical results. We would be faced with a *unicum*, given that, in general, the activation in a short time by the police is essential in this type of context. We recall that these are responsibilities for the commission of very serious crimes, such as war crimes or crimes against humanity that are the subject of the Rome Statute, by individuals often linked to state apparatuses. Such situations are inevitably characterized by a high probability that the wanted person will flee, especially when passing through the territory of a certain country, or that means, including political pressure, will be used to try to avoid arrest and hand over to the Court in The Hague persons wanted by the Court. It is clear, therefore, that the interpretation assumed at the basis of the order in question, on a practical level, would have - as it did in the specific case - very serious consequences. In fact, it would mean that persons, the subject of an arrest warrant from the ICC, who pass through our country could almost never be stopped, since the "prodromal"

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dialogue with the Minister would slow down the intervention times, effectively facilitating the possibility of the interested party's escape.

But there is more. Making the Minister of Justice the eye of the needle of this procedure appears inconsistent with the approach of Law 237 of 2012, in which the role of the Minister in cooperation with the ICC is of a servant nature, not a decision-making one. It should be highlighted that, unlike the ordinary extradition procedure, where the government, through the Minister of Justice, maintains a discretionary power of a political nature, in cooperation with the International Criminal Court the Minister plays only an executive role. While, pursuant to Law 237 of 2012, the Minister of Justice "provides for" the surrender (art. 13 paragraph 7), when the judicial procedure is concluded with a positive outcome, on the contrary, in the ordinary extradition discipline, he maintains the prerogative of "deciding on the merits" (art. 708 paragraph 1 c.p.p.). In essence, the interpretation of the Court of Appeal of Rome would end up assigning a key role – one might say preclusive – to the representative of the executive in a cooperation mechanism that instead sees him without decision-making power on the merits. And in a system in which Italy, as a member of the Court and on a par with all the countries that adhere to the Rome Statute, is required to cooperate fully.

That said, and even if one wanted to hypothetically adhere to the thesis according to which the initial arrest was "irregular" and therefore invalid, a further very problematic aspect of the matter in question remains. It is not clear, in fact, how the Minister could not have remedied ex post, through a subsequent dialogue, his (alleged) initial lack of involvement. His activation, even if it had occurred subsequently, could have remedied the original lack of involvement, due to the urgency of carrying out an arrest warrant on behalf of the International Criminal Court and on the recommendation of Interpol.

Ultimately, to consider that the l. 237 of 2012 requires that the police can only take action following the "prodromal and indispensable dialogue between the Minister of Justice and the Attorney General" leads to results that are completely incompatible with the rationale of the law itself, according to which cooperation with the ICC by the Italian State constitutes an obligation (art. 1), in compliance with the Statute (art. 86 St.). The latter, moreover, specifically contemplates the hypothesis of a transmission of the arrest warrant issued by the ICC via Interpol (art. 87 paragraph 1 letter b), as in fact occurred in the case in question. As has already been reconstructed, it is on the basis of a report of that kind, in fact, that Almasri was arrested by the Turin Digos, as happened, a few weeks earlier, in the Abedini case. Broadening the scope, it is worth noting that not even the convention between Italy and the United States precisely dictates the cases and ways in which the police can act urgently, apprehending the wanted person. Law 16 March 2009, n. 25, which ratifies the agreement on Mutual Assistance Giudici between Europe and the United States signed in 2003, does not devote provisions to this issue. Yet, no one doubted that the police could operate *motu proprio*, pursuant to art. 716 of the Code of Criminal Procedure, given that, as provided for by art. 696 of the Code of Criminal Procedure, in the field of judicial cooperation the code applies, unless the provisions contained in the international conventions in force for the State and the norms of general international law "provide otherwise". This expression must evidently be understood, contrary to what was done by the Court of Appeal of Rome, as aimed at excluding the general legislation not in the face of

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mere silence, but rather in the face of a possible provision that is different and incompatible with the one in the code. In this sense, it is observed that law 237 of 2012 does not regulate "differently" with respect to art. 716 c.p.p., emergency arrest by the police: more simply, it does not deal with it at all, which is why the only provision that can be applied is the provision of the code.

For the reasons expressed, the choice to adhere to an interpretative solution different from the one proposed here appears questionable on a legal level, to the point that illustrious scholars have had no qualms about evoking "the eclipse of law" [7]. It places Italy, one of the countries that played a decisive role in the establishment of the International Criminal Court, in a critical position, both with regard to the other 124 countries of the system that revolves around the ICC, and with regard to the UN, which is interested in this situation because, as mentioned, the Security Council has conferred jurisdiction on the Court, reporting the situation in Libya already in 2011; and, again, with regard to the European Union, which has made support for the Court in The Hague, since its establishment, a distinctive political trait; and, finally, with regard to the obligations arising from the ratification of the International Convention against Torture, a crime of which Almasri is accused, among others. In fact, this Convention requires each contracting State to equip itself with the legal instruments necessary to ensure the detention of an individual accused of such a crime and to ensure his presence. All this without considering what was stated by the ICC bodies, according to which the competent authorities of the Italian State (and therefore, also the Minister of Justice), had been promptly informed[8].

It is not a clear page that concludes the first case in which a person wanted by the International Criminal Court was arrested on Italian soil and then released, undermining the effective cooperation of a State of the European Union with the Court in The Hague in a case of urgency[9], with extremely negative results on the proceedings underway in The Hague. While waiting for full light to be shed on the matter, there are also possible responsibilities on the part of the Italian State for violation of the obligations assumed with the ratification of the Rome Statute, to cooperate "fully" with the ICC, as stated in the Court's own press release of 22 January last[10]. At a time in history in which the ICC is subjected to the strongest tensions and violent attacks ever, starting with the US sanctions already brought back into force by the newly elected President Trump[11], it is more essential than ever that all States-parties, and Europe in a united way, support the Court and its difficult work.

Was it really not possible for Italy to do better? Or, if the objectives that could not be explained were different, could it not have been done better?

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The ministerial decision not to hand over an international criminal suspect as a legitimate discretionary political act?

Alberto di Martino, Questione Giustizia, 5 February 2025

Informal translation

The criticisms leveled at the Minister by various jurists[1] for not having cooperated with the International Criminal Court by ensuring the "handing over" of an alleged international criminal (also accompanied by constructive observations on the alternatives to the interpretative choice of the magistrates who ordered his release) have been rejected and sometimes even stigmatized by interventions of influential voices from academia and the judiciary[2], united by the idea that the minister's decision is a legitimate discretionary political act and unquestionable – except, indeed, on a political level.

In truth, the further piece of the decision of the Rome Prosecutor to activate the tribunal of ministers, contesting the violation of internal criminal law, has been grafted onto the affair and its assessment. It is however necessary to distinguish the two segments and give a separate evaluation: on the one hand, there is the decision not to cooperate with the International Criminal Court and its evaluation in terms of international law and the rules that govern the relationship between that court and the Italian State; on the other hand, there is the evaluation made in terms of domestic criminal law, which has inevitably fueled the polemical fire that plagues the relationship between politics and the judiciary. Here, it is interesting to make some quick clarifications only on the first segment, due to its international importance that goes far beyond the specific case and domestic events, because the Italian decision deals a serious blow to trust in the bodies of international criminal justice, to their legitimacy, and more generally to the commitment of the State to guarantee international legality in a non-selective way.

Therefore, it has been stated that "extradition" as a legitimate discretionary political choice of the minister would be such an obvious premise in the "Almasri affair" that it has been completely neglected in the legal debate, branded as fanciful and vaguely surreal, as well as partisan[3].

In reality, if one reads what has been argued by the author and by others, even if in the cursory style of occasional writings - but without any indulgence in simplifying - one should recognize that there has been no carelessness. Instead, the very starting point of the reproach made should be rejected: in the reality of the international and Italian normative system (and certainly not in our imagination as jurists) the procedure of "surrender" of the suspect of crimes foreseen by the Rome Statute is not at all a normal extradition procedure: the latter concerns relations between States, and "ordinary" crimes (i.e. foreseen by domestic law); that of surrender to the Court is a different, special cooperation procedure, which concerns the most serious crimes which shake the conscience of the international community as such[4]. It may not be a completely "vertical" procedure, i.e. based on a technical relationship of super-ordination of the international tribunal to the State – as was certainly the case for the so-called ad hoc Tribunals – but there is no serious doubt that the State has the duty to cooperate fully («cooperate fully»:

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art. 86 of the Statute). Delivery is therefore mandatory and not optional (except in exceptional cases which we will discuss, which do not occur in the case under examination); and, we insist in maintaining, it is also mandatory for domestic law as it can be legitimately interpreted (obviously it can be violated by a "political" decision; but it is a decision which, precisely, violates the law, and international law).

Therefore, the interpretation (the foundations of which we will not repeat here) according to which it is not at the discretion of the Minister to act or not on the request of the Court, conveyed by an international arrest warrant, is aimed at taking seriously international obligations, the respect of which is part of being a state of law, precisely because Italy allows "the limitations of sovereignty necessary for an order that ensures peace and justice among nations; promotes and favors international organizations aimed at this purpose".

The fundamental premise of all the reasoning carried out by critics (like the writer) of the ministerial decision is therefore to recognize that the matter of the repression of international crimes and the instruments of cooperation aimed at it are on a qualitatively different level compared to "horizontal" cooperation in the repression of common crimes. It is therefore inappropriate to assert a free political discretion in not cooperating in the fight against impunity for the former. First of all, it is worth remembering that committing core crimes – which are often carried out by (or with the support of) state authorities – cannot be considered a legitimate expression of sovereignty – at least since Nuremberg, throughout the twentieth century and certainly with the widest consensus after the nineties. Consistently, those crimes are not acts for which, before international tribunals, functional immunity can be invoked.

On this basis, the limitation of discretion in cooperating in the surrender is also understandable: obviously the political decision can be in the opposite direction, as happened in this case, but a competent judgment on this decision cannot fail to be supported by the awareness that it is not just a subjectively "revolting" decision (as has also been said: it is really dangerous here to rely on the randomness of feelings)[5], but objectively contrary to international law[6].

Just as sovereignty is not absolute, in this context, the power of Realpolitik is not absolute, and neither is the ability to oppose reasons of national security absolute – that is, left to pure political discretion. These can only be opposed within the limits set by the Rome Statute, which are completely irrelevant here (see essentially art. 72 of the Statute).

Those who contradicted these arguments smiled at them as if they were politically preconceived fantasies, as we have said. And never mind: exercising Totò's self-irony, I would say that that grin "seemed like a ghiglia to me".

[1] M. Caianiello and C. Meloni, in <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>; A. di

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Martino and Valeria Bolici, in this Journal: <https://www.questionegiustizia.it/articolo/la-pagliuzza-e-la-trave-il-caso-almasri>; G. Vanacore, in <https://www.sistemapenale.it/it/scheda/vanacore-la-scarcerazione-del-generale-libico-elmasy-nota-critica-alla-interpretazione-resa-dalla-corte-di-appello-di-roma-sullart-11-della-legge-di-cooperazione-tra-litalia-e-la-corte-penale-internazionale>.

[2] I refer in particular to O. Mazza, in *Il Dubbio* of 30 January 2025; and P. Borgna, in *Huffingtonpost* of January 31, 2025 (https://www.huffingtonpost.it/politica/2025/01/31/news/paolo_borgna_essere_indipendente_vuole_dire_essere_responsabili_i_magistrati_ci_riflettano-18316801/).

[3] O. Mazza, cit., speaks of an «imaginative jumble in legal sauce», of «political evaluations» and of a «vaguely surreal debate».

[4] It is enough to open any text on the subject; I recall here only one classic: Robert Cryer at al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 20194, 483.

[5] The term in quotation marks is used by P. Borgna, cit.

[6] See for example the opinion of V. Zagrebelsky, in https://www.lastampa.it/editoriali/lettere-e-idee/2025/01/31/news/cosi_roma_ha_violato_il_diritto_internazionale-14973472/.

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The mote and the beam

Valeria Bolici, Alberto di Martino, Questione Giustizia, 25 January 2025

Informal translation

In its statement of 22 January 2025, the International Criminal Court reconstructed the facts surrounding the failed surrender of Osama Almasri Njeem. It states that the arrest warrant issued by the Court on 18 January had been forwarded on the same day to six States Parties to the Rome Statute, including Italy. The Court's request for arrest "was transmitted through the channels designated by each State and was preceded by consultation and coordination with each State to ensure the appropriate reception and subsequent implementation of the request". At the same time, the Court shared information on the possible movements of the person arrested with the States and issued a Red Notice via Interpol. The person arrested was arrested in Turin in the early hours of 19 January and the Court, at the request of the Italian authorities, did not publicly comment on the arrest. The release of Osama Almasri Njeem by the Italian authorities and his return to Libya were not preceded by any prior notice to the Court.

On January 19, the State Police forwarded the documents relating to the arrest to the Court of Appeal of Rome and to the Ministry of Justice.

In a note dated January 21, 2025, the Ministry of Justice confirmed that it had received the request for the arrest of the Libyan citizen, declaring that "considering the complex correspondence", it was evaluating "the formal transmission of the request of the ICC to the Attorney General of Rome, pursuant to art. 4 of Law 237 of 2012".

On January 21, the Court of Appeal asked the Attorney General's Office for an opinion on the validation of the arrest, and in particular on the applicability of art. 716 of the Code of Criminal Procedure, which regulates arrest on the initiative of the judicial police. It also asked to communicate "whether there is, in any case, a request for the application of a precautionary measure against the interested party, pursuant to art. 11 L. 237/2012". The Attorney General requested that the arrest be declared irregular «since it was not preceded by discussions with the Minister of Justice, who is responsible for relations with the International Criminal Court», specifying that the Minister had also been contacted by the Attorney General on 20 January, and had not submitted any request in this regard.

With the order of 21 January, the Court of Appeal of Rome, in accordance with the same request of the Attorney General, declared that there was no need to rule on the arrest carried out by the judicial police «since it was irregular because it was not provided for by law» and ordered the release of Osama Almasri Njeem «in the absence of a request for the application of a precautionary measure by the Attorney General for failure to transmit the documents of the International Criminal Court under ministerial jurisdiction». This is because the arrest by the State Police should have been preceded by «discussions between the Minister of Justice and the Attorney General at the Court of Appeal of Rome», given that, pursuant to art. 2 of Law 237/2012, «[t]he relations between the Italian State and the International Criminal Court are

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handled exclusively by the Minister of Justice, who is responsible for receiving requests from the Court and following up on them».

The Court of Appeal does not consider art. 716 of the Code of Criminal Procedure, which regulates the arrest of individuals subject to international arrest warrants for extradition purposes, to be applicable to arrest warrants issued by the International Criminal Court. The order states that, pursuant to art. 3 of Law 237/2012, in matters of cooperation with the International Criminal Court, including cooperation in matters of surrender, the rules of Book Eleven of the Code of Criminal Procedure – relating to jurisdictional relations with foreign authorities – are observed. It is noted, however, that the provisions of the Code apply «only if not otherwise provided by Law 237/2012 and the Rome Statute». Law 237/2012, the Court of Appeal believes, would provide differently in Articles 11 and 14, which provide for the following time frame for the purposes of applying the precautionary measures preliminary to surrender: 1) receipt of the documents from the International Criminal Court by the Minister of Justice; 2) transmission of the documents from the Minister of Justice to the Attorney General of Rome; 3) request by the Attorney General to the Court of Appeal for the application of the precautionary measure.

The Court of Appeal observes that, since Law 237/2012 must be applied as a special law, arrest on the initiative of the Judicial Police would be precluded, given that: the procedure for applying the precautionary measure is "specifically marked in all its steps" by the special law; the failure to provide in the special law for the possibility of arrest on the initiative would be indicative of the inapplicability of Article 716 of the Code of Criminal Procedure by virtue of the principle that *ubi lex voluit dixit*.

The order certifies that between 18 January and 21 January the Minister of Justice remained inactive, failing to transmit the documents received from the International Criminal Court to the Attorney General of Rome, contrary to the provisions of Article 59 of Law 232/1999, ratifying and executing the Rome Statute, which establishes that the State Party that has received a request for detention, arrest and surrender shall take "immediately" measures to arrest the person in question in accordance with its legislation.

The delay, therefore, is a violation of the duty to make an immediate decision. The requirement of conformity with national legislation, correlatively, is a purely modal requirement of the measures to be adopted; it has nothing to do with the qualifying obligation which is that - first of all - to provide, and to provide, as has been said, immediately.

The obligation to cooperate is also recalled by the same art. 1 of Law 237/2012, according to which «the Italian State cooperates with the International Criminal Court in accordance with the provisions of the Statute of the same Court, made executive by Law 12 July 1999, n. 222 (...) and of this law, in compliance with the fundamental principles of the Italian legal system». Pursuant to the subsequent art. 2 co. 3, again, «the Minister of Justice, in following up on requests for

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cooperation, ensures that the confidential nature of the same is respected and that the execution takes place promptly and with the appropriate methods».

Neither art. 4 nor art. 11 of Law 237/2012 grant the Minister of Justice any discretionary power of assessment on whether or not to transmit requests for surrender from the International Criminal Court to the Attorney General of Rome. Neither of the two provisions, nor any other provisions of law, in any way contemplate the criteria on the basis of which such assessment should be carried out. The need to arrest a suspect in crimes against humanity, war crimes and other international crimes is in fact the subject of a complex investigation, and of the equally complex application of international criminal law – a complexity that the ministerial note of 21 January 2025 acknowledges. The Italian State, first by signing and then ratifying the Rome Statute, has delegated this complex assessment to the equipped competence of the International Criminal Court, not to the representatives of the executive power.

On the other hand, the provision in art. 11 establishes that the Attorney General of Rome, "having received the documents" (from the Minister of Justice), requests the Court of Appeal to apply the measure of precautionary detention. The provision assumes that the documents are in fact received by the Attorney General. It does not take into consideration, however, the possibility that the Attorney General may not have received the documents from the Minister, or rather, to be clearer, the situation in which the Minister does not transmit the documents immediately.

This finding does not contradict the provision according to which the cooperation relations between the State and the International Criminal Court are exclusively managed by the Minister of Justice «who is responsible for receiving requests from the court and following up on them». It is certainly true that the exclusive responsibility of the Minister is to exclusively "manage" the cooperation relations; but this is precisely a responsibility that is rooted in a duty to manage those relations, and not to neglect them.

The Minister certainly receives the requests; and he certainly also has the power to follow up on them. In the case in question, he did not express this second responsibility, which, when considered carefully, constitutes the guise of the obligation to cooperate, that is, to duly follow up on the request for surrender, ensuring (art. 2 co. 3) that the execution occurs promptly and in the appropriate manner.

The ministerial inertia, continued in violation of the duties of cooperation pursuant to art. 1 and 2 co. 3 of Law 237/2012 and art. 59 of the Rome Statute, therefore prevented the completion of the procedural process set out in art. 11 and, according to the conclusions of the order of the Court of Appeal, vitiated the arrest carried out on the initiative of the State Police as irregular.

However, it is incontrovertible that, even in the face of a possible irregular arrest, the Minister of Justice could and should have activated the procedural process provided for by art. 11. Even

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after the arrest on the initiative of the Police, the transmission of the documents of the International Criminal Court to the Attorney General would have in fact allowed the request for the application of the precautionary measure by the Prosecutor's Office, and the consequent application of the precautionary measure. The Court of Appeal of Rome expressly acknowledges this when it certifies that it asked the Prosecutor's Office to specify, beyond and independently of any assessment of the legitimacy of the arrest, "whether there is, in any case, a request for the application of a precautionary measure against the interested party, pursuant to art. 11 L. 237/2012", to be answered that there could not be a request in the absence of transmission of the documents by the Ministry.

If the documents had been transmitted by the Ministry, the outcome of the proceedings would have been the application of precautionary custody to the person arrested, regardless of the validation of the arrest. Orders not validating the arrest (for defects of legitimacy, the most varied) with simultaneous application of the precautionary measure, are indeed far from uncommon in practice.

This second, further, moment of inaction by the Minister of Justice, completely detached from any assessment of the legitimacy of the arrest, definitively prevented the application of the precautionary measure, prescribed by law in any case of request for surrender by the International Criminal Court, in violation of the obligations of cooperation provided for by the Rome Statute and by law.

Having noted this, one may ask whether an alternative interpretation to that given by the Court of Appeal regarding the legitimacy of the arrest would have been possible, with consequent validation of the actions of the Officers and Agents of the State Police.

The reasoning articulated in the order does not appear to be acceptable in the reconstruction of the relationships between special law (237/2012) and general law (the eleventh book of the Code of Criminal Procedure). In particular, the argumentative path appears imprecise in the part in which it overlaps the institutions of arrest and the application of precautionary custody.

The application of precautionary measures is one thing, however, arrest is another. The first is an act of the judicial authority, the second is a typical act of the judicial police, ordinarily legitimized in cases of flagrancy, and provided for, in matters of extradition, in cases of urgency.

Articles 714 and 715 of the Code of Criminal Procedure dictate the criteria for applying coercive measures to persons whose extradition is requested, in the first case in response to an extradition request already received by the Italian State, in the second case (called "provisional arrest" as per art. 701 of the Code of Criminal Procedure) pending an extradition request by a third country, if the requirements of art. 715, paragraph 2 are met: the foreign country has declared that it has issued a personal precautionary measure or a sentence of imprisonment, and that it intends to transmit the extradition request; the foreign country has specified the

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identity of the person being captured, described the facts, and classified the crimes; there is a risk of escape. Article 716 of the Code of Criminal Procedure provides that, in cases of urgency, the judicial police may proceed with the arrest of the person against whom a request for provisional arrest has been submitted, if the requirements set out in Article 715, paragraph 2, are met. Once the arrest has been made, the Judicial Police informs the Minister of Justice and places the arrested person at the disposal of the President of the Court of Appeal, within 48 hours.

Articles 11 and 14 of Law 237/2012 regulate the procedure for the request and application of precautionary measures, in the first case in response to a request for surrender already transmitted by the International Criminal Court, in the second case pending the request for surrender by the Court, if the following requirements are met: the Court has declared that it has issued a restrictive measure against the person being arrested and that it intends to transmit the request for surrender; the Court has specified the identity of the person being arrested, described the facts, and classified the crimes.

Given the evident symmetry with articles 714 and 715 of the Code of Criminal Procedure, Law 237/2017 does not include a provision corresponding to art. 716 of the Code of Criminal Procedure.

Well, given the special nature of Law 237/2012 with respect to the provisions of the Code, Art. 3 of Law 237/2012 must be applied, according to which the rules of Book Eleven of the Code of Criminal Procedure are observed unless otherwise provided by Law 237/2012 itself and by the Rome Statute. Nothing evidently prevents the arrest of the person being arrested on the initiative of the judicial police in the Rome Statute – which indeed requires the cooperation of the signatory states in the delivery of the persons being arrested. Likewise, no provision of Law 237/2012 prevents the arrest on the initiative according to the forms of Art. 716 of the Code of Criminal Procedure. Articles 11 and 14 of Law 237/2017 in fact regulate the different institute of the application of precautionary measures by the Court of Appeal, without providing anything on the different institute of arrest on the initiative of the judicial police - for which, in the absence of provisions of the special law, the aforementioned provisions of the general law continue to apply.

In conclusion, the arrest of Osama Almasri Njeem by the State Police deserved to be validated pursuant to art. 3 of Law 237/2012 and 716 of the Code of Criminal Procedure.

The failure of the Italian State to cooperate in the delivery of the person being arrested, in violation of the Rome Statute and Articles 4, 11 and 14 of Law 237/2012, depended however on the inertia of the Minister of Justice in transmitting to the Attorney General the documents received from the International Criminal Court – regardless of any assessment of the ritual nature of the arrest.

Valeria Bolici, judge at the Court of Bologna, Alberto di Martino, full professor of criminal law, Scuola Superiore Sant'Anna, Pisa

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Bitterness and dismay for free Almasri

Mario Chiavario, Avvenire, 23 January 2025

Informal translation

A very bitter outcome of a story that was disconcerting in many ways: that's the least we can say. So, free and triumphant, General Almasri returned to Tripoli, despite being hit by an arrest warrant from the International Criminal Court for torture and other very serious crimes, of which there are multiple testimonies from international institutions and non-governmental organizations, documented for some time in these columns. Provisionally arrested on Saturday evening by the Digos in Turin, he was released three days later by the Court of Appeal in Rome.

Legally, the solution is based on an interpretation, which it is unfair to call "a quibble" but which cannot be said to be incontrovertible, of the Italian law implementing the Statute of the Court of The Hague, 237 of 2012. In essence - say the Roman lawyers, who were responsible for deciding on a defense request - the Police, before proceeding with the arrest, should have spoken to the Minister of Justice, not having the power to act as it did on its own initiative. It is a response that leverages the silence maintained, on this last point, by art. 11 of the law, which instead dwells on the power-duty of the minister to ask the court of appeal, in such cases, that the person whose delivery to international criminal justice is requested be placed in precautionary custody.

It is the classic argument summarized in the Latin "ubi lex voluit dixit ubi noluit tacuit" (where the law wanted, it spoke; where it did not want, it was silent), but there is also room to reason in the opposite direction: article 3 of the aforementioned law establishes in general terms that in the matters in question «unless otherwise provided by law and the statute, the rules contained in book eleven, titles II, III and IV, of the code of criminal procedure are observed», dictated on the subject of extradition at the request of a foreign State; and among these rules there is an article (716) that, for situations similar to the one contested on Saturday evening to the wanted man by the International Court, dictates the rules that the Turin police have followed. Nor can it be said that, by explicitly regulating, and in derogation of the rules of the code pertaining to this matter, only the situation of someone who is the object of a request for precautionary custody, the 2012 law has implicitly interfered in the different field of provisional arrest, preventing with silence the application of the rules of the code included among those recalled by art. 3, thus establishing in this regard a prohibition that is not in the code, of provisional arrest by the Police.

Moreover, one might also ask why, once the communication regarding the issuing of the international arrest warrant had reached the Ministry, an order applying precautionary custody was not immediately issued by the Court of Appeal invested by the Office of the Keeper of the Seals. Lack of supporting documentation and non-existence of the requirements for a provisional application, although theoretically possible under Article 14 of the law? Or what else?

An explanation seems necessary, so as not to give rise to yet another controversy over the shadows over the turning a blind eye of our governments (to tell the truth, not only the current ones) in the face of human rights violations committed at sea and on land by officials, including high-ranking ones, of countries such as Libya.

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However, there is at least one other aspect that the story further highlights. It is that of the sunset - one would hope only temporary - of the dream of an international criminal justice system that could effectively impose real force on its decisions. Yes, perhaps not everything and not always, in the functioning of the Court in The Hague, has been expressed in a totally credible way, and not only because of special powers such as those that the Statute grants to a political body such as the UN Security Council. Are we getting used to the indifference – sometimes even declared or announced – and to the failures to comply with the obligation to execute the sentences and provisions of that Court? Then, perhaps, those who speak of an “eclipse of law” are not wrong.

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Clarifying the Almasri Case

Aniello Nappi, Questione Giustizia, 3 February 2025

Informal translation

In order for this same discussion to be clear, it is appropriate to start from the conclusions already widely argued by some jurists who have spoken on the subject[1].

It is not true that the police could not have arrested Almasri without prior "dialogue" with the Minister of Justice, who has no formal role in this procedure.

The Court of Appeal could have validated Almasri's arrest, having received notice from the police, who had carried out the arrest at the direct request of the International Criminal Court.

The Attorney General at the Court of Appeal of Rome should have requested the application of precautionary detention in prison in any case.

Unlike what is provided for in the extradition procedure, in fact, the obligations resulting from the requests for arrest and surrender from the International Criminal Court are the exclusive responsibility of the Attorney General at the Court of Appeal of Rome (art. 11, law no. 237/2012).

It is true that, according to art. 2 of law no. 237/2012, «the cooperation relations between the Italian State and the International Criminal Court are exclusively managed by the Minister of Justice, who is responsible for receiving requests from the Court and following them up». But art. 4 of the same law provides that «the Minister of Justice shall implement the requests formulated by the International Criminal Court, transmitting them to the Attorney General at the Court of Appeal of Rome for execution».

Therefore, according to the provisions of art. 11 of law no. 237/2012, it is precisely the Attorney General, not the Minister, who must formulate the request for the application of the precautionary measure, thus fulfilling the obligation imposed on him by art. 59 of the Statute (law 12 July 1999, no. 232), with the exclusion of any assessment of the evidentiary basis of the request and the need for delivery.

And in reality, the attribution of jurisdiction to the Attorney General, rather than to the Minister as for extradition, depends on the exclusion of any assessment of opportunity in fulfilling the obligation to cooperate, as provided for by art. 86 of the Statute.

It is then necessary to consider art. 92 of the Statute, which provides that "in case of emergency, the Court may request the arrest of the person sought pending the presentation of the request for surrender and supporting documents". Therefore, requests can be transmitted through the International Criminal Police Organization (INTERPOL), for immediate execution of the arrest by the judicial police, who must then place the person arrested at the disposal of the President of the Court of Appeal of Rome for possible validation pursuant to art. 716 c.p.p., a rule referred to in art. 3 l. n. 237/2012.

The contrary opinion expressed in this regard by the Court of Appeal of Rome, which excludes the applicability of art. 716 c.p.p., ignores the provisions of art. 87 and 92 of the Statute. In fact, the International Criminal Court specified that it had "forwarded a request to Interpol to issue a red notice", which evidently legitimized direct intervention on the initiative of the police.

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The Roman magistrates therefore committed a gross error of law when they refused to validate Almasri's arrest and to apply the measure of detention in prison.

This error could have been avoided if the Minister of Justice, in response to the Roman court's request, had communicated that he was not entitled to intervene in a proceeding that was the exclusive competence of the Attorney General. Nor would the minister have had to study a "complex correspondence" to provide this information, because, not being called upon to pronounce in any way on the request for surrender, it would have been sufficient to read the law or in any case avail himself of the collaboration of the ministerial offices to which that law was presumably known.

It is by failing to prevent the error of the Roman magistrates, therefore, that the Government was able to implement the program of repatriation of Almasri, already organized before the Court of Appeal ruled.

It will be the Court of Ministers, promptly invested by the Public Prosecutor of Rome, to verify whether and which of these behaviors can be considered illicit. But the Prime Minister is certainly right when she states that the national interest was at stake. In fact, both the control of immigration flows and the supply of hydrocarbons are obviously of national interest, for example.

However, when it promoted and signed the treaty establishing the International Criminal Court, Italy committed itself precisely to making international law prevail over reasons of State. In fact, even democratic states that have not recognized the International Criminal Court, such as Russia and the United States of America, are presumably that they thus intended not to renounce the possible possibility of an even unscrupulous use of reason of State.

It follows that in these cases the claim of reason of State is not compatible with the adherence to the statute of the International Criminal Court, whose art. 127 admits the withdrawal of any State party.

It is therefore not possible to continue to "play two parts in a comedy".

Either inside or outside the International Criminal Court.

[1] V. Bolici, A. di Martino, The straw and the beam: the "Almastri" case, in *Questione giustizia*, <https://www.questionegiustizia.it/articolo/la-pagliuzza-e-la-trave-il-caso-almasri>; M. Caianiello, C. Meloni, Almasri Case: A Questionable Interpretation of Italy's Law on Cooperation with the ICC Led to the Release of the First Wanted Person Arrested on European Soil in the Context of Investigations in Libya, in *Sistema Penale*, 2025; G. Vanacore, The Release of Libyan General Elmasry. Critical Note to the Interpretation Made by the Court of Appeal of Rome on Art. 11 of the Law on Cooperation between Italy and the International Criminal Court, *ibid*.

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Rome Court of Appeals Orders Al Masri's Release: Reflections on the Italian Authorities' Execution of Arrest Warrants Issued by the International Criminal Court

Lavinia Parsi, Giustizia Insieme, 25 February 2025

Informal translation

On January 19, Njeem Osama, known as Al Masri ("the Egyptian"), was arrested and released by order of the Rome Court of Appeals on January 21. The arrest was based on a warrant issued by the International Criminal Court (ICC) the previous day[1] for war crimes and crimes against humanity, committed since at least 2015 in the Mitiga detention center, the largest in western Libya.

More specifically, Al Masri is being investigated by the ICC for the war crimes of murder, torture and cruel treatment (under Article 8(2)(c)(i) of the Rome Statute), outrages upon personal dignity (Art. 8(2)(c)(ii)), rape, sexual violence and sexual slavery (Art. 8(2)(e)(vi)) and for the crimes against humanity of murder (Art. 7(1)(a)), enslavement (Art. 7(1)(c)), unlawful detention (Art. 7(1)(e)), torture (Art. 7(1)(f)), rape, sexual violence and sexual slavery (Art. 7(1)(g)), persecution (Art. 7(1)(h)) and other inhumane acts (Art. 7(1)(k))[2] committed against migrants and opponents.[3] These crimes, already widely documented by numerous human rights lawyers and the United Nations Independent Fact Finding Mission on Libya[4], were systematically committed in Mitiga by the Special Deterrence Forces (known as "Rada'a"), a radical Islamist unit formed within the Tripoli military police during the 2011 civil war and which today represents one of the largest militias in control of the country. As director of the Mitiga detention center, and a member of Rada'a, Al Masri is said to have personally committed, ordered or participated in the commission of the above-mentioned conduct[5].

For these reasons, simultaneously with the issuance of the arrest warrant, on 18 January 2025 the ICC forwarded a request for the affixing of a red notice by Interpol, so as to alert the competent law enforcement agencies in the national jurisdictions concerned and request the arrest of the suspect[6]. Therefore, on the same night, the D.i.g.o.s. of Turin provisionally arrested Al Masri, transmitting the relevant note to the Court of Appeal of Rome (competent in the matter pursuant to art. 11 of law 237/2012, relating to the adaptation to the provisions of the Statute of the ICC) and to the Ministry of Justice, on 19 January 2025. The Court of Appeal, having heard the Attorney General, noted the irregularity of the arrest and ordered the immediate release of Al Masri[7]. As stated in the provision, the source for the application of the precautionary measure for the purpose of delivery to the ICC is correctly identified in art. 11 of law. 237/2012, which provides that – in cases where the ICC has already issued an arrest warrant or a sentence of imprisonment – the Attorney General at the Court of Appeal of Rome, upon receipt of the documents, requests the same court to apply the precautionary custody measure against the person whose delivery is requested. The transmission of the documents to the Attorney General, on the other hand, is entrusted to the Minister of Justice who, pursuant to art. 2, paragraph 1 of Law 237/2012, exclusively handles relations with the ICC, and it is his responsibility to receive requests from the Court and follow up on them.

In this case, the Court of Appeal notes that the D.i.g.o.s. of Turin, while referring to art. 11 of Law 237/2012, did not wait for the Attorney General's request for the purposes of applying the measure, but acted on its own initiative, apparently pursuant to art. 716 c.p.p.: this provision, relating to extradition procedures, in cases of urgency, in fact provides for the possibility of carrying out an arrest on the initiative of the judicial police, simultaneously informing the

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Minister of Justice and the competent Court of Appeal. In the opinion of the judges, the arrest of Al Masri would therefore be irregular because it would have occurred in application of the procedure provided for extradition, and not instead of that provided for the execution of arrest warrants issued by the ICC. In confirmation of this, the Court of Appeal emphasizes that the same law 237/2012 provides for a provision entitled "Provisional application of the precautionary measure" (art. 12), which however refers to the same procedure provided for by art. 11, and therefore to the request by the Attorney General following receipt of the documents by the Minister of Justice. It is worth noting that, as can be learned from the information of the D.i.g.o.s. relating to the execution of the arrest, there was a note from the Central Directorate of Criminal Police - International Cooperation Service, at the Ministry of the Interior, asking the Turin Police Headquarters to "evaluate the existence of the conditions and the opportunity to proceed pursuant to art. 716, in relation to 715, of the Code of Criminal Procedure"[8].

In the opinion of the writer, there was room at least for an alternative interpretation by the Court of Appeal. As rightly noted in the order, art. 3 of Law 237/2012 provides that, unless otherwise provided, in matters of surrender, cooperation and execution of sentences, the provisions contained in Book XI, Titles II, III and IV of the Code of Criminal Procedure shall be observed. In cases of arrest warrant issued by the ICC, therefore, unless otherwise provided, the provisions relating to extradition are effectively applicable. Well, the Court of Appeal of Rome excludes the applicability of art. 716 of the Code of Criminal Procedure since the procedure for the application (even provisional) of precautionary measures is provided for by arts. 11 and 14 of Law 237/2012: in compliance with the maxim *ubi lex voluit dixit*, if the legislator had wanted to provide for a form of arrest on the initiative of the judicial police, it would have drafted a dedicated provision. This interpretation, however, is apparently contrary to the letter of art. 3, l. 237/2012, which provides – on the contrary – that the gaps can and must be filled in light of the relevant provisions of the Code of Criminal Procedure: this also occurs for essential aspects inherent to the application of precautionary measures, such as the terms which, not expressly provided for by l. 237/2012, would otherwise be considered absent tout court.

Even a teleologically oriented interpretation of the provisions in question would seem to militate in favor of the applicability of the procedure provided for by art. 716 c.p.p. to cases of arrest warrants issued by the ICC. It would in fact be illogical for the Italian legal system to provide for the possibility of intervention on the initiative of the judicial police for common crimes and not for international crimes punishable by the Rome Statute, which are by definition characterized by exceptional gravity. Furthermore, in light of the interests essentially linked to the position of the suspects subject to an arrest warrant by the ICC, not being able to apply a procedure that ensures arrest in an extremely rapid time frame would mean, in most cases, frustrating any possibility of action by the Court[9].

Regardless of whether or not one adheres to the interpretation proposed by the Court of Appeal of Rome, it is worth noting that there appears to have been a failure to comply by the Minister of Justice, who did not transmit the documents relating to the arrest warrant against Al Masri to the Attorney General. This fact appears even more relevant, since in addition to having received the request through the channels provided for these communications with the ICC, the Minister of Justice had been duly notified by the D.i.g.o.s. of Turin on 19 January and by the Attorney General on 20 January. As noted in the order, as of 21 January the Ministry had not yet submitted any request regarding the arrest of Al Masri.

The reconstruction reflects what the ICC noted in a dedicated press release[10]. The press release states that, immediately after the arrest, the Court, at the express request of the Italian authorities, had refrained from commenting publicly on the news; at the same time, it had

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continued to engage with the Italian authorities to ensure the effective execution of all the procedural steps required by the Rome Statute. In this context, the ICC Registry had also reminded the Italian authorities that, in the event that they had encountered problems capable of hindering or preventing the execution of the request for cooperation, they should consult the Court without delay to resolve the issue. The Italian authorities, however, never responded to these requests: on 21 January 2025, without any prior notice or consultation, the Court learned that Al Masri had been released and taken back to Libya.

While, on the one hand, the hesitation lends itself to easy interpretations, also in light of the complaints filed with the ICC against some Italian Ministers and former Ministers precisely in relation to the crimes committed against migrants in Libya[11], it is worth remembering that, on the other hand, Italy plays a role of crucial importance in the investigation in question, representing one of the four countries that make up the Joint Team relating to crimes committed against migrants in Libya, which also includes the Office of the Prosecutor of the ICC[12]. This serious breach, in addition to having been the subject of requests for explanations by some parliamentarians[13] and of a complaint under Articles 378 and 314 of the Criminal Code[14], is currently being verified by the ICC. In fact, to the articles of law 237/2012 mentioned so far, it seems appropriate (if not necessary) to add a reference to art. 1, which establishes an "obligation "go di cooperazione" of the Italian State with the ICC: despite the fact that in recent weeks various members of the Government have released statements to the contrary[15], executing the arrest warrants of the Court represents in all respects an obligation for the States Parties, which have committed themselves to this by signing and ratifying the Rome Statute[16]. Therefore, as already noted by some lawyers and human rights organizations[17], Italy's conduct also represents a violation of Article 89 of the Rome Statute, which provides that: "States Parties shall, in accordance with the provisions of this Part and the procedure provided by their national law, comply with requests for arrest and surrender."

[1] ICC, Pre-Trial Chamber I, Situation in Libya, "Warrant of Arrest for Mr Osama Elmasry / Almasri Njeem", ICC-01/11-149-US-Exp (18 January 2025).

[2] ICC-01/11-149-US-Exp, para. 17-90.

[3] As is evident from the arrest warrant as well as, for years, from testimonies collected by civil society organizations and reports published by the United Nations, the victims also include lawyers, human rights activists and individuals discriminated against because of their religious or sexual orientation.

[4] UNGA, Human Rights Council, "Report of the Independent Fact Finding Mission on Libya", A/HRC/52/83 (20 March 2023), paras. 57-58, 61-66, 84, 97; UNGA, Human Rights Council, "Report of the Independent Fact Finding Mission on Libya", A/HRC/50/63 (22 June 2022), paras. 36-39, 65-66, 92-93.

[5] As reported in the arrest warrant, Al Masri ran Mitiga Prison and in particular "was responsible for the management of the guards, as evidenced by the fact that he organised their shifts and gave them instructions and orders. By assisting in the treatment of detainees, deciding on the assignment and reassignment of detainees for organisational purposes, in order to punish detainees or to prevent any form of adverse behaviour, [Al Masri] also appears to have exercised administrative control over the detainees in Mitiga Prison. Beating detainees was a common practice among prison guards and commanders, who reported to Mr. [Al Masri]. On some occasions, Mr. [Al Masri] was present when guards beat detainees or shot them. [Al Masri] reportedly ordered guards to beat detainees so that their wounds were not visible. He also

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reportedly punished guards who helped detainees to have contact with their families or to obtain better food."

[6] As is known, although red notices do not in themselves constitute an arrest warrant, they represent a request on a global scale to provisionally arrest the individuals indicated, as they are wanted by third States or international tribunals.

[7] Court of Appeal of Rome, Criminal Section IV, R.G. 11/2025, Order on surrender pursuant to Law 237/2012 International Criminal Court (21 January 2025).

[8] Ministry of the Interior, Department of Public Security, Central Directorate of Criminal Police – International Cooperation Service, Prot. MI-123-U-B-1-2-FD-2025-51, 19 January 2025.

[9] As is known, the ICC does not provide for the possibility of proceeding against defendants in absentia. Only in very exceptional cases, the Court has recently determined that it is possible to hold the confirmation hearing of charges (comparable to the preliminary hearing provided for by our legal system) in the absence of the suspect. See: ICC, Pre-Trial Chamber III, Situation in Uganda, Prosecutor v. Joseph Kony, "Decision on the criteria for holding confirmation of charges proceedings in absentia", ICC-02/04-01/05-532 (29 October 2024).

[10] ICC, Press release: "Situation in Libya: ICC arrest warrant against Osama Elmasry Njeem for alleged crimes against humanity and war crimes" (22 January 2025).

[11] For a complete reconstruction of the complaints submitted to the International Criminal Court, please refer to: Lavinia Parsi, Francesca Vitarelli, "Implementation of anti-migration policies and crimes against humanity: emerging parallels and needs for coordination between national and international criminal justice", Sistema Penale 9/2023.

[12] CPI, Press release: "Statement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor joins national authorities in Joint Team on crimes against migrants in Libya" (7 September 2022).

[13] Ansa, The oppositions to the attack against the release of Libyan commander Almasri" (22 January 2025).

[14] As reported by journalistic sources, the complaint was filed with the Rome Public Prosecutor's Office against the Prime Minister Giorgia Meloni, the Minister of the Interior Matteo Piantedosi, the Minister of Justice Carlo Nordio and the Undersecretary to the Presidency of the Council, Alfredo Mantovano, holder of the delegation to the secret services, on the initiative of 'former Undersecretary of Justice Luigi Li Gotti. See: Ansa, "Lawyer denounces Meloni and Piantedosi on the Almasri case" (23 January 2025).

[15] Lastly, Foreign Minister Tajani commented on the case by stating that "The Hague is not the mouthpiece of truth, one can also have different visions. We are a sovereign country and we make our own politics", Euronews, "Interior Minister Piantedosi: 'Al Masri dangerous, expelled for state security'" (23 January 2025).

[16] See most recently: ICC, Pre-Trial Chamber II, Situation in Ukraine, "Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties", ICC-01/22-90 (24 October 2024).

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[17] Fédération Internationale pour le Droits Humains, "Italy's failure to surrender Libyan suspect to the International Criminal Court is a breach of its Rome Statute obligation" (23 January 2025).

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The release of Libyan General Elmasry. Critical note on the interpretation given by the Court of Appeal of Rome on art. 11 of the law on cooperation between Italy and the International Criminal Court

Giulio Vanacore, in Sistema Penale, 27 gennaio 2025.

Informal translation

1. Introduction. – On 2 October 2024, the Prosecutor of the International Criminal Court had requested the First Pre-Trial Chamber of the same Court to adopt an arrest warrant, pursuant to Article 58 of the Statute[1], against the Libyan General Osama Elmasry Njeem. He was (and is) under investigation for crimes against humanity (in particular unlawful detention, torture, rape, sexual violence, murder and persecution, pursuant to art. 7 paragraph 1 letters a, e, f, g, h of the Rome Statute) and war crimes (in particular outrages upon human dignity, rape, sexual violence, murder, torture, cruel treatment pursuant to art. 8 paragraph 2 letters c, numbers 1 and 2, as well as letters e, number 6) committed in the prison of Mitiga, Libya, starting from 15 February 2015. The victims were detained for religious reasons (as they were Christian or atheist), ideological reasons ('immoral behaviour'), because they were homosexual or in any case because they were allegedly responsible for attitudes of opposition to the members of the Special Deterrence Forces, of which General Elmasry was a member.

On Saturday 18 January 2025, the First Preliminary Chamber of the International Criminal Court signed the order ordering the preventive detention of the suspect.[2] The warrant was transmitted, via Interpol red notice, to six countries. In particular, given the information identifying the suspect in transit from Germany to Italy, the Court had the arrest warrant sent to the Italian authorities through the embassy in The Hague, seat of the International Criminal Court. Following an alert from Interpol, DIGOS officers from Turin proceeded to arrest the general in a hotel room in the Piedmont capital in the early hours of the morning of Sunday 19 January 2025. The documents relating to the arrest of the Libyan suspect were then transferred by the Turin authorities to the Attorney General's Office at the Court of Appeal of Rome, which is competent, pursuant to Law 237/2012 (on cooperation between Italy and the International Criminal Court), regarding requests for custody of individuals subject to a precautionary detention order or a final conviction from the criminal courts of The Hague.

The Court of Appeal of Rome ordered the release of the suspect on Tuesday 21 January 2025, considering the arrest carried out by the Turin Digos to be illegitimate, since the restriction of personal freedom as a precautionary measure would not be provided for by the same law 237/2012, as per the opinion of the investigating authority. The Attorney General did not, however, request the precautionary custody of the North African general, considering the silence on the point maintained by the Minister of Justice, duly and promptly informed of the arrest, to be preclusive. The Ministry of the Interior, on the same morning of Tuesday 21 January 2025, ordered the immediate removal of the suspect from Italian soil, with repatriation to Libya guaranteed by a vehicle available to the secret services.

2. A possible alternative interpretation of the role of the Minister of Justice in the matter of the delivery of suspects (or the imprisonment of convicted persons) to the International Criminal Court. – Leaving aside any evaluation of the government's actions, which goes beyond the scope of this paper, we must ask ourselves whether the orientation taken by the Court of Appeal of Rome and the Capitoline Attorney General's Office regarding the release of Osama Elmasry Njeem was the only one admissible according to the ordinary hermeneutic canons.

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We question, with greater explanatory effort, whether the interpretation given by the Italian judges to art. 11 of Law 237/2012 regarding Italy's cooperation with the International Criminal Court is objectionable.[3]

Internal law, if we look closely, does not provide, in the literal tenor of the provision, any power of impulse or initiative on the part of the Minister of Justice regarding the execution of a prison order (preventive following a mandate or definitive following a conviction). The legislator of 2012, on the other hand, seems to have wanted to conceive a completely 'jurisdictionalized' procedure, without an authentic power of paralyzing veto or inevitable impulse on the part of the government authority. The only clause that, in that provision of the law, refers to a role of the ministry, concerns the 'receipt of documents' by the Attorney General of Rome, the only body competent to request the precautionary custody of a person wanted by the international judicial authority. And yet it is not prescribed that such receipt, in favor of the Attorney General, must necessarily come from the Ministry. In the case in question, even if the State police that proceeded with the arrest of Elmasry had not been in possession of the text of the mandate of the International Criminal Court, the same could have been transmitted to the investigating body and Roman from Interpol, Europol, Eurojust, the Italian Embassy in The Hague or from the Court itself.

Ultimately, the rule does not literally impose either a power of impulse, or a possibility of veto, or even a formal and indispensable prior dialogue between the Italian Prosecutor's Office and the Ministry of Justice, in order to provide for the custody of the international suspect.

It is true that, as the Court of Appeal explains in the release order, art. 2 paragraph 1 of the same law 237/2012[4] dictates a general right-duty of constant dialogue and exclusive care of relations with the Court by the Minister of Justice. He is the one who holds the reins of relations with the International Criminal Court in the case, for example, of active or passive rogatory letters, in terms of summonses or the taking of evidence, thus representing the sorting center for requests that cannot be formulated or received immediately and directly by domestic judges. And yet this rule does not appear to affect the different mechanism, otherwise regulated by an ad hoc rule in a separate chapter of the law (Chapter II called precisely 'Surrender'), which, precisely by way of special provision, regulates the arrest of a wanted person or the imprisonment of a convicted person. Article 11 does not repeat the designation, specific to Article 2 (a provision not even referred to in Article 11), of the Minister as the sole person authorised to dialogue with the Court and to forward the relevant requests to the domestic judges. When the arrest of the suspect, recipient of an international arrest warrant, or of the person definitively convicted by the judges of The Hague is at stake, the Attorney General, according to the proposed alternative reading of the domestic rule, can request, once the documents have been acquired (from any source), the custody of the wanted person, pending the material delivery to the International Criminal Court.

Only in the phase following the completion of custody, also following a possible appeal before the Court of Cassation pursuant to art. 11 paragraph 2, and in this last case after the negative experiment of the appeal, a role of the Minister re-emerges, who must adopt, pursuant to art. 13 paragraph 7[5], the decree of definitive delivery of the arrested person in favor of the judges of The Hague. However, this is a procedural segment subsequent to the consolidation of custody and in any case there does not appear to be any margins of political discretion in the choice of adoption of said decree by the government authority, which therefore acts, according to the overall legislative framework of 2012, as a mere executor, in a 'notarial' manner, of jurisdictional resolutions.

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Before this stage, evidently conclusive and inherent to the personal transfer of the arrested person, art. 11, it is reiterated, sculpts a procedure that involves only the Attorney General's Office as the requesting pole and the Court of Appeal as the decision-making terminal of custody. It does not seem correct to involve, in the 'closed' discipline of art. 11, a rule, that of art. 2, which, even if it is intended to be defined as 'general', cannot constitute the object of an anomalous receptive referral in the special provision that regulates the procedure in matters of personal custody and surrender.

3. The different issue of the power of pre-cautionary arrest by the Italian judicial police. – Another issue, also addressed in the release order of the Court of Appeal, concerns the power of arrest by the Italian judicial police following the receipt of an arrest warrant from the International Criminal Court.

The Court of Appeal, in the order for Elmasry's release, considers that, given the silence of the law on cooperation, the police could not have (and therefore could not in the future, in similar cases) proceeded to arrest the recipient of an international warrant (or even of a final conviction sentence from The Hague and transmitted, as in this case, by diplomatic channels or by Europol or Interpol). In other words, if the internal police bodies were, as happened in the Elmasry case, informed of the passage, even temporary (think of a mere airport stopover), of a person wanted for international crimes by the only criminal justice body existing at a global level, they would have no power (or duty) to make a precautionary arrest, having to await the request for custody from the Attorney General of Rome. The latter, as already illustrated in the previous paragraph, should always be preceded, according to the approach taken by the judges of the capital, by some act of initiative of the Minister of Justice, of which however the minimum terms of form and content should be outlined. Consequently, it would not be possible to forcibly detain the suspect or the convicted without a provision from the Court of Appeal of Rome accepting the request for custody.

This seems to be considerably worrying in terms of the need for the necessary speed of the procedure, in the face of an evident risk of escape of individuals who may enjoy significant international coverage.[6] The procedure relating to custody, thus conceived, is really an excessively burdensome and complex construct, undoubtedly a harbinger of serious inefficiencies, ultimately exposing the Italian State to inertia and liability for non-compliance before the Assembly of the States Parties to the Treaty establishing the International Criminal Court.

The Court of Appeal does not believe that this void in the regulation can be filled by the general referral that Law 237/2012 makes in favor of the codified legislation on extradition. In particular, it does not believe that it can apply, by virtue of the reference to the provisions of the Code of Criminal Procedure dictated by art. 3[7] although not specifically provided for by the law on cooperation, art. 716 c.p.p.[8] on the very point of applying the precautionary measure also to those wanted by the Court of The Hague.

In truth, this further passage does not seem to be acceptable either, in reality central to the economy of the release order. In reality, there is no silence in the law on the point (so much so as to impose the application, as the Court of Appeal intended, of the maxim *ubi lex voluit dixit*). Precisely that rule which refers to the general discipline on the subject of extradition, in the case of hypotheses and procedural steps not explicitly regulated by the special law, would have

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allowed (and would also allow for future hypotheses) to look at art. 716 c.p.p. on the subject of the power of precautionary arrest by the domestic judicial police.

Moreover, a systematic argument is also relevant: there is no mechanism of precautionary custody in the Italian criminal procedure that is not preceded by the possible application of a precautionary arrest, naturally if the conditions are met. If the 'exclusionary' interpretation of the Court of Appeal were to be definitively accepted, this would be a very serious anomaly, relating precisely to the most glaring cases of criminal violations, concerning crimes with a very high offensive profile (in terms of genocide, crimes against humanity or war crimes). Moreover, this conclusion is also imposed by a constitutionally and conventionally oriented interpretation of the law on Italy's cooperation with the International Criminal Court. Certainly, it responds more to the binding canons of fulfilling international obligations^[9] imposed by the Fundamental Charter in Articles 11 and 117. And it does not seem possible to claim a violation of Article 13 of the Constitution regarding the lack of positive discipline that imposes or permits precautionary arrest, given the reference to the general discipline of extradition (and therefore to art. 716 of the Code of Criminal Procedure) contained in art. 3 of Law 237/2012.

This obviously does not exclude that, even in the face of a police arrest deemed illegitimate, custody may still be requested and admitted, thus essentially ensuring detention pending delivery to the International Criminal Court, thus averting the concrete risk of escape of the suspect, and even of the person definitively convicted of genocide, crimes against humanity or war crimes.

4. Conclusions. – Ultimately, according to the judges of the Court of Appeal, in this interpretation also supported by the opinion of the Attorney General, an act of impetus from the Minister in favor of the second-level investigating body would have been necessary, with the aim, if we understand correctly, of providing a sort of clearance, or even assent, to the formulation of a suitable request for custody by the Roman public prosecutors.

However, in the face of the silence on the point of the legislator, and indeed of a circular, circumscribed and independent normative definition, such as that of art. 11 L. 237/2012, it is not clear why it is necessary to attribute, by way of jurisprudential interpretation, a power to the Minister of Justice, with undoubtedly problematic contours and difficult to conceptualize (first of all in terms of possible political discretion in the face of an eminently jurisdictional decision, coming from supranational bodies of a penal nature, therefore also involving the necessary compliance with Articles 11 and 117 of the Constitution), framed as an executive body that should 'start' the engine of the investigative request for detention and, in this way, making compliance with the obligations of cooperation in force on every domestic authority belonging to the States Parties to the Rome Statute, conditional on such initiative.

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ALMASRI AND THE ICC: now Italy risks being referred to the UN

Gabriele Della Morte, *Il Sussidiario*, 7 February 2025

Informal translation

The new watershed line of the Almasri case, after the repatriation of the Libyan militiaman and the notice of investigation to the Prime Minister and ministers, is certainly represented by the speeches to the Chambers of the Keeper of the Seals Nordio and the Minister of the Interior Piantedosi. The management of the very thorny affair has appeared fragile and superficial. Not by the International Criminal Court (ICC), as Nordio reproaches, but by the Italian Government. In this regard, *Il Sussidiario* has collected the technical opinion of Gabriele Della Morte, full professor of public and criminal international law at the Catholic University of Milan.

- Nordio said that "the role of the minister is not simply that of a paper pusher", but of a "political body that must consider the content of the requests in light of a possible contact with the other ministries". Let's start from here.

Two different issues concern this affair. The first is that of Italy's international responsibility, the second is that of its internal responsibility. Both raise legal problems and political problems. I can only focus on the first. From a legal perspective, we are faced with a clear international wrong.

- Why?

The legal issue, from an internationalist point of view, is governed by the provisions of Part IX of the ICC Statute, Articles 86 et seq., in combination with Article 59, which regulates the arrest procedure in the custodial State, also referring to the internal discipline, which in our case is represented by a law, no. 237/2012, expressly dedicated to the adaptation of the Italian legal system to the provisions of the ICC Statute.

- In our case, the Libyan militiaman Almasri, accused of war crimes and crimes against humanity. Continue.

The ICC is based on a Treaty, signed in Rome in 1998 and in fact it is often referred to as the "Treaty of Rome". The State – Italy – that ratified this Treaty is obliged by international law to execute its provisions "in good faith". This is clearly established by international law, and in particular by Article 26 of the Vienna Convention on the Law of Treaties, the subsequent Article 27 of which also provides that "A party may not invoke the provisions of its internal law to justify the failure to perform a treaty".

- Therefore, we have violated the obligations of the Treaty establishing the ICC.

Precisely. Not only that. According to the comments produced so far by criminal and criminal procedure doctrine – among others, for the comments in Italian only, I refer to Michele Caianiello and Chantal Meloni; Khrystyna Gavrysh; Valeria Bolici and Alberto di Martino; Lavinia Parsi – the rules of domestic law would also have been violated, since the reasoning of the Court of Appeal of Rome, based on a particular interpretation of 237/2012, which is entitled

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"Adaptation to the Statute of the International Criminal Court" and which provides for the regulation of the surrender to the ICC of persons who are on Italian territory, contains more than one argumentative fallacy. But here we move from the violation of international law to the violation of domestic rules.

- Explain better.

It says that "The Italian State cooperates with the ICC in accordance with the provisions of the Statute of the same Court" and that the Minister of Justice is responsible, "exclusively", for "following up" on requests from the Court.

- What does "follow up" mean?

Here, in fact, a problem of interpretation arises that depends on Law 237/2012. It is an adaptation law, that is, it intervened to modify internal rules to allow Italy to comply with the obligations of the Statute, but it did not do so in a sufficiently detailed way. Thus, neither art. 4 nor art. 11 of law 237/2012 seem to grant the Minister of Justice any discretionary power of evaluation, nor is it clear on what basis parameters such an evaluation would be operable.

- A question arises: on the failure to arrest Almasri, was there a sort of "gap" between the obligations of the Rome Prosecutor's Office and those of the Government?

It is a very technical matter, but one thing is certain: criminal lawyers and criminal proceduralists agree that law 237/2012 retains some grey areas, but they also agree that the interpretation that has been offered in this case is decidedly botched. There is, however, one fixed point, and it is of an internationalist nature: international law provides, as a general rule, that a single State can never invoke a provision of internal law to justify failure to comply with an internationalist obligation. And to this we must add that Italy, pursuant to Article 11 of our Constitution, "allows, on equal terms with other States, the limitations of sovereignty necessary for an order that ensures peace and justice among Nations" and that it "promotes and favors international organizations aimed at this purpose". A circumstance, evidently, not realized in the Almasri case.

- Nordio also spoke of a lack of "coherence" in the arrest warrant. Some "inconsistencies" could be identified, perhaps referring to the fact that the act was amended 5 days later.

The arrest warrant, issued by the Pre-Trial Chamber at the request of the International Prosecutor, is in line with ICC practice: it lists the reasons why there are "reasonable grounds" to believe that some – terrible! – crimes have been committed, detailing everything to the level required for an arrest warrant. Which – mind you – does not require that the names of witnesses or the exact time of the single episode, perhaps of rape or torture, be specified.

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- It seems like a crucial detail. How can it be explained?

The problem is not so much the circumstantiality of the events, which will have to be subjected to a subsequent verification procedure in the event that the charges are confirmed and the actual trial begins, but rather the "qualification" of the violations allegedly committed. The ICC trial is the passing of a "test" of credibility of the evidence that has been produced up to that point, and this "test" becomes increasingly stringent the closer we get to the moment of the conviction, and therefore to the limitation of personal freedom.

- Put another way?

In other words, there is a sort of "proportion" between what needs to be demonstrated and the "criminal club" that can hit the accused. At the moment it is a tenuous level of proportionality. It is necessary to demonstrate the "well-founded reasons", because we are at the first steps of the possible procedure; will follow the "valid reasons" for the confirmation of the charges and therefore the conviction "beyond any reasonable doubt" to recognize guilt.

- Can we return to the arrest warrant?

It is requested by the Prosecutor, but it is approved by the judges. The 40 pages of the arrest warrant published on the Court's website are an order issued by the Pre-Trial Chamber, not by the Prosecutor.

- Why do you make this observation?

Because this procedure represents an important judicial filter of guarantee. It is the Pre-Trial Chamber that approves the request of the ICC Prosecutor, which is why by the time the request to proceed with the arrest arrives in Italy, a judicial investigation has already been carried out. It is the Pre-Trial Chamber that issues the arrest warrant, not the Prosecutor.

- This brings us to an important objection. Many media have given prominence to the dissenting opinion of Mexican judge Flores Liera, to underline the fragility of the provision.

The power to adopt decisions by majority, including "dissenting opinions", is recognized under the Treaty of Rome and can also be found in other international jurisdictions. It expresses a disagreement on a point of fact or law, but the reasons expressed by the dissenting Judge have nothing to do with those evoked by the Italian Government. They mostly concern the jurisdictional extension of the Court in terms of time.

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- What does it mean?

The Libyan case was activated by the United Nations Security Council, because Libya is not a State Party to the ICC. It is as if the ICC operated with two "engines": the first, which we could define as ordinary, concerns crimes committed by a citizen of a State Party to the Treaty or in the territory of the latter; the second, or rather the "key" that turns on the second, is a resolution of the UN Security Council adopted under Chapter VII of the UN Charter, or on the basis of initiatives undertaken with a view to maintaining peace. Through an eminently political act, the Security Council can give the ICC an open mandate, which goes beyond the limits of the ordinary jurisdictions of the Court. This is what happened with Resolution 1970 of 2011, since Libya is not a State Party to the Treaty on the Court. According to Judge Flores Liera, given the period of time that has passed since Resolution 1970, we cannot interpret the current situation in Libya in which the crimes were committed as covered by that mandate, dating back to 2011. This is the main point of the dissenting opinion, but as can be easily understood, it has absolutely nothing to do with Italy's obligation to cooperate under the ICC Statute.

- What could a government do if it were to detect inconsistencies in an arrest warrant – for example, a formal incompleteness – that it considers illegitimate?

It should consult the Court, as the Court itself requested in this case.

- So, the hypothesis that the act is null and void due to procedural or formal defects?

Given the current state of the debate, it does not seem plausible to me. In any case, it has not yet been clarified to which defects, in particular, reference is being made.

- To cite as a cause of delay or execution the fact that the warrant was in English?

Surreal. The working languages of the ICC are English and French according to the founding Treaty. By ratifying the treaty, Italy accepted those working languages.

- In your opinion, did the government have a way to safeguard both the obligation to arrest Almasri and the national interest, without sacrificing one of the two?

It is an impossible question to answer, for a fairly simple reason: in this affair, there are cards that remain covered. We can perhaps guess the reason, but this is not the job of a technical jurist. In the meantime, as an internationalist, I can say that whatever was at stake, there was in

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any case an unequivocal violation of an international obligation. And this international wrong does not only concern the system of States Parties to the ICC, but also the failure to comply with an obligation of customary law, that is, valid for all States, regardless of the number of States Parties to the ICC.

- And what is this obligation?

It is the obligation to aut dedere aut iudicare, that is, to judge, or to hand over to a State or jurisdiction that intends to judge, an alleged perpetrator of what the four Geneva Conventions define as "grave breaches", serious violations. Even the Italian Society of International Law rightly recalled this in an official statement. And the crimes that were evoked in Almasri's arrest warrant are unequivocally violations of the Geneva Conventions. The arrest warrant refers to torture and even rape of very young children.

- Today, news leaked that the ICC had opened a case against the Italian government; Palazzo Chigi denied it.

If that is the case, we cannot comment on it.

- It is not difficult to see that the ICC would have waited for Almasri to be in Italy to issue the arrest warrant. He arrived in Europe on January 6. What do you think about this?

Specious suppositions not supported by any data.

- What could happen now?

The Court has the power to refer the failure to comply with the treaty obligations to the assembly of the States parties, in this case even to the UN Security Council, because behind the original mandate to open investigations in Libya there is a mandate that comes from one of its resolutions. This would be a very hard blow to Italy's international credibility.