

Pursuant to Pre-Trial Chamber I's instruction, dated 16 May 2025, this document is reclassified as "Public".

Annex II

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**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/11

Date: 30 April 2025

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

Public Document

Invitation to the Italian Republic to provide submissions concerning its failure to surrender Osama Elmasry/Almasri Njeem to the Court following his arrest. Submissions by the Italian Republic pursuant to regulation 109 of the Regulations of the Court.

Source: Italian Republic. Presidency of the Council of Ministers. Office of the Undersecretary of State.

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

- ☐ The Office of the Prosecutor
- ☐ Counsel for the Defence
- ☐ Legal Representatives of the Victims
- ☐ Legal Representatives of the Applicants
- ☐ Unrepresented Victims
- ☐ Unrepresented Applicants (Participation/Reparation)
- ☐ The Office of Public Counsel for Victims
- ☐ The Office of Public Counsel for the Defence
- ☐ States' Representatives
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M. Zavala Giler, Osvaldo

☐ Counsel Support Section
- ☐ Victims and Witnesses Unit

☐ Detention Section
- ☐ Victims Participation and Reparations Section

☐ Other

Honourable Court,

Reference is hereby made to the document *"Invitation to the Italian Republic to provide submissions concerning its failure to surrender Osama Elmasry/Almasri Njeem to the Court following his arrest"*, N. ICC-01/11 – dated 17 February 2025, and the subsequent documents titled *"Decision on the extension of time limit to present submissions"*, N. ICC-01/11 –dated 25 March 2025, and *"Second decision on the extension of time limit to present submission"* – dated 17 April 2025.

The facts providing evidence that the Italian Government has not failed to fulfil its obligations to the International Criminal Court in the proceedings related to Mr. Njeem are set out below.

1. THE CHRONOLOGICAL RECONSTRUCTION SHOWS THAT THE COURT OF APPEAL OF ROME CORRECTLY DETECTED PROCEDURAL VIOLATIONS.

On 2 October 2024, the Prosecutor of the International Criminal Court – ICC (hereinafter referred to as "the ICC") submitted a request to Pre-Trial Chamber I in order to issue a warrant for arrest against Mr. Osama Almasri Habish Njeem.

On 18 January 2025, Pre-Trial Chamber I issued the international warrant for arrest against Mr. Njeem.

On 19 January 2025 at 09:30 a.m., in Turin, the arrest warrant was executed by Italian Police agents.

On 21 January 2025, the Court of Appeal of Rome found that the requirements for validating Mr. Njeem's arrest were not met, since the arrest had erroneously been executed in accordance with the terms established by Article 716 of the Italian Code of Criminal Procedure rather than pursuant to the special provisions applicable to the case in question, as established by Law N. 237/2012 aimed at adaptation to the ICC Statute provisions (*"Norme per l'adeguamento alle disposizioni dello statuto istitutivo della Corte penale internazionale"*). Consequently, the Court of Appeal of Rome ordered Mr. Njeem's release.

In particular, the Decision issued by the Court of Appeal of Rome reads “[...] as for as the execution of the precautionary measure is concerned, Law N. 237/2012 – in application of the ICC Statute pursuant to Law N. 232/1999 – analytically decreed the related proceedings, which do not provide for a possible “*motu proprio*” intervention by the Judicial Police, such proceedings having to be obligatorily carried out following:

1. Documents receipt by the Minister of Justice “who is in charge of receiving ICC requests and following them up” – Article 2(1);
2. Documents transmission from the Minister of Justice to the General Prosecutor's Office at the Court of Appeal of Rome (“The General Prosecutor at the Court of Appeal in Rome, having received the documents, ... OMISSIS”) – Article 11(1);
3. Request by the General Prosecutor at the Court of Appeal for application of the precautionary measure (“OMISSIS ... having received the documents, requests the Court of Appeal to apply the precautionary custody measure”) – Article 22(1).

[...] Since the procedure for application of the precautionary measure was, as mentioned, thoroughly detailed in all its steps by Law N. 237/2012, the “*Ubi lex voluit dixit*” principle shall unequivocally apply, by virtue of which the arrest on Judicial Police's own initiative within the procedure of surrender upon ICC warrant shall be regarded as excluded, since it is not expressly established by the special provisions which, as mentioned, specifically regulate every requirement relating to the restriction of the status libertatis of persons [...]” (Decision issued by the Court of Appeal of Rome, pages 2-3).

Therefore, the Court of Appeal of Rome took its own decision fully autonomously and independently, by virtue of its own jurisdiction and powers. In this regard, it is worth highlighting that:

On one side, in Italy this is the very first case of Law N. 237/2012 application and that the Italian Government could only acknowledge the decision taken by the Court of Appeal of Rome, having the Italian Government no power on the contents of the decision;

On the other side, the Court of Appeal of Rome deemed it was its own duty to ascertain the correctness of the arrest, also pursuant to Article 59(2) of the ICC Statute, which establishes: “2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

2. THE COMPETING REQUEST MADE BY THE LYBIAN AUTHORITIES FOR MR. NJEIM'S EXTRADITION FOR THE SAME FACTS AT ISSUE IN THE ARREST WARRANT ISSUED BY THE INTERNATIONAL CRIMINAL COURT.

DISCREPANCIES IN THE DOCUMENTS SUPPORTING THE REQUEST FOR COOPERATION SUBMITTED BY THE INTERNATIONAL CRIMINAL COURT.

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

Simultaneously with the request for cooperation made by the ICC, information was provided as to an extradition request made by Libyan Authorities with regard to the same facts (*Note Verbale* N. 2/3/83 dated 20 January 2025 – See **Annex 1**) transmitted to Italy's Ministry of Foreign Affairs and International Cooperation via the Embassy of Libya in Italy.

Therefore, pursuant to Article 2(2) of Law N. 237/2012, Italy's Minister of Justice had the duty to assess the priority order of the requests for international cooperation as per Article 90 of the Rome Statute.

Whereby the competing request comes from a State that is not Party to the ICC Statute, the Italian Minister of Justice, pursuant to Article 2(2) of Law N. 237/2012, shall determine which request shall be given priority whereby the ICC fails to perform any preliminary examination on the case admissibility pursuant to Articles 18 and 19 of the Rome Statute.

Furthermore, the national legislation requires assessing whether the offended individuals include an Italian citizen, the Italian Court having jurisdiction in such case (Article 10(1a) of the Code of Criminal Procedure).

In the same perspective, compliantly with Article 90(4) and (5) and (6) of the Rome Statute, the Minister of Justice shall decide which request shall be given priority. In making his/her decision, the Minister of Justice “***shall consider all the relevant factors***”, including but not limited to: (a) *The respective dates of the requests;* (b) *The interests of the requesting State, including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought;* and (c) *The possibility of subsequent surrender between the Court and the requesting State.*”

In particular, the Libyan Authorities' request makes reference to:

- 1) An ongoing investigation conducted by Libyan Authorities on Mr. Njeem for *"the same charges brought against him by the International Criminal Court"*;
- 2) The provision by the Libyan legislation of specific rules on the *"criminalisation of torture, enforced disappearances and discrimination"*;
- 3) Absence of communications between the ICC and the Libyan Authorities.

Such circumstances – as indicated in the request – could have induced the State of Libya to notify the ICC of its willingness to prosecute Mr. Njeem for the charges brought against him. The extradition request, in particular, specifies that Mr. Njeem, together with other individuals, is subject: *"to investigative procedures by the Libyan General Prosecutor's Office on the facts relating to the deaths of some detainees following complaints filed by the injured parties regarding episodes of deprivation of liberty, torture and cruel and degrading treatment. The Libyan General Prosecutor's Office initiated these investigations in 2016, and during such time it began to examine the conditions of the detainees on episodes relating to a time frame extending from 2011 to the last complaint filed in 2024."* (courtesy translation of excerpt from the Note Verbale in Annex 1).

It is hereby newly noted that Mr. Njeem is: *"one of the individuals under investigation by the Libyan General Prosecutor's Office against those believed to be responsible for the clashes that took place south of the city of Tripoli on 14/08/2023."* (courtesy translation of excerpt from the Note Verbale in Annex 1)

The request issued by the Libyan Authorities indicates: *"The facts attributed by the International Criminal Court to the wanted person – Osama Anjim – fall within the legal models established by the Libyan Criminal Code and the provisions of Law N. 10/2013 on the criminalisation of torture, enforced disappearances and discrimination"* (courtesy translation of excerpt from the Note Verbale in Annex 1).

Within such perspective, the request for extradition reiterates the State of Libya's power to prosecute Mr. Njeem, indicating that, in the absence of preliminary interactions or communications with the Libyan Authorities, the arrest warrant issued by the ICC violated the principle of complementarity established by the Rome: *"In accordance with the system for dealing with questions of admissibility of a case before the International Criminal Court (ICC) – Article 17(1.a) of the Rome Statute, a case is inadmissible if the State having jurisdiction over*

it is conducting an inquiry into the facts on which the ICC proceedings are based. The arrest warrant issued against the accused for whom return (extradition) is requested violates this rule. The Libyan General Prosecutor's Office has launched criminal investigations into facts that may correspond to the descriptions provided by the International Criminal Court in its arrest request to the International Criminal Police.

The International Criminal Court failed to verify (in advance) the Libyan General Prosecutor's willingness to initiate investigations into the charges against the person whose return (extradition) is sought, not taking into account the fact that the Libyan General Prosecutor might then have the intention or determination to undertake similar proceedings. In addition, the International Criminal Court refrained from discussing with the Libyan General Prosecutor's Office any objective and procedural reasons that could have delayed the initiation of procedural proceedings against the accused whose return (extradition) is requested.

In compliance with the Rome Statute, the Libyan General Prosecutor is therefore committed to investigating the facts constituting war crimes and crimes against humanity. The Libyan General Prosecutor also has the capacity to manage the investigative procedures for the crimes attributed to the accused whose return (extradition) is requested, to verify the veracity of the evidence and set a date by which the person for whom the return (extradition) is requested to comply with the provisions, considering that he is a public official exercising his own functions.” (courtesy translation of excerpt from the Note Verbale in Annex 1).

Furthermore, the request submitted by the Libyan Authorities highlights: *“In the context of the integration between the two jurisdictions and in compliance with the Rome Statute, the Libyan General Prosecutor, as the holder of national criminal jurisdiction, has not received any request from the International Criminal Court expressing its willingness to initiate judicial cooperation, legal assistance or notification of the proceedings against the person whose return is requested. This circumstance would have allowed the Libyan General Prosecutor to notify the International Criminal Court that the national Judiciary had already exercised, on a date prior to the decision issued by the International Criminal Court, its jurisdiction over the facts covered by its request.”* (courtesy translation of excerpt from the Note Verbale in Annex 1).

Ultimately, in the presence of a competing request, Italy was called upon to assess which request should have priority: as a matter of fact, the request for extradition *de facto* posed circumstances likely to affect the admissibility of the case as per Article 17 of the ICC Statute¹,

¹ In this specific case, the arrest request issued by the ICC is deprived of any assessment as to the prior ascertainment of the State of Libya's "unwillingness" to undertake action. Such a requirement, on closer

as it asserted the existence of investigations conducted by the State of Libya, having jurisdiction over the same facts.

The framework thus outlined also inevitably affected the assessments made by the Italian Government's Minister of Justice regarding the order of priority to be given to the requests for cooperation.

2.2 Inconsistencies between the section on the crimes alleged and the conclusions with regard to the identification of the time frame when the crime was perpetrated.

The warrant for arrest N. ICC-01/11 against Mr. Njeem shows some inconsistencies, first and foremost the reported time reference of Mr. Njeem's alleged crimes (reference: year 2011), which differs from what indicated in the Prosecutor's requests laid down in the *incipit* and in the body of the same warrant (reference: year 2015). This resulted in Pre-Trial Chamber I having to meet again in order to correct the warrant. On 24 January 2025, a new version of the warrant was published in the ICC website, which enclosed the dissenting opinion of one of the ICC Judges, which had not been attached to the warrant dated 18 January 2025.

Based on the warrant, the proceedings against Mr. Njeem originated from the UN Security Council referral to the ICC.

In particular, UNSCR 1970 dated 26 February 2011 expressly reported to the ICC Prosecutor the situation in Libya starting from 15 February 2011, marked by the systematic use of force and violence perpetrated by Libyan Authorities (at the time expressing Mu'ammār Gheddafi's regime) against civilians. Albeit no date is there indicated as to the end of the conduct referred, it is a historical fact that the ultimate fall of the Gaddafi regime coincides with his death in October 2011.

Consequently, the reference in the section laying down the reasons for the arrest warrant issued against Mr. Njeem for crimes committed from 2015 onwards (instead of: in 2011) showed some discrepancy also likely to affect the ICC jurisdiction limitations, as it was not clear whether the charges underlying the mandate were actually related to the facts addressed by the mentioned UNSCR.

inspection, has not been fulfilled, in light of the contents of the extradition request issued by the Libyan Authorities, which refers to an ongoing investigation for the same facts.

In such context, the Italian Minister of Justice was not enabled to provide the General Prosecutor with any immediate response: any consideration would have proved wrong precisely because grounded on an arrest warrant that appeared, in *ictu oculi*, contradictory in the essential element of the crime structure, namely the *tempus commissi delicti*. In this regard, it cannot be omitted that pursuant to Article 1 of Law N. 237/2012 *"The Italian State shall cooperate with the International Criminal Court (ICC) pursuant to ICC Statute provisions (hereinafter referred to as "the Statute"), made enforceable by Law N. 232 dated 12 July 1999, and pursuant to this Law, in accordance with the fundamental principles of the Italian legal system"*; furthermore, Article 1 of the Statute provides that the ICC shall exercise its jurisdiction in the limited cases provided for by the Statute and shall be complementary to national criminal jurisdictions. By virtue of such complementarity principle, States are primarily responsible for prosecuting those suspected of crimes.

It must therefore be emphasised that all such profiles are also absolutely relevant, as the correct exercise of ICC jurisdiction is a prerequisite for holding the Italian State effectively bound to ICC Statute provisions.

Conclusions: The presence of competing requests and the complexity of the evaluations entrusted to the Minister of Justice were ontologically incompatible with any hypothesis of immediate obligation –which however fails to arise – to transmit the concerned documents to the General Prosecutor's Office at the Court of Appeal of Rome.

3. LEGITIMACY OF THE EXPULSION DECREE ISSUED BY THE ITALIAN MINISTER OF THE INTERIOR.

In order to correctly frame the facts, it is worth recalling that on 10 July 2024 (i.e., three months prior to the arrest warrant) the ICC had entered Njeem's name in the Interpol channels by means of a so-called Blue Notice.

Such Notice, only addressed to Germany and not available to other Countries, was aimed at unnoticeably gathering information on Njeem's travel data and documents, telephones and means of payment, persons and contacts while in Germany, with a request for the German Authorities to immediately inform the ICC Prosecutor Office.²

² The Notice underlined, in particular, that it was necessary to refrain from alarming the person and from arresting him, as he held "witness" status.

The name of Mr. Njeem has been listed in the German federal database since 4 November 2024. On 18 January 2025, the ICC extended the abovementioned Blue Notice to Belgium, the United Kingdom, Austria, Switzerland and France, but not to Italy.

At 10:55 p.m. on Saturday 18 January 2025, three days after a check on Mr. Njeem in Germany (Bonn), the ICC asked the Interpol General Secretariat in Lyon to replace the Blue Notice with a Red Notice (i.e. containing indications for arrest), which for the very first time was also addressed to Italy. Still in the night between that Saturday and Sunday, and precisely at 02:33 a.m. on 19 January 2025, the Interpol General Secretariat validated the Red Notice for the provisional arrest of the Libyan citizen and his subsequent surrender to the ICC.

Via Italy's Minister of the Interior Decree dated 21 January 2025, Mr. Njeem, immediately after his release from prison as ordered by the Court of Appeal of Rome, was expelled from the territory of the Italian State for reasons of protection of public policy and national security. The Decision stated that Mr. Njeem, equipped with a Libyan passport but with an expired multiple-entry visa for tourism, had been the subject of *"an international arrest warrant for extradition purposes issued on 18 January 2025 by the International Criminal Court for committing crimes against humanity and war crimes"* and that *"following a search carried out at his hotel room, the personnel involved found, among Mr. Njeem's other personal belongings, substantial sums of cash and a rifle optic."*

The measure was necessary and urgent as a result of a wide number of factors. Firstly, Njeem's social dangerousness was inferred from the serious nature of the charges laid down in the ICC arrest warrant and from what was found by the Italian Judicial Police at the time of his arrest on 19 January 2025, namely a large sum of cash and a rifle optic.

OMISSIS (Please refer to Annex 2)

Hence, the Italian Government's Minister of the Interior coherently and correctly adopted an expulsion provision for reasons of public policy and State security, pursuant to Article 13(1) of the Consolidated Act of provisions concerning immigration and the condition of third country nationals (i.e. Italy's Legislative Decree N. 286 dated 25 July 1998).

Furthermore, it is worth recalling that since the current Italian Government took office, as many as 190 expulsion orders for security reasons have been issued, 24 of which adopted pursuant to Article 13(1) itself.

As known, issuing the expulsion order pursuant to Article 13(1) of Legislative Decree N. 286 dated 25 July 1998 is a power entrusted to the top-ranking representatives of Italy's Ministry of the Interior (namely, the top-ranking representatives of the Authority most closely involved in relations with foreign nationals) and is undoubtedly an expression of the exercise of high discretionary administrative power (See: *TAR Lazio, Sez. I, 8 maggio 2023 – ud. 12 aprile 2023, n. 7691*).

In this domain, the Minister of the Interior's powers are also enshrined in supranational legislation and may even be exerted towards individuals entitled to the highest levels of protection. As a matter of fact, Council Directive 2003/109/EC establishes that Member States may take a decision to expel a long-term resident where he/she constitutes an actual and sufficiently serious threat to public policy or public security.

Italy's Council of State repeatedly specified that the need to protect the absolutely fundamental value of national security calls for highly advanced protection, which empowers the proceeding Authority to adopt the expulsion warrant also on grounds of mere suspicion, i.e. assessed even on mere clues (thus, *ex multis*, see: *Consiglio di Stato, Sez. III, 19 maggio 2021 – ud. maggio 2021, n. 3886*).

In the present case, the expulsion warrant issued against Njeem represents the direct expression of the powers entrusted to the Minister of the Interior, to whom the law attributes responsibility for the protection of public policy and public security (Article 1, Law N. 121 dated 1 April 1981).

Therefore, it shall categorically be excluded that the expulsion warrant could have been intended to help Mr. Njeem evade investigations or inquiries conducted by the ICC organs.

4. THE ACTION UNDERTAKEN BY THE ITALIAN GOVERNMENT HAS ALWAYS BEEN RESPECTFUL OF THE LAW

All of the above provides evidence that the Italian Government rigorously respected international and national legislations.

Mr. Njeem's release is to be ascribed to the procedural errors identified by the Court of Appeal of Rome as to the terms of the arrest executed upon Judicial Police initiative, which could not

be immediately remedied due to the issues arisen from the formulation of the arrest warrant by the ICC and the presence of a competing extradition request by Libyan Authorities for the same facts.

Once the order for Mr. Njeem's release had been issued, the expulsion decree was the swiftest measure to be adopted for national security purposes.

Within the abovementioned decision for Mr. Njeem's release dated 21 January 2025, the Court of Appeal of Rome also ordered that the seized assets be returned.

Italy is aware of not having consulted the ICC; however, that was certainly not the result of Italy's willingness to withdraw from its own obligations, rather that was the result of the particular circumstances thoroughly described in this document.

The action undertaken by the Italian Government is, in the present case, fully legitimate and compliant with the national legislation, as it is bound to:

1. The provisions laid down by Law N. 237/2012, applied for the very first time in Italy;
2. The autonomous and exclusive evaluations by the Court of Appeal of Rome, by virtue of its own powers;
3. The competing request for extradition by the Libyan Authorities for the same facts;
4. The safeguard of national security interests, the assessment of which falls exclusively within the remit of the Government Authority.

Italy confirms its full respect of the Rome Statute of the International Criminal Court, with due regard to balancing the security interests linked to the State and its citizens.

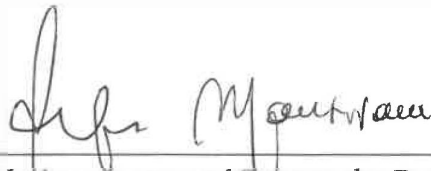
Based on the above, the ICC is hereby respectfully requested to:

- Establish that Italy has not failed to fulfil its own obligation to cooperate, having instead had to safeguard its national security interests;
- Consequently, refrain from referring the matter to the Assembly of States Parties or the Security Council.

Pursuant to Pre-Trial Chamber I's instruction, dated 16 May 2025, this document is reclassified as "Public".

Please find enclosed **Annex 1** – *Note Verbale* N. 2/3/83 dated 20 January 2025, laying down the request for extradition of Libyan citizen "Usama Almasri Ahbeish Najeem"; and **Annex 2**, containing classified information.

Best regards,



[Alfredo Mantovano, Undersecretary of State to the Presidency of the Council of Ministers of the Italian Republic]

Dated this 30 April 2025

At Rome, Italy