

Annex
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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/11

Date: 28 July

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

Public

Italy's additional Observations on the "Prosecution's Observations on the Italian Republic's Submission under regulation 109" ICC-01/11-187

Source: Italian Republic

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A. INTRODUCTION

1. On 12 June 2025, the Prosecutor of the International Criminal Court's request to submit observations on the Memorandum dated 30 April 2025, filed by the Italian Government on 6 May 2025 (*the Memorandum*) was made public on the International Criminal Court (ICC) website, within the proceedings initiated to ascertain non-cooperation regarding the request for arrest and surrender of Mr. Almasri, and the potential referral of Italy.
2. The ICC Pre-Trial Chamber I upheld the Prosecutor's request, authorising the submission of observations by 26 June 2025.
3. On 25 June 2025, following the Pre-Trial Chamber's authorisation, the Prosecutor Office submitted its reply in a 14-page pleading (*Prosecution's Observations or Reply*).
4. On 9 July 2025, the Italian Government requested to submit observations on the Prosecution's Observations;
5. On 18 July 2025 the ICC Pre-Trial Chamber I partially upheld the Italian Government's request, limited to the arguments presented in paragraphs 11 to 15 of the Prosecution's Observations.

B. PROSECUTION'S OBSERVATIONS ON THE ITALIAN GOVERNMENT'S SUBMISSIONS

6. The ICC Prosecution's Observations lay down the following arguments in rebuttal to the Italian Government's observations:

6.1 The Court of Appeal of Rome misinterpreted the domestic implementing law (Law no. 237/2012), while instead, as supported by scholarly opinions cited by the Office, such law allegedly permitted provisional arrest (see Prosecution's Observations, p. 5). Furthermore, according to the Prosecutor, Law no. 237/2012 does not confer discretionary power to the Minister of Justice – who, in accordance with the Rome Statute (hereinafter “the Statute”), performs only an executive function (see Prosecution's Observations, p. 6). In any event, even supposing that Almasri's arrest had been unlawful, the Minister of Justice could have remedied the procedural flaw by transmitting the relevant request to the Prosecutor General (see Prosecution's Observations, p. 7);

6.2 In light of the aforementioned cooperation difficulties, Italy is assessed to have failed to initiate the consultation procedure with the ICC as required under article 97 of the Statute (pp. 7-8);

6.3 Moreover, although Italy, in its Submission, invoked Libya's competing extradition request in support of its position, Italy is assessed to have failed to comply with the procedural steps set forth in article 90 of the Statute (namely, the obligation to notify the ICC of the competing request under para. 1; and to await ICC's determination on the admissibility of the case under para. 3). To this purpose, the Prosecutor has stigmatised Italy's statement that Libya's competing extradition request justified the

release of Mr. Almasri, notwithstanding the fact that Italy took no action to follow up on that request. Furthermore, the Prosecution's Observations affirm that Italy allegedly acted based on its own assessment of the effects on the case admissibility, relying solely on vague and incomplete information received from Libya (see Prosecution's Observations, pp. 8-10). Italy is assessed to have erroneously treated Libya as a non-State Party, whereas UN Security Council Resolution 1970 (2011) required it to be treated as a State Party. Consequently, according to the Prosecutor, even in the presence of a competing extradition request from Libya, such a request could not be prioritised under article 90 paras. (1) to (3) of the Statute (see Prosecution's Observations, p. 9);

6.4 Italy erroneously assessed that Libya's competing extradition request could influence the admissibility of the case before the ICC (as a consequence of the application of the principle of complementarity), basing this view solely on Libya's (erroneous and, in any case, partial) assertions in its extradition request, assertions which allegedly were uncritically accepted by Italy (Prosecution's Observations, pp. 10–11);

6.5 In any case, the issuance of the arrest warrant would not have affected the admissibility of the case, as this preliminary issue had not been decided by the Pre-Trial Chamber, but had been deferred to a later stage (Prosecution's Observations, pp. 9–10);

6.6 Libya could not have credibly declared – as it did – on 20 January 2025 that its domestic proceedings against Mr. Almasri concerned the same facts as those before the ICC, since the ICC arrest warrant was only made public on 24 January 2025. In this regard, the Prosecutor appears to suggest that the Libyan extradition request, for its content, was not sufficient *“for the purpose of any complementary assessment”* (Prosecution's Observations, p. 10);

6.7 The “competing” Libyan extradition request could not be considered favourable to Italy for the purposes of the ICC determinations regarding the possible referral, as Italy in any case did not surrender Mr. Almasri to Libya based on the extradition request and concurrent investigations into the same facts of the international proceedings, but expelled Mr. Almasri due to his social dangerousness (Prosecution's Observations, p. 13);

6.8 Italy did not execute the ICC request for surrender, partly based on its own interpretation of temporal jurisdiction in Libya; in this regard, the Prosecutor argues that Italy had no authority to evaluate such matters and should have simply executed the ICC request (Prosecution's Observations, p. 11), and that the arrest warrant did not contain significant errors regarding the date of the committed crime but only minor formal errors (Prosecution's Observations, p. 11);

6.9 Irregularities, if any were present, concerning the internal procedure under the Italian legal system (provisional arrest by law enforcement without prior request from the Minister of Justice) may not justify the failure to surrender Mr. Almasri to the ICC;

6.10 The fact that Italy *“raises the existence of an allegedly competing extradition request from Libya for the very first time”* over three months after the release of Mr. Almasri should be stigmatised, as Italy previously only referred to the expulsion decree (Prosecution's Observations, p. 3);

6.11 The alleged failure to comply with the request for search and seizure of materials found on or with Mr. Almasri should also be stigmatised, despite this request being part of the ICC cooperation request.

C. REBUTTAL ARGUMENTS TO THE ISSUES RAISED BY THE PROSECUTOR OF THE ICC

7. The Italian Government firstly observes that article 87(7) of the Statute of this honourable Court (hereinafter “ICC” or “the Court”) establishes that if a State Party fails to meet a request to cooperate by the Court, the latter may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council. The procedure outlined by above-mentioned article 87(7) is therefore not contentious in nature, does not mention the Prosecutor of the Court in any way, and even less gives scope for typical Prosecutor action. In this sense, on the other hand, both the ICC case-law and a large part of the doctrine agree in excluding that the proceedings in question have the nature of criminal proceedings: the only parties to these proceedings are the State and the ICC, being the Prosecutor of the Court a non-party to the proceedings. Consequently, the fact that the ICC Prosecution’s Observations referred to in para. 3 of this document are hereby answered cannot in any way mean that the Italian Government acquiesces to the ICC decision to allow the Prosecutor to have a role in the proceedings referred to in article 87(7) of the Statute, but it merely expresses the Italian Government’s desire not to leave unanswered some seriously inaccurate statements at a juridical level, and in some cases not confirmed by facts, and to provide the ICC with all useful elements.
8. Preliminarily, the observations outlined in point 6.1 above deal with a significant logical and legal fundamental error: the Prosecutor of the ICC improperly assumes the role of the Italian Judicial Authority in interpreting the Italian law implementing the Statute (Law no. 237/2012), i.e. the Prosecutor improperly assumes the role of the only subject (Court of Appeal of Rome) that, according to that law (articles 11 to 14 of Law no. 237/2012), is entitled to rule on restrictive measures on liberty based on surrender or arrest requests from the ICC. Furthermore, the Statute itself mandates an internal review (article 59(2) of the Statute) of the legality of the arrest by the competent Judicial Authority of the detaining State (in this case, Italy), “*which shall determine in accordance with the law of that State, that ... the person has been arrested in accordance with the proper process.*” Therefore, the Prosecutor’s interpretation is not only inadmissible in a rule-of-law State (where the competent Judicial Authority decides and interprets applicable law), but also contrary to the Statute’s provisions. Moreover, it relies solely on doctrinal commentary for support.
9. In sum, in the context of the proceedings referred to in article 87(7) of the Statute, the ICC is in charge of assessing whether the State has breached its obligation to cooperate; it does not have the power to interpret domestic provisions, and the Prosecutor has even less such power. If a domestic law implementing the Statute is poorly made, the State

is liable for it, but this does not mean legitimising the interpretation of domestic provisions by the ICC and, even less, by the ICC Public Prosecutor's Office.

10. The argument that an interpretation of Law no. 237/2012 allegedly allowed the Court of Appeal of Rome to validate the provisional arrest actually supports the position taken by the Italian Government, according to which it did not interfere, in any way, with the Italian Judicial Authority – which, within its own independent judgment, was also allowed to validate the provisional arrest. Therefore, this argument reinforces the good faith¹ – which goes against the referral of Italy – of the statutory executive bodies (notably, the Minister of Justice).
11. Hence, the internal procedure, in implementation of the Statute, provides for the autonomous and independent control by the Judicial Authority over the regularity of the arrest (article 59(2) of the Statute)². This clarification also serves to rebut the arguments presented in the aforementioned points 6.1 and 6.9. It further rebuts the Prosecutor's assertion that “[a]ny purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court [...]”³: in this case, there was no deficiency; rather, there was the correct application of the internal procedure, in line with the statutory provisions, which, due to the specifics of the case, led to the non-validation of the arrest and the subsequent expulsion of Mr. Almasri.
12. In particular, as an additional counter-argument to points 6.1 and 6.9 above (unjustifiable lack of cooperation based on a “*lack of coordination*” among State organs), it should be noted that, pursuant to article 89(1) of the Statute, “*States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender*”. Therefore, even under the same statutory provision, it was necessary to proceed with the arrest and surrender as specifically provided by the implementing law (Law no. 237/2012), and consequently with the necessary initiative by the Minister of Justice⁴ (who, as will be explained, was not placed in a position to complete the complex review of the documentation transmitted prior to the non-validation of the arrest). It should be noted that the competent executive authorities did not interfere in any way with the arrest validation procedure, deferring the issue to the decision of the Judicial Authority – which, as stated above, could have independently confirmed the detention of the individual. Therefore, the release of the Libyan citizen cannot be attributed to a lack of coordination among State organs, but rather to the outcome of a proper judicial review – assessing the regularity of the procedure (a review which, by its very nature, may also lead to a negative outcome), outlined by both the Statute and national legislation (articles 59 and

¹ Regarding the relevance of good faith for the purposes of the assessments concerning potential deferral, see ICC, Trial Chamber V, *The Prosecutor v. Kenyatta*, 3 December 2014, paras. 39 and 41.

² See pp. 3 to 4 of the *memorandum* by the Italian Government.

³ See p. 5, Prosecution's Observations.

⁴ As stated by the competent Court of Appeal of Rome.

89 of the Statute, and articles 11 and 14 of Law no. 237/2012) – which is characteristic of a rule-of-law State.⁵

13. Therefore, the Prosecutor's argument that Italy's conduct as a whole was allegedly in the direction of non-execution of the ICC's request is logically and legally flawed. This reasoning attempts to overlook the irrefutable fact that the Statute itself (articles 59 and 89) requires the intervention of various State organs with distinct functions (of initiative and review), operating entirely separately and independently (core principles of the Rule of Law). Consequently, the adoption of negative measures (for instance, concerning the review of the legality of the arrest under article 59 of the Statute) as a potential outcome of the checks embedded in the procedures outlined by the Statute cannot automatically be used to impute "non-cooperation". Rather, such measures are legitimate acts prescribed by the Statute itself, within a Rule-of-Law framework characterised by the autonomy and separation of powers.
14. Having stated this, in relation to the aforementioned Prosecution's Observations, another key misunderstanding seems to emerge. In essence, the Prosecutor's argument posits that Italy reportedly only now justified the non-surrender of Mr. Almasri based on a competing extradition request from Libya, although it did not comply with the corresponding statutory procedure and always justified Mr. Almasri's return by referring to the decree of expulsion and the reasons of national security and public order. With this argument, the Prosecutor would imply a contradiction in the arguments presented by Italy before the ICC.
15. In reality, the Italian Government has never claimed that Mr. Almasri's return to Libya was an automatic legal and executive consequence of Libya's extradition request. Instead, Italy has represented that the competing extradition request (along with all other and multiple factors) constituted an additional element of complexity in the examination of the ICC's cooperation request, in relation to the associated legal effects to be considered (including the principle of complementarity), which prevented the Italian Government from completing its assessments prior to the adoption by the Court of Appeal of Rome of its decision⁶. In other words, the extradition request submitted by Libya on 20 January further complicated the Minister of Justice's examination, a complexity acknowledged in the press release issued on the same date and in the memorandum submitted by Italy: *"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*

⁵ Besides, the precedent cited by the Prosecutor concerning the lack of coordination as a non-justifiable cause for failure to cooperate would not appear to be pertinent. This is because it pertains to a different case where the requested State, due to internal unrest and political changes, attempted to justify its failure to promptly acknowledge the arrest and surrender request from the ICC, citing a lack of handover. Therefore, in that instance, there was no provisional arrest, and thus the internal procedure provided for therein was not addressed. See Pre-Trial Chamber, *Prosecutor v. Hussein*, 13 November 2013.

⁶ Please refer to pages 5 to 8 of the Italian Government's Memorandum. The Memorandum clearly states that the competing extradition request from Libya did not automatically constitute a legal effect, but was an additional factor to be considered in the Minister of Justice's assessment, *"Italy's Minister of Justice had the duty to assess the priority order [...] The Minister of Justice shall consider all the relevant factors"* (p. 5); *"in the presence of a competing request, Italy was called upon to assess which request should have priority"* (p. 7).

however fails to arise – to transmit the concerned documents to the General Prosecutor’s Office at the Court of Appeal of Rome.”

16. Therefore, the Libyan extradition request constituted an element that, notably from a factual perspective (due to the related and potential legal implications that needed to be thoroughly examined), prevented the Italian Government from acting otherwise, in accordance with the procedure established by Italian law implementing international law (article 59(1) of the Statute).
17. Therefore, since the extradition request did not constitute a legal factor but a factual element in the arguments presented by the Italian Government, all arguments put forward by the Prosecutor emphasising the violation of article 90 of the Statute are entirely irrelevant. However, regarding this aspect, the case-law cited by the Prosecutor (for purpose of asserting that Libya should be considered as a State Party to the Statute for the purposes of article 90) appears to be irrelevant, because it merely states that “*the cooperation regime for State Parties to the Rome Statute is applicable*” to non-States Parties, if required by the terms of UN referral. Hence, these precedents pertain to cases involving the cooperation of a non-State Party, not merely its status. Nor from that the same UN Resolution 1970/2011, para. 5, it can be concluded that a non-State Party is equated to a State Party for the purposes of article 90 of the Statute. On the contrary, the Resolution, beyond the obligation of cooperation, does not establish such an equivalence and preserves the status of non-State Party for all other effects. This conclusion also seems to be drawn from the same case-law cited by the Prosecutor, “*The Appeals Chamber underlines that this does not make Sudan a State Party to the Rome Statute, with all the attendant obligations and powers.*”⁷ In any case, for the reasons above, all such technical observations are entirely irrelevant, since the extradition request had an impact on the complexity of the examination of the request (due to potential legal effects) rather than on immediate legal effects.
18. Likewise, the argument presented by the Prosecutor of the ICC – stating that the Libyan extradition request⁸ allegedly was not, for its content, sufficient for the purpose of any assessment on complementarity – does not appear to be supported by specific evidence. In fact, as indicated in the Memorandum submitted by Italy, the extradition request was transmitted through diplomatic channels by Libyan authorities and was well detailed and motivated with regard to the overlapping of proceedings and thus the related implications on complementarity⁹. Some clarification is necessary on this matter. The Public Prosecutor’s Office seems to suggest that the extradition request was not supported by a solid basis, to the point – from its perspective – of casting doubt on its very legal certainty (in its Observations, the Public Prosecutor’s Office refers to an “*alleged competing request*”). This argument appears to serve the sole purpose of circumventing the significant issue (as clarified above) of the competing extradition request. On the contrary, this request met all the requirements to be considered valid and effective under international law. Indeed, it was transmitted by the Libyan Ambassador to Italy, i.e. the organ representing the foreign State, which, for instance,

⁷ ICC 02/05-01-09, 6 May 2019, Judgment in the Jordan referral re Al Bashir Appeal, para. 142.

⁸ Attached to the Memorandum presented by Italy.

⁹ See **Libya’s extradition request** attached to the Memorandum submitted by the Italian Government.

the 1961 Vienna Convention on Diplomatic Relations (article 3) designates as the entity authorised to represent the accrediting State in the receiving State. Therefore, there can be no doubt regarding a request originating from the entity that, based on international law and practice, is entitled to represent the foreign State in the receiving State.

19. Furthermore, in its Memorandum, the Italian Government did not passively “accept” Libya’s arguments regarding complementarity; rather, it merely received the information communicated by Libya concerning the concurrent existence of criminal proceedings against Mr. Almasri and the lack of preliminary interactions by the ICC, as elements to be considered in the context of the examination of the ICC’s cooperation request¹⁰.
20. Moreover, the above arguments set forth by the Prosecutor of the ICC seem to reflect a fragmented analysis of the reasons put forth by the Italian Government: indeed, alongside the competing extradition request (for the reasons explained above), Italy clarified the overall context of complexity, novelty, and uniqueness such that the requested State could not have acted otherwise (and which must all be considered together, at least to support Italy’s good faith¹¹):
 - a) The Almasri case was for Italy the first application of the Rome Statute in relation to a request for cooperation within the execution of an arrest warrant against a person present on the territory of the Italian State;¹²
 - b) The arrest warrant contained several uncertainties regarding key elements of the alleged crimes, such as the dates of their perpetration¹³, which the Prosecutor characterises as mere typographical errors, without however acknowledging that these elements were later corrected, along with other essential elements, including the legal qualification of the alleged crimes. These aspects are essential in criminal law and related procedure matters.
 - c) The warrant was issued simultaneously with the entry of the Libyan citizen into Italy¹⁴;
 - d) A new revised version of the warrant was issued a few days later, complemented with a dissenting opinion regarding the ICC jurisdiction. Furthermore, with regard to this latter point, the suggestion made by the Prosecutor that Italy is alleged to have improperly conducted an autonomous assessment on jurisdiction appears unfounded. In fact, to this purpose, Italy has never substituted its own judgment to that of the ICC but has only detailed the inherent difficulties in assessing the case, particularly with respect to the intelligibility and coherence of the assessments on

¹⁰ See p. 6 of the Memorandum.

¹¹ In this regard, the case-law itself specifies it is appropriate to recognise States Parties the assumption of “good faith” in their cooperation with the Court, so that, “where some degree of compliance and explanations for any non-execution of the request has been provided, it may be necessary for such a presumption to be clearly rebutted”; furthermore, “where the requested State asserts that non-compliance is as a result of lack of capacity, the Chamber has to consider whether such inability is genuine and well-founded.” ICC, Trial Chamber V, *The Prosecutor v. Kenyatta*, 3 December 2014, para. 40 *et seq.*

¹² See p. 4 of the Italian Government Memorandum.

¹³ See pp. 8 to 9 of the Memorandum.

¹⁴ See p. 10 of the Memorandum.

jurisdiction contained by the first version of the arrest warrant (given the erroneous indication of dates of the alleged crimes hereby reported¹⁵). These arguments also rebut the Prosecutor's argument according to which the Italian Minister of Justice, rather than executing the arrest, engaged in assessments beyond his own remit. In fact, due to all the reasons detailed above, the Minister was not even in a position to complete the review of the complex documentation prior to the decision by the Court of Appeal of Rome not to validate the arrest. In fact, provided that the relevant framework (set out by the Statute, which recalls domestic implementing legislation, as already said) explicitly assigns evaluative responsibilities to the Minister of Justice, also a straightforward execution of the ICC's request would have required an unambiguous and complete examination of the whole documentation transmitted by the Court.

21. Always with regard to jurisdiction, the Prosecutor raises arguments that, properly considered, suggest the absence of the requirements for the referral of Italy. As a matter of fact, the Prosecutor acknowledges that ICC arrest warrant did not contain any final determination on jurisdiction or admissibility of the case – matters that remain subject to decision at a later stage under article 19 of the Statute.¹⁶ Since one of the conditions for referral (article 87(7) of the Statute) is that lack of cooperation must have prevented the Court from exercising its functions and powers, it must be noted that: in this case, the issue of jurisdiction has not been definitively resolved by the ICC (as also indicated in the warrant);¹⁷ and that a dissenting opinion on this matter has been issued, with the further consequence that, prospectively, the prevention of powers and functions of the Court cannot be asserted with certainty (precisely because the requirement of admissibility remains unresolved and, absent this requirement, the Court's powers and functions should *ab initio* be considered as non-existent¹⁸).

22. Furthermore, the Prosecutor argues that as of 20 January 2025 Libya could not have been aware of the content of the international arrest warrant (made public only on 24 January 2025), and, thus, could not have assessed the overlapping of the conducts described in the arrest warrant with those under investigation in Libya. Consequently, Libya as of 20 January 2025 could not have evaluated any complementarity issue. The Prosecutor's argument is not logically relevant. Beyond the fact that Libya had acquired knowledge of the ICC's act, including the legal qualification of alleged crimes, based on data accessible at INTERPOL level¹⁹ (which were evidently available to that Country as of 20 January, despite the Prosecutor's attempt to minimise this point²⁰), what is relevant from Italy's point of view, and in support of Italy's good faith, is that assessing the ICC request was made undoubtedly more complex due to the competing extradition

¹⁵ See p. 8 of the memorandum.

¹⁶ See para. 26, pp. 9-10, of the Prosecution's Observations.

¹⁷ "The above findings are without prejudice to the determination of any future challenge to the jurisdiction of the Court or the admissibility of the case under article 19 of the Statute" (warrant, para. 13).

¹⁸ The Court's case-law has clarified that "*where the non-compliance in question is technical or trivial in nature, such non-compliance, which in most cases would not materially prevent the Court from exercising its functions and powers under the Statute, will not reach the threshold of non-compliance required by article 87(7) of the Statute*" (ICC, Trial Chamber V, *The Prosecutor v. Kenyatta*, 3 December 2014, paras. 40 *et seq.*).

¹⁹ See Libya's extradition request attached to the Memorandum submitted by the Italian Government, p. 3.

²⁰ With regard to the concise description of the legal qualifications of the crimes contained in the INTERPOL Red Notice.

request made by the Libyan Authorities, which was conveyed through valid diplomatic channels. Indeed, the Prosecutor fails to consider that the Libyan request also contained a precise description of the facts (and the related dates) covered by the domestic proceedings;²¹ facts which appeared (on the basis of a preliminary assessment compatible with the purposes of a passive extradition and, therefore, without the need to perform the same analysis required for determining the existence of crimes) to overlap with those described in the ICC's warrant (albeit the significant abovementioned uncertainties). Consequently, from the Italian perspective, the issue did not lie in understanding whether or how Libya could have known the contents of the international warrant; what mattered was that the Libyan request, according to a *prima facie* assessment, raised possible complementarity issues in terms not patently ungrounded, as it contained the detailed description of the facts for which proceedings were ongoing in Libya, of the relevant time period and the apparent overlap with the facts represented by the arrest warrant. It was certainly not Italy's role – nor did it possess the means – to assess the merits of Libya's claims or to determine whether Libya had comprehensive knowledge of the ICC's warrant.

23. Moreover, with regard to the Libyan extradition request, the Prosecutor argues that Italy did not verify whether Libya, beyond merely having an open criminal case, actually intended to prosecute Mr. Almasri (effectivity requirement, which is relevant to complementarity). Also in this regard, it should be emphasised that the Libyan Attorney General, in the extradition request, gave clear evidence both of criminal proceedings pending against Mr. Almasri for facts apparently overlapping with those set out in the international warrant, and of the capacity to conduct investigations, which were actively proceeding (thus, also implying willingness to proceed).
24. In light of such elements, in reality, based on a preliminary assessment of the extradition request, it initially appeared that even the requirements of the principle of complementarity²², as set out in article 17, had been met.
25. All these considerations are further supported by the fact that, as indicated in a press release dated 9 July and as widely covered by the media²³, the Libya's Prosecutor

²¹ *The individual sought for repatriation [...] is among those subject to investigations undertaken by the Office of Attorney General of Libya in its probe of the reasons behind the death of prisoners, in addition to its consideration of complaints lodged by victims of deprivation of liberty, torture and brutal and degrading treatment [...] during the period from 2011 to 2024*". See Libya's extradition request, p. 5.

²² According to which, as stated in para. 10 of the preamble of the Statute, "*International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*", meaning that the latter, pursuant to the mechanism set out by article 17 of the Statute, take precedence over the ICC's jurisdiction in cases where the same conduct is involved and there exists both the capacity and the willingness to prosecute the person concerned. The ICC has interpreted article 17 of the Statute to mean that it must declare a case inadmissible based on a "two-step analysis" – see *Decision on the admissibility of the case against Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Pre-Trial Chamber I, 11 October 2013, para. 26, according to which it must be verified that: (a) the State has indeed initiated criminal proceedings in respect of the same case (even if qualified under ordinary criminal law); and (b) it has the capacity and willingness to carry such proceedings forward ("willingness" implies, by reference to indicators enumerated in the provision, that there are not sham proceedings devised to shield the accused; "capacity" implies that the State's judicial system is not in total or substantial collapse or unavailable, thereby preventing it from obtaining "the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

²³ Libya's Prosecutor General's Office "*initiated the preliminary proceedings by examining the elements of the offences mentioned in the arrest warrant issued by the Pre-Trial Chamber of the International Criminal Court. It*

General's Office is actively pursuing investigations against Almasri, both within the framework of domestic proceedings and in a cooperative perspective with the ICC. The reaffirmed intention to prosecute Almasri in a concrete and substantive manner demonstrates, on the one hand, that complementarity was indeed a serious and well-grounded issue; on the other hand, it reveals that the conditions for referral are not met, insofar as the transfer did not prevent the Court from exercising its functions and powers, but rather, the unfolding of events has confirmed that such functions and powers are in fact supported by the cooperative approach by the competent Libyan judicial authorities.²⁴

26. Finally, in its Memorandum the Italian Government claimed the legality – both in fact and in law – of the expulsion order.²⁵ This was in direct rebuttal of the argument raised by the ICC Prosecutor, who claimed that Italy had, at a later stage (specifically, in submitting its observations), motivated Almasri's return on the grounds of the extradition request rather than on the expulsion order. In this regard, the ICC Prosecutor emphasised that the aircraft designated for repatriation was already prepared several hours prior to the release. In this respect, however, reference must be made to the clarifications already provided by the Minister of the Interior to the Italian Parliament, where he explained that the timely availability of the aircraft followed established practice in similar cases, and was motivated by practical and logistical considerations²⁶ (simply related to the need to await the outcome of judicial proceedings, already scheduled). The fact that the aircraft had been on standby for hours in Turin has no significance. Indeed, a decree of expulsion against the Libyan nationals accompanying Mr. Almasri had been issued the day before the Court of Appeal's decision on Mr. Almasri. Consequently, it was practically and economically reasonable to also await the judiciary validation decision on the latter. In fact, the aircraft departed only after Almasri had boarded, thereby allowing for the simultaneous expulsion of the Libyan nationals via one single operation.

27. Always with regard to the expulsion order, the ICC Prosecutor seeks to emphasise that such order did not explicitly require that Mr. Almasri be returned to Libya (p. 13). Now, this statement is, first of all, legally unfounded. Article 13(12) of Legislative Decree no. 286/1998 stipulates that, barring exceptional circumstances not present in this case, "[...] *the expelled foreign national shall be returned to the State of nationality, or, if that is not possible, to the State of origin*". Consequently, even according to the same legal

then examined the facts dealt with by the national courts prior to the issuance of the arrest warrant to determine whether they corresponded to the elements of the offences mentioned in the warrant. The Prosecutor's Office finally requested a summons for the person concerned [...] His answers were minuted. And the prosecution then began to gather relevant information and postponed the next hearing until the processing of the request for legal assistance submitted by the prosecution to the Office of the Prosecutor of the International Criminal Court, in order to provide it with evidence of the facts that are the subject of the charge and supporting material" (statement of Libya's Prosecutor General's Office as reported in "Libya issues subpoena for Osama Almasri", Il Sole 24 Ore, 9 July 2025).

²⁴ See Note 23 above.

²⁵ See pp. 9 to 11 of the Memorandum.

²⁶ "The preparation of the aircraft as early as the morning of 21 January falls within preventive measures – intended to address any possible scenario, including the potential need for transfer to an alternative detention facility – which are the responsibility of those entrusted with managing situations involving matters of security and public order of such significance" (Stenographic transcript of the Minister of the Interior's parliamentary speech, 5 February 2025, p. 11).

provision cited by the Prosecutor, Mr. Almasri was to be expelled to Libya. Even if this legal requirement were ignored – which it should instead not be – the argument advanced by the Prosecutor (according to which an expulsion could have taken place to a Country other than Libya) is, in any case, unsupported by concrete or logical elements explaining what alternative solution Italy could have pursued in a context marked by urgency and concerns related to public order and national security. Moreover, no indication is provided as to which other State would have been available to receive Mr. Almasri. Accordingly, repatriation to Libya was the only legally and practically feasible course of action.

28. When considering the broader context, the arguments raised by the Prosecutor fail to take into account the exceptional nature of the situation faced by Italy. The Prosecutor analyses isolated elements in a fragmented way, failing to consider them within the overall framework of urgency, complexity, and exceptionality. In fact, all the abovementioned assessments needed would have required thorough analyses and adequate time, an opportunity that the circumstances of the case did not permit. The arrest took place on 19 January; the relevant complete documentation was formally received by the competent Minister on 20 January; the Libyan request for extradition was formulated on the same date; and the Court of Appeal issued its ruling on 21 January.
29. Regarding the alleged failure to seize materials found on or with Almasri, in addition to the arguments already submitted in the Italian Memorandum (namely, that this was a decision of the Judicial Authority within a procedure that, as previously outlined, complied with statutory requirements), further reference may be made to the prior submission dated 10 March 2025. In particular, with respect to the request to search and seize documents in Almasri's possession – and considering that such a search was initially conducted during the arrest of the Libyan citizen with respect to his relevant smartphone devices, which were returned later to Almasri pursuant to an order issued by the Court of Appeal of Rome – it should be noted that neither the ICC's request nor the Prosecutor's reply provides any concrete explanation as to the relevance of such devices (since their contents are unknown) in ascertaining the crimes underlying the request for international cooperation. Consequently, it cannot be established or proven that the alleged failure to seize and ensure delivery of these devices impaired the ability of the Court to exercise its functions or powers (given the absence of any connection and evidentiary value to the allegations). To this purpose, in a different case considered by the ICC, the evidentiary value of the requested documents had been duly recognised for the purposes of the activity of the ICC and the ascertainment of the alleged international crimes, also because those documents were specifically and concretely identified in the cooperation request.²⁷ In any case, these arguments are nonetheless outweighed by the fact that Libya's Prosecutor General's Office, as above-reported, is cooperating with the ICC, including in the collection of evidence.
30. In conclusion, Italy did not perform any inconsistency in its conduct. Almasri was returned to Libya not in execution of the extradition request, nor as the result of an

²⁷ Trial Chamber, *Prosecutor v. Kenyatta*, 3 December 2014, para. 79, taking into account the comprehensive review of documentation required in that case, and how it was concretely conducted (paras. 43-73).

improper declaration of “inadmissibility” (which would, in any case, fall within the ICC remit), but pursuant to an expulsion order issued for reasons of public order and national security related to the subject’s dangerousness; the expulsion order was the only possible outcome following the failure of the competent Judicial Authority to validate the provisional arrest, and in light of the Minister of Justice impossibility to complete its analysis and the assessment of the extradition request – an assessment that, owing to multiple factors including its uncertainty, was extremely complex (and therefore occurring in a context where the complexity of the assessment attributed to the Minister of Justice was ontologically incompatible with the hypothesis of an obligation to immediately transmit documents to the Prosecutor General at the Court of Appeal).²⁸

31. Finally, it should be noted that, according to part of the doctrine, the violation of the obligation to cooperate with the ICC must be verified in the same way as per article 25 of the Responsibility of States for International Wrongful Acts (2001) of the International Law Commission of the United Nations. That article addresses “*the situation of necessity*” as a ground for precluding the wrongfulness of an act. The “situation of necessity” occurs in the presence of a grave and imminent peril, and justifies acts in cases that do not comply with the obligations of the State, if they are the only way for the State to safeguard an essential interest against a prejudice. What happened in Libya in the months following the Almasri case, which also led to the exodus of several Italians, proves the rightfulness of such assessment. Furthermore, even at the time of Almasri’s arrest, as indicated in the Memorandum dated 30 April 2025, there were concrete risks that retaliatory acts could be perpetrated against Italian citizens in Libya.
32. The foregoing considerations may, in line with ICC’s judgments, be regarded as legally and logically relevant in rebutting the accusation of non-cooperation and in demonstrating, by contrast, Italy’s lawful and good-faith approach to the ICC’s request.



Augusto Massari
Ambassador of Italy to the Kingdom of the Netherlands

Dated this 28th of July 2025

At The Hague, the Netherlands

²⁸ Memorandum by the Italian Government, p. 9.