

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/11

Date: 26 January 2026

PRE-TRIAL CHAMBER I

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

SITUATION IN LIBYA

Public

**Decision to refer Italy's non-compliance with a request for cooperation to the
Assembly of States Parties**

Decision 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
Italian Republic

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

PRE-TRIAL CHAMBER I (the ‘Chamber’) of the International Criminal Court (the ‘Court’), issues the present decision referring the non-compliance by the Italian Republic (‘Italy’) to the Assembly of State Parties (the ‘ASP’).

I. Procedural history

1. On 17 October 2025, following Italy’s failure to comply with the Court’s request for the arrest and surrender of Mr Njeem and the request for search and seizure (the ‘Requests’), the Chamber issued its decision finding that ‘Italy failed to comply with its obligations under the Statute, and this non-compliance prevented the Court from exercising its functions and powers under the Statute’ (the ‘Decision on Non-Compliance’).¹ The Chamber, by majority with Judge Flores Liera dissenting as she considered that the matter should have already been referred to the ASP or United Nations Security Council (the ‘UNSC’),² decided to defer the determination as to whether Italy’s non-compliance should be referred to the ASP or the UNSC and thus invited Italy to provide information on its domestic proceedings on the present case.³
2. On 31 October 2025, Italy filed its submissions in response to the request for additional information set forth in the Decision on Non-Compliance (‘Italy’s Further Information’).⁴
3. On 11 November 2025, the Prosecution presented a submission regarding ‘new information concerning the timing of the transmission of the Libyan “extradition” request to the Italian Ministry of Justice’ (the ‘Prosecution’s Notification’).⁵
4. On 19 November 2025, Italy requested leave to reply to the Prosecution’s Notification (the ‘Request for Leave’).⁶

II. Preliminary matter

5. The Chamber notes the Request for Leave but considering that (i) the Prosecution’s Notification concerns a matter that was already addressed and decided on in the Decision on

¹ Decision on Italy’s non-compliance with a request for cooperation, ICC-01/11-209, para. 62.

² Partially Dissenting Opinion of Judge Maria del Socorro Flores Liera, 17 October 2025, ICC-01/11-209-OPI.

³ Decision on Non-Compliance, para. 63.

⁴ Italy’s response to the Pre-Trial Chamber’s invitation to provide information on relevant domestic proceedings – ICC-01/11-209, ICC-01/11-211.

⁵ Notification of new information related to the “Decision on Italy’s non-compliance with a request for cooperation”, ICC-01/11-216. See also Annex I to ‘Notification of new information related to the “Decision on Italy’s non-compliance with a request for cooperation”, ICC-01/11-216-AnxI; Annex II to ‘Notification of new information related to the “Decision on Italy’s non-compliance with a request for cooperation”, ICC-01/11-216-AnxII.

⁶ Italy’s Request for Leave to Submit Observations on the “Notification of new Information” by the Office of the Prosecutor ICC-01/11-216, ICC-01/11-217-Anx.

Non-Compliance and (ii) the Chamber has not relied on the Prosecution's Notification for the present decision, the Chamber finds that it will not be assisted by a reply by Italy thereto. The Request for Leave is thus rejected.

III. Determination

6. The Chamber recalls that it already held, unanimously, that Italy failed to comply with the Court's request to cooperate and that it thereby prevented the Court from exercising its functions and powers under the Statute within the meaning of article 87(7) of the Rome Statute (the 'Statute').⁷ The Chamber, by majority, instructed Italy to provide more information on any domestic proceedings relevant to the present case, and an indication of the impact that these proceedings could have on Italy's future cooperation with the Court in the execution of cooperation requests for the arrest and surrender of suspects.⁸

7. With Italy having provided further information,⁹ the Chamber must now consider whether referring the non-compliance to the ASP or the UNSC pursuant to article 87(7) of the Statute is warranted.

8. The following considerations are those of Judge Alapini-Gansou and Judge Flores Liera (the 'Majority'). Judge Motoc will set out her views on in a dissenting opinion, appended to the present decision.

a. Applicable law

9. The applicable law was already set out in the Decision on Non-Compliance,¹⁰ yet the Majority recalls that article 87(7) of the Statute 'aims at enhancing the effectiveness of the cooperation regime under Part IX of the Statute, by providing the Court with the possibility of engaging certain external actors to remedy cases of non-compliance'.¹¹ As further explained by the Appeals Chamber, a referral under this provision is 'not intended to be the standard response to each instance of non-compliance, but only one that may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand'.¹² Indeed,

⁷ Decision on Non-Compliance, para. 62.

⁸ Decision on Non-Compliance, para. 63.

⁹ Italy's Further Information.

¹⁰ Decision on Non-Compliance, paras 23-26.

¹¹ *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', 19 August 2015, ICC-01/09-02/11-1032 ('*Kenyatta Appeal Judgment*'), para. 51.

¹² *Kenyatta Appeal Judgment*, para. 51.

[s]ince the ultimate goal is to obtain cooperation, a Chamber has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain the cooperation requested taking into account the form and content of the cooperation; whether the referral would provide an incentive for cooperation by the requested State; whether it would instead be beneficial to engage in further consultations with the requested State; and whether more effective external actions may be taken by actors other than the ASP or the UNSC, such as third States or international or regional organisations. In conclusion, the Appeals Chamber considers that it is clear that, in determining whether a referral is appropriate, a Chamber will often need to take into account considerations that are distinct from the factual assessment of whether the State has failed to comply with a request to cooperate. The Appeals Chamber therefore considers that a referral is not an automatic consequence of a finding of a failure to comply with a request for cooperation, but rather this determination falls within the discretion of the Chamber seized of the article 87 (7) application.¹³

b. Whether a referral of the matter to the Assembly of States Parties and/or the United Nations Security Council is warranted

10. The Majority notes, and considers important, that Italy states in its most recent submissions that ‘it confirms it wants to respect’ its ‘international obligations’ to the Court, and reiterates ‘its firm intention to cooperate positively with the [Court]’.¹⁴

11. In response to the Chamber’s request for more information on any domestic proceedings relevant to the present matter, Italy explains that the case against two ministers and an under-secretary has been dismissed by the Italian parliament, ‘establishing that their actions [...] were aimed at safeguarding constitutionally relevant State interests and pursuing a pre-eminent public interest’.¹⁵ Italy further indicates that ‘the Judiciary has the power to raise the issue of a conflict of State power attribution before the Constitutional Court’,¹⁶ but neither explains whether such a procedure is ongoing nor whether such proceedings concern Italy’s non-compliance, or instead the parliament’s decision to block the prosecution of ministers and under-secretary. The same applies to Italy’s reference to a ‘second investigation’ concerning ‘a high-ranking official of the Ministry of Justice’.¹⁷

12. Consequently, it is unclear what impact, if any, the outcome of these proceedings could have on Italy’s willingness to cooperate in the future. The Majority recalls in this regard that Italy was requested to explain ‘the impact that these proceedings could have on Italy’s future

¹³ *Kenyatta* Appeal Judgment, paras 49 and 53.

¹⁴ Italy’s Further Information, paras 5 and 14.

¹⁵ Italy’s Further Information, paras 9-10.

¹⁶ Italy’s Further Information, para. 11.

¹⁷ Italy’s Further Information, para. 12.

cooperation with the Court in the execution of cooperation requests for the arrest and surrender of suspects',¹⁸ but that Italy has not made concrete submissions on this issue. The Court is not insensible to the difficulties that a State Party may identify which may impede or prevent the execution of a request of cooperation and article 97 of the Statute regulates the procedure to follow to resolve such a matter. However, the Majority notes that this procedure was not used in the present case.

13. The Majority further notes that Italy states that the government 'is committed to reviewing and enhancing the practical methods and legal forms of communication between State bodies in cases of requests for cooperation by this Court for the arrest and surrender of suspects'.¹⁹ It indicates that '[a] possible revision of Law No. 237/2012 is also being considered'.²⁰

14. Yet, at the same time, Italy appears to add disclaimers to its stated willingness to cooperate and intention to review and revise the domestic procedures and laws. Notably, Italy indicates that it intends to cooperate with the Court 'within the framework of national security interests as well as [Italy's] geopolitical position and constitutional and domestic legislation'.²¹ The Majority recalls in this regard that the Chamber already dismissed Italy's submissions in relation to challenges under its domestic law and purported national security interest in the Decision On Non-Compliance.²² Indeed, as already explained, article 88 of the Statute obliges State Parties to 'ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part IX of the Statute]' and that 'matters of domestic law', including any expulsion orders, 'cannot be invoked by a State Party to justify non-compliance'.²³ A State Party's international obligation to cooperate with the Court thus cannot be conditioned by constitutional and domestic legislation considerations.

15. The Majority further recalls that Italy appears not to have been fully forthcoming with its provision of information to the Court and that certain elements of the information provided by Italy to the Court appear to be contradicted by other information available.²⁴

¹⁸ Decision on Non-Compliance, para. 63.

¹⁹ Italy's Further Information, para. 6.

²⁰ Italy's Further Information, para. 6.

²¹ Italy's Further Information, para. 5.

²² See Decision on Non-Compliance, paras 35-39 and paras 51-53.

²³ Decision on Non-Compliance, paras 38 and 53.

²⁴ See Decision on Non-Compliance, paras 40-45 and paras 51-53; Report of the Registry on the Status of the Execution of Requests for Provisional Arrest of Mr Osama Elmasry / Almasri Njeem, 24 January 2025, ICC-01/11-151-US-Exp.

16. In the Decision on Non-Compliance, it was recalled that in the South Africa's precedent, the relevant chamber considered the domestic proceedings that had been carried out in that State to address the non-compliance in its determination as to whether the non-compliance should be referred to the ASP or UN Security Council.²⁵ It further considered it important that the domestic ruling establishing that South-Africa had to cooperate with the Court had become final because the Government of South Africa withdrew its previously lodged appeal against it. This demonstrated the government's acceptance of 'its obligation to cooperate with the Court under its domestic legal framework'.²⁶ Following the receipt of Italy's Further Information, the Majority considers that the South-African case must be distinguished from the present case, because, unlike Italy, South-Africa did not qualify or restrict its future cooperation with the Court. Italy's cooperation also appears to depend on possible future amendments of its domestic laws and procedures.

17. The Majority considers that the Chamber, in exercising its discretion, must determine whether, if a similar situation would arise today, it would be clear that Italy would be able and willing to cooperate in the arrest and surrender of suspects sought by the Court, irrespective of the person's nationality.

18. At present, taking into account the 'obstacles' and challenges raised by Italy in relation to its domestic law – 12 months after Italy's failure to comply with the Requests concerning Mr Njeem - and further noting the ambiguous wording in the assurances provided by Italy in its latest submissions, the Majority considers that the aforementioned question must be answered in the negative.

c. Conclusion

19. The majority of the Chamber therefore deems it appropriate to refer to the ASP Italy's non-compliance with the Court's requests to i) arrest and surrender Mr Njeem and ii) to search him and his belongings and seize any material for transmission to the Court.

²⁵ Decision on Non-Compliance, para. 58. See also Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, ICC-02/05-01/09-302 ('*South Africa Decision*'), paras 136-137.

²⁶ *South Africa Decision*, para. 136.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave;

IN ADDITION, THE CHAMBER, BY MAJORITY, JUDGE MOTOC DISSENTING,

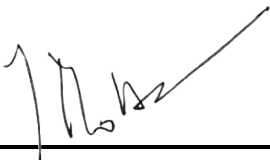
RECALLS the Chamber's prior finding that Italy failed to comply with its international obligations under the Statute, thereby preventing the Court from exercising its functions and powers under the Statute; and

REFERS the matter of Italy's non-compliance to the Assembly of States Parties through the President of the Court in accordance with regulation 109(4) of the Regulations of the Court, indicating that the Decision on Non-Compliance (document number ICC-01/11-209), its annex (document number ICC-01/11-209-AnxI) and the present decision should be transmitted simultaneously.

Judge Motoc appends a dissenting opinion.

Judge Flores appends a concurring opinion.

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



Judge Iulia Antoanella Motoc, Presiding



**Judge Reine Adélaïde Sophie Alapini-
Gansou**



Judge María del Socorro Flores Liera

Dated this Monday, 26 January 2026

At The Hague, The Netherlands