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The failure to arrest and surrender Osama Elmasry Njeem: “That Awful Mess” in Rome

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On 21 January 2025, the Court of Appeals of Rome, at the request of the concerned person and with the favorable opinion of the Prosecutor General, issued an order of immediate release in favor of Mr Osama Elmasry Njeem, who had been arrested by the Italian police in Turin the day before, pursuant to an arrest warrant for crimes against humanity and war crimes issued by the Pre-Trial Chamber of the International Criminal Court (ICC) on 18 January 2025. According to media reports, Elmasry first arrived in Italy on 6 January, and travelled to various European countries before being arrested. Immediately after his release, Mr Elmasry was expelled and repatriated on a military flight to Libya, where he was cheerfully welcomed by supporters. Details on the expulsion were made known on 23 January, when the Italian Minister of the Interior, informing the Parliament on the matter, said that he had signed an expulsion order against Elmasry “for reasons of security of the State”, in light of his

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arrest warrant against Elmasry, which has been promptly unsealed by the PTC on 24 January 2025. Instead, I confine my critical analysis to the procedural steps and decisions leading to the release from custody of Elmasry, against the backdrop of the Italian law on cooperation with the ICC (hereinafter Law 237/2012, or Cooperation Law) and taking into account the position expressed by the Italian Government in relation to other recent decisions of the ICC.

The legal framework for cooperation between Italy and the ICC, in particular on matters of arrest and surrender

As already mentioned, Italy adopted a law on cooperation with the Court in 2012, well after ratifying the Statute. Law 237/2012 establishes the fundamental principles and procedures for cooperation and identifies the political and judicial authorities entrusted with the duty to carry out the decisions of the ICC. According to article 2(1) of the Cooperation Law:

> 1. The cooperation relations between the Italian State and the International Criminal Court are entertained exclusively by the Minister of Justice, who is competent to receive the requests of the Court and to give them course. The Minister of Justice, if he or she deems it necessary, coordinates his or her action with other concerned Ministers, with other institutions or other state organs. The Minister has the faculty to present to the Court, if necessary, acts or requests.

Despite the role attributed to the Minister of Justice (MoJ) as the main political and administrative organ in cooperation proceedings, the law establishes that the Minister is almost exclusively required to pass on cooperation requests to the competent judicial authorities, which are ultimately tasked of giving them effects by adopting the necessary decisions. The judicial authorities entrusted with functional competence to entertain the ICC cooperation requests are the Prosecutor General (PG) at the Court of Appeals of Rome and the Court of Appeals of Rome itself (see articles 4(1) and 11(1) of the Cooperation Law).

Cooperation in the case of requests of arrest and surrender made by the ICC is regulated under articles 11-14 of the Cooperation Law. According to article 11(1) of the Law:

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The Court of Appeals issues its decision by means of an order, which can be challenged for error of law before the Supreme Court of Cassation. The same procedure applies also when the ICC has requested the provisional arrest under article 59(1) and 92 of the Statute, before or pending the formal transmission of a request for surrender (article 14 of the Cooperation Law). The surrender procedure proper is regulated under article 13 of the Law, which establishes strictly limited and enumerated grounds for denial.

The arrest of Elmasry and the reasoning behind the Court of Appeals' order of release

So far for the theory. But what actually happened in the handling of the Elmasry case, once he was identified and located in Turin by Italian authorities?

According to the procedural background summarized by the Court of Appeals in its order of release, Elmasry was arrested on 19 January 2025 in Turin – he was there to attend a football match – at the initiative of the Flying Squad (*Squadra Mobile, DIGOS*, a specialized unit that handles particularly sensitive investigations and is in charge of international judicial cooperation) of the Police Department of Turin. His provisional arrest was then immediately communicated to the PG in Rome and, on the same date, by the prosecutor to the MoJ. Apparently, the MoJ remained silent for at least two days on the matter, failing to state its position and without formally transmitting the relevant acts. The MoJ only published a laconic note on the matter on the afternoon of 21 January, around the same time the suspect was about to leave Italy, saying that his office was still assessing what to do in relation to the transmission of the acts to the PG, in light of the "complexity of the paperwork" ("*considerato il complesso carteggio*").

The defense for Elmasry filed a petition for his immediate release. The PG concurred with the defense's request, expressing the view that the provisional arrest was put in place without following the procedural steps and formalities required under Law 237/2012 ("*arresto irrituale*") and that the Police of Turin could not proceed to the arrest "on its own initiative" ("*di iniziativa*"), failing the (allegedly) "indispensable

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the Court, articles 11-14 of the Cooperation Law are *lex specialis* to the provisions of the Code of criminal procedure relating to precautionary detention and arrest in the context of ordinary extradition procedures, and prescribe a different and special procedure that must be exclusively followed when the arrest and surrender of a suspect is required by the ICC. Since this special procedure does not expressly envisage the arrest "on the initiative" of the Police (contrary to what happens for extradition procedures under article 716 Code of criminal procedure), the arrest by the Turin Police on its own initiative must be considered "irritual" (that is, procedurally vitiated). According to the judges, the correct steps would have been the following: 1) Receipt of the acts by the MoJ; 2) Formal transmission of the acts by the MoJ to the PG in Rome; 3) Request by the PG to the Court of Appeals of Rome for the application of the measure of precautionary detention; 4) Application of the precautionary detention measure.

Apart from the arrest on the initiative of the Turin Police, what also went wrong, in the view of the PG and the Court, concerns step 2 of the abovementioned process. Since the MoJ did not formally transmit the acts to the PG, the prosecutor considered himself not in the position to independently request the Court to issue the precautionary detention measure and, in this case, the confirmation of the provisional police arrest of Elmasry. As a result, the Court found that there was no need to decide on the precautionary detention measure, due to the lack of a formal request by the PG and the non-compliance of the provisional arrest by the Police with the procedural requirements under Law 237/2012. As a consequence, the Court ordered the release of Elmasry and the restitution of any property seized at the time of the arrest.

The reasoning of the PG and of the Court of Appeals is unconvincing and problematic for various reasons, which can be summarized as follows (for other in-depth critical analyses see, in Italian, Gavrysh; Caianiello and Meloni).

First, based on a textual, contextual and purpose-oriented interpretation of the pertinent provisions, it can be seriously doubted

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“the acts” by the PG, the provision does not precisely identify these “acts”. In other words, it is not clear whether this reference is to be intended exclusively to the original request for arrest and surrender transmitted by the ICC to the MoJ according to article 87(2) of the Statute, or if the expression may also refer to other official acts of national authorities or international bodies (such as INTERPOL, which was asked by the ICC to issue a Red Notice in this case) that: a) presupposes the existence of the ICC warrant and of the request for arrest and surrender; and b) allows the sufficient cognizance of their essential content on the part of the PG (as it must have been the case with the communication of Elmasry’s arrest by the Police of Turin to the PG in Rome). Even more importantly, the use of the term “interlocution” with regard to the MoJ-PG relations seems to suggest, contrary to the merely executive character of the cooperation procedure under Law 237/2012, that the two organs enjoy a margin of discretion on whether or not to forward the request to the Court of Appeals for its judicial determination.

In the second place and as a consequence, if the reasoning of the PG and of the Court of Appeals was correct, there would be a major flaw in the cooperation procedure under Law 237/2012. Based on this approach, the mere delay or inaction of the political authority in transmitting the acts to – and “interlocuting” with – the PG would entirely frustrate the timely execution of the ICC’s request. This delay or lack of initiative would prevent the PG from requesting to the Court of Appeals an order of precautionary detention, which is a necessary prerequisite to proceed to the surrender, in a vicious cycle that risks of entirely depriving the ICC warrant of its *effet utile*. This also in light of the duty imposed by article 2, para 3 of the Cooperation Law on the MoJ, according to which he or she must ensure that the execution of the ICC’s requests take place “in a short time” (“*in tempi rapidi*”). In other words, this interpretation gives the MoJ an improper discretionary obstructive power, which does not seem in line with the eminently jurisdictional character of cooperation procedures under Law 237/2012 and, ultimately, with the state’s duty to ensure its full cooperation with the Court (article 86 of the Statute).

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despite them being recalled by article 3 of the Cooperation Law, which declares these provisions applicable "except as otherwise provided by the present law and the Statute". This radical solution is premised on the idea that the procedure under the Cooperation Law is not only *lex specialis*, but also entirely self-sufficient on the point of arrest and surrender. Moreover, as explained by eminent experts of Italian criminal law and procedure (see Bolici and di Martino; Chiavario), this reasoning conflates the separate but connected aspects, on the one hand, of the application of a precautionary detention measure (which is the competence of the Court of Appeals) and, on the other hand, of the provisional arrest in urgent cases (which is normally the competence of the police and on which Law 237/2012 is entirely silent). Whatever the correct approach to the relations between the two bodies of law, the completely unreasonable practical result of this interpretation is that it would be easier and less procedurally cumbersome to arrest a person accused of an ordinary crime whose extradition is requested by another state, than to arrest a person suspected of having committed "crimes of concern to the international community as a whole" whose surrender is requested by the International Criminal Court. This cannot possibly be the result aimed for by the Italian legislator when adopting the Cooperation Law. Moreover, it seems to openly contravene to the principle contained in article 91(2)(c) of the Rome Statute, according to which the "[r]equirements for the surrender process in the requested State […] should not be more burdensome than those applicable to requests for extradition pursuant to treaties […] and should, if possible, be *less burdensome*, *taking into account the distinct nature of the Court*".

An "Italian Caper": political will to allow the escape disguised as procedural technicality?

It is probably too early to form a complete opinion on the overall behavior of the Italian authorities in this case, and more information is likely to emerge in the coming days as a result of parliamentary debates, instigated by the requests for explanation made by various opposition political forces.

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unavoidable "technical" consequence of his release and repatriation. Given the sensitiveness of the case, it does not seem plausible that the arrest in Turin was enacted without consultations with or prior knowledge by the Minister of the Interior. Moreover, the deliberately passive behavior of the MoJ when time was absolutely of the essence reveals that, to use a euphemism, giving effect to the Court's request was certainly not among the priorities of his office. The decision of the Minister of the Interior to immediately expel Elmasry, thereby preventing the still possible correction of the alleged procedural irregularities in the arrest, and his prompt transfer to Tripoli aboard a military flight whose departure can only be authorized at the highest governmental level, complete the picture of what seems to amount to a deliberate political decision to allow the escape of the suspect. Unfortunately, and one has to hope inadvertently, the unconvincing interpretation of the Cooperation Law by the PG and the Court of Appeals of Rome may have provided a patina of technical legitimacy to a course of action that was in all likelihood predetermined. A decision probably based on *realpolitik* considerations, namely to maintain good relations with Libyan authorities and to avoid any scrutiny also on the actions of Italian and of other European state officials, especially in relation to the management of migration issues in recent years. A legally and morally "flexible" position that has recently been expressed by the Italian Minister of Foreign Affairs also in relation to the warrants of arrest against the Israeli leadership, and confirmed in this case.

Concluding remarks

The release of Elmasry by the Italian authorities and his escape to Libya is not only a slap in the face of the ICC and of victims of the heinous crimes he is credibly suspected of having committed, but also a very worrying precedent for future cooperation relations between Italy and the Court.

The Court published a press release on the case only after Elmasry was freed (previously, the Court was asked by Italian authorities not to publicly comment on the arrest), stating that while domestic procedures were unfolding "it continued to pursue its engagement

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the authorities on the steps reportedly taken.”

In light of the overall behavior in the case and of the patent lack of good-faith, transparent and timely engagement with the Court on the part of Italian authorities, there seems to be ground for starting a procedure of non-compliance under article 87(7) of the Statute. It would be the first time that a European, traditionally like-minded State – ironically the one that hosted the Rome Conference and the birth of the Court – is scrutinized as to its failure to cooperate and to arrest a suspect wanted by the ICC. It would also be the first time that this happens in relation to a person not holding a high-level political post and in the absence of any immunity-related potential obstacles.

At a time when the Court is seeking the arrest of various high-level perpetrators, including heads of state and government, and faces an unprecedented level of violence and de-legitimization, Italy’s behavior is a sheer example of double standards and lack of commitment to the international criminal justice project, so rhetorically supported in other contexts, and should be a wake-up call for civil society to demand in the strongest terms that state authorities fully comply with their obligations under the Statute. In the meantime, the prompt unsealing of the warrant of arrest against Elmasry allows the public to fully appreciate the magnitude of this missed opportunity to advance the cause of accountability for international crimes.

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