Protecting Human Dignity through Criminal Law

Italy's International Obligations and the Challenge of Implementation

edited by

S. Forlati, R. Sicurella, F. Capone, G. Bartolini, E. Zannarini

Giappichelli

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IUSTITIAM COLIMUS

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a cura di

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Giappichelli

VIA PO, 21 - TEL. 011-81.53.111
http://www.giappichelli.it

ISBN/EAN 979-12-211-1932-9
ISBN/EAN 979-12-211-8414-3 (ebook - pdf)
ISBN/EAN 979-12-211-8415-0 (ebook - epub)

Il presente volume è finanziato dall'Unione europea – Next Generation EU, Missione 4 Componente 1 CUP F53D23003570006, nell'ambito del bando PRIN 2022, progetto International protection of human dignity through criminal law: strenghtening Italy's implementation record (DignITA).

Finanziato dall'Unione europea NextGenerationEU
Ministero dell'Università e della Ricerca
Italiadomani PIANO NAZIONALE DI RIPRESA E RESILIENZA
Università degli Studi di Ferrara

G. Giappichelli Editore

Questo libro è stato stampato su carta certificata, riciclabile al 100%

Stampa: Stampatre s.r.l. - Torino

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the registration of the *notitia criminis* to the erasure of a conviction from the *casellario giudiziale*. Throughout the different stages of criminal proceedings, suspects, defendants, and convicts may legitimately be subjected to restrictions of their fundamental human rights and freedoms. Still, they must never be reduced to mere objects of penal power or deprived of their *status* as members of the human family – and thus of the inalienable human rights that descend from the human dignity with which they are endowed by birth. In a similar fashion, victims of crime must not be instrumentalised as mere means for the pursuit of punitive aims; rather, as active parties, they must have their dignity respected and protected *in* and *through* criminal proceedings. From this perspective, the multiple layers of protection – directly or indirectly – afforded to human dignity across the different stages of Italian criminal proceedings not only reaffirm its protective role for individuals, but also shed light on the delicate interdependence between respect for and the protection of individual rights and the collective interests that characterise democratic societies governed by the rule of law.

dignity can have great effect in adjudication where it is engaged, its role, function, and weightiness therewith remain indeterminate».

Chapter XIII

Italy's Record in International and EU Judicial Cooperation in Criminal Matters and Human Dignity

Francesca Capone [*]

1. *Setting the Scene and Introductory Remarks*

Judicial cooperation refers to the collaborative processes and mechanisms established among States to facilitate the effective administration of justice across borders. The narrowest interpretation of the term refers to instruments aimed at making it possible to exercise national jurisdictional authority, favouring activities such as the notification of judgments, summons and the examination of evidence abroad. In its wider sense, the notion encompasses mechanisms designed not only to favour the judicial proceedings (to the extent to which "judicial" should only be referred to what belongs or is related to the proceedings), but also other activities linked to the proceedings that fall outside its scope. [1] Hence, arguably international judicial cooperation, understood as a broad concept, relies on the existing cooperation between judicial authorities in various matters of law in different cross-border situations, with important roles being played through a bilateral means. It is important to stress from the outset that judicial collaboration in criminal cases is dependent or based on the idea of

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[1] See A. ARNAIZ SERRANO, *Evolution of international judicial cooperation in criminal matters: in particular, judicial cooperation in criminal matters in Europe*, in *European Judicial Training Network* (*EJTN*), 2013, at <https://www5.poderjudicial.es/cvcp12-13/CVCP13-01-EN.pdf> last accessed on 31 December 2025.

reciprocal acknowledgment of judgments and court decisions. It also involves steps to make Member States' laws more uniform in selected sectors, i.e. counter-terrorism. Judicial cooperation, thus, covers both civil and criminal cases, and can take many various forms based on the specific terms and circumstances of the parties' separate treaties. From a more theoretical perspective, judicial cooperation is a manifestation of the "law of cooperation". In Wolfrum's words, «the term law of co-operation has been developed as a counterpart to the term "law of coexistence"», [2] the latter describing the traditional modern international law. The key element of such international law of cooperation is the duty of States to co-operate with each other. International cooperation in the framework of international relations amongst States may take different forms, two of which can be regarded as a given: first, cooperation is a process of interaction between two or more subjects and, second, it is animated by a common effort towards a mutual benefit. In the context of bilateral relations or the relations among a limited number of States – for example in a regional setting like the European Union (EU) – it may merely mean the joint action of the parties involved to serve their mutual interests.

Given the plethora of mechanisms and instruments in place, the present contribution does not aim to provide an exhaustive overview of how Italian authorities interpret and implement the concept of judicial cooperation amongst States, but it will dwell, both in relation to the international and the European sphere, on the most relevant developments that have a bearing on the protection of human dignity. As highlighted by Pastore in his excellent contribution in this edited volume, «human dignity is a concept tied to human rights in the sense that it plays a role in their understanding, at least in two senses: 1) rights derive from the inherent dignity of every person; 2) rights and dignity are interdependent and coordinate ideas». [3] The scope of this Chapter is not to eviscerate the entwined relation between dignity and (human) rights, but rather to discuss those instances where judicial cooperation has contributed to fostering this undeniable connection.

The present work will first address the relevance of judicial cooperation in the field of human rights, reflecting in particular on its impact on human dignity. Second, this contribution will unpack the Italian approach to judicial cooperation, at the international and at the regional, i.e. EU, level and finally it will provide some concluding observations.

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[2] R. WOLFRUM, *Cooperation, International Law of*, in A. PETERS-R. WOLFRUM (eds), *Max Planck Encyclopedia of International Law*, OUP, Oxford, 2010, p. 783.

[3] See B. PASTORE, *Human Dignity and Criminal Law: A Legal – Philosophical Approach*, in this volume, p. 7.

2. *Judicial Cooperation as a Tool to Enhance Human Dignity?*

It is trivial to observe that conspicuous literature and growing attention have been devoted to the actors, the factors and the existing and future mechanisms that promote and protect human rights, also by thinking outside the usual boxes. [4] Conversely, the relationship between human rights and international judicial cooperation remains under-explored in recent scholarship. [5] In spite of the widely recognised need for effective judicial protection against human rights violations, incidental review of acts of a foreign State is still limited, since the exercise of jurisdiction could interfere with the foreign State' sovereignty but also affect the relations between States and therefore hinder cooperation in other sectors. [6] Yet, the relevance of the interplay between judicial cooperation and human rights has emerged in certain domains, shedding light on the need to further investigate it. The European Court of Human Rights (ECtHR) jurisprudence provides evidence of this connection. [7]

The *Soering case*, which notably deals with extradition, i.e. one of the most well-known forms of judicial cooperation, represents the benchmark example for all cases concerning international cooperation in criminal matters. In this case the ECtHR ruled on the application of the European Convention on Human Rights (ECHR) to the extradition of a German citizen to the USA, i.e. a non-State party. The decision focused on whether Mr Soering could be extradited to the USA, since the crime for which he was convicted carried the death penalty in the State of Virginia. In his submission Mr Soering claimed that his extradition would lead to a violation of Articles 3 and 6 of the ECHR by the United Kingdom, i.e. the extraditing State. In particular in relation to the violation of the prohibition of torture and inhumane and degrading treatment, the ECtHR

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[4] See for example the flourishing literature on the role of businesses in tackling climate change and its consequences as a human rights issue. C. MACCHI, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence*, in *Business and Human Rights Journal*, 6, 2021, p. 93.

[5] S. TRECHSEL, *The Role of International Organs Controlling Human Rights in the Field of International Cooperation*, in A. ESER-O. LAGODNY (eds), *Principles and Procedures for a New Transnational Criminal Law*, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, Freiburg, 1992, pp. 658-659. See also A.A.H. VAN HOEK-M.J.J.P. LUCHTMAN, *Transnational Cooperation in Criminal Matters and the Safeguarding of Human Rights*, in *Utrecht Law Review*, 2, 2005, p. 1.

[6] M. BÖSE-M. BRÖCKER-A. SCHNEIDER, *Introduction*, in M. BÖSE-M. BRÖCKER-A. SCHNEIDER (eds), *Judicial Protection in Transnational Criminal Proceedings*, Springer, Cham, 2021, p. 1.

[7] On the notion of human dignity in the ECtHR jurisprudence, see generally P. PINTO DE ALBUQUERQUE-P. ÖLÇER, *Dignity and Criminal Justice under the European Convention on Human Rights*, in this volume.

restated the absolute nature of Article 3 and the need to interpret the ECHR in a way that renders its safeguards practical and effective. [8] The Court firmly rejected the UK's argument that an extraditing State could not be responsible under the ECHR for any inhumane or degrading treatment or punishment inflicted by a receiving State. In fact, the Court posited that «[i]n so far as any liability under the Convention is or may be incurred, it is responsibility incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment». [9] Furthermore, the ECtHR noted that the loss of control after extradition did not absolve the State from responsibility for foreseeable consequences of extradition suffered outside its jurisdiction. [10]

A few years later in the *Saadi v Italy* case the ECtHR unanimously reasserted its existing jurisprudence prohibiting return *or extradition* of individuals to States in which they faced a "real risk" of torture, inhuman or degrading treatment and clarified that involvement in terrorism did not affect an individual's absolute rights under Article 3. [11] In the decision, the Court briefly considered and rejected the claim that Italy's Article 3 obligations could be satisfied by means of diplomatic assurances from Tunisia. In doing so, the Strasbourg judges weighed on the UK's practice of acquiring diplomatic assurances from receiving States and, relying on these assurances, returning non-citizens who are deemed to pose a significant terrorist threat to countries with a demonstrated record of carrying out or tolerating torture or ill-treatment. [12] When assessing the sufficiency of any particular diplomatic assurances, the Court clearly stated the obligation to consider whether the assurances provide a sufficient guarantee of protection from prohibited treatment in their practical application and taking the circumstances into account. [13] In other words, even if the Tunisian authorities had provided Italy with these assurances, the Court must still examine whether such assurances represented a reliable guarantee. [14]

In the field of counter-terrorism too there are some attempts to reinforce the relationship between judicial cooperation and human rights. The international

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[8] ECtHR, *Soering v. UK*, 7 July 1989, Application no. 14038/88, para. 102.

[9] *Ibidem*, para. 111.

[10] *Ibidem.*

[11] A. GIANELLI, *Il carattere assoluto dell'obbligo di* non-refoulement*: la sentenza* Saadi *della Corte europea dei diritti dell'uomo*, in *Rivista di diritto internazionale*, 91, 2, 2008, p. 449.

[12] ECtHR, *Saadi v. Italy*, 28 February 2008, Application no. 37201/06, para. 145. G. GENTILI, *European Court of Human Rights: An absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-treatment is a Genuine Risk*, in *I•CON*, 8, 2010, p. 311.

[13] ECtHR, *Saadi v. Italy*, cit., para. 148.

[14] *Ibidem*, para. 52.

treaties concerning terrorism, that according to some authors have established a sort of «evolving code of terrorist offences», [15] enshrine some (limited) provisions concerning the protection of human rights. These clauses are of three types. There are general provisions indicating that the obligations set forth in the treaty are without prejudice to other international obligations of the State party. Other conventions contain provisions concerning the right of accused or detained persons to due process. Finally, the most recent treaties establish conditions regarding extradition and the transfer of prisoners. [16] In relation to the latter, the provision in effect prohibits the practices known as "rendition" and "extraordinary rendition", [17] whose links to torture, denial of access to competent courts, incommunicado detention and other human rights violations have been well documented and ascertained also by ECtHR. [18]

3. *Italy's Approach to International Judicial Cooperation in Criminal Matters*

Italy's approach to international judicial cooperation is layered and quite complex. Italy is a party of bilateral agreements on judicial cooperation in criminal matters signed with several States, [19] at the same time it is a party of the relevant multilateral conventions, such as the UN Convention Against Transnational Organised Crime (UNTOC) and the UN Convention Against Corruption (UNCAC), the "sectoral" counter-terrorism treaties mentioned in the previous paragraph as well as the Genocide Convention and the war crimes provisions of the Geneva Conventions, with the latter supplying at least rudimentary form of judicial cooperation in relation to some war crimes. [20] Under international

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[15] D. O'DONNELL, *International Treaties against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces*, in *International Review of the Red Cross*, 88, 2006, p. 853.

[16] *Ibidem*, pp. 858-859.

[17] M.B. DE FELIPE-A.N. MARTÍN, *Post 9/11 Trends in International Judicial Cooperation: Human Rights as a Constraint on Extradition in Death Penalty Cases*, in *Journal of International Criminal Justice*, 2012, p. 58.

[18] A. LIGUORI, Extraordinary renditions *nella giurisprudenza della Corte europea dei diritti umani: Il Caso Abu Omar*, in *Rivista di diritto internazionale*, 99, 3, 2016, p. 777. C. CANDELMO, *Il ruolo italiano nella pratica delle* extraordinary renditions: *il caso* Nasr et Ghali c. Italie, in *Osservatorio costituzionale*, 3, 2016, p. 1.

[19] The list of countries is available here: <https://www.giustizia.it/giustizia/it/mg_1_3.page?tabaip=y> last accessed on 31 December 2025.

[20] A. BISSET, *The Mutual Legal Assistance Treaty for Core Crimes: Filling the Gap?*, in

judicial cooperation, there are obviously two dimensions to consider and that need to be examined when deciding on a request for cooperation; namely the international and internal dimensions that are dealt with separately by various bodies. The former dimension is dealt with by the Ministry of Justice and is preliminary to any judicial decision. The latter dimension is dealt with by judicial authorities and partly by the Ministry of Justice. [21] As is well known, competences in international judicial cooperation procedures have always been distributed between Italian political and judicial authorities. Following the reform of Chapter XI of the Italian Code of Criminal Procedure, entitled «Jurisdictional relations with foreign authorities» and carried out by Legislative Decree No. 149/2017 (amending the rules of the criminal procedural code on extradition and judicial cooperation), the competence of judicial authorities in "passive" cooperation procedures has been differentiated according to the modality of cooperation at issue. Prior to the 2017 reform, the only judicial authority competent to grant the execution of any kind of judicial cooperation request was the Court of Appeal. Since the entry into force of the new legislation the competent judicial authority to grant the execution of a legal assistance request is the Public Prosecutor or the judge of preliminary investigations when the requested measure requires the "participation" of a judge. The Court of Appeal remains competent to decide on requests for extradition and enforcement of a foreign judgment. [22]

Furthermore, Law 149/2017 – while recognising the "primacy" of the international binding instruments ratified by Italy – introduced into the criminal procedural code also the principle of mutual recognition of EU judicial authorities decisions and orders, providing that mutual recognition is ruled by the aforementioned law and by the relevant EU legislation as well as by the domestic legislation transposing the relevant EU Framework Decisions and Directives on cooperation in criminal matters. [23] Notably, the "nuts and bolts" of Italy's approach to international judicial cooperation have been thoroughly described elsewhere, [24] therefore there is no need to further linger on the technical aspects. What is worth discussing, without aiming to provide an exhaustive overview of the issues at stake, and in light of the most recent events, is the "vertical" judicial

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EJIL: Talk!, 13 June 2025, at <https://www.ejiltalk.org/the-mutual-legal-assistance-treaty-for-core-crimes-filling-the-gap/> last accessed on 31 December 2025.

[21] T. RAFARACI, *Country Report "Italy"*, in M. BÖSE-M. BRÖCKER-A. SCHNEIDER (eds), *Judicial Protection in Transnational Criminal Proceedings*, Springer, Cham, 2021, p. 149.

[22] *Ibidem,* pp. 150-151.

[23] N. PIACENTE, *Overview of Italian Legislation and Case Law on Judicial Cooperation*, in *Diritto penale contemporaneo*, 9, 2018, p. 25.

[24] T. RAFARACI, cit., pp. 60-64.

cooperation with the International Criminal Court (ICC). [25] As is well known, the ICC funding treaty does not contain a regime for cooperation between States, besides a general obligation enshrined in Article 86 of the Rome Statute, according to which «States Parties shall, in accordance with the provisions of this Statute, *cooperate fully* with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court».

This notwithstanding, Italy, alongside most of the States parties to the Rome Statute, adopted a law on cooperation with the Court only in 2012, well after ratifying the treaty. Law 237/2012 (hereinafter "Cooperation Law") establishes the key principles and procedures for cooperation and designate both the political and judicial authorities entrusted with the duty to carry out the decisions, including of course the arrest warrants, issued by the ICC. [26] The episode that has sparked significant outrage, also outside the Italian border, and shed light on the shortcomings of the existing framework, can be summarised as follows: on 21 January 2025, the Court of Appeals of Rome, at the request of the concerned person and with the favourable opinion of the Prosecutor General, granted an order of immediate release in favour of a Libyan citizen, 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 ICC on 18 January 2025. [27] First of all, it is important to note that the jurisdiction of the ICC over Libya, a State not party to the Rome Statute, is based on the referral from the United Nations Security Council (UNSC) contained in Resolution 1970 (2011). Second, it is also worth recalling that the ICC Prosecutor, as part of the various lines of investigation into the Libyan situation, submitted a request for the issuance of an arrest warrant against Mr Elmasry Njeem to the preliminary judges in a confidential manner on October 2, 2024. On 17 January 2025, once the ICC has been informed that Mr Elmasry Njeem was in the Schengen area, the Pre-Trial Chamber met promptly and issued a majority ruling for his arrest warrant. [28]

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[25] On other aspects related to the notion of human dignity and international criminal courts and tribunals, see S. ZAPPALÀ, *Human Dignity and International Criminal Law*, in this volume.

[26] L. POLTRONIERI ROSSETTI, *The Failure to Arrest and Surrender Osama Elmasry Njeem: That Awful Mess in Rome*, in *EJIL: Talk!*, 27 January 2025, at <https://www.ejiltalk.org/the-failure-to-arrest-and-surrender-osama-elmasry-njeem-that-awful-mess-in-rome/> last accessed on 31 December 2025. Se more in general M. CHIAVARIO-A. PERDUCA, *Cooperazione giudiziaria internazionale in materia penale*, Giappichelli, Milano, 2022, pp.15-20.

[27] *Ibidem*. See also K. GAVRYSH, *Un po' di chiarezza sulla mancata consegna di Osama Elmasry Njeem alla Corte penale internazionale*, in *SIDIblog*, 24 January 2024, at <http://www.sidiblog.org/2025/01/24/un-po-di-chiarezza-sulla-mancata-consegnadi-osama-elmasry-njeem-alla-corte-penale-internazionale/> last accessed on 31 December 2025.

[28] See A. DI MARTINO, *La decisione ministeriale di non consegnare un sospetto criminale internazionale come legittimo atto politico discrezionale?*, in *Questione Giustizia*, 5 February

The request for the delivery of Mr Elmasry Njeem was the first significant test of Italy's cooperation with the ICC; and it is fair to claim that the test resulted into a shocking failure. In order to provide an overview of what went wrong, it is useful to remind the reader of the provisions that govern the case of requests of arrest and surrender made by the ICC, as enshrined in Articles 11-14 of the Cooperation Law. In particular Article 11(1) affirms that if the object of the request of the ICC is the surrender of a person against whom a warrant of arrest pursuant to Article 58 of the Rome Statute or a conviction decision to a prison term has been issued, the Prosecutor General (PG) at the Court of Appeals of Rome, having received the acts, submits a request to the same Court of Appeals seeking the application of the measure of precautionary detention in respect of the person whose surrender is sought. [29] The Court of Appeals issues its decision by means of an order, which can be challenged for error of law only before the Supreme Court of Cassation. The same procedure finds application also when the ICC has requested the provisional arrest under Articles 59(1) and 92 of the Statute, before or pending the formal transmission of a request for surrender. The surrender procedure is regulated under Article 13 of the Law, which establishes strictly limited and enumerated grounds for denial. [30]

Despite the overall linear procedure swiftly summarised above, in a surprising (?) turn of events, on 21 January 2025, at the request of the suspect's defence and with the favourable opinion of the PG, the Court of Appeals of Rome declared: i) the irregularity of the arrest made by the General Investigations and Special Forces Division (*Divisione Investigazioni Generali e Operazioni Speciali, DIGOS*) of the Italian State Police, due to the lack of "preliminary and indispensable dialogue" between the PG and the Minister of Justice and the inapplicability of the provisions of the Code of Criminal Procedure to the specific case; ii) the failure to rule on the measure of preventive custody of the suspect, which the PG had not requested in the absence of the transmission of the documents by the Minister, who had remained inactive despite repeated prompts from the PG. Consequently, the Court of Appeal ordered the release of Mr

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2025; M. COLORIO-M. CRIPPA, *As Rome Mutinies, Justice for Libya Fades*, in *Opinio Juris*, 31 January 2025, at <https://opiniojuris.org/2025/01/31/as-rome-mutinies-justice-for-libya-fades/> last accessed on 31 December 2025.

[29] L. POLTRONIERI ROSSETTI, cit.

[30] According to Art. 13(3) of the Cooperation Law, denial is justified only in the following cases: «a) no decision restricting personal liberty or definitive sentence of condemnation has been issued by the International Criminal Court; b) there is no correspondence between the identity of the requested person and that of the person subject to the extradition proceedings; c) the request contains provisions contrary to the fundamental principles of the legal order of the State; d) for the same act and against the same person, a final judgment has been pronounced in the Italian State, subject to what is established in Article 89, paragraph 2, of the statute».

Elmasry Njeem and the return of the seized assets at the time of his arrest. On the evening of 21 January Mr Elmasry Njeem received an expulsion order issued, according to the Minister of the Interior, for "public order and state security reasons" and considering the "social dangerousness" of the suspect. Immediately after, the suspect was escorted back to Tripoli on a military flight. [31] The ordinance of 21 January 2025, regarding the non-validation of the arrest of Mr Elmasry Njeem contained a justification for such a measure based on some arguments that are not without contradiction. In the view of the Court, Articles 11-14 of the Cooperation Law are *lex specialis* to the provisions of the Italian Code of Criminal Procedure relating to precautionary detention and arrest in the context of ordinary extradition procedures. Thus, the provisions prescribe a "different and special procedure" that must be exclusively followed when the arrest and surrender of a suspect is required by the ICC. In this scenario, and since the "special procedure" does not expressly envisage the arrest "on the initiative" of the Police, the arrest by the Turin Police must be considered "irritual" (hence, procedurally vitiated). In the judges' view, as reported by Poltronieri-Rossetti, «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». [32] With a provocative, yet perfectly appropriate expression, the eminent criminal law professor Mario Chiavario described Italian authorities' decision to release Mr Elmasry Njeem and hastily fly him back to Libya as "the eclipse of law". [33] In the face of Italy's failure to comply with its international obligations, the prompt unsealing of the warrant of arrest against Mr Njeem allowed the Italian civil society to fully appreciate the magnitude of this missed opportunity to advance the cause of accountability for international crimes and the implications of setting a very worrying precedent for future cooperation relations between Italy and the ICC. As summarised by Meloni, the list of crimes *allegedly* committed by the suspect at the Mitiga prison in Tripoli from February 2015 onwards, [34]

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[31] L. POLTRONIERI ROSSETTI, *L'Italia e l'obbligo di cooperazione con la Corte penale internazionale: riflessioni attorno al caso Elmasry Njeem*, in *Osservatorio costituzionale*, 4, 2025, p. 14.

[32] L. POLTRONIERI ROSSETTI, cit.

[33] M. CHIAVARIO, *Amarezza e sconcerto per Almasri libero*, in *Avvenire*, 23 January 2025, available at <https://www.avvenire.it/opinioni/pagine/amarezza-e-sconcerto-per-almasri-libero> last accessed on 31 December 2025.

[34] C. MELONI, *Italy, Libya, and the Failure of State Cooperation with the International Criminal Court in the Elmasry Arrest Case*, in *Just Security*, 30 January 2025, at <https://www.justsecurity.org/107175/italy-libya-icc-cooperation-elmasry-arrest/> last accessed on 31 December 2025.

includes both crimes against humanity and war crimes within the jurisdiction of the Court. [35]

The evidence presented showed that among the victims of the alleged thousands of crimes committed there were children, including a 5-year-old boy, who were subjected to sexual violence or rape, and a 15-year-old boy assaulted by Mitiga prison guards. Undeniably, Italy has written a dark chapter in the history of refusals by States Parties to comply with their obligations to cooperate with the ICC. The case occurred at a time when the Court faces a truly unparalleled level of scrutiny and de-legitimisation. Furthermore, Italy's behaviour significantly affects and calls into question the entire system of cooperation between a State Party and the ICC, weakening at its core the ability of the Court to perform its role and functions in an effective way. On 17 October 2025, the Pre-Trial Chamber I of the ICC issued a public decision regarding the situation in Libya, finding non-compliance by the Italian Republic under article 87(7) of the Rome Statute. [36] The Chamber concluded that Italy's conduct prevented the Court from exercising its functions and powers, in particular its ability to secure the presence of a suspect alleged to have committed crimes against humanity and war crimes. Although the Chamber refrained to refer the Italian conduct to the Assembly of States Parties, the decision has been subsequently taken on 26 January 2026.

4. *Italy's Approach to EU Judicial Cooperation*

Italy's approach to EU judicial cooperation finds its legal basis in Article 82 of the Treaty on the Functioning of the European Union, which introduces

[35] Amongst the crimes set out in the warrant that were allegedly committed by Mr Njeem personally, ordered by him, or with his assistance by members of the Special Deterrence Forces – also known colloquially as RADA – (the "SDF/RADA"), there are: war crimes of outrages upon personal dignity pursuant to article 8(2)(c)(ii) of the Statute; of the war crime of cruel treatment pursuant to article 8(2)(c)(i) of the Statute; of the war crime of torture pursuant to article 8(2)(c)(i) of the Statute; of the war crimes of rape and sexual violence pursuant to article 8(2)(e)(vi) of the Statute; the crimes against humanity of imprisonment pursuant to article 7(1)(e) of the Statute; of the crime against humanity of torture pursuant to article 7(1)(f) of the Statute; of the crimes against humanity of rape and sexual violence pursuant to article 7(1)(g) of the Statute; of the crime against humanity of murder pursuant to article 7(1)(a) of the Statute. See ICC, *Situation in Libya: ICC arrest warrant against Osama Elmasry Njeem for alleged crimes against humanity and war crimes*, press release, 22 January 2025, at <https://www.icc-cpi.int/news/situation-libya-icc-arrest-warrant-against-osama-elmasry-njeem-alleged-crimes-against-humanity> last accessed on 31 December 2025.

[36] ICC, *Decision on Italy's non-compliance with a request for cooperation*, Pre-Trial Chamber, Decision 17 October 2025, ICC-01/11-209.

standards of compromise in matters of protection and procedural guarantees common to all the national systems in order to facilitate judicial cooperation. [37] At the EU level, there exists a comprehensive set of instruments designed to foster judicial cooperation and access to justice in cross-border civil, commercial and criminal cases. [38] Focussing specifically on the latter, in 2001, the Council first adopted a detailed Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, and subsequently it promoted the adoption of a wide range of Framework Decisions putting forward a comprehensive system of mutual recognition in the field of criminal justice. It is possible to affirm that those Framework Decisions have seen the light over three crucial phases. The first one post-9/11, followed by an intermediary stage consisting of the adoption of the Framework Decision on the European Evidence Warrant (now superseded by the post-Lisbon Directive on the European Investigation Order, "EIO"), [39] and another in the years leading to the adoption of the Lisbon Treaty in 2009. [40] Those instruments affirmed and reinforced the application of the principle of mutual recognition in the field of EU criminal law, which ultimately «has provided the motor of European integration in criminal matters». [41] To understand the rationale of the principle and its scope, it is important to properly situate it within a broader discourse on the Area of Freedom, Security and Justice (AFSJ). In a nutshell, while the abolition of internal border controls is an essential feature of the development of the AFSJ, a similar simplification in inter-state judicial cooperation has been vehemently called for. In fact, in the field of justice cooperation – especially in criminal matters – one urgent question has been how to make national legal systems better and more efficiently interact in the borderless Area of Freedom, Security and Justice.

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[37] C. MAURO, "*Minimum" Procedural Rights in Judicial Cooperation Procedures*, in T. RAFARACI-R. BELFIORE (eds), *EU Criminal Justice*, Springer, Cham, 2019, p. 71.

[38] V. MITSILEGAS, *The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust*, in *Revista Brasileira de Direito Processual Penal*, 5, 2019, p. 565.

[39] The EIO is a judicial decision issued in or validated by the judicial authority in one EU country to have investigative measures to gather or use evidence in criminal matters carried out in another EU country. It is valid throughout the EU, but does not apply in Denmark and Ireland. See EUROJUST, *Report on Eurojust's casework in the field of the European Investigation Order*, November 2020, at <https://www.eurojust.europa.eu/sites/default/files/assets/2020_11_eio_casework_report_corr.pdf> last accessed on 31 December 2025.

[40] M. CAIANIELLO, *Facilitating Judicial Cooperation in the EU*, Brill | Nijhoff, Leiden, 2025, p. 29.

[41] V. MITSILEGAS, cit., p. 565. See also T. WISCHMEYER, *Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"*, in *German Law Journal*, 17, 2016, p. 339.

As is well known, until now EU Member States have firmly rejected the option of a common legal framework in Europe's criminal justice area. Therefore, the goal has largely been to shift the focus on the second most viable option, namely the development of systems of cooperation between Member States' authorities based on "automaticity". [42] This entails that a national decision will be enforced beyond the territory of the issuing EU Member State by authorities in other EU States within the AFSJ «without many questions being asked and with the requested authority having at its disposal extremely limited – if any at all – grounds to refuse the request for cooperation». [43] In this scenario, the application of the principle of mutual recognition in the field of judicial cooperation in criminal matters serves the scope of guaranteeing both automaticity and speed. As mentioned in the previous section, within the Italian judicial landscape the judicialisation of cooperation procedures according to the EU principle of mutual recognition has been recently embedded in the Italian Code of Criminal Procedure through the adoption of Law 149/2017 which reformed Chapter XI of the same Code, entitled "Jurisdictional relations with foreign authorities".

In Italy, within the framework of EU judicial cooperation, the decisions on "requests" of cooperation are dealt with by judicial authorities only, according to the relevant legal instruments. Therefore, the Italian Ministry of Justice has «only the task of guaranteeing compliance with conditions imposed by the foreign executing authority or by the Italian issuing authority», [44] as established by Article 696-sexies of the Code of Criminal Procedure. Focussing on the implementation into the Italian legal system of the main EU instruments of judicial cooperation, which are the European Arrest Warrant (EAW), the European Investigation Order (EIO), and the Regulation 1805/2018 on the Mutual Recognition on Freezing and Confiscation Orders, it is worth clarifying from the outset that for each of them the Italian legislator has adopted a different approach, «depending on the margin of discretion allowed by each EU legislative instrument and the entity of discrepancies with the national procedural law». [45] The first instrument, i.e. the EAW, is perhaps the one that triggers more considerations concerning the impact on human rights and in particular human dignity. The European Arrest Warrant has been established by the "Council Framework

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[42] V. MITSILEGAS, cit., p. 568.

[43] *Ibid*. See also V. MITSILEGAS, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, 31, 2012, p. 319.

[44] T. RAFARACI, cit., p. 157.

[45] I.N. REZENDE-A. PUGLIESE-N. GIBELLI-A. PIOVAN, *Chapter 8 Italy: the EU Criminal Cooperation Instruments at the Test in Italy – Procedures and Critical Profiles*, in G. LASAGNI-G. CONTISSA-M. CAIANIELLO (eds), *Facilitating Judicial Cooperation in the EU*, Brill | Nijhoff, Leiden, 2025, p. 218.

Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA" (EAW FD). The EAW FD was transposed in the Italian system with Law 69/2005, which was amended multiple times over the years to make sure that the domestic provisions fully reflect the EU text. [46] Without lingering on the procedural aspects, which have been addressed in detail elsewhere, [47] it is important to reflect on the issues that have raised flags with respect to fundamental rights.

In particular, the regulation of grounds for refusal has been one of the most troubled areas in Italy's transposition of the EAW FD. Even though violations of fundamental rights are not explicitly listed as a ground for refusal to surrender a person subject to an EAW, Article 2 of Law 69/2005 – as amended by the Legislative Decree no. 10/2021 – provides for a general clause that excludes the execution of an arrest warrant when this may entail a breach of: the supreme principles of the Italian constitutional order, the inalienable rights of the person recognised by the Constitution, the fundamental rights and principles enshrined by Article 6 of the Treaty on European Union (TEU), or the fundamental rights guaranteed by the ECHR. Furthermore, the EAW execution is to be refused whether the issuing State has been suspended by the EU Council due to serious and persistent violation of Article 6(1) TEU. As showed by the relevant case law on the matter, Italian domestic courts are paying significant attention to considerations of fundamental rights' violations in passive EAW proceedings.

The Italian Court of Cassation has stated the necessity to rely on the two-step approach developed by the Court of Justice of the European Union (CJEU) in the case *Aranyosi and Căldăraru* and then reiterated in several judgments, including *GN (Grounds for refusal based on the best interests of the child)*. [48] Based on this approach, in those instances where the Court of Appeal complies

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[46] The latest amendments have been introduced by Legislative Decree no. 10 of 2 February 2021, "Provisions for the full alignment of national legislation with the provisions of Framework Decision 2002/584/JHA, on the European arrest warrant and surrender procedures between Member States, implementing the delegations provided for in Article 6 of Law no. 117 of 4 October 2019. (21G00013)". See V. PICCIOTTI, *La riforma del mandato d'arresto europeo. Note di sintesi a margine del D.Lgs. 2 febbraio 2021*, in *Cassazione penale*, 10, 2021, p. 2.

[47] V. CAIANIELLO-G. VASSALLI, *Parere sulla proposta di decisione-quadro sul mandato di arresto europeo*, in *Cassazione penale*, 1, 2002, p. 462.

[48] CJEU, *GN (Grounds for refusal based on the best interests of the child)*, Judgment of 21 December 2023, C-261/22. The case concerned an EAW issued by the Belgian authorities against GN for the purposes of serving a prison sentence. GN had been arrested in Italy while she was pregnant and living with her son, who was less than three years old. The Bologna Court of Appeal refused GN's surrender on the grounds that, in the absence of a satisfactory response by the Belgian authorities to requests for information, it was by no means certain that Belgian law provided for custodial arrangements that protected mothers and small children to an extent comparable to those in force in Italy.

with the obligation to request additional information, but the issuing State avoids providing detailed information to exclude the risk of inhuman and degrading treatment, the surrender may be refused. [49] In 2023 the Italian Constitutional Court has included the protection of health among the fundamental rights' considerations that may lead to «a refusal – *rectius*, a postponement for (indefinite) time – of a EAW». [50] More in detail, in judgment no. 177 of 2023, the Constitutional Court affirmed that Articles 18 and 18-*bis* of the Law 69/2005 are constitutionally lawful since it is possible to interpret the EAW discipline in a way that ensures the safeguard of fundamental rights, and in particular of the right to health (Articles 2 and 32 of the Italian Constitution) and of the prohibition of inhuman and degrading treatment (Article 4 CFREU). Therefore, the Court found that the national executing authority may temporarily postpone the surrender of the requested person, provided that there are serious reasons for believing, as corroborated by objective grounds such as medical certificates or expert reports, that the execution of the EAW poses a risk to endangering the health of that person. [51] In the decision no. 178 of 2023, the Italian Constitutional Court has dealt with another side of the same coin, ultimately declaring the constitutional unlawfulness of Article 18-*bis*(1)(c) and, consequently, Article 18-*bis*(2) of the Law 69/2005 (as amended by Legislative Decree 10/2021) because they do not set forth that the Court of Appeal may refuse to surrender a requested third-country national who has been lawfully and effectively resident in Italy for at least five years and who is sufficiently integrated. The Court concluded that these provisions violate the EU law as interpreted by the CJEU (and therefore Articles 11 and 117 of the Italian Constitution) as well as Article 27 of the Constitution. [52]

An excellent overview of this lengthy judicial saga has been offered by Venturi, [53] and therefore there is no need to address all the various steps that led to the CJEU's rulings on cases C-699/21 and C-700/21 in 2023 and to the

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[49] Court of Appeal of Milan, Judgment of 28 March 2024, no. 155 (rejecting the surrender of an Italian citizen following the refusal of the Hungarian authorities of providing individualized information on detention facilities).

[50] See I.N. REZENDE-A. PUGLIESE-N. GIBELLI-A. PIOVAN, cit., pp. 233-234.

[51] Constitutional Court, Judgments of 28 July 2023, nos. 177 and 178. See I.N. REZENDE-A. PUGLIESE-N. GIBELLI-A. PIOVAN, cit., p. 234.

[52] F. VENTURI, *Analysing Italian Constitutional Court Judgments No. 177 and 178 of 2023: The Predictable Happy Ending of the Judicial Saga on the Protection of Fundamental Rights in EAW Cases*, in *Diritti comparati*, 8 November 2023, at <https://www.dirritticomparati.it/analysing-italian-constitutional-court-judgments-no-177-and-178-of-2023-the-predictable-happy-ending-of-the-judicial-saga-on-the-protection-of-fundamental-rights-in-eaw-cases/> last accessed on 31 December 2025.

[53] *Ibidem*.

Constitutional Court's decisions. What is interesting to highlight here, besides the human rights carve-outs that struck a balance between the EAW's objective to fight impunity and the need to uphold human rights and core principles of criminal law, is the open and cooperative approach adopted by both the Italian Constitutional Court and the CJEU. Both aspects ultimately led to progress in the European multilevel criminal legal system, thus making the idea of a European criminal legal framework not only more acceptable, but even desirable.

5. *Concluding Observations*

The interplay between judicial cooperation, *lato sensu*, and the protection of human rights is a topic that needs to be further addressed and that warrants additional research. The present contribution aimed at sketching the main traits of such a complex issue, by focussing on criminal matters and by looking at the international level as well as at the EU level. With regard to Italy's approach to international judicial cooperation, it has been noted how the relevant Italian authorities, when deciding upon a foreign request (of any type), are called to apply international treaties and conventions, including the ECHR, as well as general international laws. To this end, Article 696(2) of the Italian Code of Criminal Procedure as amended in 2017, expressly provides that in any international judicial cooperation procedure, conventions/treaties as well as general international laws shall have supremacy. [54] In spite of a solid legal framework and of the developments registered in some areas, such as counter-terrorism, Italy's record has been tested in recent times, especially in relation to the cooperation with the ICC, leading to the disappointing outcomes briefly discussed above.

Shifting the focus to the EU dimension, there is a clear tension between the aim of achieving a single legal space that fully reflects the borderless design of the AFSJ and Member States' not too subtle desire to retain their sovereignty especially in the field of law enforcement; [55] in this context, fundamental rights can act as either limits or drivers of mutual recognition. This has happened in recent cases brought before Italian Courts and has also registered an intensification in the level of cooperation between the domestic courts involved and the CJEU, which, as noted by Venturi, represents a welcome sign of a growing «human rights sensitivity». [56]

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[54] T. RAFARACI, cit., pp. 169-170.

[55] V. MITSILEGAS, cit., pp. 567-568.

[56] F. VENTURI, cit.