

## The arrest and surrender of persons to the ICC by the United Kingdom

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‘[I]t is important to get absolutely clear and on the record the safeguards or limitations which the Secretary of State—or, in any other country trying to pass similar legislation to ours, a senior minister, Minister of Justice, or whatever—can deploy to prevent an investigation going ahead.’<sup>1</sup>

#### 1. *Introduction*

The apparent failure of cooperation between Italy and the International Criminal Court (ICC, the Court) in respect of the arrest and surrender by Italy of Osama Elmasry Njeem (*Njeem*) has likely left State agents across ICC States parties wondering as to the proper procedure for the arrest and surrender of persons to the Court and their role in it: ‘paper-pusher’<sup>2</sup> or more? The Rome Statute of the International Criminal Court (Rome Statute, the Statute) imposes a general obligation on States parties to ‘cooperate fully with the Court’<sup>3</sup> and, to this end, obliges each of them to ‘ensure that there are procedures available under their national law’ for all relevant forms of cooperation.<sup>4</sup> Such cooperation includes the arrest and surrender of persons to the Court, which States parties, upon receiving a request from the Court

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<sup>1</sup> The Rt Honourable Lord Howell of Guildford, HL Deb 12 February 2001, vol 622, col 119.

<sup>2</sup> In Italian, as used by the Italian Minister of Justice to assert that his role was not so limited, ‘passacarte’. Atti Parlamentari, Camera dei Deputati, XIX Legislatura, Resoconto Stenografico No 422, Seduta di mercoledì 5 febbraio 2025, ‘Informativa urgente del Governo in merito alla richiesta di arresto della Corte penale internazionale e successiva espulsione del cittadino libico Najeem Osema Almasri Habish’ at 3 <<https://documenti.camera.it/leg19/resoconti/assemblea/html/sed0422/stenografico.pdf>>

<sup>3</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 86.

<sup>4</sup> *ibid* art 88.

for the provisional arrest or arrest and surrender of a person within their territory or about to enter their territory,<sup>5</sup> must do.<sup>6</sup> The ‘steps’ that a State party is required to ‘immediately take’ pursuant to such a request are determined by reference to both the provisions of Part 9 of the Statute (‘International Cooperation and Judicial Assistance’) and domestic law.<sup>7</sup> Whether the organ or agent of a State party enjoys any discretion when faced with a request for the provisional arrest or arrest and surrender of a person to the ICC is thus assessed by a combined reading of the Statute, its supporting instruments,<sup>8</sup> and the domestic law of the State party in question.<sup>9</sup>

In the United Kingdom, the International Criminal Court Act (ICC Act, the Act)<sup>10</sup> and the International Criminal Court (Scotland) Act were enacted in 2001 with a view to both the ratification of the Rome Statute<sup>11</sup> and the implementation of the obligations thereunder.<sup>12</sup> To the extent that the position of a rule is itself an indication of its priority, the placement in the ICC Act of the procedures for ‘arrest and delivery of persons’ in Part 2,

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<sup>5</sup> The reference in the Rome Statute is to ‘the custodial State’. *ibid* art 59.

<sup>6</sup> *ibid* art 89(1). See also *ibid* art 59(1), (7).

<sup>7</sup> *ibid* art 59(1). See also *ibid* art 89(1).

<sup>8</sup> When it comes to matters of cooperation, these are the Rules of Procedure and Evidence 1998 and the Regulations of the Court 2004.

<sup>9</sup> Reference to the domestic laws of states parties in Part 9 of the Rome Statute was not inevitable. During the drafting of the Statute, some States were concerned that ‘an express reference to national law or procedures could ... allow States to provide less than full cooperation to the Court’, if not in bad faith, then ‘legitimately [to] interpret such a reference as allowing for limitations on the kind or extent of assistance on the basis of national law’. K Ambos (ed), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Bloomsbury 2021) 2492–93. In the end, it was agreed that the obligation to cooperate ‘cannot be qualified through domestic law’. *ibid* 2493.

<sup>10</sup> The International Criminal Court Act (ICC Act) 2001 applies in England and Wales and, as stipulated in Section 79(2), ‘extends to Northern Ireland’. Many of the provisions of the Act also apply to Scotland; Section 79(1) lists those that do not. None of the provisions of Part 2 of the Act, some of which specify their applicability to England and Wales or to Scotland, clearly addresses the question of their applicability vis-à-vis Northern Ireland. The article does not specifically address the case of Northern Ireland.

<sup>11</sup> The United Kingdom requires the ‘transformation’ of treaties for their domestic application. See A Tzanakopoulos, ‘Mapping the Domestic Engagement of Domestic Courts with International Law’, Final Report of the ILA Study Group on Principles on the Engagement of Domestic Courts with International Law (2016) para 18; R Cryer, ‘Implementation of the International Criminal Court Statute in England and Wales’ 2002 51 ICLQ 733, 733–34.

<sup>12</sup> See, *inter alia*, Rome Statute (n 3) art 88.

following a few preliminary clarifications in Part 1, is noteworthy.<sup>13</sup> Beyond the desire to show the United Kingdom's commitment to the first permanent international criminal court, the impetus to ensure 'full cooperation'<sup>14</sup> with the ICC was fuelled by the long shadow cast by the *Pinochet* case<sup>15</sup> and existing legislation enabling cooperation with the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and was likely influenced further by the jettisoning, by that time, of the requirement of evidence for extradition to States parties to the European Convention on Extradition.<sup>16</sup>

In the light of the events following the ICC's request to Italy to provisionally arrest and ultimately to surrender Osama Elmasry Njeem to the Court, this article considers the comparable procedures for responding to such requests in the domestic law of the United Kingdom. It does not set out such procedures comprehensively, a task already undertaken in the academic commentary.<sup>17</sup> Nor does the article address the issue of State immunities owed to non-States parties, which may be relevant to other requests for cooperation from States parties pursuant to warrants of arrest issued by the ICC.<sup>18</sup> Against the backdrop of the *Njeem* case, the article instead reflects on the extent to which the ICC Act, in its implementation of

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<sup>13</sup> In contrast, the incorporation of Rome Statute crimes into domestic criminal law is only addressed in Part 5 of the Act.

<sup>14</sup> Rome Statute (n 3) art 86.

<sup>15</sup> In overview, see A Gattini, 'Pinochet Cases' Max Planck Encyclopedia of International Law (2007). See also HL 8 February 2001, vol 621, cols 1275–76.

<sup>16</sup> Cryer (n 11) 736; E Wilmschurst, 'Implementation of the ICC Statute in the United Kingdom' in THC Lee (ed), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (Brill 2005) 147, 153. As commentators note further, the procedures set out in the ICC Act mirrored those on extradition between the United Kingdom and Ireland. Cryer (n 11) 736; Wilmschurst (n 16) 153; V Oosterveld, M Perry, J McManus, 'The Cooperation of States with the International Criminal Court' (2002) 25 *Fordham Intl LJ* 767, 777.

<sup>17</sup> Wilmschurst (n 16); Cryer (n 11); P Lewis, 'The United Kingdom' in C Kreß, B Broomhall, F Lattanzi, V Santori (eds), *The Rome Statute and Domestic Legal Orders: Constitutional Issues, Cooperation and Enforcement* (vol II, Nomos Verlagsgesellschaft 2005); R Cryer, O Bekou, 'International Crimes and ICC Cooperation in England and Wales' (2007) 5 *JICJ* 441; Oosterveld et al (n 16).

<sup>18</sup> See eg G Verdirame and R Ekins, 'The International Criminal Court Act 2001 and State or Diplomatic Immunity: The Case of the Prime Minister of Israel' (*Policy Exchange*, 2024) <<https://policyexchange.org.uk/publication/the-international-criminal-court-act-2001-and-state-or-diplomatic-immunity/>>.

the treaty obligation to ‘ensure that there are procedures available under [] national law’ for the arrest and surrender of persons to the ICC, permits relevant organs or agents of the United Kingdom one or another form of discretion in responding to such requests from the Court.<sup>19</sup> This includes, in the event of the ambiguity or obscurity of provisions that have yet to be tested in practice, the interpretation of relevant provisions of the Act by reference to the Rome Statute.<sup>20</sup>

First, the article considers the task of the Secretary of State,<sup>21</sup> who receives requests for provisional arrest or arrest and surrender from the ICC. Next, it examines the role of the ‘appropriate judicial officer’,<sup>22</sup> who decides whether to endorse or issue a warrant of arrest, as appropriate and, once a person is in custody, the role of the ‘competent court’,<sup>23</sup> which determines whether to make a ‘delivery order’ for his or her surrender to the ICC or, if the ICC so directs, to another State.<sup>24</sup> While the ICC’s request to Italy included an order to search Njeem and to seize and transmit to the Court ‘any evidence or device that may contain evidence’, the focus of this article is the request for arrest and surrender of persons only.<sup>25</sup>

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<sup>19</sup> Rome Statute (n 3) art 88.

<sup>20</sup> The ICC Act, which, in its preamble, makes explicit the legislative intention to ‘give effect’ to the Rome Statute, may be interpreted by courts in the United Kingdom by reference to the Rome Statute and, arguably, its supporting instruments. See S Fatima, ‘Engagement of English Courts with International Law’ in A Nollkaemper, Y Shany, A Tzanakopoulos, E Methymaki (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (OUP 2024) 234–35.

<sup>21</sup> It was suggested that ICC requests be made to the Secretary of State for Foreign, Commonwealth and Development Affairs, in keeping with the practice vis-à-vis the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. HL Deb 8 February 2001, vol 621, col 1275.

<sup>22</sup> ICC Act (n 10) s 26. See also HL Deb 8 February 2001, vol 621, col 1296 (‘That would be the senior district judge, whom we always used to refer to as the “chief stipendiary at Bow Street” or a district judge—formerly a stipendiary—designated by the Lord Chancellor or, north of the Border, the sheriff of Lothian and the Borders. Those courts comprise the “competent court.”’).

<sup>23</sup> *ibid.*

<sup>24</sup> ICC Act (n 10) s 5(3).

<sup>25</sup> *Situation in Libya*, ICC-01/11-163-Red2, Office of the Prosecutor, Public Redacted Version of the ‘Prosecution’s request for a finding of non-compliance under article 87(7) against the Republic of Italy for the release of Osama Elmasry/Almasry Njeem’, 25 February 2024, 25 February 2025 (Prosecution’s request for a finding of non-compliance), para 6.

2. *The transmission by the Secretary of State of a request for arrest and surrender*

In the United Kingdom, the Secretary of State<sup>26</sup> is to receive all requests from the ICC for the arrest and surrender<sup>27</sup> or provisional arrest<sup>28</sup> of persons alleged to have committed one or more crimes within the jurisdiction of the Court. Upon receiving a request for the arrest and surrender of a person to the Court, the Secretary of State ‘shall transmit the request and the documents accompanying it to an appropriate judicial officer’.<sup>29</sup> ‘If it appears to’ the Secretary of State that ‘the request should be considered in Scotland’, he or she ‘shall transmit the request and the documents accompanying it to the Scottish Ministers’ who, in turn, ‘shall transmit them to an appropriate judicial officer’.<sup>30</sup>

Where, instead, the Secretary of State receives a request for provisional arrest, a warrant of arrest must be issued by an ‘appropriate judicial officer’ in the United Kingdom in order to enable the arrest.<sup>31</sup> It is for the Secretary of State to determine whether ‘it appears’ that the warrant ‘should be made’ in England and Wales or in Scotland.<sup>32</sup> In the case of England and Wales, the Secretary of State ‘shall transmit the request to a constable and direct the constable to apply for a warrant for the arrest of that person’.<sup>33</sup> In the case of Scotland, the Secretary of State’s role is even more limited; he or she ‘shall transmit the request to the Scottish Ministers’, who, in turn, ‘shall instruct the procurator fiscal to apply for a warrant for the arrest of that person’.<sup>34</sup>

The Italian Minister of Justice’s omission to transmit the ICC’s request to the relevant judicial authorities in Italy, and his insistence on the discretionary nature of the task, prompts the question whether, in the United Kingdom, the ICC Act permits the Secretary of State any such discretion, whether in the context of a request for arrest and surrender or provisional

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<sup>26</sup> See n 21.

<sup>27</sup> ICC Act (n 10) s 2.

<sup>28</sup> *ibid* s 3.

<sup>29</sup> *ibid* s 2(1).

<sup>30</sup> *ibid* s 2(2). See also HL Deb 12 February 2001, vol 622, col 117.

<sup>31</sup> ICC Act (n 10) s 3(2).

<sup>32</sup> *ibid* s 3(2)–(3).

<sup>33</sup> *ibid* s 3(2)(a). For the case of Northern Ireland, see *ibid* s 79(2).

<sup>34</sup> *ibid* s 3(3)(a). The use of the term ‘shall’ indicates that the Scottish Ministers are obliged to instruct the procurator fiscal to apply for a warrant of arrest.

arrest.<sup>35</sup> On its face, the text of Section 2(1) of the ICC Act makes clear, through the use of the term ‘shall’, that the Secretary of State enjoys no such discretion in respect of a request for arrest and surrender.<sup>36</sup> In the case of a request for provisional arrest, the relevant text, Section 3(2)–(3) of the Act, is less clear as to whether the Secretary of State is free to choose not to set in motion one of the two procedures specified therein for executing such requests in England and Wales and Scotland, respectively. On a plausible reading of these provisions, it may ‘appear[] to’ the Secretary of State, having received a request for the provisional arrest of a person, that an application for a warrant of arrest ‘should be made’ in neither England and Wales nor Scotland.<sup>37</sup> Yet any ambiguity as to the mandatory nature of the Secretary of State’s task, in the context of both a request for arrest and surrender and a request for provisional arrest, is dispelled by the legislative history of the relevant provisions, to which the courts may be permitted recourse in limited circumstances.<sup>38</sup>

On the reading of the then bill in the House of Lords, the suggestion to substitute ‘may’ for ‘shall’ in the relevant draft provisions,<sup>39</sup> and thereby to allow the Secretary of State ‘the option, for whatever reason he thinks fit, not to initiate the sending of documents to a judicial officer’,<sup>40</sup> was made more than once.<sup>41</sup> The concern was partly for ‘maintaining the autonomy of

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<sup>35</sup> ‘Informativa urgente del Governo in merito alla richiesta di arresto della Corte penale internazionale e successiva espulsione del cittadino libico Najeem Osema Almasri Habish’ (n 2) at 1–11; M Arcari, B Bonafé, ‘The execution of ICC arrest warrants in domestic legal orders: Challenges from the Elmasry case’ (2025) 109 QIL 1, 4–5.

<sup>36</sup> Read alongside Section 2(1), nor does Section 2(2) confer any such discretion on the Secretary of State.

<sup>37</sup> ICC Act (n 10) s 3(2)–(3). But see HL Deb 12 February 2001, vol 622, col 117 (‘if that is read together, as it must be, with the statute, the Secretary of State would have little reason to refuse to issue a warrant’).

<sup>38</sup> In the words of Lord Browne-Wilkinson in *Pepper v Hart*: ‘reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity’ and only ‘where such material clearly discloses ... the legislative intention lying behind the ambiguous or obscure words’. *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, [1993] 1 All ER 42, 634.

<sup>39</sup> A similar suggestion was made in respect of the procedure for executing such requests in Scotland, proposing to replace the term ‘instruct’ with ‘request’ in what is now Section 3(3)(a) of the ICC Act. See HL Deb 8 February 2001, vol 621, cols 1288–89.

<sup>40</sup> HL Deb 8 March 2001, vol 623, col 369.

<sup>41</sup> See HL Deb 8 February 2001, vol 621, cols 1273–74; HL Deb 8 March 2001, vol 623, cols 369–70.

the United Kingdom in international matters'.<sup>42</sup> It was suggested to leave 'just a little flexibility' so that there may be 'some ways and means of allowing a process of reconciliation to happen without necessarily applying the full rigour of the law'.<sup>43</sup> Support for conferring this discretion on the Secretary of State was also given with a view to guaranteeing the domestic prosecution of members of the British armed forces, rather than prosecution at the ICC, in the light of uncertainty as to the operation of the ICC's 'complementarity' with domestic criminal courts.<sup>44</sup> The various amendments proposed were ultimately withdrawn, due to the admission that the Rome Statute permits no such discretion,<sup>45</sup> that the discretion would be 'very broad',<sup>46</sup> and that claiming any such discretion would be 'inappropriate in relation to a court of this special character'.<sup>47</sup> An amendment to include parliamentary oversight of the Secretary of State under the proposed bill, also suggested in the House of Lords, was likewise withdrawn due to 'the very limited breadth of ministerial discretion' reflected in the bill.<sup>48</sup> The absence of any discretion on the part of the Secretary of State, suggested by the text of the provisions read in context, thus remains the most persuasive reading of Sections 2 and 3 of the ICC Act.<sup>49</sup>

The question may nevertheless be asked whether the Secretary of State could use other means to delay and, ultimately, not to execute a request from the ICC for the arrest and surrender of a person. One possibility was envisaged during the drafting of Article 91(2)(c) of the Rome Statute, which, in setting out the documents that are to accompany such a request, permits a State party to require the ICC to provide '[s]uch documents, statements or information as may be necessary to meet the requirements for the surrender

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<sup>42</sup> *ibid* col 369.

<sup>43</sup> HL Deb 8 February 2001, vol 621, cols 1276–77.

<sup>44</sup> See Rome Statute (n 3) art 17(1)(a)–(b). HL Deb 8 February 2001, vol 621, col 1277. The suggestion was also made to preserve vis-à-vis the ICC the 'residual right', available under extradition law, not to surrender a person pursuant to an extradition request. See HL Deb 3 April 2001, vol 366, col 254.

<sup>45</sup> Rome Statute (n 3) art 89(1); HL Deb 8 February 2001, vol 621, col 1274; HL Deb 8 March 2001, vol 623, cols 372–73.

<sup>46</sup> HL Deb 8 February 2001, vol 621, col 1275.

<sup>47</sup> *ibid*.

<sup>48</sup> HL Deb 12 February 2001, vol 622, col 117.

<sup>49</sup> For Wilmshurst: '[t]he Secretary of State will make no judgment about the merits of the request'. Wilmshurst (n 16) 153.

process' under its domestic law. The only limitation on imposing any such requirement is that it 'should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States' and 'should, if possible, be less burdensome, taking into account the distinct nature of the Court'.<sup>50</sup> This clumsy wording was the result of a compromise between the common law and civil law traditions, whose extradition procedures diverged as to whether or not requests for extradition be supported by evidence.<sup>51</sup> To permit States parties, chiefly of the common law tradition, to require such additional evidence was seen as 'a great concession by those delegations [of States] which did not require the production of evidence'.<sup>52</sup> The 'main danger' with the text of Article 91(2)(c) is that 'it offers an opportunity for States unwilling to cooperate with an international court to delay compliance with that court's requests or to sabotage them'.<sup>53</sup> Conversely, no State party to the Rome Statute may impose any such requirement in relation to a request for provisional arrest, which is made in 'urgent cases'.<sup>54</sup>

In the case of the United Kingdom, which takes distinct positions as to the requirement of evidence in its extradition requirements with different States,<sup>55</sup> Article 91(2)(c) might leave it 'free to determine' whether or not to 'apply the requirement to the Court's requests'.<sup>56</sup> Yet the ICC Act makes no textual reference to any such requirement, which would presumably be communicated to the Court by the Secretary of State.<sup>57</sup> Such a flexible view

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<sup>50</sup> Rome Statute (n 3) art 91(2)(c). A further requirement, suggested by one commentary, is that a State 'seeking any particular information from the Court ... must be in a position to demonstrate why that is needed for the surrender process'. Ambos (n 9) 2071.

<sup>51</sup> Ambos (n 9) 2522–23; B Swart, 'Arrest and Surrender' in A Cassese, P Gaeta, JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (vol II, OUP 2002) 1689–90; K Prost, 'The Surprises of Part 9 of the Rome Statute on International Cooperation and Judicial Assistance' (2018) 16 JICJ 363, 371–72.

<sup>52</sup> Ambos (n 9) 2521.

<sup>53</sup> Swart (n 51) 1690.

<sup>54</sup> Rome Statute (n 3) art 92(1). See also Ambos (n 9) 2526; Swart (n 51) 1692–93. According to one commentary, '[i]t is common extradition practice amongst States to require only a concise description of the crime and underlying facts when seeking provisional arrest.' *ibid* 2527. Nor is a copy of a warrant of arrest required in support of a request for provisional arrest. See Rome Statute (n 3) art 92(2)(a)–(d).

<sup>55</sup> See the distinction between 'category 1' and 'category 2' territories in the Extradition Act 2003, which postdates the ICC Act. See also Swart (n 51) 1692 fn 164.

<sup>56</sup> Swart (n 51) 1692.

<sup>57</sup> See Rome Statute (n 3) art 91(4).

is not favoured in the commentary either.<sup>58</sup> As will be seen below, nor is there any requirement for the relevant judicial authorities in the United Kingdom to require evidence, or a prima facie case, in support of requests for arrest and surrender from the ICC.

3. *The endorsement by the ‘appropriate judicial officer’ of a warrant of arrest*

Upon receiving a request for the arrest and surrender of a person, along with a warrant of arrest, from the Secretary of State, the ‘appropriate judicial officer’, whether sitting in England and Wales or in Scotland, ‘shall endorse the warrant for execution in the United Kingdom’ if he or she is ‘satisfied that the warrant appears to have been issued by the ICC’.<sup>59</sup> Once endorsed,<sup>60</sup> the warrant is enforceable in the United Kingdom.<sup>61</sup> ‘Nothing more is required’ of the judicial officer under Section 2(3) of the Act.<sup>62</sup>

The decision whether to endorse a warrant of arrest issued by the ICC does not call for the exercise of discretion. No reference is made in Section 2(3) to ‘[s]uch documents, statements or information as may be necessary to meet the requirements for the surrender process’ in the United Kingdom, as is permitted States parties under Article 91(2)(c) of the Rome Statute.<sup>63</sup> This omission suggests that Section 2(3) sets ‘the standard for endorsement ... quite low’.<sup>64</sup> Indeed, the proposal in the House of Lords to substitute ‘may’ for ‘shall’ was, like the proposal to confer a comparable discretion on the

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<sup>58</sup> According to one commentary: ‘In case a requested State, while maintaining evidentiary requirements in its domestic extradition Statute, has abolished them in treaties concluded with certain States, that requested State must accord the more favorable treatment to the Court.’ Ambos (n 9) 2522–23. See also Swart (n 51) 1692; Cryer (n 11) 736; SNM Young, ‘Surrendering the Accused to the International Criminal Court’ (2001) 71 BYIL 317, 351.

<sup>59</sup> ICC Act (n 10) s 2(3). For the case of Northern Ireland, see *ibid* s 79(2).

<sup>60</sup> The warrant, so endorsed, is referred to as a ‘section 2 warrant’. *ibid* s 2(5).

<sup>61</sup> See *ibid* s 14(1)–(2).

<sup>62</sup> Cryer (n 11) 736. As Wilmshurst elaborates: ‘it will not be for [the authorities] to second-guess the validity of the warrant’. Wilmshurst (n 16) 153.

<sup>63</sup> Cryer, Bekou (n 17) 451. Although Article 91(2)(c) refers solely to ‘the surrender process’, the title of Article 92, the chapeau to Article 92(2), and the remainder of the text of Article 92 all refer to requests for ‘arrest and surrender’, suggesting that Article 91(2)(c) could be taken to refer to additional documents, statements or information requested by a State party in relation to arrest, surrender, or both.

<sup>64</sup> Cryer, Bekou (n 17) 451.

Secretary of State, withdrawn.<sup>65</sup> In practice, moreover, it is unlikely that the transmission of the ICC's request, through 'designated channels', could ever lead to the receipt by the Secretary of State of a warrant issued by anyone other than a Pre-Trial Chamber of the ICC.<sup>66</sup> The alleged transmission by the ICC to Italy of documents in English and Arabic, rather than Italian and French, as was required<sup>67</sup> in the *Njeem* case is illustrative of circumstances that could delay, if not exclude, the endorsement of a warrant under the ICC Act.<sup>68</sup> In the end, however, the ICC Act, by limiting the function of the judicial officer to assessing whether the warrant was issued by the ICC, and by requiring no further documentation for the endorsement, 'facilitates the expeditious transmission of a request for arrest and surrender' to the relevant authorities in the United Kingdom.<sup>69</sup>

#### 4. *The issue by the 'appropriate judicial officer' of a provisional warrant*

Where the Secretary of State receives a request for the provisional arrest of a person, an application for a warrant of arrest must be made by a constable in England and Wales or the procurator fiscal in Scotland.<sup>70</sup> In England and Wales, the 'appropriate judicial officer' 'shall issue a warrant for the arrest of that person' if he or she has received an application from the constable stating, on oath, that 'he [or she] has reason to believe' 'that a request has been made on grounds of urgency by the ICC for the arrest of a person' and that 'the person is in, or on his [or her] way to, the United Kingdom'.<sup>71</sup> A similar application must be made by the procurator fiscal,

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<sup>65</sup> HL Deb 8 February 2001, vol 621, col 1274.

<sup>66</sup> Cryer, Bekou (n 17) 451.

<sup>67</sup> See Rome Statute (n 3) art 87(2).

<sup>68</sup> 'Informativa urgente del Governo in merito alla richiesta di arresto della Corte penale internazionale e successiva espulsione del cittadino libico Najeem Osema Almasri Habish' (n 2) 3. See further G Pecorella, 'A "lost in translation" in the obligations to cooperate with the International Criminal Court: the case of Al-Masri' (*International Law Blog*, 22 February 2025) <<https://internationallaw.blog/2025/02/22/a-lost-in-translation-in-the-obligations-to-cooperate-with-the-international-criminal-court-the-case-of-al-masri/>>.

<sup>69</sup> Cryer, Bekou (n 17) 451.

<sup>70</sup> See ICC Act (n 10) s 3(2)–(3). For the case of Northern Ireland, see *ibid* s 79(2).

<sup>71</sup> *ibid* s 3(2)(b).

acting on the instruction of the Scottish Ministers, in Scotland.<sup>72</sup> A ‘provisional warrant’,<sup>73</sup> so issued, is enforceable in the United Kingdom.<sup>74</sup>

A request for the provisional arrest of a person is accompanied by even less documentation than that appended in support of a request for the arrest and surrender of a person,<sup>75</sup> and the procedure for provisional arrest in the United Kingdom, set out in Section 3(2)–(3) of the ICC Act, sets an even lower bar for the issuance of a provisional warrant.<sup>76</sup> One additional requirement for the issuance of a provisional warrant, however, which is not needed for the endorsement of a warrant of arrest issued by the ICC, is that the constable must have ‘reason to believe’ that the person ‘is in, or on his way to, the United Kingdom’.<sup>77</sup> Certainty as to the whereabouts of the person notwithstanding, the ICC Act leaves the judicial officer little discretion in whether to issue a provisional warrant for the arrest of a person pursuant to an ICC request to do so. In this respect, the procedure for the provisional arrest of a person through the issue of a domestic warrant of arrest differs little from the procedure for his or her arrest following the endorsement domestically of a warrant of arrest issued by the ICC.

##### 5. *The making by the ‘competent court’ of a delivery order*

Article 59(2) of the Rome Statute requires that a person who is arrested or provisionally arrested ‘shall be brought promptly before the competent judicial authority in the custodial State’. In the United Kingdom, such a person ‘shall be brought before a competent court as soon as is practicable’.<sup>78</sup> The Rome Statute requires further, in Article 59(2)(a)–(c), that the ‘competent judicial authority’ determine, in accordance with domestic law, that ‘[t]he warrant applies to that person’, that ‘[t]he person has been arrested in accordance with the proper process’, and that ‘[t]he person’s rights have

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<sup>72</sup> See *ibid* s 3(3).

<sup>73</sup> *ibid* s 3(5).

<sup>74</sup> *ibid* s 14(1)–(2).

<sup>75</sup> See Rome Statute (n 3) art 92(2)(a)–(d).

<sup>76</sup> Cryer, Bekou (n 17) 453.

<sup>77</sup> ICC Act (n 10) s 3(2)(b)(ii). See also Cryer, Bekou (n 17) 453. For the parallel requirement in Scotland, see *ibid* sec 3(3)(b)(ii) (omitting the phrase ‘has reason to believe’).

<sup>78</sup> See ICC Act (n 10) ss 4(1), 5(1).

been respected'.<sup>79</sup> In the *Njeem* case, the Italian Minister of Justice argued—although without reference to Article 59 or any other provision of the Statute—that it was open to Italy to question the substance of the ICC's warrant, including what he alleged were inconsistencies as to the time of commission of the alleged crimes and uncertainty as to whether they were 'sufficiently linked'<sup>80</sup> to the situation in Libya referred to the ICC by the United Nations Security Council in 2011.<sup>81</sup> Whether or not Article 59 or any other provision of the Rome Statute permits States parties the discretion to question the validity of warrants issued by the ICC, the ICC Act, which, in the words of the then Foreign Secretary, 'proposes an expedited system of transfer' of persons to the Court, excludes any such possibility in the United Kingdom.<sup>82</sup>

The ICC Act incorporates the requirements of Article 59(2)(a)–(c) into the court's decision whether to make a 'delivery order'<sup>83</sup> for the surrender of an arrested person to the ICC.<sup>84</sup> A delivery order 'shall' be made if the court is satisfied that the warrant 'is a warrant of the ICC and has been duly endorsed' by the appropriate judicial officer<sup>85</sup> and that 'the person brought before the court is the person named or described in the warrant'.<sup>86</sup> Conversely, as stipulated in Section 5(5) of the Act, 'the court is not concerned to enquire' 'whether any warrant issued by the ICC was duly issued'<sup>87</sup> or whether there is evidence to justify the trial of the arrested person for the crimes alleged to have been committed by him or her.<sup>88</sup> The explanatory notes to Section 5(5) reveal that the provision was intended to reflect the requirements of Article 59(4) of the Rome Statute. While Article 59(4) of the Statute does in fact declare that 'the competent authority of the

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<sup>79</sup> See further Ambos (n 9) 1739–40.

<sup>80</sup> See, inter alia, the dissenting opinion of Judge Flores Liera in *Situation in Libya*, ICC-01/11-152-Anx, Pre-Trial Chamber I, Corrected version of the 'Warrant of Arrest for Mr Osama Elmasry/Almasry Njeem' dated 18 January 2025 (ICC-01/11-149-US-Exp), including Dissenting Opinion of Judge Socorro Flores Liera, 18 January 2025.

<sup>81</sup> Cf Arcari, Bonafé (n 35) 5.

<sup>82</sup> HL Deb 3 April 2001, vol 366, col 219.

<sup>83</sup> ICC Act (n 10) s 5(3).

<sup>84</sup> See *ibid* s 5.

<sup>85</sup> *ibid* s 2(3).

<sup>86</sup> *ibid* s 5(2).

<sup>87</sup> *ibid* s 5(5)(a).

<sup>88</sup> *ibid* s 5(5)(b).

custodial State' 'shall not ... consider whether the warrant of arrest was properly issued', it only does so in the context of an application by the person arrested for interim release.<sup>89</sup> As such, Section 5(5) of the Act, which is not limited to an application for interim release, excludes in broader terms than even the Rome Statute the assessment by the competent court of whether a warrant was 'duly issued' by the ICC.<sup>90</sup> The limited nature of the court's function is confirmed by the discussion of the draft provision in the House of Lords, in which context it was agreed that, when deciding whether to issue a delivery order, the court would operate 'within an extremely limited range',<sup>91</sup> would not examine '[t]he ingredients of the offence',<sup>92</sup> and would be left with 'a very limited function indeed'.<sup>93</sup> This 'streamlined approach'<sup>94</sup> to delivery orders excludes any requirement of evidence, or a prima facie case, against the arrested person, as is permitted States parties to the Rome Statute 'to meet the requirements for the surrender process' under domestic law.<sup>95</sup> As commentators explain, '[t]he examination of whether all the necessary documents are present is acceptable, whereas an investigation into the legality of [the ICC] issuing the warrant is not permitted'.<sup>96</sup> In short, the court's task is limited to ensuring the satisfaction of 'procedural formality' rather than assessing 'the substance of the request'.<sup>97</sup>

Where the court makes a delivery order, the ICC Act permits the person against whom the order is made to make, within two weeks, an application for habeas corpus.<sup>98</sup> The court may 'set aside the delivery order and order the person's discharge'<sup>99</sup> if it is not satisfied that the warrant 'is a warrant of the ICC and has been duly endorsed' by the appropriate judicial officer or, in the case of a valid warrant, if 'the person brought before the court is the person named or described in the warrant'.<sup>100</sup> Where the court decides not

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<sup>89</sup> See Rome Statute (n 3) art 59(3)–(4).

<sup>90</sup> ICC Act (n 10) s 5(5)(a).

<sup>91</sup> HL Deb 8 February 2001, vol 621, col 1296.

<sup>92</sup> *ibid* col 1295.

<sup>93</sup> *ibid* col 1296.

<sup>94</sup> Oosterveld et al (n 16) 779.

<sup>95</sup> Rome Statute (n 3) art 91(2)(c). See also Cryer (n 11) 736; Cryer, Bekou (n 17) 451.

<sup>96</sup> *ibid*. See also *ibid* 451–52.

<sup>97</sup> *ibid* 451.

<sup>98</sup> ICC Act (n 10) s 12(2).

<sup>99</sup> *ibid* s 12(4)(a).

<sup>100</sup> *ibid* s 5(2).

to make a delivery order, it shall inform the Secretary of State and, in the case of Scotland, the Scottish ministers ‘of its decision and of the grounds for it’<sup>101</sup> and shall remand the arrested person pending an appeal by the Secretary of State or the procurator fiscal, as the case may be.<sup>102</sup>

Whether or not the court makes a delivery order, it ‘may of its own motion, and shall on the application of the person arrested’, determine ‘whether the person was lawfully arrested in pursuance of the warrant’<sup>103</sup> and ‘whether his [or her] rights have been respected’.<sup>104</sup> In making any such determination, the court ‘shall apply the principles which would be applied on an application for judicial review’.<sup>105</sup> Like the Rome Statute, the Act does not, however, ‘seek to spell out all the rights which the court may consider’.<sup>106</sup> By permitting or requiring, as the case may be, the court to assess ‘whether the person was lawfully arrested in pursuance of the warrant’,<sup>107</sup> the Act is taken to fulfil the requirement, stipulated in Article 59(2)(b) of the Rome Statute, that it determine, in accordance with domestic law, whether a person ‘has been arrested in accordance with the proper process’.<sup>108</sup> Permitting or requiring the court to assess ‘whether the person was lawfully arrested in pursuance of the warrant’,<sup>109</sup> rather than whether he or she was ‘arrested in accordance with the proper process’,<sup>110</sup> tends to limit the court’s task.<sup>111</sup>

If the court finds that a person has not been lawfully arrested or that his or her rights have otherwise not been respected, it ‘shall make a declaration or declarator to that effect, but may not grant any other relief’.<sup>112</sup> Excluding, by implication, the release of the arrested person,<sup>113</sup> this limitation

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<sup>101</sup> *ibid* s 8(1)(b).

<sup>102</sup> See *ibid* ss 9–10.

<sup>103</sup> *ibid* s 5(6)(a).

<sup>104</sup> *ibid* s 5(6)(b).

<sup>105</sup> *ibid* s 5(7).

<sup>106</sup> Explanatory notes to the ICC Act (n 10) s 5, para 25.

<sup>107</sup> ICC Act (n 10) s 5(6)(a).

<sup>108</sup> *Wilmshurst* (n 16) 153; M El Zeidy, ‘Critical Thoughts on Article 59(2) of the ICC Statute’ (2006) 4 *JICJ* 448, 454.

<sup>109</sup> ICC Act (n 10) s 5(6)(a).

<sup>110</sup> Rome Statute (n 3) art 59(2)(b).

<sup>111</sup> See further El Zeidy (n 108) 454. On the lack of clarity as to what Article 59(2)(b) requires, see *ibid* 453–55.

<sup>112</sup> ICC Act (n 10) s 5(8).

<sup>113</sup> *Cryer* (n 11) 737; *Cryer, Bekou* (n 17) 454; *Lewis* (n 17) 461.

constitutes an ‘extremely significant’<sup>114</sup> restriction on the court when compared with the Rome Statute, which is silent on the point,<sup>115</sup> and the *Njeem* case, in which the Corte di Appello di Roma, due to the procedural irregularity arising from Njeem’s arrest, ordered his release.<sup>116</sup> Were an order for release to be permitted, it was forewarned in the House of Lords, ‘[i]t would be quite easy for a state unwilling, for ignoble purposes, to surrender a particular individual, simply to violate his rights or secure a compliant court to make such a determination’.<sup>117</sup> A finding by a court in the United Kingdom that a person was not lawfully arrested or that his or her rights were not respected<sup>118</sup> obliges the court to notify the Secretary of State who, in turn, ‘shall transmit that notification to the ICC’.<sup>119</sup> Such a finding ‘has no impact on the United Kingdom’s obligation to deliver [the person] to The Hague’ and ‘it will be for the ICC, when it hears the case, to decide what to do about it’.<sup>120</sup> The view reflected in the ICC Act is that while remedies should be available to arrested persons whose rights are not respected, ‘the ICC is the appropriate venue for determining what those remedies are’.<sup>121</sup>

## 6. Conclusion

Italy’s release and repatriation of Osama Elmasry Njeem to Libya, rather than his surrender to the ICC, as requested by the Court, is, at the time of

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<sup>114</sup> Cryer, Bekou (n 17) 454.

<sup>115</sup> El Zeidy (n 108) 455; Ambos (n 9) 1740. The Rome Statute, in Article 97, does, however, require a State party, when it ‘identifies problems which may impede or prevent the execution of [a request under Part 9]’, to ‘consult with the Court without delay in order to resolve the matter’. See also Prosecution’s request for a finding of non-compliance (n 25) paras 37, 40–42.

<sup>116</sup> Corte di Appello di Roma, Sezione IV Penale, ‘Ordinanza in materia di consegna ex lege 237/2012 Corte Penale Internazionale’ (21 January 2025) <[www.giurisprudenzapenale.com/wp-content/uploads/2025/01/NAJEEM-Osema-Almasri-Habish.pdf](http://www.giurisprudenzapenale.com/wp-content/uploads/2025/01/NAJEEM-Osema-Almasri-Habish.pdf)>; C Meloni, ‘Italy, Libya, and the Failure of State Cooperation with the International Criminal Court in the Elmasry Case’ (Just Security, 30 January 2025) <[www.justsecurity.org/107175/italy-libya-icc-cooperation-elmasry-arrest/](http://www.justsecurity.org/107175/italy-libya-icc-cooperation-elmasry-arrest/)>.

<sup>117</sup> HL Deb 8 February 2001, vol 621, col 1300.

<sup>118</sup> ICC Act (n 10) s 5(8)(a)–(b).

<sup>119</sup> *ibid* s 5(9).

<sup>120</sup> Wilmshurst (n 16) 153. See also Lewis (n 17) 461–62.

<sup>121</sup> Cryer, Bekou (n 17) 455. For a tentative view of what the ICC’s approach may be, see R Rastan, ‘Can the ICC Function Without State Compliance?’ in M deGuzman, V Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar 2020) 147, 162–65.

writing, the subject of ongoing ICC proceedings.<sup>122</sup> Whatever the Court's findings as to Italy's compliance or not with its obligations under the Rome Statute, the unfolding of events in the *Njeem* case demonstrates that even the most mundane procedures on cooperation may, if the circumstances dictate, come under immense strain. In the light of the Italian affair, and given the number of warrants of arrest recently issued by the ICC, States parties to the Rome Statute will want to examine their respective domestic laws on cooperation with the Court to recall the extent of the discretion they have retained, and that is thus available to them, on the receipt a request for the arrest and surrender of a person to the Court.<sup>123</sup> Scrutiny of the text of key provisions of the ICC Act, read in context and against the backdrop of their legislative history, reveals that legislators in the United Kingdom, for reasons including a principled commitment to cooperation with the ICC, chose to limit various forms of discretion relevant to cases like *Njeem*. These are: the discretion afforded the Secretary of State, on the receipt of a request for arrest and surrender or provisional arrest from the ICC, whether to transmit the request to the relevant authorities; the discretion of the judicial officer who decides whether to endorse or issue, as the case may be, a warrant to enable the arrest in the United Kingdom of a person wanted by the ICC; and the discretion of the court which determines whether to order the surrender of an arrested person to the ICC.

**Abstract:** The apparent failure of cooperation between Italy and the International Criminal Court (ICC) in respect of the arrest and surrender by Italy of Osama Elmasry Njeem (*Njeem*) has likely left State agents across ICC States parties wondering as to the proper procedure for the arrest and surrender of persons to the ICC and their role in it. Against the backdrop of the *Njeem* case, this article reflects on the procedures for the arrest and surrender of persons to the ICC in the domestic law of the United Kingdom. Rather than provide a comprehensive account of the relevant provisions of the International Criminal Court Act 2001, and leaving aside the question of

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<sup>122</sup> See *Situation in Libya*, ICC-01/11-162, Pre-Trial Chamber I, Invitation to the Italian Republic to provide submissions concerning its failure to surrender Osama Elmasry/Almasri Njeem to the Court following his arrest, 17 February 2025. Italy made its submission, classified as 'ex parte' by the Court, on 6 May 2025.

<sup>123</sup> In a different context, see eg HC Deb 25 November 2024, vol 757.

the effect of any immunities owed States not party to the Rome Statute, the article considers the extent of the discretion made available to the Secretary of State, the appropriate judicial officer, and the competent court, respectively, under key provisions of the Act. Scrutiny of these provisions suggests that, in cases such as *Njeem*, the relevant authorities in the United Kingdom enjoy little discretion to refuse a request for the arrest and surrender of a person to the ICC.

**Keywords:** International Criminal Court, arrest warrant, surrender, domestic law, United Kingdom, ICC Act 2001, discretion