



Original: **English**

No.: **ICC-01/11-01/11**

Date: **2 June 2016**

PRE-TRIAL CHAMBER I

Before: Judge Joyce Aluoch, Presiding Judge
Judge Cuno Tarfusser
Judge Péter Kovács

SITUATION IN LIBYA

IN THE CASE OF *THE PROSECUTOR* v. *SAIF AL-ISLAM GADDAFI*

Public

Order to the Registrar with respect to the “Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-‘Ajami AL-‘ATIRI, Commander of the *Abu-bakr al-Siddiq* Battalion in Zintan, Libya”

Decision to be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Saif Al-Islam Gaddafi

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representative

Competent authorities of the State of
Libya

Others

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”) issues this order to the Registrar with respect to the “Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-’Ajami AL-’ATIRI, Commander of the *Abu-bakr al-Siddiq* Battalion in Zintan, Libya” (the “Request”).¹

1. The Chamber issued a warrant of arrest against Saif Al-Islam Gaddafi (“Mr Gaddafi”) on 27 June 2011.² The request for the arrest and surrender of Mr Gaddafi to the Court³ was transmitted by the Registrar to the Libyan authorities on 5 July 2011.⁴ Libya’s admissibility challenge concerning Mr Gaddafi’s case before this Court was rejected by Pre-Trial Chamber I on 31 May 2013⁵ and that decision was confirmed by the Appeals Chamber on 21 May 2014.⁶ On 10 December 2014, the Chamber found that Libya had failed to comply with the request for the arrest and surrender of Mr Gaddafi to the Court and decided to refer the matter to the United Nations Security Council.⁷ On 20 August 2015, the Government of Libya indicated to the Court that “Mr Gaddafi continues to be in custody in Zintan and is presently “unavailable” to the Libyan State”.⁸

2. On 26 April 2016, the Prosecutor filed the Request, in which she requests the Chamber “to order the Registry, in consultation and coordination with the Prosecutor, to transmit the request for the arrest and surrender of Mr Gaddafi to Mr al-’Ajami AL-’ATIRI, Commander of the *Abu-bakr al-Siddiq* Battalion based in Zintan, Libya”.⁹

¹ ICC-01/11-01/11-624 and its public and confidential annexes.

² ICC-01/11-01/11-2.

³ ICC-01/11-01/11-5.

⁴ ICC-01/11-01/11-25-Conf.

⁵ ICC-01/11-01/11-344-Red.

⁶ ICC-01/11-01/11-547-Red.

⁷ ICC-01/11-01/11-577.

⁸ ICC-01/11-01/11-612, para. 3.

⁹ ICC-01/11-01/11-624, paras 1 and 24.

3. In support of her Request, the Prosecutor argues that Libya confirmed its inability to execute the request for arrest and surrender of Mr Gaddafi, as he remains beyond the reach of the Libyan State.¹⁰ The Prosecutor further submits that the Libyan local authorities have not been in a position to secure “Mr Gaddafi[’s] transfer from his place of detention”, as he remains in the custody of the “Zintan militia”.¹¹ According to the most recent information, the situation has not changed as Mr Gaddafi is “currently being held in Zintan in the custody of the *Abu-bakr al-Siddiq* Battalion (falling under the leadership of the Zintan Revolutionaries’ Military Council), which is commanded by Mr AL-’ATIRI”.¹²

4. Moreover, the Prosecutor states that her Office contacted the local authorities having actual custody of Mr Gaddafi, namely, Mr AL-’ATIRI, allegedly “head of judicial police authorities in Zintan and also the head of guards who are in control of Mr Gaddafi’s detention”.¹³ According to the Prosecutor, based on a telephone conversation between her Office and Mr AL-’ATIRI, the latter confirmed that Mr Gaddafi “is no longer wanted for any crimes” as a result of an amnesty issued by the Libyan parliament in Tobruk around July or September 2015, and that he is “waiting instructions from the government, specifically the Minister of Justice” based in Bayda concerning his detention.¹⁴

5. In light of these submissions, the Prosecutor submits that since Mr Gaddafi is not in the custody of the Libyan State, the Chamber should rely on its powers under article 57(3)(d) of the Rome Statute (the “Statute”) or its inherent powers to notify the pending request for arrest and surrender of Mr Gaddafi, to the *de facto* local authorities in Zintan.¹⁵

¹⁰ ICC-01/11-01/11-624, paras 1 and 6-8.

¹¹ ICC-01/11-01/11-624, paras 6-7.

¹² ICC-01/11-01/11-624, para. 8.

¹³ ICC-01/11-01/11-624, paras 9-16.

¹⁴ ICC-01/11-01/11-624, para. 12.

¹⁵ ICC-01/11-01/11-624, paras 19-23.

6. The Chamber notes articles 21(1)(a), 86, 87(1) and 89(1) of the Statute and rule 176(2) and (3) of the Rules of Procedure and Evidence (the “Rules”).

7. The Chamber has already concluded in the past that Libya is under the obligation to fully cooperate with the Court, as provided for in article 86 of the Statute and in accordance with the provisions of its Part IX.¹⁶ That said, it is recalled that article 87 of the Statute and rule 176(3) of the Rules leave open the possibility for States to designate more than one channel of communication for the purposes of cooperation with the Court under Part IX of the Statute.¹⁷ In this regard, a State may agree that the Court addresses directly local authorities for the purposes of cooperation with the Court. With regard to the case at hand, this avenue could potentially involve the authorities in Zintan which, the Chamber notes, are still in contact with the Libyan Government as they appear to be waiting for its instructions, specifically those from the Ministry of Justice.

8. Taking the above into consideration, the Chamber does not find it necessary to resolve at this point the controversial legal question raised by the Prosecutor on whether, and to what extent, the Statute envisages that the Court addresses directly, and without the agreement of the relevant *de jure* State authorities as designated by that State, non-State actors for the purpose of executing cooperation requests under part IX of the Statute.

9. Therefore, before delving into the merits of the Request, the Chamber deems it necessary to first order the Registrar to communicate with the Libyan authorities enquiring: (i) whether there is any recent coordination or liaison between them and

¹⁶ ICC-01/11-01/11-72, para. 12.

¹⁷ This is in conformity with traditional inter-State cooperation in criminal matters: see in this regard United Nations Model Treaty on Extradition, article 5, adopted by the United Nations General Assembly on 14 December 1990 (A/RES/45/116); see also the United Nations Model Treaty on Mutual Assistance in Criminal Matters, article 3, adopted by the United Nations General Assembly on 14 December 1990 (A/RES/45/117) and amended by United Nations General Assembly resolution A/RES/53/112 which introduced the following sentence: “Countries may also wish to agree that the central authorities are not the exclusive channel for assistance between the Parties and that the direct exchange of information should be encouraged to the extent permitted by domestic law or arrangements” (article 3, footnote 4).

the militia in Zintan as alleged; (ii) whether the Libyan authorities would agree that a request for arrest and surrender of Mr Gaddafi to the Court be addressed to the militia in Zintan; and, if so, (iii) whether the Libyan authorities would either facilitate, in accordance with their obligation to fully cooperate with the Court, the transmission to the relevant local authorities in Zintan of such request or, alternatively, agree for a direct transmission by the Court of that request to those local authorities.

FOR THESE REASONS, THE CHAMBER

ORDERS the Registrar to proceed, as soon as practicable, in accordance with what is described in paragraph 9 of the present decision;

ORDERS the Registrar to transmit, as soon as practicable, an Arabic translation of the present decision and the Request to the Libyan authorities;

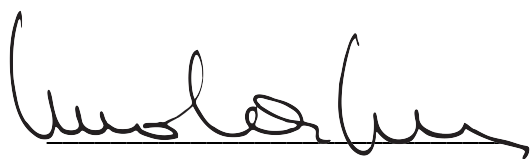
and

ORDERS the Registrar to prepare a report to be filed in due course.

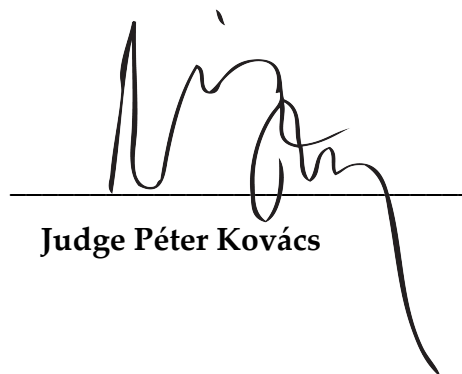
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch
Presiding Judge



Judge Cuno Tarfusser



Judge Péter Kovács

Dated this Thursday, 2 June 2016

At The Hague, The Netherlands