



while pointing to facts that suggested that the Government of Libya may be unable to move to the case forward

Original: **English**

No.: **ICC-01/11-01/11**  
Date: **21 November 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 Redacted**

**Decision on the Prosecutor's "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**

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**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 decision on the Prosecutor’s “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”).<sup>1</sup>

## **I. Procedural History**

1. The Chamber issued a warrant of arrest against Saif Al-Islam Gaddafi (“Mr Gaddafi”) on 27 June 2011.<sup>2</sup> The request for his arrest and surrender to the Court<sup>3</sup> was transmitted by the Registrar to the Libyan authorities on 5 July 2011.<sup>4</sup> 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”.<sup>5</sup>

2. On 26 April 2016, the Prosecutor filed the Request, in which she requested 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”.<sup>6</sup>

3. On 2 June 2016, the Chamber ordered “the Registrar to communicate with the Libyan authorities enquiring (i) whether there is any recent coordination or liaison between them and the militia in Zintan (...); (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

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<sup>1</sup> ICC-01/11-01/11-624 with its public and confidential annexes.

<sup>2</sup> Pre-Trial Chamber I, Warrant of Arrest for Saif Al-Islam Gaddafi, 27 June 2011, ICC-01/11-01/11-3.

<sup>3</sup> ICC-01/11-01/11-5.

<sup>4</sup> ICC-01/11-01/11-25-Conf.

<sup>5</sup> ICC-01/11-01/11-612, para. 3.

<sup>6</sup> ICC-01/11-01/11-624, paras 1 and 24.

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".<sup>7</sup>

4. On 28 October 2016, the Registrar submitted the "Registry's update on the implementation of the Chamber's Order ICC-01/11-01/11-627" (the "Registry's Update") informing the Chamber of his communications with the Representative of Libya, Ahmed El Gehani ("Mr El Gehani").<sup>8</sup>

5. On 11 November 2016, the Prosecutor submitted the "Prosecution's Submission on the 'Registry's update on the implementation of the Chamber's Order ICC-01/11-01/11-627'" (the "Renewed Request") and renewed her Request.<sup>9</sup>

## II. Submissions

6. In her Request, the Prosecutor states that the Libyan State authorities confirmed their inability to execute the request for arrest and surrender of Mr Gaddafi, as he remains beyond the reach of the Libyan State.<sup>10</sup> She further submits that Mr Gaddafi is held "in Zintan in 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"<sup>11</sup> and that Libya has not been in a position to secure Mr Gaddafi's transfer from his place of detention under the custody of the Zintan militia into State authority.<sup>12</sup>

7. In light of this situation, the Prosecutor suggests that the Chamber rely on its powers under article 57(3)(a) and/or (d) of the Rome Statute (the "Statute") or its

<sup>7</sup> Pre-Trial Chamber I, "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", 2 June 2016, ICC-01/11-01/11-627, para. 9.

<sup>8</sup> ICC-01/11-01/11-632, with one public and four confidential annexes.

<sup>9</sup> ICC-01/11-01/11-633-Conf; a public redacted version was registered the same day, ICC-01/11-01/11-633-Red.

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

<sup>11</sup> ICC-01/11-01/11-624, para. 8.

<sup>12</sup> ICC-01/11-01/11-624, paras 6-7.

inherent powers to order the Registrar to transmit the request for arrest and surrender of Mr Gaddafi to Mr AL-'ATIRI, Commander of the *Abu-Bakr al-Siddiq* Battalion,<sup>13</sup> the *de facto* local authorities in Zintan.<sup>14</sup>

8. Upon the Chamber's order of 2 June 2016, the Registrar informed the Chamber that he had had communications with the Representative of Libya, who "has a mandate of representation both from the Government of National Accord [the "GNA"] and from the Libyan House of Representatives".<sup>15</sup> Annexes 4 and 5 of the Registry's Update are of importance providing further factual background.

9. In Annex 4 to the Registry's Update, the Registrar summarises the remarks of Mr El Gehani during his communications with the Court as follows: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>16</sup>

10. In Annex 5 to the Registry's Update, the Registrar transmitted a reply from the Office of the Attorney General to Mr El Gehani as to whether the Libyan authorities agree to the request for the arrest and surrender of Mr Gaddafi being transmitted to the local authorities in Zintan. In this document, the Public Attorney clarifies, *inter alia*, that [REDACTED]

[REDACTED]

<sup>13</sup> ICC-01/11-01/11-624, para. 24.

<sup>14</sup> ICC-01/11-01/11-624, paras 19-23.

<sup>15</sup> ICC-01/11-01/11-632, para. 3.

<sup>16</sup> ICC-01/11-01/11-632-Conf-Anx4, p. 2.

[REDACTED].<sup>17</sup>

11. In her Renewed Request, the Prosecutor submits that “the situation with respect to the control of Mr Gaddafi by the Zintan militia has not altered materially since [she] filed [her] request to the Chamber six months ago”.<sup>18</sup> [REDACTED]

[REDACTED].<sup>19</sup> She therefore maintains that the Chamber should “take practical measures within its powers to facilitate the execution of the pending request for arrest and surrender” and “directly address, via the Registry, the *de facto* authorities with actual physical control over Mr Gaddafi”.<sup>20</sup>

### III. The Chamber’s Determination

12. The Chamber notes articles 21(1)(a), 57(3)(a) and (d), 86, 87(1) and 89(1) of the Statute and rule 176(2) and (3) of the Rules of Procedure and Evidence (the “Rules”).

13. At the outset, the Chamber clarifies that matters of transmission of cooperation requests are regulated comprehensively in article 87 of the Statute and rule 176 of the Rules. It therefore does not deem it necessary to resort to its inherent powers. Likewise, and contrary to what the Prosecutor alleges in her Request, articles 57(3)(a) and (d) of the Statute are not appropriate legal bases since the requested order is neither “required for the purposes of an investigation” nor would it “authorise the

<sup>17</sup> ICC-01/11-01/11-632-Conf-Anx5, p. 6.

<sup>18</sup> ICC-01/11-01/11-633-Conf, para. 9.

<sup>19</sup> ICC-01/11-01/11-633-Conf, para. 9.

<sup>20</sup> ICC-01/11-01/11-633-Conf, para. 10.

Prosecutor to take any specific investigative steps within the territory of a State Party”.

14. The Chamber reiterates that Libya, albeit a non-State Party to the Statute, is, by dint of the Security Council resolution 1970 (2011), 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.<sup>21</sup> Pursuant to article 87(1), second sentence, of the Statute, the requests for cooperation, including those relating to arrest and surrender, “shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession”. Thus, the Statute leaves 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.<sup>22</sup> In this regard, a State may agree that the Court addresses directly local authorities for the purposes of cooperation with the Court.

15. With regard to the case at hand, the Chamber notes that the official channel of communication between Libya and the Court are the competent national authorities, namely the GNA, which is recognised by the international community to represent the State. Accordingly, the Court cannot but deal with the *de jure* government and cannot direct its cooperation requests to any other non-State entity claiming to represent the State, as suggested by the Prosecutor.

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<sup>21</sup> See, for example, Pre-Trial Chamber I, Decision on Libya’s Submissions Regarding the arrest of Saif Al-Islam Gaddafi, 7 March 2012, ICC-01/11-01/11-72, para. 12; Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 December 2014, ICC-01/11-01/11-577, para. 21.

<sup>22</sup> 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).

16. Even if the Court were to pursue other channels of communications, these channels would need to be clearly designated by the State. The information provided in the Registry's Update does not allow the Chamber to determine with certainty that an alternative channel of communication has been designated by the Libyan State. [REDACTED]

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Prosecutor's Request; and

**ORDERS** the Registrar to transmit, as soon as practicable, an Arabic translation of the confidential version of the present decision to the Libyan authorities.



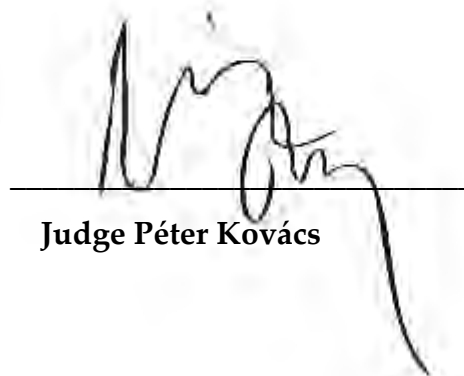
Done in both English and French, the English version being authoritative.



**Judge Joyce Aluoch**  
**Presiding Judge**



**Judge Cuno Tarfusser**



**Judge Péter Kovács**

Dated this Monday, 21 November 2016

At The Hague, The Netherlands