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

Date: **26 April 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 document
with Confidential Annexes A, A-3, A-4, A-5 and A-6
and Public Annexes A, A-1, A-2, A-7 and A-8**

**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**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor

Mr James Stewart, Deputy Prosecutor

Mr Julian Nicholls, Senior Trial Lawyer

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

Mr Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The case against Saif Al-Islam Gaddafi (“Mr Gaddafi”) is at an impasse as a result of Libya’s non-compliance with the request for his arrest and surrender. Libya has confirmed its inability to execute the request. Mr Gaddafi remains in the custody Mr al-‘Ajami AL-‘ATIRI (“Mr AL-‘ATIRI”), Commander of the *Abu-Bakr al-Siddiq* Battalion in Zintan, Libya. With respect to Mr Gaddafi’s detention, the Libyan State authorities have no control over Mr AL-‘ATIRI. Having communicated directly with Mr AL-‘ATIRI and the Registry, the Prosecution requests the Chamber to issue an order directing the Registrar to notify the request for arrest and surrender to Mr AL-‘ATIRI.

Procedural history

2. A warrant of arrest for Mr Gaddafi was issued by Pre-Trial Chamber I on 27 June 2011.¹

3. On 1 May 2012, Libya challenged the admissibility of Mr Gaddafi’s case before the Court.² On 31 May 2013, the Pre-Trial Chamber rejected Libya’s challenge and reminded Libya of its obligation to surrender Mr Gaddafi to the Court.³ On 7 June 2013, Libya appealed this decision.⁴ On 21 May 2014, the Appeals Chamber dismissed Libya’s appeal.⁵

4. On 10 December 2014, the Pre-Trial Chamber made a finding under article 87(7) of the ICC Statute that Libya had failed to comply with the request to surrender Mr Gaddafi to the Court, and referred the matter to the United Nations Security Council.⁶ The United Nations Security Council noted this decision in its Resolution

¹ ICC-01/11-14.

² ICC-01/11-01/11-130-Red.

³ ICC-01/11-01/11-344-Red, p. 91.

⁴ ICC-01/11-01/11-350.

⁵ ICC-01/11-01/11-547-Red.

⁶ ICC-01/11-01/11-577, p. 16.

2238 (2015), along with the Prosecution's request to the Pre-Trial Chamber of 30 July 2015 that Libya immediately surrender Mr Gaddafi to the Court.

Factual background

Custody of Mr Gaddafi

5. Mr Gaddafi was arrested in Libya on 19 November 2011 and detained in the city of Zintan, Libya.⁷

6. In its 31 May 2013 admissibility decision, the Pre-Trial Chamber noted that "Libya has not yet been able to secure the transfer of Mr Gaddafi from his place of detention under the custody of Zintan militia into State authority."⁸

7. On 20 August 2015, Libya submitted to the Court that "Mr Gaddafi continues to be in custody in Zintan and is presently 'unavailable' to the Libyan State."⁹

8. The Prosecution has continued to monitor the situation and to receive and analyse information with respect to Mr Gaddafi's detention. Consequently the Prosecution understands that 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.

Contact with Mr AL-'ATIRI

9. On 11 March 2016, the Prosecution telephoned Mr AL-'ATIRI in order to obtain current information on Mr Gaddafi's detention and the possibilities for his surrender.

10. Mr AL-'ATIRI stated that he is the head of the judicial police authorities in Zintan and also the head of the guards who are in control of Mr Gaddafi's detention.

⁷ ICC-01/11-01/11-577, para. 7.

⁸ ICC-01/11-01/11-344-Red, paras 206, 215.

⁹ ICC-01/11-01/11-612, para. 3.

11. The Prosecution informed Mr AL-'ATIRI of the key ICC decisions related to Mr Gaddafi, namely: the issuance of the arrest warrant for Mr Gaddafi; the challenge brought by Libya in relation to the admissibility of the case before the Court; the Court's decision that the case was admissible; the finding of the Appeals Chamber confirming this decision; and the consequent finding by the Court that Libya must surrender Mr Gaddafi to the custody of the ICC. Mr AL-'ATIRI stated that he was not a lawyer and had no understanding of these legal issues.

12. Mr AL-'ATIRI told the Prosecution that the Libyan parliament in Tobruk issued a general amnesty around July or September 2015 in relation to all prisoners, including Mr Gaddafi, and that as a result, he is no longer wanted for any crimes. When asked why he continues to detain Mr Gaddafi, Mr AL-'ATIRI stated that he is awaiting instructions from the government, specifically the Minister of Justice who was based in Bayda.

13. The Prosecution emphasised to Mr AL-'ATIRI that Libya is under an obligation to transfer Mr Gaddafi to the ICC and that the Court's jurisdiction is not precluded by any national amnesty.

14. Mr AL-'ATIRI was reminded that he had previously cooperated with the domestic court in Tripoli trying Mr Gaddafi by facilitating a video link. Mr AL-'ATIRI acknowledged that he had previously cooperated with the domestic court before July 2014, but after militias took control of Tripoli he no longer recognised the Tripoli court and the authorities in the Libyan capital.

15. In response to questions about the conditions in which Mr Gaddafi is currently being detained, Mr AL-'ATIRI stated that Mr Gaddafi is in good health.

16. The Prosecution has conveyed this information to the Registry.

Supporting Declaration

17. The foregoing information relating to Mr AL-'ATIRI is supported by a confidential declaration which is attached to this filing as Annex A.

Submissions

18. The Court should undertake measures within its powers to facilitate the execution of the pending request for the arrest and surrender of Mr Gaddafi. If the Libyan State authorities are unable to execute the request as he is “unavailable” to them, the Court should directly address the *de facto* authorities with actual custody of Mr Gaddafi.

19. Although article 89(1) of the ICC Statute provides that the Court may transmit a request for arrest and surrender to “*any State* on the territory of which that person may be found”,¹⁰ there is nothing which would prevent the Court from addressing relevant non-State entities. This is particularly so when the State authorities in question have previously admitted their inability to execute the request. State consent should not be a prerequisite in these circumstances.¹¹

20. The Pre-Trial Chamber can issue such orders and warrants as may be necessary for an investigation under article 57(3)(a) of the ICC Statute. Moreover, article 57(3)(d) of the ICC Statute provides for instances when investigative activities may be carried out on the territory of a State Party where “the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9”. While the present situation involves a non-State Party, albeit one subject to Part 9 of the ICC Statute pursuant to United Nations Security Council Resolution 1970,¹² and does not relate to investigative activities by the Prosecution, article 57(3)(d) nonetheless illustrates the extent of the Chamber’s authority to take practical measures to overcome obstacles to the effective implementation of cooperation requests.

21. Moreover, the Prosecution observes that the ability of the Court to notify a request for arrest and surrender to a non-State entity, particularly where the State

¹⁰ Italics supplied.

¹¹ By analogy, the Prosecution notes that under article 57(3)(d), the Chamber shall have regard to views of the State concerned, without being definitively bound by them.

¹² ICC-01/11-01/11-563, para. 2, citing among others, ICC-01/11-01/11-72, paras 12-13.

authorities have proven clearly unable to execute it, can be derived on the basis of the Court's inherent powers.¹³ The Chamber must be regarded as possessing the necessary power to ensure that its basic judicial functions may be fully discharged and its judicial role safeguarded.¹⁴ In the absence of such power, the Court would be left in a situation where there is no applicable law and without the means to secure the surrender of a person that is exclusively in the custody and under the control of a non-State entity.

22. The Prosecution recalls that, faced with similar circumstances where an entity other than the central State authorities was in a position to execute a cooperation request, the United Nations International Criminal Tribunal for the former Yugoslavia directly addressed the authorities of *Republika Srpska* within the State of Bosnia and Herzegovina.¹⁵ In doing so, the Tribunal applied the definition of the term "State" in rule 2(A) of its Rules of Procedure and Evidence as including "a self-proclaimed entity *de facto* exercising governmental functions, whether recognised as a State or not".¹⁶

23. The *Abu-Bakr al-Siddiq* Battalion, commanded by Mr AL-'ATIRI, is *de facto* exercising governmental functions in Zintan with respect to the detention of Mr Gaddafi. Accordingly, the Prosecution submits that the Chamber has the authority to order the Registrar to transmit the request for arrest and surrender of Mr Gaddafi to Mr AL-'ATIRI.

¹³ For an example of the Court's exercise of such inherent powers, *see* ICC-02/05-01/07-57, p.6, citing to *Prosecutor v. Tihomir Blaskić*, IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 ("*Blaskić* interlocutory appeal"), 29 October 1997, para. 33.

¹⁴ *Blaskić* interlocutory appeal, *ibid.*

¹⁵ *Prosecutor v. Krstić*, IT-98-33-PT, Binding Order to the Republika Srpska for the Production of Documents, 12 March 1999.

¹⁶ ICTY Rules of Procedure and Evidence, Revised 30 January 1995, amended 12 December 2002.

Relief sought

24. The Prosecution requests the Pre-Trial 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.



Fatou Bensouda
Prosecutor

Dated this 26th day of April 2016
At The Hague, The Netherlands