

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/11-01/17**

Date: **4 July 2018**

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN LIBYA

**IN THE CASE OF *THE PROSECUTOR* v. *MAHMOUD MUSTAFA BUSAYF
AL-WERFALLI***

Public

Second Warrant of Arrest

Warrant 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 the Defence

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

Others

REGISTRY

Registrar

Peter Lewis

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 warrant of arrest pursuant to article 58(1) of the Rome Statute (the “Statute”) for

Mahmoud Mustafa Busayf AL-WERFALLI

a Libyan national, born in 1978, belonging to the al-Sahibani family of the Werfalla tribe, son of Na’imah Ibrahim Mahmoud, reported to live at Square 8, Number 40 Qundulah Road in the Bu-Hadimah area of Benghazi, commander in the Al-Saiqa Brigade, and graduate of the military college in Libya in Jamahiriya’s 41st graduation class, 1 September 2000, bearing the military service number 33568.¹

I. Procedural History

1. On 26 February 2011, the United Nations Security Council (the “Security Council”), acting under Chapter VII of the Charter of the United Nations, unanimously adopted Resolution 1970 and referred the situation in the Libyan Arab Jamahiriya (“Libya”) since 15 February 2011 to the Prosecutor of the Court, in accordance with article 13(b) of the Statute, urging all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor.²

2. On 15 August 2017, the Chamber – in a previous composition – issued a warrant of arrest for Mr. Mahmoud Mustafa Busayf Al-Werfalli (“Mr. Al-Werfalli”) for his alleged criminal responsibility for the war crime of murder pursuant to articles 8(2)(c)(i) and 25(3)(a) and (b) of the Statute (the “First Warrant of Arrest”). The First Warrant of Arrest referred to seven incidents in which 33 persons were allegedly murdered, either directly by Mr. Al-Werfalli or upon his orders, from on or

¹ Alternative spellings of his last name include: “Al-Warfalli”, “Al-Warfilli”, “Al-Warfaly”, “Al-Warfally” and “Al-Werfali”. LBY-OTP-0053-1338 and translation LBY-OTP-0053-1476, at 1477.

² S/RES/1970 (2011).

before 3 June 2016 until on or about 17 July 2017 in Benghazi or surrounding areas, in Libya.³

3. On 16 March 2018, the Presidency recomposed the Chambers of this Court and assigned the situation in Libya to the Chamber in its present composition.⁴

4. On 21 March 2018, the Judges of this Chamber issued a decision indicating that Judge Péter Kovács would act as Presiding Judge of the Chamber.⁵

5. On 1 May 2018, the Prosecutor submitted, under seal, the “Prosecution’s request to amend the warrant of arrest for Mahmoud Mustafa Busayf AL-WERFALLI” (the “Request”) pursuant to article 58(6) of the Statute. The Prosecutor alleges that Mr. Al-Werfalli is responsible for an additional war crime of murder pursuant to articles 8(2)(c)(i) and 25(3)(a) of the Statute, committed on 24 January 2018 in Benghazi, Libya and requests the Chamber to amend the First Warrant of Arrest by adding this crime.⁶

6. On 19 June 2018, the Chamber received, under seal, updated information from the Prosecutor.⁷

II. Preliminary Remarks

7. The Chamber notes that the Prosecutor has requested the Chamber to amend the First Warrant of Arrest by adding murder as a war crime within the context of an eighth incident. After reviewing the Prosecutor’s allegations and the evidence submitted in support, the Chamber considers it appropriate to issue a second warrant of arrest pursuant to article 58(1) of the Statute to complement the First Warrant of Arrest, rather than amend it pursuant to article 58(6) of the Statute. The

³ Pre-Trial Chamber I, “[Warrant of Arrest](#)”, ICC-01/11-01/17-2, p. 16.

⁴ The Presidency, “[Decision assigning judges to divisions and recomposing Chambers](#)”, ICC-01/11-01/17-7, p. 9.

⁵ Pre-Trial Chamber I, “[Decision on the Election of the Presiding Judge](#)”, ICC-01/11-01/17-8-tENG.

⁶ ICC-01/11-01/17-9-US-Exp, paras 1, 10-11 and 69.

⁷ ICC-01/11-01/17-12-US-Exp.

Chamber will focus therefore on the facts underpinning this second warrant of arrest. It will however rely, at times, on findings made in the First Warrant of Arrest which may be necessary for the purposes of this second warrant of arrest.

III. Classification

8. Pursuant to regulation 23 *bis*(3) of the Regulations of the Court and considering the reasons provided by the Prosecutor in her Request,⁸ the Chamber is of the view that it may issue this warrant of arrest publicly. Where the Chamber has made reference to confidential information, it has kept such remarks to a minimum and has made them without endangering the interests concerned and without defeating the very purpose of confidentiality. The Chamber clarifies that this does not affect the classification of any evidence in the record of the case.

IV. Statement of Facts

9. In the First Warrant of Arrest, the Chamber found that there were reasonable grounds to believe that an armed conflict not of an international character had been ongoing on the territory of Libya, from at least early March 2011, between governmental forces and different organized armed groups or among various such armed groups.⁹ One of the groups involved in the conflict was the Al-Saiqa Brigade, where Mr. Al-Werfalli held the position of Axes Commander.¹⁰ Notably, the Chamber found that since May 2014, the Al-Saiqa Brigade had been taking part in an operation launched by the Libyan National Army (the “LNA”)¹¹ in Benghazi, known as “Operation Dignity”, under the command of General Khalifa Haftar

⁸ ICC-01/11-01/17-9-US-Exp, para. 6.

⁹ [First Warrant of Arrest](#), paras 4-8 and 25.

¹⁰ [First Warrant of Arrest](#), paras 7-9 and 25.

¹¹ The Chamber recalls that the LNA is a coalition of army units, ex-revolutionary groups and tribal militias, acting under the command of General Khalifa Haftar, which should be distinguished from the Libyan National Army in existence during the Gaddafi regime; see [First Warrant of Arrest](#), para. 6.

(“Mr. Haftar”).¹² The Chamber sees no reason to depart from these findings and finds them equally applicable in relation to the crime described in the Request.

10. The Chamber notes further that armed clashes among forces affiliated with the Government of National Accord (the “GNA”),¹³ international forces and armed groups have continued to occur on the territory of Libya after the issuance of the First Warrant of Arrest and have extended to the period relevant for the purposes of the Request. In the west, forces affiliated with the GNA engaged in fighting against several armed groups west and south of Tripoli, in October and early November 2017.¹⁴ The fighting – which involved one opposing group affiliated with the LNA – resulted in over 60 persons killed and more than 300 injured.¹⁵ On 15 January 2018, a militia known by the name of Al-Bugra launched an assault on Mitiga airport in Tripoli, which led to clashes with the Special Deterrence Force, a group allegedly affiliated with the GNA.¹⁶ The fighting involved the use of tanks and other heavy weapons and resulted in 23 persons killed and 60 injured.¹⁷

11. In northern, central and southern Libya, the Islamic State in Iraq and the Levant (“ISIL”) carried out several attacks on LNA checkpoints in August and October 2017 which resulted in 15 persons killed and 8 injured.¹⁸ In September and November 2017, the Libyan Air Force and the United States of America conducted airstrikes against ISIL positions in and around the city of Sirte.¹⁹

¹² [First Warrant of Arrest](#), paras 6 and 8.

¹³ The GNA was established pursuant to the Libyan Political Agreement signed in December 2015 and brokered by the United Nations; *see* LBY-OTP-0049-0205. The GNA received the support of United Nations Member States as the sole legitimate representative of the Libyan people; *see* LBY-OTP-0053-1152, at 1154, para. 10.

¹⁴ LBY-OTP-0062-0060, at 0060, para. 4 and at 0062, paras 14-15.

¹⁵ LBY-OTP-0062-0060, at 0062, para. 14.

¹⁶ LBY-OTP-0049-0205, at 0211.

¹⁷ LBY-OTP-0062-0060, at 0062, para. 17; LBY-OTP-0062-0077, at 0077.

¹⁸ LBY-OTP-0062-0060, at 0064, para. 26.

¹⁹ LBY-OTP-0062-0060, at 0064, para. 24.

12. The security situation remained volatile also in the east, in particular in the cities of Darnah and Benghazi. On 30 October 2017, an unidentified aircraft carried out airstrikes on several positions around the city of Darnah, killing 15 and injuring 17, including civilians.²⁰ Parts of the city controlled by the Darnah Mujahadin Shura Council were under siege by LNA forces.²¹ In Benghazi, the building of the Ministry of Interior was hit by mortar fire on 10 November 2017 and ensuing clashes with LNA forces resulted in 14 persons killed and 25 injured, including civilians.²² A particularly deadly attack occurred on 23 January 2018, when two vehicle-borne improvised explosive devices (“IEDs”) were detonated in front of the Bi’at al-Radwan Mosque, in the Salmani district of Benghazi. The attack resulted in at least 30 persons killed, including children, and at least 56 injured.²³ On 9 February 2018, another two IEDs exploded inside a mosque, in the Majuri district of Benghazi, killing 1 civilian and injuring another 116.²⁴

13. In total, 52 civilian deaths and 196 injuries were documented in January and February 2018 alone, as a result of hostilities across the country, caused by IEDs, explosive remnants of war, gunfire and shelling.²⁵

14. In the period following the issuance of the First Warrant of Arrest, the Al-Saiqa Brigade remained engaged in fighting in Benghazi. In November-December 2017, it was reported that the Al-Saiqa Brigade had conducted assaults in the Sidi Akribesh district, one of the last areas in Benghazi under the control of opposing forces, which had been under siege for four months.²⁶

²⁰ LBY-OTP-0062-0060, at 0063, para. 20.

²¹ LBY-OTP-0062-0060, at 0063, para. 19.

²² LBY-OTP-0062-0060, at 0063, para. 18.

²³ LBY-OTP-0062-0077, at 0077-0078; *see also* LBY-OTP-0062-0060, at 0063, para. 18, stating however that the attack occurred on 24 January 2018.

²⁴ LBY-OTP-0062-0081, at 0082; LBY-OTP-0062-0060, at 0063, para. 18.

²⁵ LBY-OTP-0062-0077, at 0077; LBY-OTP-0062-0081, at 0081.

²⁶ LBY-OTP-0062-0277; LBY-OTP-0062-0707 and translation LBY-OTP-0063-0048, at 0049.

15. There are reasonable grounds to believe that Mr. Al-Werfalli continued to act as a commander in the Al-Saiqa Brigade. The Chamber notes that Mr. Al-Werfalli was still in a position of command on 14 August 2017 when he issued a circular in his capacity of “Special Forces Axes Commander”.²⁷ Later on, in the autumn of 2017, he reportedly commanded the 1st battalion of the Al-Saiqa Brigade during an assault in the Sidi Akribesh district of Benghazi, on 30 November 2017.²⁸ At the time relevant for the purposes of the Request, he was still being referred to as a commander with the Al-Saiqa Brigade.²⁹

16. The additional crime the Prosecutor alleges Mr. Al-Werfalli to be responsible for occurred on 24 January 2018, in Benghazi.³⁰ The incident took place in the aftermath of the double IED attack mentioned above which was carried out on 23 January 2018, in front of the Bi’at al-Radwan Mosque, in the Salmani district of Benghazi.³¹ Mr. Al-Werfalli reportedly committed the alleged crime as a response to the said attack.³²

17. The available evidence indicates that there are reasonable grounds to believe that Mr. Al-Werfalli is directly responsible for the killing of 10 persons in front of the same Bi’at al-Radwan Mosque, in the Salmani district of Benghazi on 24 January 2018. A video footage shows Mr. Al-Werfalli wearing a camouflage uniform and

²⁷ LBY-OTP-0054-0262 and translation LBY-OTP-0054-0758, at 0759.

²⁸ LBY-OTP-0062-0707 and LBY-OTP-0063-0048, at 0049.

²⁹ LBY-OTP-0062-0060, at 0063, para. 10, stating that, at the time relevant for the purposes of the Request, Mr. Al-Werfalli was a “Libyan National Army Commander”; and LBY-OTP-0062-0077, at 0079, referring to Mr. Al-Werfalli in January 2018 as “a field commander with the Special Forces”. The “Special Forces” is the formal name of the Al-Saiqa Brigade; *see* LBY-OTP-0062-0707 and LBY-OTP-0063-0048, at 0049.

³⁰ LBY-OTP-0062-0091; LBY-OTP-0062-0077, at 0079; LBY-OTP-0056-0407 and LBY-OTP-0063-0063, at 0064; LBY-OTP-0062-0187, at 0197, para. 70; *see however* LBY-OTP-0062-0060, at 0063, para. 18, reporting that the alleged crime was committed on 25 January 2018.

³¹ *See* para. 12 above; LBY-OTP-0062-0187, at 0197, para. 70.

³² LBY-OTP-0062-0703; LBY-OTP-0062-0654, at 0656, lines 9-20; LBY-OTP-0056-0407 and translation LBY-OTP-0062-0166, at 0168.

holding a firearm in his left hand.³³ In front of him, 10 persons dressed in blue jumpsuits are lined up kneeling down, blindfolded and with their hands behind their backs.³⁴ Beginning from the left of the row of kneeling persons, Mr. Al-Werfalli starts shooting each person in the head in quick succession. As they are shot, the persons fall one by one to the ground. After the last person is shot, Mr. Al-Werfalli fires freely at the 10 persons now lying on the ground.³⁵ A crowd of people are chanting: “The blood of martyrs shall not go in vain”.³⁶ The 10 persons who were shot are shown lying on the ground in what appear to be pools and streams of blood. Bodies in blue jumpsuits are then seen being loaded and transported in two pick-up trucks as the crowd of onlookers continues chanting.³⁷

18. The Chamber is satisfied that the above mentioned video has sufficient indicia of authenticity in order to be relied upon at this stage of the proceedings. The Chamber notes, in particular, that the Prosecutor has submitted an expert report on the authentication of the video, prepared by a renowned, independent institute.³⁸ Having analysed the video and its key frames, the report concluded that there were no traces of forgery or manipulation in relation to locations, weapons or persons shown in the video.³⁹ The location has also been confirmed by a witness, who stated that the video was shot “[i]n front of the mosque at Al-Salmani” where “[a] day before [...] there was a bombing”.⁴⁰

³³ LBY-OTP-0056-0407, 00:48. The Chamber notes that Mr. Al-Werfalli is mainly seen from behind in the video and is not identifiable based on his facial features; *see also* LBY-OTP-0063-0068, at 0075-0078. The Chamber nevertheless finds reasonable grounds to believe that Mr. Al-Werfalli is indeed the person appearing in the video based on a number of other pieces of evidence which identify Mr. Al-Werfalli as the person who shot dead the 10 individuals in front of the Bi’at al-Radwan Mosque in Benghazi: *see* para. 19 below.

³⁴ *See also* LBY-OTP-0060-4362.

³⁵ LBY-OTP-0056-0407, 00:48 – 01:10.

³⁶ LBY-OTP-0056-0407, 01:10 and translation LBY-OTP-0062-0166, at 0168, line 20.

³⁷ LBY-OTP-0056-0407, 01:28 – 01:55.

³⁸ LBY-OTP-0063-0068.

³⁹ LBY-OTP-0063-0068, at 0072-0074.

⁴⁰ LBY-OTP-0062-0187, at 0197, paras 69 and 75.

19. Further evidence before the Chamber provides reasonable grounds to believe that Mr. Al-Werfalli is directly responsible for the killing of the 10 persons on 24 January 2018. In particular, the Chamber notes a public statement made by the spokesperson of the LNA on or around 7 February 2018, according to which Mr. Al-Werfalli had admitted to the killings.⁴¹ A letter allegedly sent by Mr. Haftar to the Prosecutor of the Court also confirms that Mr. Al-Werfalli “killed some detained terrorists [...] as a reaction to the bombings” of 23 January 2018.⁴² This allegation is further supported by other evidence before the Chamber, including a report by the United Nations.⁴³

V. Jurisdiction and Admissibility

1. Jurisdiction

20. The Chamber finds, pursuant to articles 19(1) and 58(1)(a) of the Statute, on the basis of the evidence submitted and without prejudice to its future determinations, that the crime referred to in the Request falls within the jurisdiction of the Court. The incident that forms the basis of the Request occurred in Benghazi, on 24 January 2018, and is associated with the ongoing armed conflict underlying the referral by the Security Council pursuant to article 13(b) of the Statute concerning the situation on the territory of Libya since 15 February 2011.⁴⁴ The Chamber recalls its finding in the First Warrant of Arrest that the Al-Saiqa Brigade has been involved in an armed conflict not of an international character in Libya ever since the days of the revolution against the Gaddafi regime.⁴⁵ The Chamber finds that there are reasonable

⁴¹ LBY-OTP-0062-0654, at 0656, lines 17-20; LBY-OTP-0063-0063, at 0063.

⁴² LBY-OTP-0062-0703.

⁴³ LBY-OTP-0062-0060, at 0063, para. 18, reporting however that the alleged crime was committed on 25 January 2018; LBY-OTP-0062-0091; LBY-OTP-0056-0374 and draft translation LBY-OTP-0062-0174, at 0175.

⁴⁴ S/RES/1970 (2011). Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, “[Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana](#)”, 28 September 2010, ICC-01/04-01/10-1, paras 5-7.

⁴⁵ [First Warrant of Arrest](#), para. 23.

grounds to believe that the Al-Saiqa Brigade remained engaged in said conflict after the issuance of the First Warrant of Arrest and that Mr. Al-Werfalli continued to hold a position of command in the Al-Saiqa Brigade.⁴⁶ In light of the above, the Chamber is satisfied that the alleged crime described in the Request is sufficiently linked with the situation that triggered the jurisdiction of the Court through the Security Council referral.⁴⁷

2. Admissibility

21. The Chamber recalls the Appeals Chamber's pronouncement that, when deciding on an application for a warrant of arrest in *ex parte* Prosecutor only proceedings, the Pre-Trial Chamber should exercise its discretion to address the admissibility of the case pursuant to article 19(1), second sentence, of the Statute only when it is appropriate in the circumstances of the case and bearing in mind the interests of the suspect.⁴⁸

22. Following the issuance of the First Warrant of Arrest, it was reported that an investigation had been initiated in Libya, by a Military Prosecutor, upon the orders of Mr. Haftar, into the crimes allegedly committed by Mr. Al-Werfalli and two cases were opened against him.⁴⁹ While the first case concerns conduct that formed the basis of the First Warrant of Arrest,⁵⁰ the second case allegedly concerns conduct that is the subject matter of the Request.⁵¹ On 19 June 2018, the Chamber received updated information from the Prosecutor.⁵²

⁴⁶ See above paras 14-15.

⁴⁷ Pre-Trial Chamber I, *Prosecutor v. Callixte Mbarushimana*, "[Decision on the 'Defence Challenge to the Jurisdiction of the Court'](#)", 26 October 2011, ICC-01/04-01/10-451, para. 16.

⁴⁸ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, "[Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'](#)", 13 July 2006, ICC-01/04-169, paras 1-2, 52.

⁴⁹ LBY-OTP-0062-0654; LBY-OTP-0062-0703.

⁵⁰ LBY-OTP-0055-0186 and translation LBY-OTP-0063-0004; LBY-OTP-0055-0231; LBY-OTP-0062-0654.

⁵¹ LBY-OTP-0062-0654; LBY-OTP-0062-0703.

⁵² ICC-01/11-01/17-12-US-Exp.

23. The Chamber considers that the reported opening of a case against Mr. Al-Werfalli in Libya for the crime he allegedly committed on 24 January 2018 constitutes an ostensible cause that impels it to exercise its discretion pursuant to article 19(1), second sentence, of the Statute⁵³ and determine at this stage the admissibility of the case against Mr. Al-Werfalli. In what follows, the Chamber will focus on the investigation allegedly opened into the events of 24 January 2018, which form the subject matter of the Request.

a) Complementarity

24. In August 2017, following an order issued by Mr. Haftar, Mr. Al-Werfalli was suspended from his military functions and an investigation was initiated by the Military Prosecutor which reportedly covered the same conduct that made the object of the First Warrant of Arrest.⁵⁴ Mr. Al-Werfalli was immediately arrested and was thereafter interrogated by the Military Prosecutor.⁵⁵ However, by 30 November 2017, Mr. Al-Werfalli had allegedly been released.⁵⁶

25. Following the alleged killing of the 10 persons in front of the Bi'at al-Radwan Mosque on 24 January 2018, Mr. Haftar once again ordered Mr. Al-Werfalli's arrest and detention in order for the Military Prosecutor to initiate an investigation into the said acts, as well as to continue the investigation opened in August 2017.⁵⁷ On 6 February 2018, Mr. Al-Werfalli appeared in a video stating: "Upon the instructions of the General Command, the Commander-in-Chief, regarding my arrest, I, Major Mahmoud Mustafa Busayf AL-WERFALLI [...] I'll surrender to the Military Police in

⁵³ See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, "[Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'](#)", 13 July 2006, ICC-01/04-169, para. 52.

⁵⁴ LBY-OTP-0055-0186 and translation LBY-OTP-0063-0004; LBY-OTP-0055-0231; LBY-OTP-0062-0703.

⁵⁵ LBY-OTP-0055-0186 and translation LBY-OTP-0063-0004; LBY-OTP-0055-0231; LBY-OTP-0062-0703.

⁵⁶ See above para.15; see also LBY-OTP-0062-0654, at 0656, lines 14-15.

⁵⁷ LBY-OTP-0062-0703.

the town al-Marj so that the investigations relating to the International Criminal Court could be concluded".⁵⁸

26. On 7 February 2018, Mr. Al-Werfalli was allegedly in the custody of the Military Police.⁵⁹ The official spokesperson of the LNA stated on or around the same day that it had been established that Mr. Al-Werfalli was the perpetrator and that a second case was opened against him concerning the events of 24 January 2018.⁶⁰ Following Mr. Al-Werfalli's surrender, a demonstration took place in Benghazi in opposition to legal action being taken against him, with roads being blocked and tires burnt.⁶¹ On 8 February 2018, it was reported that the investigation was completed and that Mr. Al-Werfalli was released.⁶²

27. The Chamber finds that the proceedings allegedly initiated against Mr. Al-Werfalli in Libya do not render the case against him inadmissible before this Court. The Chamber finds that irrespective of whether the entity exercising authority in the territory controlled by the LNA can be considered a State for the purposes of article 17 of the Statute, there remains a situation of inactivity. The Chamber recalls that for a case to be considered as "being investigated" within the meaning of article 17(1)(a) of the Statute, tangible, concrete and progressive investigative steps must have been taken.⁶³ Based on the limited available information, the Chamber considers that the investigation has not complied with these requirements.

⁵⁸ LBY-OTP-0062-0648, at 0650.

⁵⁹ LBY-OTP-0062-0654, at 0656, lines 24-25; LBY-OTP-0060-7303 and translation LBY-OTP-0062-0651; LBY-OTP-0062-0091.

⁶⁰ LBY-OTP-0062-0654, at 0656, lines 17-24.

⁶¹ LBY-OTP-0062-0089, LBY-OTP-0062-0091.

⁶² LBY-OTP-0062-0089, LBY-OTP-0062-0091.

⁶³ Pre-Trial Chamber III, "[Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017](#)", ICC-01/17-9-Red, 9 November 2017, para. 148; Pre-Trial Chamber I, *Prosecutor v Simone Gbagbo*, "[Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo](#)", 11 December 2014, ICC-02/11-01/12-47-Red, para. 65; Appeals Chamber, *Prosecutor v Simone Gbagbo*, "[Judgment on the appeal of Côte d'Ivoire against the decision](#)

28. First, the Chamber observes that the investigation was closed only one day after Mr. Al-Werfalli surrendered to the Military Police and two weeks after the alleged crime was committed. The Chamber is concerned by the limited timeframe of the investigation especially considering the seriousness of allegations made against Mr. Al-Werfalli. Second, the Chamber notes based on the available evidence that no concrete investigative steps have been taken. No witnesses were interviewed with regard to the events of 24 January 2018, despite the fact that a large crowd of onlookers was present at the scene of the alleged crime, and no forensic examination of the bodies was conducted, although such an examination would have been a crucial investigative step. The Chamber observes, based on the available evidence, that the only investigative step that has been taken since the opening of investigations into crimes allegedly committed by Mr. Al-Werfalli was an interrogation of him by the Military Prosecutor in August 2017, which in any case concerned conduct which made the object of the First Warrant of Arrest. Finally, the Chamber notes that no explanation was provided for the closing of the investigation, despite the fact that only one day before Mr. Al-Werfalli's release officials of the LNA had stated that it was established that Mr. Al-Werfalli was the perpetrator.

29. In the light of the foregoing, the Chamber finds that it cannot be concluded that the case against Mr. Al-Werfalli is being or has been investigated in Libya within the meaning of article 17(1)(a)-(b) of the Statute. This conclusion stands notwithstanding the Prosecutor's updated information provided to the Chamber regarding an alleged ongoing investigation against Mr. Al-Werfalli for the incident set out in the Request. The Prosecutor has not provided the Chamber with any evidence that shows that the required investigative activities, as elaborated in paragraph 28 of the present decision, were undertaken. In view of the foregoing, the Chamber considers that there remains to be a situation of inactivity.

[of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'](#)", 27 May 2015, ICC-02/11-01/12-75-Red, para. 122.

b) Gravity

30. The Chamber recalls that in determining whether a case is of sufficient gravity to justify further action by the Court, within the meaning of article 17(1)(d) of the Statute, it must have regard to: (i) whether the case captures those persons who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed, which may be examined following both a quantitative and a qualitative approach.⁶⁴ With regard to the second element, the Chamber notes that cases encompassing a limited number of casualties⁶⁵ or even those dealing exclusively with the destruction of buildings dedicated to religion⁶⁶ have been considered to be sufficiently grave to justify prosecution.

31. The Chamber recalls that there are reasonable grounds to believe that Mr. Al-Werfalli was a commander in the Al-Saiqa Brigade at the time relevant for the purposes of the Request⁶⁷ and that he had been in a commanding role since at least December 2015.⁶⁸ In the First Warrant of Arrest, the Chamber found that he had many men under his command and had authority over at least one detention centre.⁶⁹ The Chamber sees no reason to depart from these findings which are equally applicable to the crime described in the Request. The Chamber further observes that, while the number of victims in the case at hand is limited, the manner in which the crime was committed and publicized was cruel, dehumanizing and degrading. The victims were lined up on a public street, kneeling down and with

⁶⁴ Pre-Trial Chamber II, *Situation in the Republic of Kenya*, "[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#)", ICC-01/09-19-Corr, paras 60-62.

⁶⁵ Pre-Trial Chamber I, *Prosecutor v Abdallah Band Abakaer Nourain*, "[Corrigendum of the 'Decision on the Confirmation of Charges'](#)", 7 March 2011, ICC-02/05-03/09-121-Corr-Red, paras 48-123.

⁶⁶ Trial Chamber VIII, *Prosecutor v Ahmad Al Faqi Al Mahdi*, "[Judgment and Sentence](#)", 27 September 2016, ICC-01/12-01/15-171, paras 34-37.

⁶⁷ See para. 15 above.

⁶⁸ [First Warrant of Arrest](#), para. 9.

⁶⁹ [First Warrant of Arrest](#), para. 9.

their hands tied behind their backs. They were shot dead one by one, in front of a crowd of onlookers who were chanting in apparent support for the killings.

32. For these reasons, the Chamber considers that the case against Mr. Al-Werfalli is of sufficient gravity to justify further action by the Court within the meaning of article 17(1)(d) of the Statute. In light of the foregoing, the Chamber determines that the case against Mr. Al-Werfalli is admissible before this Court.

VI. Requirements of Article 58(1) of the Statute

1. Whether Mr. Al-Werfalli has committed a crime under the jurisdiction of the Court (article 58(1)(a) of the Statute)

33. The Chamber finds that there are reasonable grounds to believe that an armed conflict not of an international character has been ongoing on the territory of Libya from at least early March 2011 until at least February 2018 between governmental forces and different organized armed groups or among various such armed groups, including the Al-Saiqa Brigade.⁷⁰ The Chamber recalls that in the First Warrant of Arrest it found that there were reasonable grounds to believe that the Al-Saiqa Brigade was an organized armed group.⁷¹ The Chamber finds no information in the evidence to show that the facts have changed in this regard. Further, the evidence before the Chamber sufficiently demonstrates, to the required standard of proof, that the violence among the above mentioned armed groups has been protracted, rising above the level of isolated and sporadic acts of violence,⁷² with the parties to the conflict conducting airstrikes, mortar attacks and IED attacks in the period following

⁷⁰ See paras 9-14 above.

⁷¹ [First Warrant of Arrest](#), para. 26; see Trial Chamber III, *Prosecutor v Jean-Pierre Bemba Gombo*, "[Judgment pursuant to Article 74 of the Statute](#)", 21 March 2016, ICC-01/05-01/08-3343, paras 128 and 132-136.

⁷² Article 8(2)(d) of the Statute.

the issuance of the First Warrant of Arrest. The Chamber notes also the number of casualties and the spread of the violence throughout the country.⁷³

34. The Chamber finds that there are reasonable grounds to believe that the acts described in Section IV, paragraphs 16-19 above, constitute the war crime of murder and were committed in the context of and were associated with an armed conflict not of an international character, pursuant to article 8(2)(c)(i) of the Statute. The Chamber is satisfied to the required threshold that the persons killed were either placed *hors de combat* by being deprived of liberty or were civilians taking no active part in the hostilities.⁷⁴ There is no information in the evidence to show that they have been afforded a trial by a legitimate court, whether military or otherwise, that would comport with any recognised standard of due process. This finding does not prevent the Prosecutor from amending the legal characterisation of the acts described in this warrant of arrest.

35. Further, the Chamber finds that there are reasonable grounds to believe that Mr. Al-Werfalli is criminally responsible for the crime of murder described in paragraphs 16-19 above pursuant to article 25(3)(a) of the Statute, as a direct perpetrator, having personally committed the crime.⁷⁵ The Chamber is satisfied to the required standard of proof that he acted with intent and knowledge and that he was aware of the status of the victims and of the factual circumstances that established the existence of an armed conflict not of an international character.⁷⁶ This does not prevent the Prosecutor from amending the legal characterisation of

⁷³ Trial Chamber III, *Prosecutor v Jean-Pierre Bemba Gombo*, "[Judgment pursuant to Article 74 of the Statute](#)", 21 March 2016, ICC-01/05-01/08-3343, paras 137-141; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Bošković and Tarčulovski*, Case No. IT-04-82-T, "[Judgement](#)", 10 July 2008, para. 177.

⁷⁴ Article 8(2)(c)(i)-1, Elements of Crimes.

⁷⁵ Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, "[Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda](#)", ICC-01/04-02/06-309, 9 June 2014, para. 136.

⁷⁶ Article 30 of the Statute; Article 8(2)(c)(i)-1, Elements of Crimes.

Mr. Al-Werfalli's criminal responsibility in light of evidence presented at a later stage.

2. *Whether the arrest of Mr. Al-Werfalli appears necessary (article 58(1)(b) of the Statute)*

36. Finally, the Chamber is satisfied, in conformity with article 58(1)(b) of the Statute, that the arrest of Mr. Al-Werfalli appears necessary to ensure that (i) he is prevented from continuing with the commission of such crimes or related crimes arising out of the same circumstances, as described in Section IV; and (ii) he appears at trial. The Chamber notes that Mr. Al-Werfalli has committed the alleged crime described above after the issuance of the First Warrant of Arrest. The Chamber takes the view that, unless prevented, Mr. Al-Werfalli is likely to continue to carry out crimes of similar gravity in the near future. The Chamber is satisfied that Mr. Al-Werfalli is unlikely to cooperate with a summons to appear, within the meaning of article 58(7) of the Statute, considering that the First Warrant of Arrest remains unexecuted. In light of the above, the issuance of the present warrant of arrest is necessary.

FOR THESE REASONS, THE CHAMBER HEREBY

ISSUES a warrant of arrest for **Mahmoud Mustafa Busayf AL-WERFALLI**, a Libyan national, born in 1978, reported to live at Square 8, Number 40 Qundulah Road in the Bu-Hadimah area of Benghazi, commander in the Al-Saiqa Brigade, for his alleged criminal responsibility pursuant to article 25(3)(a) of the Statute, for the war crime of murder under article 8(2)(c)(i) of the Statute, committed on 24 January 2018, in Benghazi, Libya;

DECIDES that the warrant of arrest is issued publicly and may be communicated to any State or international organization for the purposes of its execution;

DECIDES that, as soon as practicable, the Registrar shall: (i) prepare a request for cooperation seeking the arrest and surrender of Mr. Al-Werfalli and containing the information and documents required by articles 89(1) and 91 of the Statute and rule 187 of the Rules of Procedure and Evidence; and (ii) transmit the request, in consultation and coordination with the Prosecutor, to the competent authorities of Libya or any other relevant State, or to any other competent authority, in accordance with article 87 of the Statute and Resolution 1970 of the United Nations Security Council to cooperate with the Court for the purpose of executing the request for arrest and surrender of Mr. Al-Werfalli;

DIRECTS the Registrar to prepare and transmit to any relevant State, in consultation and coordination with the Prosecutor, any request for transit pursuant to article 89(3) of the Statute or any request for provisional arrest pursuant to article 92 of the Statute which may be necessary for the surrender of Mr. Al-Werfalli;

ORDERS the Prosecutor to transmit to the Registry and to the Chamber all information available to her that may be of assistance in the execution of the request for arrest and surrender as well as any information of relevance to assessing any risks to victims and witnesses associated with the transmission of the request for arrest and surrender; and

ORDERS the Registrar to prepare, as soon as practicable, an Arabic translation of the present warrant of arrest for the purposes of transmitting it to the Libyan authorities.

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



Judge Péter Kovács
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Reine Adélaïde Sophie
Alapini-Gansou

Dated this Wednesday, 4 July 2018

At The Hague, The Netherlands