

Second arrest warrant in *Prosecutor v. Al-Werfalli*, ICC

Proposed citing: ICC, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Case no. ICC-01/11-01/17, Pre-Trial Chamber I, Decision of 4 July 2018, Arrest warrant (excerpt)

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Date of the decision: 4 July 2018

Author of the decision: International Criminal Court

Summary of the decision: The ICC found 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. 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.

Cited international law materials: Rome Statute of the International Criminal Court

Key words: non-recognised courts, responsible command, international war crimes, functional military judicial system, Libyan National Army



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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

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.

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 Boškoski 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