

Case Comment: New Arrest Warrant at the International Criminal Court

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By: Joseph Rikhof

On August 14, 2017, the Pre-Trial Chamber (PTC) of the ICC issued a warrant for the arrest of Mahmoud Mustafa Busayf Al-Werfalli in the situation, pertaining to Libya after the fall of the Gaddafi regime, referred to the Prosecutor by the Security Council.[1] This is the 33rd person against whom proceedings have started by the Prosecutor of the ICC since the inception of the court in 2002, either by way of arrest warrant or as a result of a summons to appear. He is also the fifth person against whom a warrant for arrest was issued in the Libyan situation, although the first one who was not connected the Gaddafi government for the commission of international crimes in 2011. The allegations against Al-Werfalli are related to incidents which occurred between June and July of this year.

The case has a number of unique aspects, which will be discussed later after a short background of the case has been provided.

The Libyan Context

Since 2011, when the other four persons under warrant of arrest[2] were accused of the commission of crimes against humanity, the security situation in Libya has deteriorated and has become increasingly complicated. The PTC describes this as follows:

In February 2011, violence erupted in Libya in the context of an uprising against the regime of Muammar Mohammed Abu Minyar Gaddafi ("Mr Gaddafi"). By early March 2011, the situation had escalated into hostilities between governmental forces and rebel forces.

After the fall of the Gaddafi regime, the existing rebel forces did not lay down their arms and were not integrated into a national army. Consequently, the following years were marked by periodic fighting between various armed groups. In particular, major clashes erupted in Tripoli and surrounding areas in 2013 and 2014 between, inter alia, (i) Zintan brigades, affiliated with the Ministry of Defence; (ii) the Supreme Security Committee in Tripoli, affiliated with the Ministry of Interior; and (iii) the Libya Shields units. The hostilities involved exchanges of heavy artillery and rocket fire, with the shelling of populated residential areas in Tripoli.

In Benghazi, a coalition of army units, ex-revolutionary groups and tribal militias calling themselves the "Libyan National Army" (the "LNA"), and acting under the command of General Khalifa Haftar ("General Haftar"), launched Operation Dignity, on 16 May 2014. The reported objective of the operation was to fight terrorist groups in Benghazi, which included Ansar al-Sharia, the February 17 Revolutionary Martyrs' Brigade, the Rafallah Al-Sahati militia and the eastern Libya Shield brigade, which joined forces to form the Benghazi Revolutionaries Shura Council (the "BRSC"). The violence gradually escalated, including aerial bombings and frequent missile and/or mortar attacks. In mid-October 2014 and on 20 February 2016, General Haftar launched renewed military operations to oust the BRSC from the city. The fighting between the LNA and the BRSC continued in Benghazi at least until 18 March 2017."[3]

The PTC continues to set out the role of the Al-Werfalli in the following manner:

"One of the forces taking part in Operation Dignity was the Al-Saiqa Brigade, an elite unit which, during the Gaddafi regime, had been part of the Libyan National Army. It defected at an early stage of the 2011 uprising and joined the revolutionary forces. The group operates under the command of Colonel Wanis Abdel Kareem Bukhmada ("Colonel Bukhmada"), who has the power to issue orders and appoint members of the group. Among its ranks it numbers also field officers, such as Field Commander Major Muhammad al-Ghazali, Advances Coordinator Captain Anas al-Zuway, Inquiries Commander Sargent Fadl al-Hasi (deceased on 22 May 2017) and Mr Al-Werfalli, as Axes Commander, as well as other axes commanders. The group is reported to have up to 5000 soldiers, organized into divisions and battalions.

Mr Al-Werfalli joined the Al-Saiqa Brigade after the fall of the Gaddafi regime. He has been in a commanding role since at least December 2015. Currently he holds the position of Axes Commander. He is reported to have many men under his command. For example, on 9 April 2017, following instructions from Colonel Bukhmada, he issued an order to the al-Burkan Battalion, under the command of officer Ali Sa'd al-Tawurghi, to take up positions on the al-Sabiri axis. Mr Al-Werfalli also has authority over at least one detention centre."[4]

Al-Werfally has been accused of the killing of 33 persons who either civilians or persons hors de combat in seven incidents in Benghazi or surrounding areas between June 3 and July 17, 2017 and as a result was charged with the war crime of murder in a non-international armed conflict for either personally killing the victims or by ordering their execution. The charges were laid pursuant to articles 25(3)(a) and (b) of the *Rome Statute*.

As indicated, this case has a number of unusual aspects, of which the first is that for the first time, the charge of war crimes is used in the Libyan situation as opposed to crimes against humanity, which stands to reason in that in the case of the other four persons, whose arrest had been sought by the ICC, the charges had been concentrated on crimes committed against Libyan civilians not connected to an armed conflict, either international or non-international.

Secondly, the speed of the investigation resulting in the warrant for arrest was astonishingly fast with less than one month between the last incident recounted in the warrant and the decision rendered by the PTC. The Prosecutor had actually submitted under seal the application for the warrant already two weeks earlier, namely on August 1. This is the fastest investigation in the ICC's 15 year's history and most likely as well in any other international or domestic investigation into the commission of international crimes.

Thirdly, and possibly related to the point just made, the number of victims, 33, is the lowest in any of all the investigations by the ICC and possibly also the investigations conducted by other international or internationalized institutions, such as the ICTY, ICTR (the International Criminal Tribunals for the former Yugoslavia and Rwanda), the SLSC (Special Court for Sierra Leone), the ECCC (Extraordinary Chamber in the Courts of Cambodia) and the IAC (the International African Chamber) in Senegal, which convicted Hissène Habré, the ex-president of Chad.

Fourthly, and connected to points 2 and 3, is the fact, that in spite of the PTC making reference to various types of evidence early in the decision, such as recordings and summaries of witness interviews and reports of international organizations, non-governmental organizations, and research centres, ultimately the PTC states after the iteration of each incident: "The video depicting this incident was posted on Facebook …"[5]

Accessing and analyzing social media has become an important tool in domestic criminal investigations and its use in court as evidence has increased in recent years. However, the almost exclusive use of videos or pictures posted on social media vehicles in order to prove an international crime, as is done in this case, is unique at the international level.

At the domestic level, there have been some examples of convictions for such crimes based on pictures and video postings on the internet, namely in Sweden, Finland and the Democratic Republic of the Congo.

In Sweden, on February 26, 2015, a Syrian refugee, Mouhannad Droubi, was sentenced to five years in prison after been convicted for the war crime of attacking an enemy who was 'hors de combat', or

effectively defenceless, and a particularly grave assault by abusing a captured member of the armed forced of the Assad government. Droubi was part of a group associated with the Free Syrian Army, where he and other members beat a prisoner and posted a video of the abuse on Facebook. This finding and sentence was upheld by the Court of Appeal on August 5, 2016.

In Finland, on March 21, 2016 an Iraqi man, Jebbar Salman Ammar, was given a 16-month suspended sentence in a rare war crime case where the defendant was found guilty of degrading a deceased enemy soldier. The 29-year-old former member of an Iraqi paramilitary unit had posted pictures of himself and a decapitated head of an alleged Islamic State militant on his open Facebook page. A day later, an Iraqi Shi'ite militiaman, Hadi Habeeb Hilal, was given a 13 month suspended sentence for the same crime.

In the Democratic Republic of the Congo, on March 18, 2017, seven Congolese Army officers were arrested and charged with war crimes after a video had surfaced a month earlier that appeared to show uniformed soldiers opening fire on a group of civilians under their command in a massacre that left at least 13 people dead. On July 6, 2017, the court in the central Congolese city of Mbuji Mayi, sentenced two army majors to 20 years in prison and three other soldiers to 15 years for murder and improperly disposing of weapons in part based the evidence in the social media videos.

The last issue of interest in the PTC decision is the fact that the charges are based on the unusual combination of personal participation in murder and ordering subordinates to murder. Of the 232 persons charged at the six international criminals institutions (ICTY, ICTR, SLSC, ECCC, IAC, ICC) between 1993 and the present, only 13 persons have been charged with this combination but typically with other charges as well. There has only been one other case where the exact same combination of these two charges was used.[6] There has been one other case where this combination was used at the ICC, namely *Ntaganda*, but in that case, the trial of which is ongoing, other charges have been laid as well.

Personal participation has been charged in 35 cases,[7] usually with a number of other charges but there have been 14 cases where the only allegation had been direct involvement.[8] In the first situation of personal participation in combination with other charges the perpetrators were usually mid-level operators in either a military (such as camp commanders in the former Yugoslavia) or civilian capacity (such as prefects or burgomeisters in Rwanda), although one striking exception was Habré, the former head of state of Chad. The persons who had been charged with only personal participation usually occupied lower level positions, such as camp guards, soldiers or members in a paramilitary organization.

A conviction for personal participation combined with other charges would in most cases result in a sentence at the very high end of the spectrum, reflecting the combination of the position of the accused involved and his willingness to get his hands dirty without the need to do so.[9] The sentencing range for persons convicted of direct participation only, ran between eight years and life imprisonment.[10]

With respect to the charge of ordering murder, there have been 28 instances where this form of liability was used, again mostly against mid-level operators, which is most likely the result of the fact that such persons were almost always giving instructions to immediate subordinates in close physical proximity to the victims. This would distinguish this form of liability from command or superior responsibility where the person in authority is usually in a higher position in the organization and also further removed physically from the victims. However, it should be pointed out that a charge of ordering was also laid against a cabinet minister in Rwanda and against Habrè. In those cases, both had been charged and convicted of numerous forms of liability and the ordering conviction was part of a much larger pattern of criminal behaviour subject also to other charges.

Of the 28 ordering cases, five involved exclusively the charge of ordering, one at the ICTY and four at the ICC (all involving senior commanders of the Lord's Resistance Army, operating in northern Uganda). As with the charges of personal participation where convictions were entered (none of the LRA cases has been completed yet, while there has been one acquittal at the ICTR and one accused died at the ICTY before a sentence could be pronounced) they are again in the higher end of the sentencing range, namely from 12 years to life imprisonment with the majority over the 25 year imprisonment range.[11] The same can be said for convictions with a combination of personal participation and ordering (as well as other charges in all but one case).[12]

Conclusion

It would appear that Al-Werfalli's background as a medium level commander who operated in very close proximity to the victims who were killed would fit the general profile of cases tried at other international institutions and, while sentencing trends are notoriously difficult to predict, if ICC judges decided to take into account the judgments made by their colleagues at other international criminal institutions, he should face, if the charges are eventually proven, a very serious sentence.

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Globally-recognized as an expert in cases of war crimes, Dr. Joseph Rikhof is with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada's Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.

References

1. See https://www.icc-cpi.int/CourtRecords/CR2017_05031.PDF.
2. They were Muammar Gaddafi, the head of state of Libya at that time and for which an arrest warrant was issued on June 27, 2011 (but withdrawn on November 22, 2011 due to his death), which was the same date for which warrants were issued for Saif Al-Islam Gaddafi, the Honorary chairman of the Gaddafi International Charity and Development Foundation and who was acting as the Libyan de facto Prime Minister as well as Abdullah Al-Senussi, National head of Military Intelligence (but against whom the proceedings came to an end on July 24, 2014 when the Appeals Chamber confirmed the Pre-Trial Chamber decision that the case was inadmissible due to the fact that Libya was able and willing to conduct its own criminal proceedings). On April 18, 2013 a sealed warrant for arrest was issued against Al-Tuhamy Mohamed Khaled, Lieutenant General of the Libyan army and the Head of the Libyan Internal Security Agency, which was unsealed on April 24, 2017. None of the two remaining accused are in the custody of the ICC.
3. Paras. 4-6 All paragraph references are to the PTC decision.
4. Paras. 8-9.
5. Paras. 11-16 and 22.
6. Éphrem Setako, a Lieutenant Colonel in the Rwandan Armed Forces who received 25 years imprisonment by the ICTR.
7. 13 at the ICTR, 20 at ICTY and one at the IAC and ICC each (the *Ntaganda* case in the last institution).
8. 2 at the ICTR and 12 at the ICTY.
9. At ICTR, the sentences were either life (in seven cases) or 25 years (in five cases) with one instance a sentence of 15 years; at the ICTY, the sentences varied from life (one case) to four sentences of over 20 years, 12 cases with sentences between 10 and 20 years and three sentences between eight and ten years. At the IAC, Habré received life imprisonment.
10. The ICTR meted out sentences of life and 25years while at the ICTY the sentences were: life, 40, 28, 23, 20, 20, 18, 15, 15, 12, 10 and eight years.
11. At the ICTR, there were 11 persons who received a life imprisonment while one person 47 years imprisonment and two people 25 years; at the ICTY the sentences imposed were 12, 20, 25, 35 years; at the ECCC, the one person convicted of this mode of liability received 35 years imprisonment while Habré at the IAC received life imprisonment.
12. As these are combination cases, this group is already included in the previous footnote but given specific attention here. Most cases of this combination with convictions occurred at the ICTR, which issued seven sentences of life imprisonment as well 47, 40, 25, 25 years imprisonment and again Habré at the IAC with a life imprisonment.