

**Security Council**

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**Letter dated 11 December 2015 from the Secretary-General
addressed to the President of the Security Council**

In accordance with article 17, paragraph 3, of the Relationship Agreement between the United Nations and the International Criminal Court, I have the honour to convey the attached communication from the President of the Court, Judge Silvia Fernández de Gurmendi, dated 19 November 2015 (see annex).

The President transmits the decision on the Prosecutor's request for a finding of non-compliance in relation to the situation in Darfur, issued by Trial Chamber IV of the Court on 19 November 2015 in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*.

I should be most grateful if you would bring the present letter and its annex to the attention of the members of the Security Council.

(Signed) **BAN** Ki-moon



Annex

**Letter dated 19 November 2015 from the President of the
International Criminal Court addressed to the Secretary-General**

[Original: English and French]

Pursuant to article 17 (3) of the Relationship Agreement between the United Nations and the International Criminal Court, and in accordance with article 87 (7) of the Rome Statute and regulation 109 (4) of the Regulations of the Court, and as requested by Trial Chamber IV, I hereby transmit the decision on the Prosecutor's request for a finding of non-compliance in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain* of the said Chamber, dated 19 November 2015 (see enclosure).

I would be grateful if you could convey the present letter and the attached decision to the Security Council.

(Signed) Silvia **Fernández de Gurmendi**

Enclosure

[Original: English and French]

**Cour
Pénale
Internationale**

**International
Criminal
Court**



No.: ICC-02/05-03/09
Date: 19 November 2015

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Chile Eboe-Osuji
Judge Geoffrey Henderson

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN**

Public

Decision on the Prosecution's Request for a Finding of Non-Compliance

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Julian Nicholls

Counsel for the Defence

Mr Karim A.A. Khan

Mr David Hooper

Legal Representatives of Victims

Ms Hélène Cissé

Mr Jens Dieckmann

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 Representatives

Competent authorities of the
Republic of the Sudan

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Presidency

Bureau of the Assembly of States Parties

Trial Chamber IV ('Chamber') of the International Criminal Court ('Court', or 'ICC') in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain* ('Banda case'), having regard to Articles 1, 86, 87(7), 89 and 97 of the Rome Statute ('Statute'), Rule 195(1) of the Rules of Procedure and Evidence ('Rules'), Regulation 109 of the Regulations of the Court ('Regulations') and Article 17(3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, issues the following 'Decision on the Prosecution's Request for a Finding of Non-Compliance'.

1. On 16 October 2015, the Office of the Prosecutor ('Prosecution') requested that the Chamber issue a finding of non-compliance against the Republic of the Sudan ('Sudan') in the *Banda Case*, pursuant to Article 87(7) of the Statute ('Request').¹ The Prosecution submits that Sudan has failed to implement the Court's order to arrest Mr Banda,² and there is no prospect of Sudan complying with the arrest warrant of its own volition.
2. On 9 November 2015, the Legal Representative of Victims filed a submission supporting the Prosecution's request.³
3. The defence for Mr Banda did not respond to the Request. The Chamber gave the Sudanese authorities an opportunity to file submissions on the Request by 9 November 2015,⁴ but, as happened when the Registry sent Sudan the request to

¹ Public redacted version of "Prosecution's request for a finding of non-compliance against the Republic of the Sudan in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain* pursuant to article 87(7) of the Rome Statute", ICC-02/05-03/09-636-Conf, ICC-02/05-03/09-636-Red.

² Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606. *See also* Public Redacted Version of the Partly Dissenting Opinion of Judge Eboe-Osuji in the 'Decision on defence application for leave to appeal the decision on "Warrant of arrest for Abdallah Banda Abakaer Nourain" and, in the alternative, request for reconsideration', 8 January 2015, ICC-02/05-03/09-619-Anx-Red, para. 14.

³ Observations des Représentants Lésés Communs à la Requête du Procureur "Prosecution's request for a finding of non compliance against the Republic of the Sudan in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain* pursuant to article 87(7) of the Rome Statute", 16 October 2015, ICC-02/05-03/09-Conf, ICC-02/05-03/09-639-Conf (with four annexes containing letters from represented victims supporting the relief sought).

⁴ Decision Requesting Submissions from the Government of Sudan on the Prosecution's Request for a Finding of Non-Compliance, 19 October 2015, ICC-02/05-03/09-638.

arrest and surrender Mr Banda,⁵ the Sudanese Embassy refused receipt of the Registry's *note verbale* seeking their observations.⁶

4. Although Sudan is not a state party, it is obligated to accept and carry out United Nations ('UN') Security Council resolutions by virtue of its membership in the UN.⁷ UN Security Council Resolution 1593 provides that Sudan 'shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution [...]'.⁸
5. The Chamber considers that this resolution requires Sudan to arrest and surrender Mr Banda in accordance with the Statute's cooperation framework. If Sudan has any difficulty which impedes the execution of these cooperation requests, it is also obligated to consult with the Court.⁹
6. By disregarding the requests to arrest and surrender Mr Banda and not consulting with the ICC on their execution, Sudan failed to comply with requests to cooperate with the Court contrary to the provisions of the Statute and UN Security Council Resolution 1593. Particularly in view of Sudan's systematic refusal to cooperate with the Court in all pending cases,¹⁰ the Chamber considers it appropriate to grant the relief sought by the Prosecution and refer this matter to the UN Security Council.

⁵ Report of the Registry on the notifications of the Request for the arrest and surrender of Abdallah Banda Abakaer Nourain to States Parties and non States Parties, including the Republic of Sudan, 19 March 2015, ICC-02/05-03/09-635-Conf, para. 4.

⁶ Report of the Registry on the "Decision Requesting Submissions from the Government of Sudan on the Prosecution's Request for a Finding of Non-Compliance" (ICC-02/05-03/09-638), 9 November 2015, ICC-02/05-03/09-640 (notified 10 November 2015).

⁷ Article 25 of the UN Charter. Sudan has been a member of the UN since 12 November 1956.

⁸ UNSC Resolution 1593, 2005, S/RES/1593, para. 2.

⁹ Articles 1, 86, 89 and 97 of the Statute and Rule 195 of the Rules.

¹⁰ Pre-Trial Chamber II, *The Prosecutor v. Abdel Raheem Muhammad Hussein*, Decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan, 26 June 2015, ICC-02/05-01/12-33; Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad al-Bashir*, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, 9 March 2015, ICC-02/05-01/09-227; Pre-Trial Chamber I, *The Prosecutor v. Ahmad Harun and Ali Kushayb*, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, 25 May 2010, ICC-02/05-01/07-57.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

FINDS that the Republic of the Sudan has failed to: (i) cooperate with the Court by refusing to liaise with the relevant organs of the Court and execute the pending requests for the arrest and surrender of Mr Banda, thus preventing the Court from exercising its functions and powers under the Statute; and (ii) consult with the Court on any difficulty which could have impeded the execution of the requests for arrest and surrender of Mr Banda, or to bring to the attention of the Court relevant information which would have assisted it in deciding on any such difficulty; and

REFERS, pursuant to Regulation 109(4) of the Regulations, the present decision to the President of the Court for transmission to the Security Council through the Secretary General of the United Nations.

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



Judge Joyce Aluoch



Judge Chile Eboe-Osuji



Judge Geoffrey Henderson

Dated this 19 November 2015

At The Hague, The Netherlands