

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 16 October 2015

TRIAL CHAMBER IV

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

**SITUATION IN DARFUR, THE SUDAN
IN THE CASE OF**

THE PROSECUTOR V. ABDALLAH BANDA ABAKAER NOURAIN

Public Document

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", 16 October 2015, ICC-02/05-03/09-636-Conf

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
Mr James Stewart
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

Amicus Curiae

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Introduction

1. The Prosecution seeks a finding of non-compliance pursuant to article 87(7) against the Republic of the Sudan ("Sudan") because it has failed to implement the Court's warrant of arrest ("Arrest Warrant") for the Accused, Mr Abdallah Banda Abakaer Nourain ("Mr BANDA"),¹ which was issued over a year ago on 11 September 2014.
2. Mr BANDA is charged with three counts of war crimes, arising out of the attack against the African Union ("AU") peacekeeping mission base in Haskanita, Darfur, and the killings of twelve AU peacekeepers. The Court must be able to conduct its functions and try Mr BANDA for these crimes. In failing to arrest Mr BANDA, Sudan is frustrating the Court's work.
3. Sudan is obliged to arrest Mr BANDA. As a member state of the United Nations ("UN"), Sudan is required by the UN Charter and United Nations Security Council ("UNSC") Resolution 1593 (2005) to cooperate with the Court. As it has done in relation to Sudan's failure to arrest and surrender suspects Ahmad Muhammad Harun ("Mr Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Mr Kushayb"),² Omar Hassan Ahmad Al Bashir ("Mr Al Bashir")³ and Mr Abdel Raheem Muhammad Hussein ("Mr Hussein"),⁴ the Court should similarly make a finding of non-compliance pursuant to article 87(7) against Sudan for its failure to arrest Mr BANDA.
4. Sudan has repeatedly failed to implement the Court's orders to arrest and surrender the four persons mentioned above. This practice of non-compliance continues with Sudan's current inaction and refusal to implement the Arrest

¹ ICC-02/05-03/09-606.

² ICC-02/05-01/07-57.

³ ICC-02/05-01/09-227.

⁴ ICC-02/05-01/12-33.

Warrant for Mr BANDA. There is no prospect of Sudan complying with the Arrest Warrant of its own volition – in fact the Sudanese authorities [REDACTED] of the Arrest Warrant against Mr BANDA [REDACTED].⁵

5. In both of her reports to the UNSC since the Arrest Warrant was issued, the Prosecutor has underscored Sudan's obligation to immediately arrest and surrender Mr BANDA.⁶ This has not happened. The Court's mandate to prosecute Mr BANDA is being frustrated by Sudan's wilful failure to cooperate, and therefore the Court should find Sudan in non-compliance and refer the matter to the UNSC pursuant to article 87(7).

Confidentiality

6. Regulation 23*bis*(2) of the Regulations of the Court requires the Prosecution to file the current request confidentially as it discusses the content of [REDACTED],⁷ and [REDACTED]⁸ that were both submitted confidentially. The Prosecution is simultaneously filing a public redacted version of this filing.

Background

7. On 31 March 2005, the UNSC, acting under Chapter VII of the Charter of the United Nations adopted Resolution 1593 (2005) referring the situation in Darfur to the Court. The UNSC decided in the context of cooperation with and assistance to the Court that:

⁵ [REDACTED].

⁶ Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to the UNSCR 1593 (2005), <http://www.icc-cpi.int/iccdocs/otp/20th-UNSC-Darfur-report-ENG.PDF>, para. 1; Twenty-First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), <http://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Darfur-%20Sudan.pdf>, para. 1.

⁷ [REDACTED].

⁸ [REDACTED].

the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urge[d] all States and concerned regional and other international organizations to cooperate fully.⁹

8. On 27 August 2009, Pre-Trial Chamber I (“PTC I”) issued a summons to appear for Mr BANDA.¹⁰ PTC I found reasonable grounds to believe that a summons to appear was sufficient to ensure Mr BANDA’s appearance before the Court, without prejudice to its power to review its determination under articles 58(1) and 58(7) of the Statute at a later stage.¹¹
9. On 7 March 2011, PTC I confirmed charges against Mr BANDA.¹² Mr BANDA is charged with three counts of war crimes: (i) violence to life and attempted violence to life – article 8(2)(c)(i); (ii) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations – article 8(2)(e)(iii); and (iii) pillaging a town or place, when taken by assault – article 8(2)(e)(v).¹³
10. On 11 September 2014, Trial Chamber IV (“Chamber”) issued the Arrest Warrant replacing the original summons for Mr BANDA.¹⁴ In its Arrest Warrant, the Chamber directed the Registry to “prepare a request for cooperation seeking the arrest and surrender of Mr Abdallah Banda Abakaer Nourain pursuant to Articles 89(1) and 91 of the Statute and Rule 187 of the Rules; [and] transmit, in consultation and coordination with the prosecution,

⁹ Resolution 1593 (2005), adopted by the UNSC at its 5158th meeting, on 31 March 2005, S/RES/1593 (2005), Operative Paragraph 2.

¹⁰ ICC-02/05-03/09-3.

¹¹ ICC-02/05-03/09-3, para. 20.

¹² ICC-02/05-03/09-121-Corr-Red.

¹³ ICC-02/05-03/09-79-Red, pp. 42-44.

¹⁴ ICC-02/05-03/09-606.

the request to the competent authorities of Sudan and any other state as may be appropriate in accordance with Rule 176(2) of the Rules".¹⁵

11. On 16 January 2015, the Registry issued a request for cooperation to Sudan seeking the arrest and surrender of Mr BANDA pursuant to articles 89(1) and 91 of the Statute ("Request for Arrest and Surrender"), identifying Darfur, Sudan as the "[p]robable location" of Mr BANDA.¹⁶

12. [REDACTED].¹⁷

Sudan has continually refused to cooperate with the Court

13. Sudan has a long history of refusal to cooperate with the Court. On 25 May 2010, PTC I informed the UNSC about the lack of cooperation by Sudan in relation to Mr Harun and Mr Ali Kushayb.¹⁸ The decision stressed "that the obligation of the Republic of the Sudan to cooperate with the Court stems directly from the Charter of the United Nations and Resolution 1593."¹⁹ PTC I found Sudan in non-compliance in relation to the enforcement of the warrants of arrest against Mr Harun and Mr Kushayb, and ordered the Registrar to communicate the decision to the UNSC.²⁰

14. More recently, on 9 March 2015, Pre-Trial Chamber II ("PTC II") issued a decision on the Prosecutor's request for a finding of non-compliance against Sudan in relation to Mr Al Bashir.²¹ PTC II found that Sudan had failed to cooperate with the Court by deliberately refusing to liaise with the relevant organs of the Court, and execute the pending requests for the arrest and

¹⁵ ICC-02/05-03/09-606, para. 26(iv).

¹⁶ ICC-02/05-03/09-626. [REDACTED].

¹⁷ [REDACTED].

¹⁸ ICC-02/05-01/07-57.

¹⁹ ICC-02/05-01/07-57, p. 6.

²⁰ ICC-02/05-01/07-57, pp.7-8.

²¹ ICC-02/05-01/09-227.

surrender of Mr Al Bashir, thus preventing the Court from exercising its functions and powers under the Statute. PTC II found further that Sudan had failed to consult the Court in accordance with article 97 of the Statute and rule 195(1) of the Rules on any problem(s) which could have impeded the execution of the requests for arrest and surrender of Mr Al Bashir.²² PTC II made a similar finding in the case against Mr Hussein more recently.²³

15. In addition to the evidence above of non-cooperation, Sudan has persistently made official statements that illustrate and underscore its refusal to cooperate with the Court, demonstrating a state policy of deliberate non-cooperation with the Court.

16. After the Prosecutor's 17th briefing to the UNSC on 5 June 2013, Sudan's Permanent Representative to the UN, Daffa-Alla Elhag Ali Osman stated that:

[t]he Prosecutor's demand that we implement the arrest warrants issued against President Omer (*sic*) Hassan A. Al-Bashir and other Sudanese officials is unacceptable because it is based on faulty logic. What is based on wrong is of necessity wrong itself.²⁴

17. In addition, in a statement to the UNSC on 11 December 2013, Mr Elhag Ali Osman asserted:

I should like to say, for the purposes of the record of this meeting, that our participation today does not mean that we recognize the International Criminal Court (ICC) or that we are going to cooperate with it, since the Sudan is not a party to the Rome Statute.²⁵

²² ICC-02/05-01/09-227, p. 10.

²³ ICC-02/05-01/12-33.

²⁴ UNSC, 6974th meeting, 5 June 2013 (S/PV.6974), Reports of the Secretary-General on the Sudan, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6974 (last visited on 15 October 2015), p. 17. The Permanent Representative also stated that: "Other claims that the Sudanese Government is not making the required effort to cooperate are false. We are cooperating in removing all obstacles facing the Office of the Prosecutor. The visit of Ms. Valerie Amos, Under-Secretary-General for Humanitarian Affairs Emergency Relief Coordinator, to the Sudan in May is proof of that cooperation" (p. 18).

²⁵ UNSC, 7080th meeting, 11 December 2013 (S/PV.7080), Reports of the Secretary-General on the Sudan and South Sudan, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7080 (last visited on 15 October 2015), p. 4.

18. Similarly, in December 2014, after the Prosecutor's address to the UNSC on the situation in Darfur, Mr Al Bashir was quoted as saying "[i]t is the people of Sudan who stood firm and said that no Sudanese official shall surrender to colonial courts at The Hague or anywhere else."²⁶ In March 2015, the Information Minister, Ahmed Bilal Osman reaffirmed Sudan's policy of non-cooperation, claiming that "[t]he decisions of the ICC are not in any way binding to the Sudanese government", and "it doesn't scare Sudan at all."²⁷
19. As PTC II noted in its decision finding Sudan in non-compliance in the case against Mr Hussein,²⁸ Sudan has a "history of determined and consistent failure to comply with UNSC Resolution 1593", and that this refusal to comply "dates back to the first warrants of arrest issued in the situation in Darfur, [and] has emerged as a constant feature ever since".²⁹
20. From the information above, there can be no question as to Sudan's continued wilful non-cooperation with the Court in relation to the outstanding Arrest Warrant against Mr BANDA.

Efforts by the Prosecution to encourage cooperation from Sudan have failed

21. In the two briefings before the UNSC since the issuance of the warrant of arrest against Mr BANDA, the Prosecutor has stressed the necessity of arresting and surrendering Mr BANDA to the Court. In her 20th and 21st Reports to the UNSC, on 15 December 2014 and 29 June 2015 respectively, the Prosecutor noted that Mr BANDA remained at large in Sudan, and called on

²⁶ BBC, news article, "Sudan President Bashir hails 'victory' over ICC charges" <http://www.bbc.com/news/world-africa-30467167> (last visited on 15 October 2015).

²⁷ NDTV, news article, "Sudan Brands International Criminal Court 'Failure' For Referring President Omar Al-Bashir to UN", 13 March 2015, <http://www.ndtv.com/world-news/sudan-brands-international-criminal-court-failure-for-referring-president-omar-al-bashir-to-un-746233> (last visited on 15 October 2015).

²⁸ ICC-02/05-01/12-33.

²⁹ ICC-02/05-01/12-33, para. 7.

the Government of Sudan to abide by its obligation to immediately arrest and surrender Mr BANDA to the Court, in addition to the other four main suspects still at large in the country – Mr Al Bashir, Mr Hussein, Mr Harun and Mr Kushayb.³⁰

22. These briefings have not resulted in any cooperation by Sudan. On the contrary, as shown above, Sudan has specifically rebuffed these efforts to secure cooperation by [REDACTED] of the Court's Arrest Warrant against Mr BANDA.³¹

The Chamber should make a finding of non-compliance against Sudan and refer the matter to the UNSC

23. As stated above, the Court's work is being frustrated and blocked by Sudan. The victims and witnesses who have patiently waited for the trial to commence have only seen multiple trial dates vacated, with no start date set because of the failure of Mr BANDA to appear and the failure of Sudan to arrest and surrender him to the Court.

24. Accordingly, it is ripe for the Court to find Sudan in non-compliance and refer the matter to the UNSC. It is evident that Sudan is not going to cooperate, and thus the Court should take utmost steps to prompt cooperation so that it can achieve its mandate to try those persons - such as Mr BANDA - accused of committing serious crimes of concern to the international community as a whole.

25. Under article 87(7) of the Statute, the Chamber may make a finding of non-compliance and transmit it to the Assembly of States Parties or, where the

³⁰ See note 6 above.

³¹ See paras. 4 and 12 above.

matter has been referred to the Court, to the UNSC. The Court has already found that once there has been a UNSC referral of a situation of a non-State party, the entire legal framework of the Statute, particularly Part IX on cooperation, applies.³² Prior to making a finding of non-compliance against a State and referring the matter to the Assembly of States Parties or the UNSC, regulation 109(3) of the Regulations of the Court requires the Chamber to “hear from the requested State”. However, given Sudan’s demonstrated deliberate policy of non-recognition of the ICC, let alone its obstructive non-cooperation, Sudan’s right to be heard has been waived. Indeed, PTC II has already found that:

Sudan has constantly refused to engage in any sort of dialogue with the responsible organs of the Court, as of 2009 and for over six years. As such, the Chamber considers that Sudan has waived its right to be heard on the matter.³³

26. In the *Gaddafi* Decision, the Court made a formal finding of non-compliance against a non-State party for the failure to surrender a person against whom there was an outstanding arrest warrant.³⁴ Libya was found to be in non-compliance for, *inter alia*, not surrendering Saif Al-Islam Gaddafi.³⁵ Critically, this finding was made despite the fact that the Chamber accepted that Libya had exhibited “commitment to the Court”,³⁶ “recognis[ing] the genuine efforts made by Libya to maintain a constructive dialogue with the Court”³⁷ – a situation that is opposite to the position of Sudan.

27. Unlike Libya, Sudan continues its policy of non-recognition of the Court and total non-cooperation. There is no prospect for consultation and no prospect

³² ICC-01/11-01/11-163, paras. 28-30; see also ICC-01/11-01/11-72, para. 12.

³³ ICC-02/05-01/12-33, para. 17. See also ICC-02/05-01/09-227, para. 19.

³⁴ ICC-01/11-01/11-577.

³⁵ Also, for not returning originals of privileged documents seized from Saif Al-Islam Gaddafi’s former counsel.

³⁶ ICC-01/11-01/11-577, para. 31.

³⁷ ICC-01/11-01/11-577, para. 33.

for cooperation. A formal finding of non-compliance pursuant to article 87(7) of the Statute and referral to the UNSC is the only avenue left to the Court to effect cooperation and to enable the Court to discharge its functions. In light of the above, the Chamber ought to make a judicial determination that Sudan has failed to comply with its obligation, pursuant to UNSC Resolution 1593 and the Arrest Warrant and consequently refer the matter to the UNSC, through the President of the Court.³⁸

28. Lastly, in addition to making a finding of non-compliance against Sudan and referring the matter to the UNSC, the Prosecution invites the Chamber to stress to the UNSC that the mandate entrusted to the Court by UNSC Resolution 1593 is in danger of becoming meaningless if Sudan is permitted to openly ignore its international obligations that derive from UNSC Resolution 1593, and therefore, from the Rome Statute.

29. Concerted action by the UNSC is necessary in order to ensure that UNSC Resolution 1593 is fully implemented. As PTC II has stated, when the UNSC referred the situation in Darfur, Sudan to the Court, it did so because it determined that the situation in Sudan constituted a threat to international peace and security under Chapter VII of the UN Charter. Having done so – PTC II points out – “it might be expected that the Council might also consider deciding on a follow-up”.³⁹

³⁸ Regulation 109(4) of the Regulations of the Court.

³⁹ ICC-02/05-01/12-33, para. 15.

Relief Sought - Request for a finding of non-compliance

30. For the above reasons, the Prosecution requests that the Chamber issue a finding of non-compliance by Sudan in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, pursuant to article 87(7), and notify its decision to the President of the Court for transmission to the UNSC.



Fatou Bensouda,
Prosecutor

Dated this 16th day of October 2015
At The Hague, The Netherlands