

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/05-03/09**

Date: **11 October 2019**

TRIAL CHAMBER IV

Before: Judge Kimberly Prost, Presiding Judge
Judge Robert Fremr
Judge Reine Alapini-Gansou

SITUATION IN THE DARFUR, SUDAN

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

**Public Redacted Version
with Public annexes V and VI**

“Second Update to ‘Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court’”, submitted on 12 September 2019

Source: Charles Achaleke Taku, Associate Counsel for Abdallah Banda

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. Julian Nicholls

Counsel for the Defence

Chief Charles Achaleke Taku

Mr. Anand Shah

Legal Representatives of the Victims

Ms. Hélène Cissé

Mr. Jens Dieckmann

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Dr. Esteban Peralta-Losilla

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. Chief Charles Achaleke Taku, associate counsel (“Associate Counsel”) for Mr. Abdallah Banda Abakaer Nourain (“Mr. Banda”), submits this second update to “Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court”, filed on 27 August 2019 before Trial Chamber IV.¹
2. Associate Counsel attaches as confidential and *ex parte* **Annex I** a video recorded on and received from Mr. Banda on 11 September 2019, in which Mr. Banda executes a verbal appointment and power of attorney in favour of Associate Counsel as Mr. Banda’s lead counsel before the ICC in case ICC-02/05-03/09 (“Appointment and Power of Attorney”). An English transcription and translation of the Zaghawa and Arabic language spoken in the video is provided in confidential and *ex parte* **Annex II**.
3. Associate Counsel submits that the Appointment and Power of Attorney is self-authenticating or at the very least may be sufficiently authenticated by information in the Court’s possession (see public annexes **V** and **VI** hereto). It should be considered to meet the requirements of regulation 123(1) of the Regulations of the Registry (“RoR”) in respect of a validly executed and authenticated power of attorney and/or appointment of counsel.
4. Notwithstanding the above submission, Associate Counsel maintains his request² that the Trial Chamber act pursuant to Regulation 76(1) of the Regulations of the Court (“RoC”)³ to acknowledge Associate Counsel’s

¹ ICC-02/05-03/09-658-Conf-Exp (“Regulation 76 Request”).

² *Id.* at para. 36.

³ Associate Counsel corrects for the record the reference at paragraph 6 of the Regulation 76 Request to a prior version of Regulation 76(1) of the RoC. The version of Regulation 76(1) in force reads as follows: “A Chamber, following consultation with the Registrar and, when appropriate, after hearing from the person entitled to legal assistance, may appoint counsel in the circumstances specified in the Statute, Rules and these Regulations or where the interests of justice so require. This may include the appointment of standby counsel, if appropriate.”

appointment as Mr. Abdallah Banda Abakaer Nourain's lead counsel before the ICC. The Trial Chamber's acknowledgement of Associate Counsel's appointment would be in the interests of justice, and would best preserve the interests of the client and the good administration of justice, pending any potential review, analysis and consideration of the Appointment and Power of Attorney that the Counsel Support Section and other relevant sections of the Registry may wish to undertake.

II. Classification

5. Pursuant to Regulation 23*bis* of the RoC this filing is classified as confidential and *ex parte* available only to the Counsel Support Section and Defence as it refers to filings that are so classified, [REDACTED].

III. Recent procedural history

6. On 27 August 2019, Associate Counsel submitted the Regulation 76 Request.
7. On 2 September 2019, Trial Chamber IV ordered the Registry to submit its observations on the Regulation 76 Request.⁴
8. On 9 September 2019, Associate Counsel submitted the "Update to 'Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court'",⁵ advising that during a phone call on 7 September 2019, "Mr. Banda provided his verbal consent and authorisation for Associate Counsel to be appointed as his lead counsel".⁶ [REDACTED].⁷

⁴ See Registry's observations in relation to the legal representation of Abdallah Banda Abakaer Nourain, 9 September 2019, ICC-02/05-03/09-660-Conf-Exp ("Registry Observations"), para. 1.

⁵ ICC-02/05-03/09-659-Conf-Exp ("First Update").

⁶ *Id.* at para. 2.

⁷ *Id.* at para. 3(ix).

9. Subsequently, on 9 September 2019, the Registry filed the Registry Observations.

The Registry submitted, *inter alia*, that

the issuance of either a power of attorney or an appointment of counsel in writing, pursuant to regulation 123(1) of the RoR, is required for the appointment of counsel as the Court must be certain that representations made by a lawyer in fact reflect the position of the accused person. To confirm that the counsel purportedly representing the accused's interests is indeed the counsel of the accused's own choosing in accordance with article 67(1)(d) of the Rome Statute, the established practice is that an officer of the Registry physically verifies the authenticity of the power of attorney by meeting with the person purportedly issuing the document to ensure that it accurately reflects his or her instructions or, in the alternative, by a notarised document.⁸

10. The Registry Observations, referring to the Regulation 76 Request and First Update, further noted [REDACTED] submit either a power of attorney or a notarised document appointing a new counsel to represent him in the proceedings before the Court” and that “[a]ccordingly, in absence of such documentation, the Registry is not in a position to verify the authenticity of the power of attorney and confirm the appointment”.⁹

11. In the Registry’s view, it is therefore “for the Chamber to decide, in accordance with regulation 76(1) RoC, whether to appoint Mr Taku as Lead Counsel in the interests of justice”.¹⁰ The Registry finally “point[ed] out that in circumstances such as those described in the [Regulation 76] Request, regulation 76(1) RoC allows for the possibility of appointing counsel without hearing from the accused”.¹¹

⁸ Registry Observations, para. 10.

⁹ *Id.* at para. 11.

¹⁰ *Id.* at para. 12.

¹¹ *Ibid.*

IV. Submissions

12. Associate Counsel respectfully advises the Trial Chamber, [REDACTED],¹² [REDACTED] the Defence's receipt from Mr. Banda [REDACTED] on 11 September 2019 at 13h37, the Appointment and Power of Attorney.
13. In the Appointment and Power of Attorney Mr. Banda, speaking primarily in Zaghawa as well as in Arabic, [REDACTED].¹³ [REDACTED].¹⁴
14. Associate Counsel additionally attaches: [REDACTED] a capture of a still image from a video recording of Mr. Banda's initial appearance before the Court on 17 June 2010 (public **Annex V**); and the fact sheet available on the Court's website on Mr. Banda's case, which contains a picture of Mr. Banda from his initial appearance before the Court (public **Annex VI**).
15. Associate Counsel submits that the "established practice"¹⁵ of the Registry in relation to properly executed and authenticated powers of attorney or appointment of counsel documentation must, in appropriate circumstances, and given the *sui generis* nature of the Court's territorial and substantive jurisdiction, be expanded or read to include video execution of powers of attorney and appointments of counsel. Associate Counsel posits that a video execution by a defendant of a power of attorney or appointment of counsel may well provide better proof of veracity of "the position of the accused person"¹⁶ in respect of his or her representation before the Court in comparison to a notarised document given the inherent limitations on the Registry's ability to conduct the necessary investigation into and verification of the credentials and background of the

¹² First Update, para. 3(ix).

¹³ See confidential and *ex parte* Annex II.

¹⁴ *Ibid.*

¹⁵ Registry Observations, para. 10.

¹⁶ *Ibid.*

notarizing authority, as well as the circumstances in which the notarization took place.

16. Associate Counsel further submits that a review of the video and audio of the Appointment and Power of Attorney, when evaluated alongside the other items annexed to this filing as well as the video recording of Mr. Banda's initial appearance before the Court,¹⁷ more than sufficiently authenticates the identity of the individual appearing and speaking in the Appointment and Power of Attorney as Abdallah Banda Abakaer Nourain.
17. Associate Counsel, noting all of the relevant circumstances identified in the Rule 76 Request,¹⁸ First Update,¹⁹ the current filing, as well as the Registry's relevant submissions,²⁰ respectfully submits that [REDACTED] execute a valid and authenticated appointment of counsel and power of attorney in favour of Associate Counsel.
18. To the extent that the Registry may harbour any procedural concerns with respect to the Appointment and Power of Attorney, Associate Counsel submits that the requirements of Regulation 76(1) of the RoC have been satisfied,²¹ and that the Trial Chamber should act under its own authority to acknowledge Associate Counsel's appointment as Mr. Banda's lead counsel before the Court in the interests of justice.

¹⁷ A video recording of portions of Mr. Banda's initial appearance before the Court is available at the following link: <https://www.youtube.com/watch?v=YvFXgt-gRE0&list=PLCF9EB200B6EE0E36&index=2&t=70s>.

¹⁸ Rule 76 Request, para. 34.

¹⁹ First Update, para. 3.

²⁰ Registry Observations, para. 12 (*"The Registry points out that in circumstances such as those described in the [Regulation 76] Request, regulation 76(1) RoC allows for the possibility of appointing counsel without hearing from the accused."*)

²¹ Associate Counsel submits that, to the extent the Trial Chamber wishes to consider the matter, the recorded Appointment and Power of Attorney may be deemed to satisfy the element of the Chamber having heard from the accused pursuant to Regulation 76(1) of the RoC.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read 'Charles Taku', is written over a horizontal line.

Chief Charles Achaleke Taku
Associate Counsel for Abdallah Banda Abakaer Nourain

Dated this 11th Day of October 2019
At Maryland, United States of America