

**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

**Public redacted version of “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**

Source: The Registry

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

The Office of the Prosecutor

Counsel for the Defence of Mr Banda

Mr Charles Achaleke Taku

Mr Anand Shah

Legal Representatives of the Victims

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

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Following the order of Trial Chamber IV (“Chamber”) of 2 September 2019,¹ the Registry hereby transmits its observations on “Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court” (“Request”).²

Classification

2. This submission is classified as confidential *ex parte* Defence for Mr Banda and Registry only in accordance with regulation 23*bis*(1) of the Regulations of the Court (“RoC”) as it contains sensitive information pertaining to Mr Banda’s legal representation before the Court.

Applicable Law

3. The present submission is based on regulations 13 and 123 of the Regulations of the Registry (“RoR”) and regulation 76(1) of the Regulations of the Court (“RoC”).

Procedural history

4. On 16 July 2018, Mr Karim Khan, then Lead Counsel for Mr Banda, submitted “Lead Counsel’s Request Pursuant to Regulation 78(1) of the Regulations of the

¹ Email from the Associate Legal Officer of Trial Chamber IV to Registry on 2 September 2019 at 14.00.

² Trial Chamber IV, “Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court”, 27 August 2019, ICC-02/05-03/09-658-Conf-Exp (“Request”).

Court” (“Withdrawal Request”)³ requesting the Chamber’s permission to withdraw as Lead Counsel for Mr Banda.

5. On 23 July 2018, the Chamber authorised the withdrawal of Mr Khan, which “shall only take effect once new counsel has been appointed for Mr Banda”.⁴

6. On 27 August 2019, the Associate Counsel for Mr Banda submitted the Request, where he requested the Chamber to “acknowledge the appointment of Associate Counsel as Mr. Abdallah Banda Abakaer Nourain’s lead counsel before the ICC, at the very least on an interim basis”.⁵

7. On 9 September, the Associate Counsel for Mr Banda submitted the update to his Request, where he states that a phone call between Mr Banda and his Defence team took place on 7 September 2019 and that “Mr. Banda provided his verbal consent and authorisation for Associate Counsel to be appointed as his lead counsel in case ICC-02/05-03/09 with immediate effect.”⁶

Submissions

8. On 31 May 2018, Mr Khan was appointed United Nations Special Advisor and Head of the Investigative Team established pursuant to UN Security Council Resolution 2379 and the “nature of and responsibilities arising from this new mandate [...] result[ed] in [him] being unavailable to continue to represent Mr. Banda in the present case”.⁷

³ Trial Chamber IV, “Lead Counsel’s Request Pursuant to Regulation 78(1) of the Regulations of the Court”, 16 July 2018, ICC-02/05-03/09-652 (“Withdrawal Request”).

⁴ Trial Chamber IV, “Decision on withdrawal of counsel”, 23 July 2018, ICC-02/05-03/09-654, para. 5.

⁵ Request, para. 36.

⁶ Trial Chamber IV, “Update to “Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court””, ICC-02/05-03/09-659-Conf-Exp, 9 September 2019 (“Update on the Request”), para 2.

⁷ Withdrawal Request, para. 2.

9. The Registry notes that “as of 28 July 2018, Mr Khan QC has not been involved in conducting Mr. Banda’s representation before the ICC”⁸ and that “[a]ll work and decisions in relation to Mr. Banda’s representation [...] have been undertaken by [Mr Charles Achaleke Taku, Associate Counsel,⁹ and Mr Anand Ajay Shah, Associate Counsel¹⁰].”¹¹ The Registry confirms that it has not been in contact with Mr Khan, for the purposes of the case, since that date.

10. The Registry further submits 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.

11. [REDACTED],¹² notwithstanding Mr Taku’s latest submission referring to the verbal consent and authorisation received from Mr Banda to appoint the Associate Counsel as his Lead Counsel,¹³ [REDACTED] submit either a power of attorney or a notarised document appointing a new counsel to represent him in the proceedings before the Court. Accordingly, 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.

⁸ Request, para. 13.

⁹ Trial Chamber IV, “Registration of the appointment of Mr Charles Achaleke Taku as Associate Counsel for Mr Abdallah Banda Abakaer Nourain”, 16 July 2018, ICC-02/05-03/09-653.

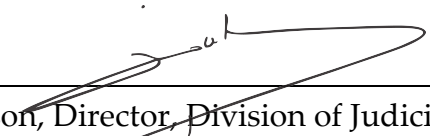
¹⁰ Trial Chamber IV, “Registration of the appointment of Mr Anand Ajay Shah as Associate Counsel for Mr Abdallah Banda Abakaer Nourain”, 4 July 2018, ICC-02/05-03/09-651.

¹¹ Request, para. 13.

¹² [REDACTED].

¹³ Update on the Request, para. 2.

12. Therefore, as the requirements of regulation 123(1) RoR are not met, it is 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. The Registry points out that in circumstances such as those described in the Request, regulation 76(1) RoC allows for the possibility of appointing counsel without hearing from the accused.¹⁴



Marc Dubuisson, Director, Division of Judicial Services
on behalf of
Peter Lewis, Registrar

Dated this 11 October 2019

At The Hague, The Netherlands

¹⁴ Regulation 76(1) states, in relevant part, that “[a] Chamber [...] *when appropriate*, after hearing from the person entitled to legal assistance, may appoint counsel [...] or where the interests of justice so require.” [Emphasis added].