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TRIAL CHAMBER IV

Before: **Judge Kimberly Prost, Presiding Judge**
Judge Reine Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN THE DARFUR, SUDAN

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

Public

with one confidential annex

Public redacted version of "Registry's observations on "Defence Request Pursuant to Regulation 83(4) of the Regulations of the Registry" (ICC-02/05-03/09-720-Conf-Exp, 19 July 2023)"

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**
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 Osvaldo Zavala Giler	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

I. Introduction

1. Following Trial Chamber IV's ("Chamber") email instruction on 25 July 2023,[1] the Registrar hereby submits his observations on the "Defence Request Pursuant to Regulation 83(4) of the Regulations of the Registry" ("Request") submitted by [redacted] Lead Counsel for Mr Abdallah Banda Abakaer Nourain ("Defence").[2]

II. Procedural history

2. On 10 March 2016, the Registrar granted "a limited amount (capped at [six thousand and five hundred euros] per month) to the [Defence] in order to cover the needs for the Defence".[3]

3. On 25 September 2019, after considering particular circumstances of the case,[4] the Chamber appointed "Mr Taku as Lead Counsel pursuant to Regulation 76(1) of the Regulations."[5] In this decision, the Chamber indicated that the "appointment of Lead Counsel of Mr Banda's choosing has the potential to facilitate communication and cooperation between Mr Banda and the Court with a view to his appearance to face trial" ("Defence mandate").[6]

4. On 15 November 2022, the Registry informed the Defence about the change in the allocation of resources, specifically that from 15 December 2022 until 15 March 2023 the team will receive a maximum lump sum of €5,000 for the purpose of "securing the

[1] Email from Trial Chamber IV to Registry on 25 July 2023 at 10.34.
[2] Banda Defence, "Defence Request Pursuant to Regulation 83(4) of the Regulations of the Registry", ICC-02/05-03/09-720-Conf-Exp, 19 July 2023 ("Request").
[3] Banda Defence, "Annex 2 to the Request for Review of Registry's Decision on legal assistance," ICC-02/05-03/09-668-Conf-Exp-Anx2, dated 23 October 2019 and registered on 24 October 2019.
[4] Trial Chamber IV, "Decision on Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court", ICC-02/05-03/09-664-Conf-Exp, 25 September 2019 ("Chamber 2019 Decision"), para. 11: "Mr Taku's efforts and achievements in increasing the Defence's contact with Mr Banda over the last months, as well as Mr Banda's purported continued willingness to appear before the Court, provided that there is no fear of retribution against his family".
[5] Chamber 2019 Decision, para. 12.
[6] Chamber 2019 Decision, para. 11.

presence of Mr Banda at the Seat of the Court" ("15 November 2022 Decision").[7] In view of the flexibility principle under the "Registry's single policy document on the Court's legal aid system" ("Legal Aid Policy"),[8] Counsel could distribute the allocated resources among the team members for the work effectively carried out. In addition, the Registry informed the Defence that "due to limited resources available" interpretation services to the Defence will be provided "two times per month in order to facilitate communication of the team with Mr Banda".[9]

5. On 26 April 2023, after the Defence has fully exhausted the allocated amount of €5,000, as per the terms of the 15 November 2022 Decision, the Registry requested the Defence to provide "the relevant justifications and information in relation to [...] [the] specific mandate and purpose of the recent financial assistance, *i.e.* securing the presence of Mr Banda at the seat of the Court as per the Chamber's decision (ICC-02/05-03/09-664-Conf-Exp, 25 September 2019) [...]" ("26 April Request").[10]

6. On 28 April 2023, the Defence provided justifications and requested that "the budget of the Banda team be doubled, [redacted] an expenses budget be provided and the appropriate mission approved for the Defence to meet Mr Banda as he has requested. And the payment of the Defence be backdated to 15 March 2023 based on the timesheets [...] submitted" ("28 April Request").[11]

7. On 8 June 2023, the Registry issued a decision on the 28 April Request ("8 June Decision").[12] In this decision, while referring to the Defence mandate, the Registry indicated that "[w]ithout any concrete change in circumstance as to Mr Banda's appearance before the Court to face trial, the Registry will not remunerate the

[7] Annex I.
[8] Registry's single policy document on the Court's legal aid system, ICC-ASP/12/3, 4 June 2013 ("Legal Aid Policy"), para. 9.
[9] 15 November 2022 Decision.
[10] Email from Registry to the Defence on 26 April 2023 at 10.50.
[11] Banda Defence, Annex 1 to the "Defence Request Pursuant to Regulation 83(4) of the Regulations of the Registry", ICC-02/05-03/09-720-Conf-Exp-Anx2, 19 July 2023 ("28 April Request").
[12] Banda Defence, Annex 1 to the "Defence Request Pursuant to Regulation 83(4) of the Regulations of the Registry", ICC-02/05-03/09-720-Conf-Exp-Anx1, 19 July 2023 ("8 June Decision").

Defence." The Registry also informed the Defence that it "will continue to provide a Zaghawa interpreter as per the [15 November 2022 Decision]" and "will remunerate the fees for a Counsel during these phone communications, with the maximum of 2 hours per communication, based on a clear explanation" ("Defence resources").

8. On 19 July 2023, the Defence submitted the Request, in which it requests the Chamber to 1) "review the Defence's request for full funding for a period of three months, which includes field missions [...] and grant the amount requested, including a review of funding after the three months (if necessary)", and 2) "to order the funding of an interpreter for five days per month for the purpose of speaking with its client in attempts to fulfil [Defence] strategy **[...].**"[13]

III. Classification

9. In accordance with regulation 23 *bis* (2) of the Regulations of the Court ("RoC"), the present observations and its annex are classified as confidential *ex parte* only available to the Defence and Registry because they refer to the Request with the same level of classification.

IV. Applicable Law

10. The present observations are made in consideration of article 67 of the Rome Statute ("Statute"), regulations 76, 83 and 85 of the RoC and regulations 123 and 130 of the Regulations of the Registry ("RoR"), as well as the Legal Aid Policy.

[13] Request, paras 30, 31.

V. Observations

1. *The Request is inadmissible as it has been submitted after the applicable 15-days deadline*

11. The Defence filed the Request pursuant to regulation 83(4) of the RoC, which provides that "[d]ecisions by the Registrar on the scope of legal assistance paid by the Court [...] may be reviewed by the relevant Chamber on application by the person receiving legal assistance." According to regulation 135(2) of the RoR, "counsel may request the Chamber to review any decision" of the Registrar relating to a dispute concerning the calculation and payment of fees or the reimbursement of expenses "within 15 calendar days of notification."

12. This Chamber previously considered an appeal on the matter of resources submitted by the Defence and applied both regulation 83(4) of the RoC and regulation 135(2) of the RoR together when determining whether said appeal complied with the legal framework of the Court.[14] Therefore, considering that the Request has been submitted on 19 July 2023, which is 41 calendar day of the Decision's notification (i.e. 8 June 2023), the Registrar submits that the Request is time barred and should be dismissed.

2. *The requested resources do not fall within the scope of the mandate of the Defence to facilitate communication and cooperation with Mr Banda*

13. The Defence argues that by reducing the funding, "the Registry erroneously discounted the Defence's strategy",[15] which is to conduct missions to interview witnesses in order to prepare its case-in-chief.[16] The Defence further argues that having

[14] Trial Chamber IV, "Decision on the Defence request for review of Registry decision on Defence resources", ICC-02/05-03/09-678-Conf-Exp, 27 January 2020, para. 5.
[15] Request, para. 29.
[16] Request, paras 16, 17.

a strong case-in-chief and being ready for trial so as to ensure that the case "[is] heard expeditiously"[17] is a condition for Mr Banda to appear before the Court.[18]

14. The Registry notes that the Chamber appointed Counsel for Mr Banda pursuant to regulation 76(1) of the RoC in order "to facilitate communication and cooperation between Mr Banda and the Court with a view to his appearance to face trial."[19] Therefore, in view of the Registrar, the Defence mandate is strictly limited to this scope and contrary to the assertions made by the Defence in the Request, does not include activities related to the preparation of the case. The Registrar further notes that the detailed assessment of the Defence's timesheets, including for the period preceding the 15 November 2022 Decision, demonstrated that communication with Mr Banda or intermediary and related activities, such as preparing text messages for translation and analysing them, constituted a minor portion of the reported activities. The main activities related to reading and analysing case records; reviewing transcripts, witness statements, evidence and other documents such as newspaper articles and reports.

15. Furthermore, regarding the prospects of Mr Banda's appearance before the Court, the Registrar recalls that the Chamber "re-emphasise[d] to the Defence that the discussions should be confined to finding *reasonable* and *realistic* solutions in light of the Court's limitations."[20] The Registrar further notes that the Chamber stated that "should Mr Banda wish to proceed with plans to appear before the Court, he can communicate that to the Registry – directly or through Counsel – so that logistical arrangements can be made."[21] To date, the Registry did not receive any such request from Mr Banda or his Counsel. In fact, since the appointment of Counsel for Mr Banda,

[17] 28 April Request, para. 6.
[18] See also 28 April Request, paras 2, 4 and 6. See also Banda Defence, "Defence Urgent Request for an Order to the Registry to Allow the Defence to Speak with its Client and Potential Witnesses", ICC-02/05-03/09-718-Conf-Exp, 12 October 2022, para. 32.
[19] Chamber 2019 Decision, para. 11.
[20] Second Order, para. 7.
[21] Trial Chamber IV, "Decision to end mandated facilitation discussions and reports by the Registry", ICC-02/05-03/09-705-Conf-Exp, 21 July 2021, para. 11.

no evidence has been provided to support the claim that Mr Banda is willing to appear before the Court allowing the Registry to make logistical arrangements as appropriate.

16. In accordance with the principle of objectivity stipulated in the Legal Aid Policy, "[t]he payment system allocates resources on the basis of the requirements of the case and not on the basis of subjective requirements."[22] Therefore, in line with its discretionary authority as recognised by the Chamber,[23] the Registrar is of the view that the resources allocated and assistance provided to the Defence are sufficient to ensure continuous efforts at "finding *reasonable* and *realistic* solutions in light of the Court's limitations"[24] for Mr Banda's appearance before the Court.

3. *The linguistic assistance provided by the Registry to the Defence is reasonable and appropriate to maintain communications with Mr Banda at the current stage of the proceedings*

17. The Defence alleges that "the Registry's limitations to interpretation services not only stifles the Defence from completing the Chamber's order to attempt to have the client appear before the Chamber but violates Article 67(1) (b) and (f) of the Rome Statute."[25]

18. The Registrar notes that article 67(1) of the Statute provides that "[i]n the determination of any charge, the accused shall be entitled [...]: (b) [t]o have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; [...] (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks [...]".

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[22] See Legal Aid Policy, para. 9.
[23] Trial Chamber IV, "Decision on the Defence request for an order to the Registry to provide the Defence with an interpreter", ICC-02/05-03/09-719-Conf-Exp, 14 October 2023, para. 3.
[24] Second Order, para. 7.
[25] Request, para. 19.

19. Concerning the rights enshrined in article 67(1)(b) of the Statute, the Registrar recalls that "[t]he right to adequate time and facilities for the proper preparation of the defence presupposes that the defence team be afforded sufficient time to conceive, prepare and raise meaningful and effective grounds of defence which are tailored to its case."[26] The Registrar, however, notes that as per the Chamber 2019 Decision, the Defence mandate is limited "to facilitate communication and cooperation between Mr Banda and the Court with a view to his appearance to face trial."[27] Considering this, the Registry understands that the Defence at this stage is not required to prepare its case. The Registry is therefore of the view that sufficient resources are provided by the Registry, and article 67(1)(b) of the Statute is not infringed.

20. Furthermore, article 67(1)(f) of the Statute provides that "the assistance of a competent interpreter" is required "if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks." In accordance with the Court's jurisprudence,[28] absent any ongoing proceedings in the case pending the appearance of Mr Banda, the Registrar is of the view that the resources provided to the Defence, including two interpretations per month during telephone communications and unrestricted translations of audio messages from and into Zaghawa language interpretation as well as *ad hoc* translations of relevant documents on a short notice,[29] are sufficient for the purpose of the Defence mandate (as defined by the Chamber).[30]

21. The Defence further asserts that "[c]onsidering the security situation in Sudan, [...] it is absolutely necessary and vital that counsel be able to schedule more than two days to attempt to contact his client."[31] The Defence argues that "the only reliable mode

[26] Trial Chamber II, "Judgment pursuant to article 74 of the Statute", ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 1572.
[27] Chamber 2019 Decision, para. 11.
[28] Appeals Chamber, "Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 10 July 2020 entitled 'Decision on Defence request under article 67(1)(f) of the Rome Statute'", ICC-02/05-01/20-199, 5 November 2020, para. 30
[29] See also Request, paras 15 and 25.
[30] This further becomes evident from the Registry's 15 November 2022 and 8 June 2023 Decisions.
[31] Request, para. 24.

of communication between the client and counsel is through direct telephone communication."[32] At the same time, the Defence indicates that "it spoke with [Mr Banda] at the beginning of June 2023 for about five minutes, but was only able to give him a brief update."[33] In addition, the Defence acknowledges that "on 1 July 2023, [it] was only able to speak with [Mr Banda] for approximately five minutes because of network issues on both the internet and mobile phone carriers."[34] The Defence further states that "[s]ince the outbreak of violence, the Defence has spoken with its client three times, all of which were between 2-5 minutes long because of network issues in and around Darfur".[35]

22. The Registrar notes that, aside from references to the security situation in Darfur and recent technical issues where Mr Banda was not able to listen to audio messages sent by the Defence,[36] the Request fails to explain why the linguistic assistance provided by the Registry (i.e. two interpretations per month during telephone communications and unrestricted translations of audio messages from and into Zaghawa language) is insufficient.

23. For these reasons, the Registrar is of the view that the modalities of linguistic assistance currently provided to the Defence are reasonable and appropriate to maintain communications with Mr Banda at the current stage of the proceedings.

VI. Conclusion

24. As the Defence fails to submit its request in line with the judicial deadline pursuant to regulation 135(2) of the RoR, the Request ought to be considered as inadmissible and dismissed in its entirety.

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[32] Request, para. 26.
[33] Request, fn. 14
[34] Request, fn. 14.
[35] Request, fn. 22.
[36] Request, para. 25.

25. On the subject matter of the Request, the Defence further fails to provide valid justifications for additional resources to fulfil its mandate as defined in the Chamber 2019 Decision. As such, in the Registrar's view, and under consideration of the reasons provided above, the resources allocated to the Defence in accordance with the 8 June 2023 Decision are sufficient at the current stage of the proceedings.

26. The Registry remains available to assist the Defence to find "reasonable and realistic solutions in light of the Court's limitations' to facilitate Mr Banda's appearance for trial."[37]

Marc Dubuisson, Director, Division of Judicial Services
on behalf of
Osvaldo Zavala Giler, Registrar

Dated this 4 November 2026

At The Hague, The Netherlands

[37] Second Order, para. 7. See also, Trial Chamber IV, "Decision to end mandated facilitation discussions and reports by the Registry", ICC-02/05-03/09-705-Conf-Exp, 21 July 2021, para. 6.