

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **10 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

“Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court”, submitted on 27 August 2019

Source: Charles Achaleke Taku, Lead 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”), hereby respectfully requests the Trial Chamber to appoint him as lead counsel for Mr. Banda, at the very least on an interim basis, pursuant to Regulation 76(1) of the Regulations of the Court (“Regulations”). Associate Counsel submits that such appointment would be in the interests of justice, including the relevant interests of the client and the good administration of justice.

II. Classification

2. This filing is submitted confidential and *ex parte* available only to the defence of Mr. Banda (“Defence”) and the Counsel Support Section (“CSS”) [REDACTED].

III. Applicable Law

3. Article 67(1)(d) of the Rome Statute (“Statute”) establishes, *inter alia*, an accused person’s right to counsel of his or her choice in order to conduct his or her defence before the Court.
4. Rule 22(2) of the Rules of Procedure and Evidence provides that: “Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.”
5. Regulation 78(1) states that before “withdrawing from a case, defence counsel shall seek the leave of the Chamber”.
6. Regulation 76(1) provides that: “A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require”.

IV. Factual Background

A) The status of Mr. Banda and his case before the ICC

7. On 11 September 2014, Trial Chamber IV issued the “Warrant of arrest for Abdallah Banda Abakaer Nourain”,¹ holding, *inter alia*, that “an individual can be obstructed in his willingness or freedom to appear at trial by means other than detention” and that “[i]f these obstacles are such that there are no longer guarantees that he will appear, the Chamber may issue a warrant of arrest”.² The Chamber also undertook, in the event “Mr Banda nonetheless appear[s] voluntarily before the Court”, to take such “voluntary appearance into consideration and revisit accordingly the conditions of his stay in The Netherlands during trial”.³
8. The Chamber further vacated the trial commencement date and “suspend[ed] preparatory measures for the trial as well as rulings for pending filings until Mr Banda’s arrest or voluntary appearance before the Court”.⁴ The Appeals Chamber upheld the Arrest Warrant Decision on 3 March 2015.⁵
9. In the more than four years since the issuance of the Appeals Judgment, no substantive litigation has taken place before the Trial Chamber in relation to Mr. Banda’s case.
10. [REDACTED],⁶ [REDACTED],⁷ [REDACTED].⁸

¹ ICC-02/05-03/09-606 (“Arrest Warrant Decision”). On 15 September 2014, Judge Eboe-Osuji issued a Dissenting Opinion to the Arrest Warrant Decision (ICC-02/05-03/09-606-Anx-Corr).

² Arrest Warrant Decision, para. 23.

³ *Id.* at para. 24.

⁴ *Id.* at para. 26(vii).

⁵ Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest, ICC-02/05-03/09-632-Conf OA 5 (public redacted version ICC-02/05-03/09-632-red OA 5) (“Appeals Judgment”).

⁶ [REDACTED].

⁷ *Id.* at para. 4.

⁸ *Id.* at para. 5.

B) Mr. Banda's representation before the ICC

11. On 16 July 2018, Mr. Karim Khan QC submitted "Lead Counsel's Request Pursuant to Regulation 78(1) of the Regulations of the Court",⁹ requesting the Trial Chamber's permission to withdraw as counsel for Mr. Banda in light of Mr. Khan's appointment on 31 May 2018 as the United Nations Special Advisor and Head of the Investigative Team established pursuant to Security Council Resolution 2379 (2017) – in particular in view of the "nature of and responsibilities arising from this new mandate [which] will result in Lead Counsel being unavailable to continue to represent Mr. Banda in the present case".¹⁰ The Withdrawal Request also noted Associate Counsel Mr. Taku's availability for appointment as Mr. Banda's Lead Counsel.¹¹

12. On 23 July 2018, the Chamber issued its "Decision on the withdrawal of counsel",¹² in which it granted the Withdrawal Request, noted that "[t]he appointment of a new lead counsel is a matter for the Registry's Counsel Support Section"¹³ and stated that "the withdrawal [...] shall only take effect once new counsel has been appointed for Mr Banda".¹⁴

13. The Defence respectfully advises that since the issuance of the Withdrawal Decision, and as of 28 July 2018, Mr. Khan QC has not been involved in conducting Mr. Banda's representation before the ICC, including the taking of any decisions in this regard. All work on and decisions in relation to Mr. Banda's representation before the ICC since the noted date have been undertaken by Associate Counsel, in conjunction with co-associate counsel Anand Shah ("co-associate counsel"), working under the superintendence of Associate Counsel.

⁹ ICC-02/05-03/09-652 ("Withdrawal Request").

¹⁰ *Id.* at para. 2.

¹¹ *Id.* at para. 3.

¹² ICC-02/05-03/09-654 ("Withdrawal Decision").

¹³ *Id.* at para. 4.

¹⁴ *Id.* at para. 5.

C) [REDACTED]

14. [REDACTED] the Defence engaged in discussions with the Counsel Support Section ("CSS") in order to ascertain whether a verbal confirmation from the client that he accepts Associate Counsel's appointment as his lead counsel would be sufficient, at least on an interim basis, for CSS to confirm Associate Counsel's appointment as Mr. Banda's lead counsel. CSS informed the Defence that in order for the Registry to confirm such an appointment, the appointment would need to be performed through a document issued by Mr. Banda and authenticated by a person with legal authority to do so, such as a notary.¹⁵
15. [REDACTED].
16. [REDACTED].
17. [REDACTED] on 13 September 2018, co-associate counsel, with the assistance of a Zaghawa interpreter engaged through the CSS and the Registry's Language Services Section (LSS),¹⁶ was able to [REDACTED] consult with Mr. Banda [REDACTED].
18. [REDACTED].
19. [REDACTED].
20. [REDACTED].
21. [REDACTED].
22. [REDACTED].

¹⁵ The Defence notes that the Registry position in this regard represents a shift in recent years from its previous practice that did allow discretion for the acceptance of un-authenticated appointment documentation. In this regard, see [REDACTED].

¹⁶ [REDACTED].

23. [REDACTED].

24. [REDACTED].

25. [REDACTED].

26. [REDACTED].

27. [REDACTED].

28. [REDACTED].

29. [REDACTED].

30. [REDACTED].

31. [REDACTED].

V. Submissions

32. Associate Counsel respectfully submits that the unique circumstances presented by Mr. Banda's case and status before the ICC, as set out above, weigh heavily in favour of the Trial Chamber exercising its authority and discretion pursuant to Regulation 78(1) of the Regulations, and after consultation with the Registrar, to appoint Associate Counsel as lead counsel for Mr. Banda, at the very least on an interim basis.

33. The interests of justice are served, in the unique circumstances of this case, by the Chamber's appointment of a lead counsel for Mr. Banda who is not precluded by another conflicting mandate from carrying out the duties of lead counsel before the ICC, including being able to best manage and organize the limited resources available to the Defence given the current status of proceedings against Mr. Banda.

34. In sum, Associate Counsel submits that the following factors justify the Chamber's acknowledgement of the appointment of Associate Counsel as lead counsel for Mr. Banda, at the very least on an interim basis:

- i. Mr. Banda is an accused person with respect to whom an arrest warrant has been issued, preparation for trial proceedings have been suspended for close to five years, and no other substantive trial-related issues are live before the Chamber or otherwise foreseeable under present circumstances; the scope of possible matters with respect to which Mr. Banda would require representation before the Court is accordingly greatly circumscribed within this context;
- ii. Associate Council is a member of Mr. Banda's Defence team and has a full understanding of all pertinent legal and factual issues relevant to Mr. Banda's case before the ICC;
- iii. Associate Council is unencumbered by any other conflicting mandate that would preclude his acting as lead counsel, does not anticipate any such conflict arising in the foreseeable future, and remains available and willing to take on the mandate of lead counsel for Mr. Banda;
- iv. [REDACTED];
- v. [REDACTED];
- vi. [REDACTED].

35. Associate Council remains available to provide any additional information that the Trial Chamber or Registry may require in order to assist the Trial Chamber's consideration of this request.

VI. Relief Requested

36. For the reasons set out above, Associate Counsel respectfully requests the Trial Chamber to act pursuant to Regulation 76(1) of the Regulations of the Court 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.

Respectfully Submitted,



Chief Charles Achaleke Taku
Lead Counsel
for Abdallah Banda Abakaer Nourain

Dated this 10th Day of October 2019
At Maryland, United States of America