



Original: English

No. ICC-02/05-03/09

Date: 25 October 2019

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

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

Public

Public redacted version of ‘Decision on Associate Counsel’s Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court’,
25 September 2019

Decision 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

Mr Charles Achaleke Taku
Mr Anand Shah

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER IV ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, issues this 'Decision on Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court'.

I. Procedural history and submissions

1. On 23 July 2018, the Chamber granted Lead Counsel Mr Karim Khan's Request¹ to withdraw from his representation of Mr Banda in case ICC-02/05-03/09.² Although noting Mr Khan's submission that Associate Counsel Mr Charles Achaleke Taku is 'available and may be appointed as Lead Counsel',³ the Chamber held that the appointment of new Lead Counsel was a matter for the Counsel Support Section⁴ and that 'the withdrawal of Mr Khan shall only take effect once new counsel has been appointed for Mr Banda.'⁵
2. On 27 August 2019, Associate Counsel Mr Taku requested to be appointed as Lead Counsel for Mr Abdallah Banda Abakaer Nourain, pursuant to Regulation 76(1) of the Regulations of the Court ('Request' and 'Regulations'), at least on an interim basis.⁶ Mr Taku submits that Mr Khan has not been involved in conducting Mr Banda's representation since his withdrawal.⁷ Furthermore, Mr Taku informed the Chamber that on 13 September 2018, [REDACTED], Co-Associate Counsel Anand Shah was able to reach Mr Banda [REDACTED].⁸ [REDACTED].⁹ [REDACTED].¹⁰ Mr Taku thus submits that in the unique circumstances of this case, the Chamber should use its discretion

¹ Lead Counsel's Request Pursuant to Regulation 78(1) of the Regulations of the Court, 16 July 2018, ICC-02/05-03/09-652.

² Decision on the withdrawal of Counsel, ICC-02/05-03/09-654.

³ ICC-02/05-03/09-652, para. 3.

⁴ ICC-02/05-03/09-654, para. 4.

⁵ ICC-02/05-03/09-654, para. 5.

⁶ Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court, ICC-02/05-03/09-658-Conf-Exp (redacted confidential *ex parte* version, available to the Defence, Prosecution and Counsel Support Section, notified on 19 September 2019).

⁷ ICC-02/05-03/09-658-Conf-Exp-Red, para. 13.

⁸ ICC-02/05-03/09-658-Conf-Exp-Red, paras 17-18.

⁹ ICC-02/05-03/09-658-Conf-Exp-Red, para. 19.

¹⁰ ICC-02/05-03/09-658-Conf-Exp-Red, paras 20-31.

under Regulation 76(1) of the Regulations to appoint Lead Counsel in the interests of justice.¹¹

3. On 9 September 2019, Mr Taku filed an update to the Request ('First Update').¹² In his First Update, Mr Taku informs the Chamber, *inter alia*, that during a phone call on 7 September 2019, Mr Banda has, with the assistance of a Zaghawa interpreter, provided his verbal consent and authorisation for Associate Counsel to be appointed as his Lead Counsel with immediate effect.¹³ [REDACTED].¹⁴
4. On 9 September 2019, the Registry filed its observations on the Request and the First Update.¹⁵ The Registry submits that a power of attorney or an appointment of counsel in writing is required for the appointment of counsel, pursuant to Regulation 123(1) of the Regulations of the Registry, as the Court must be certain that representations made by a lawyer in fact reflect the position of the accused person.¹⁶ According to the Registry, the established practice is to physically verify 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.¹⁷ In the absence of written documentation in this case, the Registry submits that is not in a position to verify the authenticity of the power of attorney.¹⁸ The Registry therefore submits that it is for the Chamber to decide whether to appoint

¹¹ ICC-02/05-03/09-658-Conf-Exp-Red, paras 32-34.

¹² 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 (redacted confidential *ex parte* version, available to the Defence, Prosecution and Counsel Support Section, notified on 19 September 2019).

¹³ ICC-02/05-03/09-659-Conf-Exp-Red, para. 2.

¹⁴ ICC-02/05-03/09-659-Conf-Exp-Red, para. 3, ix.

¹⁵ Registry's observations in relation to the legal representation of Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-660-Conf-Exp (originally only available to the Defence and Registry, reclassified as *ex parte*, available to the Defence, Registry and Prosecution on 20 September pursuant to Chamber's email order on 19 September 2019, at 16:41).

¹⁶ ICC-02/05-03/09-660-Conf-Exp, para. 10.

¹⁷ ICC-02/05-03/09-660-Conf-Exp, para. 10.

¹⁸ ICC-02/05-03/09-660-Conf-Exp, para. 11.

Mr Taku as Lead Counsel in the interests of justice, pursuant to Regulation 76(1) of the Regulations.¹⁹

5. On 12 September 2019, Mr Taku filed another update to the Request ('Second Update').²⁰ In the Second Update, Mr Taku transmits, *inter alia*, a video of Mr Banda, in which he verbally, in Zaghawa and Arabic, appoints Mr Taku as his new Lead Counsel,²¹ including transcription and translation.²² Mr Taku submits that this video should be considered as a valid power of attorney, arguing that 'the "established practice" 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.'²³ Furthermore, Mr Taku contends that videos provide better proof of veracity in comparison to notarised documents, given the limitation to the Registry's ability to verify credentials and background of the notarising authority and the circumstances under which the notarisation took place.²⁴
6. On 17 September 2019, the Registry filed its observations to the Second Update ('Second Registry Observations').²⁵ The Registry acknowledges the particular circumstances of this case and the fact that the language Zaghawa exists only in oral form, [REDACTED].²⁶ Nonetheless, the Registry submits that the requirements of Regulation 123(1) of the Regulations of the Registry are still

¹⁹ ICC-02/05-03/09-660-Conf-Exp, para. 12.

²⁰ Second Update to "Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court", ICC-02/05-03/09-661-Conf-Exp with Confidential and *Ex Parte* annexes I, II, III, IV and Public annexes V and VI (redacted confidential *ex parte* version, available to the Defence, Prosecution and Counsel Support Section, notified on 19 September 2019).

²¹ ICC-02/05-03/09-661-Conf-Exp-AnxI.

²² ICC-02/05-03/09-661-Conf-Exp-AnxII.

²³ ICC-02/05-03/09-661-Conf-Exp-Red, para. 15.

²⁴ ICC-02/05-03/09-661-Conf-Exp-Red, para. 15.

²⁵ Registry's observations on the "Second Update to "Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court"", (ICC-02/05-03/09-661-Conf-Exp), ICC-02/05-03/09-662-Conf-Exp (originally only available to the Defence and Registry, reclassified as *ex parte*, available to the Defence, Registry and Prosecution, on 20 September pursuant to Chamber's email order on 19 September 2019, at 16:41).

²⁶ ICC-02/05-03/09-662-Conf-Exp, para. 9.

not met. The Registry thus maintains its position that it is for the Chamber to appoint Lead Counsel under Regulation 76(1) of the Regulations.²⁷

7. On 19 September 2019, Mr Taku filed a response to the Second Registry Observations ('Response').²⁸ In his Response, Mr Taku submits, *inter alia*, that sufficient documentation and information is available to the Registry to authenticate the appointment and power of attorney in accordance with Regulation 123(1) of the Regulations of the Registry.²⁹ Mr Taku, however, concurs with the Registry, and maintains his position, that is for the Chamber to appoint Lead Counsel pursuant to Regulations 76(1) of the Regulations.³⁰

II. Analysis

8. The Chamber notes at the outset that the Warrant of Arrest against Mr Banda was issued on 11 September 2014.³¹ More than five years have passed since, and no significant progress has been made in the implementation of the Warrant of Arrest, nor has there been any advancement with other steps which could lead to Mr Banda's appearance before the Court.
9. Regulation 76(1) of the Regulations stipulates that the 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.'
10. As a preliminary matter, having considered Mr Taku's and the Registry's submissions, the Chamber is satisfied on the totality of the material adduced that Mr Banda himself has expressed the wish to appoint Mr Taku, in particular through the video submitted to the Chamber.³² Thus, insofar as the consent of an accused is relevant for the appointment of Lead Counsel in the interests of

²⁷ ICC-02/05-03/09-662-Conf-Exp, para. 11.

²⁸ Response to "Registry's observations on the 'Second Update to 'Associate Counsel's Request to be appointed as Lead Counsel pursuant to Regulation 76 of the Regulations of the Court'", (ICC-02/05-03/09-661-Conf-Exp)", ICC-02/05-03/09-663-Conf-Exp.

²⁹ ICC-02/05-03/09-663-Conf-Exp, para. 5.

³⁰ ICC-02/05-03/09-663-Conf-Exp, paras 3, 7, 12.

³¹ Warrant of arrest for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-606.

³² ICC-02/05-03/09-661-Conf-Exp-AnxI.

justice, this component has been fulfilled. In addition, the Chamber notes that the Registry does not oppose the appointment,³³ and that previous Lead Counsel Mr Khan endorsed Mr Taku's appointment.³⁴

11. Evidently, the interests of justice in the context of Regulation 76(1) of the Regulations depend heavily on the specific facts of a case. The Chamber does not consider that the interests of justice generally weigh in favour of providing Counsel to an individual who continues to evade the execution of a Warrant of Arrest. However, in this instance, the Chamber is of the view that 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. In this regard, the Chamber particularly notes Mr Taku's efforts and achievements in increasing the Defence's contact with Mr Banda [REDACTED],³⁵ as well as [REDACTED].³⁶ In these very particular circumstances, the Chamber considers that Mr Taku's appointment is required in the interests of justice.
12. In light of the above, the Chamber hereby appoints Mr Taku as Lead Counsel pursuant to Regulation 76(1) of the Regulations.
13. Finally, the Chamber also takes this opportunity to inform Lead Counsel that it intends to hold a status conference in the near future, in the presence of the Prosecutor and the Registry, in order to discuss potential ways forward to ensure Mr Banda's appearance for trial. The Chamber will issue a separate order on this matter in due course.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request.

Done in both English and French, the English version being authoritative.

³³ ICC-02/05-03/09-660-Conf-Exp, para. 12; ICC-02/05-03/09-662-Conf-Exp, para. 11.

³⁴ ICC-02/05-03/09-652, para. 3.

³⁵ ICC-02/05-03/09-658-Conf-Exp-Red, paras 14-31; ICC-02/05-03/09-659-Conf-Exp-Red, paras 2-3.

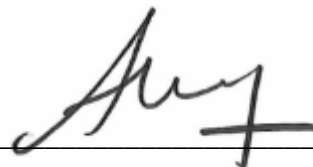
³⁶ ICC-02/05-03/09-658-Conf-Exp-Red, para. 10; [REDACTED].



Judge Robert Fremr



Judge Kimberly Prost
Presiding Judge



Judge Reine Alapini-Gansou

Dated this Friday, 25 October 2019

At The Hague, The Netherlands