

Pursuant to TCI instruction, dated 31 May 2023, this document has been reclassified as "Public"

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-01/20

Date: 6 July 2022

TRIAL CHAMBER I

Before: Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Confidential

**Decision on the CLRV's request for reconsideration of the decision terminating
the appointment of counsel**

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

The Office of the Prosecutor

Karim A.A. Khan
Nazhat Shameem Khan
Julian Nicholls

Counsel for the Defence

Cyril Laucci
Iain Edwards

Legal Representatives of Victims

Natalie von Wistinghausen
Anand Shah

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

Peter Lewis

Counsel Support Section

Pieter Vanaverbeke

Victims and Witnesses Unit**Detention Section****Victims Participation and Reparations
Section****Other**

1. On 19 October 2021, Trial Chamber I (the 'Chamber') appointed Ms Natalie von Wistinghausen and Mr Nasser Mohamed Amin Abdalla as common legal representatives for victims (together, the 'CLRVs') in the present case.¹
2. On 5 May 2022, the Chamber issued a decision terminating the appointment of Mr Amin as counsel within the team of CLRVs (the 'Termination Decision').²
3. On 2 June 2022, Mr Amin filed a request for reconsideration of the Termination Decision with the Registry (the 'Reconsideration Request').³
4. On 10 June 2022, and upon instruction from the Chamber,⁴ Ms von Wistinghausen filed the Reconsideration Request with five annexes on the case record.⁵
5. The parties indicated they would not file any response to the Reconsideration Request.⁶
6. The Chamber incorporates by reference the general framework applicable to the assessment of requests for reconsideration, as previously established.⁷ As reconsideration is an exceptional measure that can only be granted if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice, the Chamber will assess the Reconsideration Request on the basis of these two criteria.

A. No clear error of reasoning was demonstrated

7. Mr Amin argues that the Termination Decision erred in finding that:

¹ Decision on victims' participation and legal representation in trial proceedings, ICC-02/05-01/20-494.

² Decision terminating the appointment of counsel, ICC-02/05-01/20-683-Conf-Exp.

³ Email from the Registry, 2 June 2022, at 12:30.

⁴ Email from the Chamber, 3 June 2022, at 15:48.

⁵ Common Legal Representative of Victims' Request for Reconsideration of the "Decision terminating the appointment of counsel", ICC-02/05-01/20-701-Conf (notified on 13 June 2022), with confidential *ex parte* Annexes A, A1, A2 only available to the CLRV and Registry, and confidential Annexes A3, A4. A confidential redacted version of Annex A was notified on 14 June 2022, ICC-02/05-01/20-701-Conf-AnxA-Red.

⁶ See Email from the Chamber, 16 June 2022, at 09:17. Initially, the Defence had indicated that it intended to file brief observations in response to the Reconsideration Request, see Email from the Defence, 17 June 2022 at 11:25. However, after inquiry from the Presiding Judge about whether the Defence had *locus standi* to address the matter, the Defence stated it would no longer file any response, see Transcript of hearing, 17 June 2022, ICC-02/05-01/20-T-052-CONF-ENG RT, p. 107, line 18 to p. 109, line 8. The Prosecution also indicated it did not intend to file any response to the Reconsideration Request, ICC-02/05-01/20-T-052-CONF-ENG RT, p. 109, lines 9-11.

⁷ Decision on Defence request for reconsideration of "Decision on Defence submissions on cooperation with Sudan", 29 March 2022, ICC-02/05-01/20-650-Conf, para. 10. A public redacted version was notified on the same day, ICC-02/05-01/20-650-Red.

- a) he was subject or previously subject to criminal proceedings;
- b) that he was aware of the travel ban imposed on him prior to the submission of his application for the List of Counsel or otherwise breached an undertaking in the application for the List of Counsel by failing to inform the Registry of the travel ban once he became aware of it;
- c) he pursued a deliberate and continuing course of conduct to mislead the Registry and the Chamber in breach of the Code of Professional Conduct for counsel (the 'Code of Conduct'); and
- d) the appropriate sanction was immediate termination of his mandate.⁸

8. The nature of the travel ban, i.e. whether an administrative or criminal sanction, as argued by Mr Amin,⁹ in no way alters the Chamber's decision. Even if the travel ban was solely administrative, the gravamen of the Chamber's decision is the fact that Mr Amin intentionally failed to disclose the travel ban to the Chamber and to the Registry, which evidently and unavoidably affects his ability to appear in person to represent victims before the Court. Accordingly, the nature of the travel ban was not determinative of the Chamber's decision to terminate Mr Amin's appointment.

9. In relation to the second point raised by Mr Amin, the Chamber recalls that '[i]t is Mr Amin's responsibility to raise any impediments to the representation of his clients, pursuant to the Code of Professional Conduct for counsel [...], particularly Article 24 detailing counsel's duties towards the Court'.¹⁰ Mr Amin's argument that he was not required to 'regularly update the ICC Registry on their life circumstances' reveals a fundamental ignorance of the duty owed by counsel both to his clients and to the Court. In any event, this submission is no more than a disagreement with the Chamber's decision.¹¹

10. The Chamber reiterates that Article 24 of the Code of Conduct relates to matters which impact counsel's ability to represent clients before the Court, in the instant case, the travel ban. In the Chamber's view, it is evident that, aside from considerations of transparency and ethical conduct, it is mandatory that counsel report any change in

⁸ Reconsideration Request, ICC-02/05-01/20-701-Conf-Exp-AnxA, para. 3.

⁹ Reconsideration Request, ICC-02/05-01/20-701-Conf-Exp-AnxA, paras 10-26.

¹⁰ Termination Decision, ICC-02/05-01/20-683-Conf-Exp, para. 14.

¹¹ Reconsideration Request, ICC-02/05-01/20-701-Conf-Exp-AnxA, para. 32.

circumstance which **may** affect their ability to carry out the duties for which they have been appointed **and for which they are remunerated** through the Court's legal aid scheme.

11. The Chamber is further unpersuaded by Mr Amin's argument that he did not pursue a deliberate and continuing course of conduct to mislead the Court in breach of the Code of Conduct.¹² Between the time when he was appointed counsel for victims and the time the Chamber was made aware of the travel ban (which was only when the Chamber made it clear remote attendance would no longer be permitted), Mr Amin had ample opportunity to bring this information to the Chamber's attention. In that period, Mr Amin on five separate occasions requested the Chamber to attend hearings remotely,¹³ stating reasons of travel restrictions related to the COVID-19 pandemic and/or health issues, all the while knowing that these were not the only reasons or even the predominant reason why he could not attend the hearings in person. Mr Amin thus chose to withhold the information on the travel ban from the Chamber on five separate occasions. The Chamber can only conclude that this was a deliberate course of action.

12. Considering the number of occasions on which Mr Amin had the opportunity to inform the Chamber of the travel ban, a submission that a failure to do so was merely 'an error of judgment' carries little weight.¹⁴

13. Moreover, none of the arguments presented by Mr Amin can be considered new facts which the Chamber would have taken into account when arriving at the Termination Decision. Accordingly, Mr Amin's arguments in relation to the deliberate and continuing course of conduct to mislead the Court do not provide good and sufficient reason to alter the Termination Decision.

14. Finally, in relation to the fourth point raised by Mr Amin, the Chamber finds that, since it is vested with the authority to appoint counsel to represent the victims in trial proceedings, (as happened in the present case), it is logically also vested with the power to terminate the appointment of counsel. The Chamber accepts that there exists a clear procedure pursuant to Article 34 of the Code of Conduct whenever it appears that counsel has committed misconduct. However, nothing in the Court's legal texts dictates

¹² Reconsideration Request, ICC-02/05-01/20-701-Conf-Exp-AnxA, paras 34-42.

¹³ Termination Decision, ICC-02/05-01/20-683-Conf-Exp, para. 3.

¹⁴ Reconsideration Request, ICC-02/05-01/20-701-Conf-Exp-AnxA, para. 38.

that disciplinary action is the sole possible measure and that a trial chamber cannot impose other measures it deems appropriate, separate from or in addition to disciplinary action. Indeed, the Chamber's decision to terminate Mr Amin's appointment is separate from any disciplinary complaint regarding misconduct the Chamber may submit to the Registry.

B. Reconsideration is not necessary to prevent an injustice

15. In relation to the question whether reconsideration is necessary to prevent an injustice, Mr Amin argues that the Termination Decision 'has removed Former CLRV from the case, and thereby permanently deprived Former CLRV's clients from the benefit of his representation, assistance and advice in the present proceedings.'¹⁵ The Chamber recalls that Mr Amin was not the sole counsel representing the participating victims in the present case; he was part of a single team, together with Ms von Wistinghausen.¹⁶ The Chamber also recalls that it decided in the Termination Decision that 'going forward, Ms von Wistinghausen and Mr Shah, shall continue to represent all participating victims in the present case.'¹⁷ Considering that the effective representation of the victims' interests continues to be guaranteed by Ms von Wistinghausen and Mr Shah in the present case, the Chamber rejects Mr Amin's argument that reconsideration would be necessary to prevent an injustice.

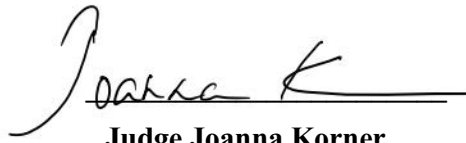
16. Considering the above, the Chamber finds that no clear error of reasoning has been demonstrated nor has it been shown that reconsideration would be necessary to prevent an injustice. Consequently, the Chamber rejects the Reconsideration Request in its entirety.

¹⁵ Reconsideration Request, ICC-02/05-01/20-701-Conf-Exp-AnxA, para. 48.

¹⁶ Decision on victims' participation and legal representation in trial proceedings, ICC-02/05-01/20-494, para. 16(i).

¹⁷ Termination Decision, ICC-02/05-01/20-683-Conf-Exp, para. 22.

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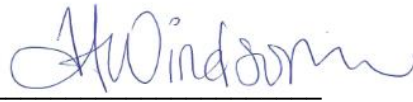


Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 6 July 2022

At The Hague, The Netherlands