



Original: English

No. ICC-02/05-01/20

Date: 31 May 2023

Date of original: 5 May 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')***

**Public redacted version 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
Nasser Mohamed Amin Abdalla
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

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Philipp Ambach

Other

1. On 19 October 2021, and pursuant to Regulation 80(1) of the Regulations of the Court (the ‘Regulations’), 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 9 November 2021, in response to the questions of the CLRVs whether ‘the Trial Chamber allow remote attendance of the hearings for the CLRV once the trial started’, the Chamber clarified ‘that in-person attendance to trial hearings remains the rule. However, the Chamber may exceptionally grant requests from counsel to attend hearings remotely if required (i.e. due to COVID-19 travel restrictions)’².
3. On 11 November 2021,³ on 10 December 2021,⁴ on 4 February 2022,⁵ on 3 March 2022,⁶ and on 21 March 2022,⁷ Mr Amin requested leave to attend remotely all status conferences scheduled in the case, indicating his physical presence was not possible due to COVID-19 related travel restrictions.
4. On 14 December 2021,⁸ the Chamber determined the following as regards remote attendance of counsel:

Lastly, the Chamber notes that although it authorised, exceptionally, counsel’s remote attendance during status conferences, it must be extremely vigilant if and when authorising remote attendance during trial. Bearing in mind its duty to guarantee the protection of witnesses and the integrity of the proceedings, the Chamber considers that such evidence must be heard, as a rule, within the secured facilities of the ICC courtroom. Although the Registry may be able to facilitate secure transmission to a remote location, the Chamber cannot guarantee the safety of witnesses at the other end of the video-link transmission (*see recently Yekatom and Ngaissona case*, ICC-01/14-01/18-T-076-CONF-ENG ET, p. 71, lines 8-20). Considering the expected subject matter of the status conference scheduled for 7-11 February 2022, which is to discuss the list of trial witnesses to be disclosed on 5 January 2022, the Chamber considers, for the same reasons, that remote attendance is not appropriate.

Lastly, the Chamber notes that although the COVID-19 pandemic is an ongoing and continuing challenge, travel is possible and in-court attendance can be facilitated. If counsel wish to attend hearings, the Chamber expects their presence in court.

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

² E-mail from Trial Chamber I at 15:11.

³ E-mail from Mr Amin at 09:07.

⁴ E-mail from Mr Amin at 17:27.

⁵ E-mail from Mr Amin at 13:20.

⁶ E-mail from Ms von Wistinghausen at 09:51.

⁷ E-mail from Mr Amin at 13:19.

⁸ E-mail from Trial Chamber I at 09:18.

Accordingly, the Chamber is not prepared to allow lead and/or co-counsel to attend remotely save in exceptional circumstances. Ms von Wistinghausen is to inform the Chamber orally during the status conference, or in writing no later than 17 December 2021, if she is able to continue representing victims in this case under the aforesaid circumstances.

5. On 1 April 2022, in light of the aforesaid e-mail instruction of the Chamber, and the imminent start of trial on 5 April 2022, Mr Amin informed the Chamber, for the first time since his appointment, that he is ‘currently prohibited by the Egyptian government from traveling outside of Egypt’.⁹
6. On 4 April 2022, the Chamber instructed Mr Amin ‘to provide further information as regards the travel ban, particularly the date on which it was imposed’.¹⁰
7. On 5 April 2022, Mr Amin informed the Chamber that the travel ban ‘was imposed by the Egyptian authorities in 2016’.¹¹
8. On 6 April 2022, and noting that ‘Mr Amin can neither attend hearings or meet with victims outside Egypt’, the Chamber instructed the Registry ‘to provide a full report on this matter no later than 21 April’.¹²
9. On 21 April 2022, the Registry submitted its report, concluding that ‘the information now before it appears to meet the standard for termination per the Undertaking’ (the ‘Registry Report’, filed as Annex 1 to this decision).¹³
10. On 25 and 28 April 2022, Mr Amin¹⁴ and Ms von Wistinghausen¹⁵ responded to the Registry’s report (filed as Annex 2 to this decision).
11. At the outset, it is important to outline the two issues arising from the aforesaid extensive account of e-mail exchanges between the Chamber, the CLRVs, specifically Mr Amin, and the Registry. First, there is the issue of in-person vs. remote attendance, and the Chamber’s instructions that remote attendance of counsel should be exceptional, particularly since the Chamber cannot guarantee the safety of witnesses

⁹ E-mail from Mr Amin at 14:54

¹⁰ E-mail from Trial Chamber I at 13:59.

¹¹ E-mail from Mr Amin at 12:05

¹² E-mail from Trial Chamber I at 14:18.

¹³ E-mail from Registry at 17:35 (hereinafter the ‘Registry Report’).

¹⁴ E-mail from Mr Amin at 11:23.

¹⁵ E-mail from Ms von Wistinghausen at 09:52.

appearing in court when Counsel are following a hearing remotely. Second, and more importantly, it is a matter of grave concern that at no stage did Mr Amin raise with the Chamber or the Registry, that he was subject to a travel ban and could therefore not attend any hearing in person. These two issues are distinct. Counsel's inability to travel and attend a hearing in person is not an issue which, if it stood alone, would be likely to warrant termination.¹⁶ However, counsel's failure to inform the Court of his inability to travel (and the reasons therefore), until it became unavoidable, must be carefully assessed in order to determine whether termination of counsel's mandate is required.

12. The Chamber is also deeply troubled by Mr Amin's failure to acknowledge that he should have informed the Registry and the Chamber about the travel ban at the earliest opportunity, namely at the stage when consideration was being given to the appointment of the Legal Representatives for Victims, after the withdrawal of Ms Clooney.¹⁷ The Chamber rejects Mr Amin's assertion that it was unnecessary to inform the Court of his travel ban since, at the time of his appointment, and the subsequent requests to attend status conferences remotely, travel restrictions were in place 'whatever [his] situation was regarding the travel ban'.¹⁸

13. Mr Amin's stance on this matter is not improved by his further assertion that [REDACTED].¹⁹

14. It is Mr Amin's responsibility to raise any impediments to the representation of his clients, pursuant to the Code of Professional Conduct for counsel (the 'Code of Conduct'), particularly Article 24 detailing counsel's duties towards the Court, but also articles 7(3), 9(3) and 12 of the Code of Conduct referred to in the Registry Report).

15. As noted by the Registry Report, on 29 March 2016, when Mr Amin applied to be included in the list of Counsel,²⁰ he made no mention of a travel ban. According to

¹⁶ It should be noted that it is unclear whether the 17 victims who selected Mr Amin as their representative were informed of the travel ban.

¹⁷ Up to that stage Ms Clooney and Mr Amin were acting for the victims on a *pro bono* basis.

¹⁸ See Annex 2 of the Registry Report.

¹⁹ See Annex 2 of the Registry Report.

²⁰ See Annex 3 of the Registry Report.

one of the documents supplied by Mr Amin,²¹ criminal proceedings by the Egyptian authorities against him and others, had been resumed in March 2016. In fact, the Registry Report states that the issue of any pending criminal proceedings and/or any (associated) travel ban has never been brought to the attention of the Registry until the Chamber did so, by forwarding to CSS the information Counsel had provided to the Chamber to that effect, on 1 April 2022 at 14.54’.

16. As noted in the Registry Report, Mr Amin failed to mention the travel ban and connected criminal charges he could face in Egypt, despite the clear question in this respect, contained in the application form to be included to the List of Counsel.²²

17. The Chamber further notes that on page 13 of the application form, Mr Amin signed the following undertaking:

I certify on my honour that I have verified the information in this form and that it is true and correct. **I hereby undertake to inform the Court in the event of a change in my circumstances.** (emphasis added). I understand that any decision to appoint me at the Court will be based on the information provided herein. I also understand that, should any item of information herein prove to be incorrect or false, the Court would be at liberty to terminate my appointment without notice (“Undertaking”). **I hereby undertake to inform the Court of any future criminal proceedings that may be initiated against me.** (emphasis added). I undertake not to enter into any fee-splitting arrangement with any person seeking representation or relative, friend or associate of the same.

This undertaking was breached by Mr Amin’s failure to communicate the aforesaid travel ban to the Court.

18. Furthermore, the Chamber notes that the Registry used its resources to facilitate and organise a mission and a visa for Mr Amin, in order for him to be present for the opening of the trial on 5 April 2022. Again, Mr Amin failed to mention the travel ban, thereby misleading the Registry into believing he was able to travel to The Hague. The Chamber notes that Mr Amin’s explanation²³ for not doing so is inapposite since, in any event, it was incumbent on Mr Amin to have informed the Registry of the travel ban *ab initio*. Indeed, the explanation further compounds the issue as it is clear that, even at that juncture, Mr Amin had no intention of informing the Court of the travel ban. As noted by the Registry, upon approval of his visa, the CLRVs case manager informed the Registry that ‘Mr Nasser Amin [...] will unfortunately not be able to travel to the Hague and needs to cancel the mission’, without providing the reason.

²¹ Press Release issued by “Frontline Defenders” dated 18 July 2016 contained in Annex 2.

²² See Registry Report and application form submitted by Mr Amin in Annex 1.

²³ See Email from Mr Amin dated 25 April 2022, at 11:23, in which he states that the ‘travel ban may be lifted at the end of April or next month’.

Regrettably the only conclusion which can be drawn from this final failure is that there has been a deliberate and continuing course of conduct, by Mr Amin, to mislead the Registry and the Chamber.

19. Counsel who are selected to be included on the list of counsel authorised to act on behalf of accused and victims and who then are appointed, are expected to act with honesty and integrity when providing information relevant to their appointment. The Registry have neither the ability nor the resources to check the accuracy and truthfulness of the information provided.²⁴ Representation of victims and accused forms a, not insubstantial, part of the court's budget. Counsel, who are receiving remuneration for their services from that budget, have a duty to inform the Registry if there are circumstances, particular to them, which might render them ineligible to act.

20. The Chamber has concluded that the history of this matter, as set out above, reveals that Mr Amin intentionally, by acts of omission and commission, has misled the Registry and the Chamber and accordingly cannot continue to represent victims in this case.

21. Accordingly, the Chamber directs the Registry to terminate the appointment of Mr Amin.

22. The Chamber notes that Ms von Wistinghausen already acts as Lead Counsel, and that Mr Shah has recently been appointed as Associate Counsel and has since appeared uninterruptedly in court. The Chamber decides that, going forward, Ms von Wistinghausen and Mr Shah, shall continue to represent all participating victims in the present case.

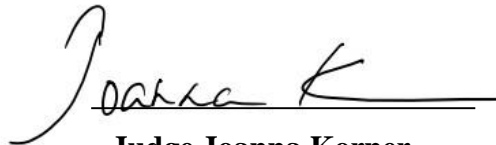
23. The Chamber deems it necessary to inform the victims that had initially designated Mr Amin as their legal representative of his termination. The Chamber notes that this decision does not arrogate from the rights of the victims to have the legal representative of their choice since the Chamber had already adjudged that the legal team would be *one* team comprising Ms von Wistinghausen and Mr Amin.²⁵ Accordingly, the Registry is instructed to contact the victims in question, to inform

²⁴ In principle, the Registry does not conduct additional checks into the information provided by counsel applying to be on the List of Counsel, unless there are discrepancies or inconsistencies that warrant further follow-up, in accordance with Regulation 69(4) of the Regulations of the Court.

²⁵ Decision on victims' participation and legal representation in trial proceedings, ICC-02/05-01/20-494, para. 10.

them of Mr Amin's termination and inform them that they shall continue to be represented by Ms von Wistinghausen and Mr Shah.

24. The Chamber reminds Mr Amin that he remains subject to obligations pursuant to Article 8 of the Code of Conduct, as well as any related provisions of the Statute and the Rules of Procedure and Evidence.




Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 5 May 2022

At The Hague, The Netherlands