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**International
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Court**

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Date: **11 March 2024**

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

CLR V Reply to Defence “Response to Request ICC-02/05-01/20-1076-Corr-Red”

Source: The Common Legal Representative of Victims

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

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I. Introduction

1. Following Trial Chamber I's grant of leave,¹ the Common Legal Representative of Victims ("CLR V") submits this reply to the Defence response² to the public redacted version of the corrigendum to the "CLR V Request for Trial Chamber guidance on mapping of potential beneficiaries".³
2. These submissions are limited to the three issues identified in the CLR V request for leave to reply,⁴ arising from the Response, namely:
 - a) an alleged lack of clarity in the Request in respect of the issuance of Trial Chamber guidance on the outer bounds of direct and indirect victims;⁵
 - b) Defence concerns regarding the standard of assessment proposed in the Request, Defence rights, and the presumption of innocence;⁶ and
 - c) an alleged lack of substantiation on the necessity of the relief requested.⁷

II. Submissions in reply

(a) Issue 1: alleged lack of clarity in respect of request for guidance on the outer bounds of direct and indirect victims

3. The Response submits that the Request does not ask the Chamber to take a position on the outer bounds of direct and indirect victims who may qualify as potential beneficiaries arising from the four charged incidents in the case, nor the nature of the clarifications requested.⁸ Accordingly, it is submitted that the Chamber cannot take a position 'in the absence of a question'.⁹

¹ Decision on the CLR V Request for Leave to Reply to Defence "Response to Request ICC-02/05-01/20-1076-Corr-Red", 8 March 2024 (transmitted by email). In the decision, the Trial Chamber noted that the parties did not oppose the CLR V's request for leave to reply.

² Réponse à la Requête ICC-02/05-01/20-1076-Corr-Red, 29 February 2024, [ICC-02/05-01/20-1091](#) ("Response").

³ Corrigendum to "CLR V Request for Trial Chamber guidance on mapping of potential beneficiaries", 16 February 2024 (ICC-02/05-01/20-1076-Conf), 22 February 2024, ICC-02/05-01/20-1076-Conf-Corr (public redacted version filed on 27 February 2024: [ICC-02/05-01/20-1076-Corr-Red](#)) ("Request").

⁴ CLR V Request for Leave to Reply to Defence "Response to Request ICC-02/05- 01/20-1076-Corr-Red", 4 March 2024, [ICC-02/05-01/20-1094](#).

⁵ Response, para. 4.

⁶ *Id.*, paras 6, 11-15.

⁷ *Id.*, paras 7-10.

⁸ Response, para. 4.

⁹ *Ibid.*

4. Contrary to the position in the Response, the Request, at paragraph 12, is clear as to the nature and parameters of the factual and legal guidance sought, specifying in relevant part (bolding in original, underline added):

The CLRV submits that relevant guidance can be provided in two respects. Firstly, the **geographic and temporal scope** of the four incidents out of which the confirmed charges arise, and the **outer bounds of direct and indirect victims** who may qualify as potential beneficiaries in connection with these incidents. Second, legal guidance on **harm to potential indirect victims**: (a) under the **concept of transgenerational harm**; and (b) as **members of a community whose leaders have been targeted or killed**. The Chamber's guidance on these matters will assist the CLRV in advising and consultation with her clients, as well as benefit the outcome of the VPRS' mandate to "endeavour to have fully identified, mapped, or at least traced the relevant potential victim population" and facilitate the VPRS' understanding of the confidential case record.

5. The Request further explains, at paragraph 18, that it provides "for each incident proposed factual findings and parameters aimed at capturing the outer bounds of the potential population of direct and indirect victims" in order to "assist the Chamber in providing the requested guidance", and noting that the identified heads of harm and victim statuses are not intended to be exhaustive.¹⁰
6. The CLRV understands the Response's main critique¹¹ to be that, whereas the proposed factual guidance on the geographic and temporal scope for each incident set out in the Request includes the wording "guidance may be given",¹² the accompanying proposed parameters on the outer bounds of the relevant potential beneficiary population merely states "may include".¹³
7. Submissions must be read and assessed a whole, not in a piecemeal or selective fashion. As set out above, the relief sought from the Trial Chamber includes

¹⁰ Request, para. 18 ("The below submissions are not intended to capture all potential heads of harm that could arise from the charged incidents, nor do they discount that a potential victim may have suffered harm arising from multiple charged crimes, or that an individual may qualify as both a direct and indirect victim.").

¹¹ Response, para. 4.

¹² For Kodoom – Request, para. 19; for Bindisi – Request, para. 22; for Mukjar – Request, para. 26; for Deleig – Request, para. 30.

¹³ For Kodoom – Request, paras 20-21; for Bindisi – Request, paras 23-24; for Mukjar – Request, paras 27-28; for Deleig – Request, paras 31-32.

factual guidance, firstly, on the geographic and temporal scope of the four incidents out of which the confirmed charges arise, and, *thereafter*, and *arising from such indications*, guidance on the outer bounds of direct and indirect victims who may qualify as potential beneficiaries in connection with each incident. The CLRV reaffirms that the factual guidance sought is two part, and in the manner set out at paragraph 12 of the Request.

(b) Issue 2: proposed standard of evidence, Defence rights, and the presumption of innocence

8. The Response submits that only the beyond a reasonable doubt standard of assessment may be applied for factual determinations at the trial stage,¹⁴ not the balance of probabilities standard proposed in the Request in respect of the preliminary and non-binding factual guidance sought, and that to proceed with such determinations at this stage would require the exercise of ‘prejudgment’ by the Chamber, including in respect of the admissibility of evidence, which is incompatible with the rights of the Defence and the presumption of innocence.¹⁵
9. This submission does not comport with the position taken by the Defence in the context – nor the legal and factual reality – of the motion for acquittal process that took place earlier in the trial proceedings. The CLRV’s submission that the guidance sought “could not bind or constitute factual findings for purposes of the Chamber’s ultimate determinations” in its Article 74 judgment¹⁶ was not, as the Response posits, a mere ‘clarification’ only representing the CLRV’s views.¹⁷
10. Instead, the guidance sought in the Request has the same legal groundings as the motion for acquittal process initiated by the Defence, and in respect of which the Defence did not make claims of *ultra vires* prejudgment by the Chamber, or violation of other Defence rights, including the presumption of innocence. In its decision on the Defence motion for acquittal, the Trial Chamber recalled the

¹⁴ Response, para. 6.

¹⁵ *Id.*, paras 11-15.

¹⁶ Request, para. 13.

¹⁷ Response, para. 13.

applicable test for the assessment of evidence in this context, noting the Appeals Chamber’s holdings, *inter alia*, that: (i) the standard of assessment must focus on whether the evidence presented thus far was such that a Trial Chamber ‘could convict’ an accused under the beyond a reasonable doubt standard, not whether such evidence ‘would’ result in a conviction;¹⁸ (ii) in the event the case continues, “[o]n no account should such a sense of the evidence prejudice the strength of the case for the defence”;¹⁹ and (iii) “the evidential assessment will focus on the strength of the evidence that the prosecution has tendered to prove their case, rather than focusing on the strength of any evidence that the defence might have introduced at that stage to neutralise the strength of the prosecution evidence”.²⁰

11. The Appeals Chamber in *Gbagbo and Blé Goudé* further stressed that:

The significance of the issue [of assessing strengths and weaknesses in the Prosecution case] diminishes where the trial chamber is both the tribunal of fact and the tribunal of law. Here, the more controlling consideration is the command of article 74(2) of the Statute which provides that the trial chamber’s judgment ‘shall be based on its evaluation of the evidence and the entire proceedings’.

12. As submitted in the Request,²¹ the Trial Chamber’s authority to issue the factual and legal guidance sought by the CLRV arises from the Appeals Chamber’s recommendation in the *Ntaganda* case that Chambers commence at an earlier stage of the proceedings the mapping of potential beneficiaries of the charged crimes,²² as well the Appeals Chamber’s holding in the present proceedings that in appropriate circumstances a Chamber may issue interim orders and decisions regarding reparations proceedings prior to the reparations phase.²³

¹⁸ [T-116-Red](#), p. 8, lines 2-13 (citing *Gbagbo & Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions, [ICC-02/11-01/15-1400 A](#) (“*Gbagbo* Appeals Judgment”) para. 309).

¹⁹ *Id.*, p. 8, lines 18-21 (citing *Gbagbo* Appeals Judgment, para. 316).

²⁰ *Id.*, p. 12, lines 12-15 (citing *Gbagbo* Appeals Judgment, para. 317).

²¹ Request, para. 4,

²² Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Réparations Order”, 12 September 2022, [ICC-01/04-02/06-2782 A4-A5](#), paras 9, 340.

²³ Request, para. 14 (citing Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 18 August 2020 entitled ‘Decision on the Defence request and observations on reparations pursuant to article 75(1) of the Rome Statute’, 18 December 2020, [ICC-02/05-01/20-237 OA4](#), para. 14).

13. The Chamber may issue the requested factual and legal guidance under the same legal framework and in the same manner as for a motion for acquittal, albeit applying, as suggested in the Request, a balance of probabilities standard²⁴ rather than one of “could convict” (both of which are lesser than the standard applicable under Article 74 of the Statute). Issuing the requested guidance under this framework would, like the motion for acquittal process, engender no risk of improper prejudice by the Chamber, or to the Defence’s fair trial rights, including the accused’s fundamental right to the presumption of innocence. The Defence’s challenges to the credibility and admissibility of the Prosecution’s evidence would remain wholly intact and undamaged for the Chamber’s ultimate considerations and determinations under Article 74 of the Statute, based on the entirety of the trial record, and under the beyond a reasonable doubt standard.
14. The CLRV accordingly respectfully submits that the Response’s submissions on the absence of a legal basis for the standard of proof proposed in the Request, and the dangers claimed in respect of fundamental Defence rights should the relief sought be granted, are without merit.
15. For the avoidance of doubt, the CLRV reiterates her full respect for the Chamber’s edict that the mapping process ordered in these proceedings “does not affect the fact that the accused benefits from the presumption of innocence, until proven guilty beyond reasonable doubt”.²⁵ The Request is premised on the understanding, as set out above and in the Request, that the guidance sought can be issued wholly in compliance with this fundamental principle. On the latter, as well as her role, the CLRV has been unambiguous throughout the proceedings, and need not be lectured by the Defence.

(c) Issue 3: alleged lack of substantiation on the necessity of the relief requested

16. The Response further submits that the Request does not provide ‘any indication’ that would enable the Trial Chamber’s understanding of why the relief sought is

²⁴ Request, para. 16.

²⁵ *Id.*, para. 6 (citing Second decision on the admission of victims to participate in trial proceedings, 3 October 2022, [ICC-02/05-01/20-761](#), para. 20).

necessary at this stage of the proceedings, beyond submitting that the requested guidance would facilitate the work of the CLRV and Victims Participation and Reparations Section (“VPRS”).²⁶

17. The Response misinterprets the Request, which directly addresses the benefit and necessity of the Trial Chamber providing the factual and legal guidance sought. At paragraph 11 of the Request it is explained and submitted that:

The Chamber has received the core crime base evidence in these proceedings. It is not anticipated that future Defence witnesses will address in any substance core crime base issues. It is therefore appropriate for the Chamber to provide additional guidance at this juncture, and based on the case record and relevant jurisprudence, to facilitate the effective and efficient conduct of the VPRS’ mapping mandate. Such guidance will better ensure that the outcome of this process – in the event of a conviction – is of the greatest utility to the Chamber, as well as the CLRV, Defence, VPRS, and eventually the Trust Fund for Victims.

18. The Request also noted the lengthy period between sentencing and the finalisation of the reparations order in other ICC cases, and the desire of shortening this period, in the interests of the participating victims, which the CLRV submitted the requested guidance would measurably contribute to.²⁷
19. The current parameters of the case are established in the Pre-Trial Chamber’s decision on the confirmation of charges, issued on 9 July 2021.²⁸ At this stage of the proceedings, more than two years and eight months later, the Trial Chamber is in a position to provide guidance on the basis of the evidence received in the trial record in respect of the geographic and temporal parameters of the case – confirming or potentially refining these parameters – as well as on the outer bounds of direct and indirect victims who may qualify as potential beneficiaries. Again, and addressed above, this guidance would be preliminary and non-

²⁶ Response, paras 7-10.

²⁷ Request, para. 15.

²⁸ Corrected version of ‘Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), 9 July 2021, ICC-02/05-01/20-433, 23 November 2021.

binding *vis-à-vis* the Chamber's ultimate determinations under Article 74 of the Statute.

20. Receiving the Chamber's preliminary guidance now – as opposed to findings issued many months down the road in or following a potential judgment of conviction,²⁹ will, as alluded to in the Request, bring greater certainty to the mapping work the VPRS has been ordered to start undertaking and must have clarity on. Such increased certainty will also assist the CLRV's consultations with the participating victims. It is, of course, the Trial Chamber, not the Pre-Trial Chamber, that will ultimately determine – in the event a conviction is issued and confirmed on any appeal – the final contours of the case and scope of the population of potential beneficiaries arising from the four charged incidents.
21. The fact that the VPRS has only recently been granted access to the voluminous confidential record of the case³⁰ further weighs in favour of the Chamber's issuance of the requested guidance. As the Chamber is aware, the mapping process will take place in a Situation that is beset with security, logistical, and communication difficulties. The greater the clarity and certainty with which the VPRS can conduct its mapping mandate in respect of the Trial Chamber's indications on the parameters of the case and outer bounds of the population of potential beneficiaries can, as submitted in the Request,³¹ only lead to a more efficient and effective process that will be of the greatest utility to the Trial Chamber in the event a conviction is entered, and ultimately to a shorter reparations phase.
22. In respect of the legal guidance sought on transgenerational harm and potential harm arising to indirect victims from the targeting of community leaders, the Response's main complaint is that the subjects in question are sufficiently

²⁹ In this respect, the VPRS submits that “should there be a conviction in this Case, the Registry would seek further guidance from the Chamber, as may be necessary, on the contours of the Case for reparation purposes based on the information collected at that stage”. (Registry Observations on the “CLRV Request for Trial Chamber guidance on mapping of potential beneficiaries”, 29 February 2024, ICC-02/05-01/20-1092 (“Registry Observations”), para. 8).

³⁰ *Id.*, para. 7.

³¹ Request, para. 11.

established in the jurisprudence of the Appeals Chamber, as referred to in the Request, and accordingly there is no need of further instruction from the Trial Chamber at this stage.³²

23. However, as addressed in the Request, it is the application of the relevant Appeals Chamber Jurisprudence *in the context of the present proceedings*, as well as any additional legal elements or considerations from the Trial Chamber, that are at the heart of the relief sought.³³ The Trial Chamber's guidance on these matters will ensure that the VPRS' mapping process is best structured to collect and assess information that the Trial Chamber deems relevant to assist its reparations mandate in the event of a conviction, particularly where the "VPRS notably intends to put a particular focus on these two notions [of harm] in its Mapping Exercise".³⁴ The Registry indeed notes that clarifications in respect of these two notions of victimisation, including "from a legal perspective, is always welcome".³⁵ The CLRV fully agrees, and reiterates that she would likewise be greatly assisted in her mandate to consult with and advise the participating victims in respect of these two areas of potential victimisation, should the Trial Chamber issue the requested legal guidance.

24. The CLRV has taken a very conservative approach regarding the guidance sought and wishes to stress that any additional guidance the Trial Chamber deems sensible and constructive at this stage, would be more than well received by her.

III. Conclusion

25. The CLRV respectfully requests Trial Chamber I to take into account the above submissions in reply in considering and determining the CLRV Request.

³² Response, para. 10.

³³ Request, paras 26, 40.

³⁴ Registry Observations, para. 10.

³⁵ *Ibid.*

Respectfully submitted,



Natalie v. Wistinghausen
Common Legal Representative of Victims

Dated this 11 March 2024
At Berlin, Germany