

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/09-01/11

Date: **22 June 2016**

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR***

v.

WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public document

Request for leave to submit observations in relation to the issues raised under the heading “Questions concerning reparation” in the “Decision on Defence Applications for Judgments of Acquittal”

Source:

The Trust Fund for Victims

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 James Stewart

Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim AA Khan

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Ms Caroline Buisman

Legal Representatives of Victims

Mr Wilfred Nderitu

The Office of Public Counsel for Victims

Ms Paolina Massidda

States Representatives

Githu Muigai, S.C.;

Attorney General, Republic of Kenya

REGISTRY

Registrar

Mr Herman von Hebel

Victims Participation and Reparations Section

Isabelle Guibal

I. BACKGROUND

1. On 5 April 2016, Trial Chamber V(A) (hereinafter “Trial Chamber”) issued the “Decision on Defence Applications for Judgments of Acquittal”,¹ in which it, by majority, vacated the charges against the two accused without prejudice.² In the “Reasons of Judge Eboe-Osuji”, the honourable Presiding Judge raised several important questions concerning whether reparations or assistance in lieu of reparation could potentially be provided to the victims of the post-election violence in Kenya in the absence of a conviction in the case.³

2. On 15 June 2016, the Common Legal Representative for Victims (hereinafter “CLR”) filed a submission containing the views and concerns of the victims in the case regarding the matters raised by the Presiding Judge.⁴ Therein, the CLR submitted that the “assistance mandate of the of [the Trust Fund for Victims] should be invoked with a view to alleviating the physical and psychological well-being and dignity of the victims of the post-election violence”⁵ and requested, *inter alia*, that the Trial Chamber grant the following relief:

to make an order directed at the Trust Fund for Victims to urgently look into ways and means of initiating and providing assistance to all victims of the post-election violence in accordance with its assistance mandate[.]⁶

3. The CLR also requested that the Trial Chamber, “if need be”, invite further submissions from the parties and participants, including the Trust Fund for Victims.⁷

¹ ICC-01/09-01/11-2027-Red (hereinafter “Decision Vacating the Charges”).

² Decision Vacating the Charges, p. 1.

³ Decision Vacating the Charges, PART V: QUESTIONS CONCERNING REPARATION, paras 195-210.

⁴ Victims’ Views and Concerns on the Issue of Reparation or Assistance in Lieu of Reparation Pursuant to the Trial Chamber Decision of 5 April 2016 on the Defence Motions on ‘No Case to Answer’, ICC-01/09-01/11-2035 (hereinafter “CLR Submission”).

⁵ CLR Submission, para. 53.

⁶ CLR Submission, para. 54 (ii).

⁷ CLR Submission, para. 54 (iii).

II. APPLICATION FOR LEAVE

4. The Trust Fund for Victims at the International Criminal Court (hereinafter “Trust Fund”) wishes to express at the outset that it appreciates the Presiding Judge’s concerns that the victims of the post-election violence in Kenya not be “left out in the cold”. Indeed, the Trust Fund’s Board of Directors and, at their direction, the Trust Fund Secretariat have been closely following developments and engaging with stakeholders in the Kenya situation. In this spirit, the Trust Fund respectfully requests leave to submit observations on the questions raised by the Presiding Judge, as well as the response of the CLR, that potentially concern its assistance mandate under regulation 50 (a) of the Regulations of the Trust Fund. In the Trust Fund’s view, these observations may be of assistance to the Trial Chamber’s further considerations.

5. Regarding the legal basis for its request for leave, the Trust Fund notes that the exact nature of any contemplated order that may implicate the Trust Fund’s resources and its assistance mandate is not entirely clear. Accordingly, the Trust Fund would like to make two submissions for the Trial Chamber’s consideration.

6. First, in relation to rule 103 of the Rules, the Trust Fund submits that it should be considered an “organisation” within the meaning of rule 103 (1) of the Rules. In this regard, the Trust Fund recalls that it is an independent body from the Court, established by and accountable to the Assembly of States Parties, which *inter alia* elects the Members of the Trust Fund’s Board of Directors. The Trust Fund further submits that receiving observations on these issues from the Trust Fund would be appropriate and, given the subject matter of the questions posed by the Presiding Judge and the CLR’s responses thereto, may be desirable for the Trial Chamber’s proper determination of the case. The Trust Fund recalls that the CLR indicated that receiving submissions from the Trust Fund may be needed.

7. Irrespective of rule 103 of the Rules or in addition to it, the Trust Fund notes that the contemplated order may take the form of a request or invitation to the Trust Fund’s Board of Directors for it to consider, as provided for in regulation 50 (a) (i) of the Regulations of the Trust Fund, whether to undertake activities pursuant to its assistance mandate. The Trust

Fund would welcome the opportunity to constructively and proactively engage with the Trial Chamber with regard to the Trust Fund's assistance mandate, and any potential Board of Director's decisions thereon, under regulation 50 (a) of the Regulations of the Trust Fund.

III. THE PROPOSED TOPICS TO BE ADDRESSED IN THE OBSERVATIONS

8. The Trust Fund respectfully submits that its observations would be “desirable for the proper determination of the case” because they relate to issues that impact not only on this case, but also future situations and cases at the Court, and, most importantly, on the rights and expectations of the victims of crimes within the Court's jurisdiction with respect to the Trust Fund's assistance activities. If granted leave, the Trust Fund will address the following issues:

- a. The applicable legal framework relevant to the Trust Fund's assistance mandate under regulation 50 (a) of the Regulations of the Trust Fund, including
 - i. the Board of Directors' full discretion and authority to decide whether to provide assistance in a particular situation;
 - ii. the “relevant Chamber of the Court” to be notified by the Board of Directors of its conclusion to undertake activities pursuant to regulation 50 (a) (ii) and (iii) of the Regulations of the Trust Fund;
 - iii. the legal parameters of the Trust Fund's activities under regulation 50 (a) of its Regulations, which are in place in order to ensure that such activities do not “pre-determine any issue to be determined by the Court”;
 - iv. the other factors that are considered by the Board of Directors in exercising its discretion under regulation 50 (a) of its Regulations, such as the safety and security of victims and their families, as well as the Trust Fund staff and its partner institutions, the human and financial resources available in the overall context of all other situations before the ICC, and whether there are other agencies and donors providing assistance to relevant victims; and

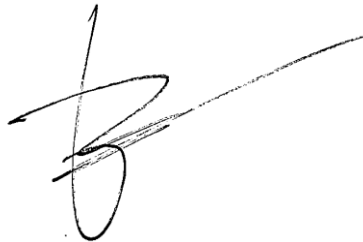
- v. with respect to the victims of the post-election violence at issue in the present case, the potential implications of the Trial Chamber's decision to vacate the charges without prejudice to the accused being prosecuted afresh in the future.
 - b. The relationship between the Trust Fund's assistance activities in a situation country and any potential domestic and/or international obligations of a State to provide reparations to its citizens, in the sense that the Trust Fund's activities are supplementary and do not function to alleviate or replace any such State obligation.
 - c. The concept of "assistance *in lieu of* reparation", including the difference in scope between Court-ordered reparations deposited with or made through the Trust Fund (regulation 50 (b) of the Regulations of the Trust Fund) and assistance to victims provided pursuant to regulation 50 (a) of its Regulations, in consideration of the absence of a required nexus with established individual criminal responsibility (which is relevant to reparations) and the situation-based, victim-centred approach that is particular to the Trust Fund's assistance mandate.
9. The Trust Fund notes that the Presiding Judge and CLR addressed other issues than those for which the Trust Fund requests leave to submit observations, including the question of whether the Court may issue an order for reparations against a State, generally or due to the specific circumstances of the present case, as well as whether a conviction is a *conditio sine qua non* for any order for reparations issued by the Court. The Trust Fund considers that these matters do not *per se* touch upon its independent authority or its resources, nor do they necessarily find resolution by reference to its Regulations, given that it is not presently clear if such an order is contemplated to be made directly against a State, as opposed to a convicted person, potentially implicating the Trust Fund by ordering any such awards to be deposited with or made through the Trust Fund (rule 98 (2) –(4) of the Rules, Regulations 50 (b) and 59 -75 of the Regulations of the Trust Fund). The Trust Fund therefore does not include these issues in the present request. However, the Trust Fund wishes to express its

willingness and readiness to provide observations on these or any other issues if felt desirable and potentially of assistance by the Trial Chamber.

10. Finally, the Trust Fund wishes to assure the Trial Chamber of its willingness to comply with any page and time limit that the Trial Chamber may set, should it grant the Trust Fund's present request for leave to submit observations.

FOR THE FOREGOING REASONS

The Board of Directors respectfully submits this request for leave to submit observations before the Trial Chamber.

A handwritten signature in black ink, consisting of a stylized 'P' followed by a long horizontal stroke and a loop at the end.

Pieter W.I. de Baan
Executive Director of the Secretariat of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 22 June 2016

At The Hague, The Netherlands