Dissenting Opinion of Judge Eboe-Osuji

1. With respect, I am unable to share the decision and reasoning of my highly esteemed colleagues in: (i) rejecting the request of the Trust Fund for Victims to make submissions in reaction to the views and concerns expressed by the Victims' Counsel; and, (ii) declining to consider the merits of the views and concerns expressed by the Victims' Counsel.

2. In a dissenting opinion at the US Supreme Court, Justice Blackmun once saw a reason to rue the decision of the majority from which Justice Brennan also dissented. Blackmun J opened his opinion in the following words: 'Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." ... But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts.'[1] And, a little later, he continued: 'Like the antebellum judges who denied relief to fugitive slaves, ... the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case ... is an open one, and our ... precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.'[2]

3. The decision and reasoning of my highly esteemed colleagues compel me into the fullest affinity with Justice Blackmun's demurrer. To be clear, I firmly share the view that compassion must not be banished from the province of judging. But, I hasten to make clear also that my disagreement with my distinguished colleagues does not hang merely on the tendrils of that sentiment. Far more than that, my disagreement is firmly anchored in 'the legal norms that should apply to [the] facts' in the present matter, in the light of the terms and context of the Rome Statute.

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[1] *DeShaney v Winnebago County Department of Social Services*, 489 US 189 (1989) at p 212.
[2] *Ibid*, p 213.

4. Notably, one basis of the majority decision is a suggested parity of reasoning with the Chamber's 'Decision on the Ruto Counsel's Request to appoint an *Amicus* Prosecutor' dated 2 June 2016.[3]

5. But, in law, disparity in the circumstances being compared is generally inconvenient to parity in reasoning. This engages that important notion in law known in some legal systems as 'distinguishment.' It misses the point, in my respectful view, to say that the reasoning in the 2 June 2016 decision should control the outcome in the present matter. There is no parity.

6. The decision of 2 June had engaged two main considerations. First, the Chamber 'consider[ed] it inappropriate to exercise jurisdiction on the merits of the application made by the Ruto Counsel.'[4] And, second, the Chamber reasoned as follows: 'As the Ruto Counsel's application aims to initiate an investigation against certain targets, the proper forum for the applicants to bring their complaint would be the Pre-Trial Division.'[5]

7. It is to be noted that the first consideration did not result from any peremptory juristic formula, but on a sensible judgement call that it was '*inappropriate* to exercise jurisdiction on the merits of the application' [emphasis added]. More importantly, what made it inappropriate to exercise jurisdiction was necessarily coloured by the request being made: this was to initiate an investigation whose purpose was to commence a new case, including confirmation of proceedings. That was something that engaged the very *raison d'être* of the Pre-Trial Division. And, as such, the Ruto Counsel's request had necessarily engaged a seriously questionable exercise of jurisdiction on the part of the Trial Chamber.

8. But, just as importantly, other stated reasons for the view that it was inappropriate to exercise jurisdiction also rested on the consideration that the 'case' between *the Prosecutor* and *Ruto and Sang* in which the Ruto Counsel had continued to describe themselves as 'the defence' had been terminated on 5 April 2016, by a decision of the Chamber in which it was found (by majority) that neither Mr Ruto nor Mr Sang had a 'case' to answer. No appeal was lodged against that decision at all or within the time-limit for the appeal, which time-limit had expired before the lodging of the Ruto Counsel's Request to appoint an *Amicus* Prosecutor. '*Accordingly,*

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[3] 'Decision on the Ruto Counsel's Request to appoint an *Amicus* Prosecutor' dated 2 June 2016, ICC-01/09-01/11-2034.

[4] See *ibid* para 10.

[5] See para 11.

the Chamber's majority decision of 5 April 2016 effectively terminated all trial proceedings *against the accused*. The "case" of the *Prosecutor* ***[versus]*** *Mr William Samoei Ruto and Mr Joshua Arap Sang* ... before Trial Chamber V(A) was therefore concluded by the decision of 5 April 2016, for all intents and purposes.'[6] [Emphases added.] It is thus clear that the purport of that finding related to the *lis* – as such – between the Prosecutor on the one hand and Mr Ruto and Mr Sang on the other.

9. That the case against Mr Ruto and Mr Sang *had been terminated* by the decision of 5 April 2016, thus terminating Mr Ruto's and Mr Sang's *loci standi* to bring further proceedings before the Chamber as 'accused' or 'defence', compels no logic at all to any effect that precludes this Chamber from considering the views and concerns of the victims arising from the consequences of terminating the 'case' against Mr Ruto and Mr Sang – when such consequences do not engage any interest of Mr Ruto and Mr Sang as accused persons in the terminated case. This is particularly so, given that the victims were never given an opportunity to express such views and concerns as to reparation prior to the termination of the case.

10. What is more, that Ruto Counsel's request of the Trial Chamber *to initiate new investigations* (for purposes of a different case and trial) had been found to occasion questions of inappropriate exercise of jurisdiction on the part of the Trial Chamber (given the existence of precisely that jurisdiction in the Pre-Trial Division) generates no logic at all to the effect that the Trial Chamber cannot or should not consider questions of reparation arising from the termination of the case against Mr Ruto and Mr Sang.

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11. Another basis apparently implicated in the Majority's reasoning in today's decision is the view, as I understand it, that the question of reparation does not arise, since there had been no conviction in the case. In that regard, the Majority wrote as follows:

> In the LRV Request, the LRV requests the Chamber to play a role in ensuring that reparations awarded or assistance be given to the victims of the 2007/2008 post-electoral violence in Kenya. However, the view that victims must be able to express their views and concerns on matters of reparations does not mean that this Chamber is the right forum to entertain such views and concerns. Indeed, there are no pending proceedings related to the harm allegedly suffered by the victims of the post-

[6] See para 9.

> electoral violence before this Court, let alone this Chamber. The Majority understands that while 'this must be dissatisfactory to the victims, a criminal court can only address compensation for harm suffered as a result of crimes if such crimes have been found to have taken place and the person standing trial for his or her participation in those crimes is found guilty'.[7]

12. With respect, I see no convincing basis in law for the idea that an ICC Trial Chamber may not entertain questions of reparation merely because the accused they tried was not found guilty. The reasoning is precisely of the kind that Justice Blackmun had lamented as retreating 'into a sterile formalism' in a manner that is inimical to the 'dictates of fundamental justice.' In a similar vein, Lord Wilberforce had also cautioned judges against the 'austerity of tabulated legalism' which does not give individuals the full measure of their rights.[8] In my view, such formalistic approach could never supply a convincing system of reasoning that prevents an ICC Trial Chamber from entertaining questions of reparation in the absence of conviction. And this is especially so in a case, as the *Ruto and Sang* trial, in which there was never a question that the victims suffered harm – to the contrary, all the parties and the Government of Kenya had accepted that the victims had suffered harm.

13. Indeed, there is a solid basis in international law to reject the no 'compensation' without conviction thesis. International and transnational norms concerning criminal injuries compensation have completely rejected the idea. A representative norm in that regard is expressed in the European Convention on Compensation of Victims of Violent Crimes. It provides in article 2(2) that '[c]ompensation shall be awarded ... even if the offender cannot be prosecuted or punished.' A similar norm obtains in New Zealand,[9] Ontario (Canada),[10] the United Kingdom[11] and Western Australia.[12]

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[7] See para 7 of the Majority Decision.

See *Minister of Home Affairs* v *Fisher* [1980] AC 319 at p 328. The dictum of Lord Wilberforce has been quoted with approval in the Canadian Supreme Court. See, for instance, *Hunter v Southam* [1984] 2 SCR 145 at p 156.

[9] See <www.acc.co.nz/index.htm>

[10] See <www.sjto.gov.on.ca/cicb/>

[11] See <www.gov.uk/government/organisations/criminal-injuries-compensation-authority>

[12] See <www.courts.dotag.wa.gov.au/C/compensation.aspx?uid=1894-2822-6966-4703>

14. I have previously expressed myself on that matter.[13] I need not repeat myself here: I incorporate those reasons by reference.

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15. Before proceeding further, I note that the Majority alluded – and it is only an allusion – to the possibility that there may be another forum that may be 'the right forum to entertain [the victims'] views and concerns' on matters of reparation. But the Majority neither identified any such forum, nor the legal basis that makes it the right forum to consider questions of reparation following the trial of a case before a particular Trial Chamber.

16. Surely, the allusion that this Trial Chamber is not the 'the right forum to entertain [the victims'] views and concerns' on matters of reparation arising from termination of the case against Mr Ruto and Mr Sang, could not (out of any parity of reasoning with the decision of 2 June) be an allusion that the Pre-Trial Division would afford the right forum (as was said in the 2 June decision). Notably, in the 2 June decision, the Ruto Counsel had requested this Trial Chamber to take a decision to initiate the investigation of a new article 70 case, following the termination of the case against Mr Ruto and Mr Sang. But, there is nothing in the Rome Statute that contemplates that a Trial Chamber that handled a main case is free to take it upon itself to take a decision initiating a new case. The Statute is clear on how new cases are to be initiated. The Statute is amply clear that it is the decision of a Pre-Trial Chamber that initiates a new case. Therefore, it was right for this Trial Chamber to decline jurisdiction, out of a sense of judicial propriety.

17. But the matter now before us – the question of reparation incidental to the termination of a trial – is quite a different matter. The Victims' Counsel requested us to consider their views and concerns on the question of reparation, following the termination of the case against Mr Ruto and Mr Sang. In the absence of a specialised reparations Chamber, it seems clear to me that the question of reparation following a trial (however concluded or terminated) falls to the Trial Chamber that conducted the relevant trial – if the concerned judges are still in service at the Court. The Statute nowhere indicates that such questions fall to a Pre-Trial Chamber, following the completion of a trial. On what statutory basis, then, does a Trial Chamber decline (as the Majority have done) to consider the views and concerns of victims on the

[13] See *Prosecutor v Ruto and Sang* (Decision on Defence Applications for Judgments of Acquittal) dated 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, paras 199 to 202.

question of reparation, reasoning by allusion that the question belongs to another forum?

18. Also surprising is the Majority's reasoning that says: 'Indeed, there are no pending proceedings related to the harm allegedly suffered by the victims of the post-electoral violence before this Court, let alone this Chamber.' But, how does such a proceeding pend before the Court, following a Trial Chamber's termination of a case upon either acquittal or termination of a trial on a no-case basis? It seems to me an impossible – and unfair – position in which to place victims who want the Chamber to consider their views and concerns as to reparation following the termination of a trial either on a no-case basis or an acquittal. They are effectively told: 'Sorry, Victims, but we cannot consider your views and concerns, because there is no longer a case pending before the Court.' But, the question arises, why is it that there is no longer a case pending before the Court? The inevitable answer is this: 'A case is no longer pending, because we had terminated proceedings when we discharged the accused upon acquittal or on a no-case basis. And we did so, without giving you a chance to express those views and concerns as to reparation.' It is indeed a surprising and difficult reasoning. I do not share it.

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19. It is clear that a critical consideration in appraising the correctness of the second basis for the majority's decision – and, indeed, also for the first basis – engages the idea of integrating reparative justice within the framework of administration of justice in this Court: this being an idea not generally shared among all the courts that have been known to administer international criminal justice. It may be noted that unlike the juristic circumstances of the major international courts that had occupied the field of international criminal justice before the ICC – specifically, the Nuremberg Tribunal, the Tokyo Tribunal, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone that were virtually exclusively concerned with *punitive* justice – the juristic circumstances of the ICC are more expansive in scope, specifically because this Court's Statute actively recognises the need to administer *reparative* justice, too. This thus begets a particular international legal norm that must be handled with care, in order to do justice according to it. It necessarily requires that the strand of reparative justice be isolated with care and given its own specific value, when it is possible to do so without unfair prejudice to

the rights of accused persons. Anything less will be to diminish the place of reparative justice as an integral part of administration of justice in this Court.

20. Indeed, to the man or woman in the street, a truism of justice requires that Peter and Paul be given their respective dues. There are also religious iterations of the same truism. I may be forgiven, perhaps, to recall the classical moral story taught in Sunday school about how Jesus Christ had avoided an early trap set by detractors, in hopes of finding a legitimate reason for the eventual crucifixion. St Mark's version of the story goes like this:

> Later, they sent some of the Pharisees and Herodians to catch Jesus in His words. 'Teacher,' they said, 'we know that You are honest and are swayed by no one. Indeed, You are impartial and teach the way of God in accordance with the truth. Now then, is it lawful to pay taxes to Caesar or not? Should we pay them or not?'
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> But Jesus saw through their hypocrisy and said, 'Why are you testing Me? Bring Me a denarius to inspect.'
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> So they brought it, and He asked them, 'Whose likeness is this? And whose inscription?'
>
> 'Caesar's,' they answered.
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> Then Jesus told them, 'Give to Caesar what is Caesar's, and to God what is God's.'
>
> And they marvelled at Him.[14]

21. In this Court, it should not require divine inspiration of Jesus-like proportions to see the need and the possibility to give to accused persons what is theirs and to victims what is the victims' – nor should it be a thing of marvel. Much like the denarius, the Rome Statute contains tangible inscriptions pertaining to victims, which are discernibly different from those pertaining to accused persons. We may, in that regard, first consider the words of article 64(2) of the Rome Statute, which provides as follows: 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.'

22. And, perhaps, more to the point, the two provisions of the Rome Statute that best spell out the differences between this Court on the one hand, and the ICTR, the ICTY and the SCSL on the other are article 68 and article 75. More relevantly for our purposes, article 68(3) provides as follows:

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[14] Mark 12: 13-17.

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

23. And article 75 speaks more elaborately to the need for this Court to establish principles concerning reparation for victims. There are no words of limitation that circumscribe the circumstances in which those principles may need to be established and in which they may be brought to bear in the administration of justice in the broader sense that includes reparative justice. Those circumstances do not then preclude from their contemplation the termination of proceedings either upon an acquittal or on the basis that there had been no case made out for the accused to answer at the close of the case for the prosecution.

24. The decision of 5 April 2016 terminating the proceedings on the no-case basis was the first occasion of its kind in this Court. Given the Court's unique context of reparative justice unknown to the other international criminal courts mentioned above that were more used to the idea of termination of proceedings on grounds of no-case to answer, it is necessary to consider whether there are principles of reparation that can be established to apply at the ICC in circumstances in which cases are terminated on the no-case basis. And to do that, it is important to consider not only the views and concerns of victims, but also to receive submissions from the Trust Fund for Victims, as well as concerned States Parties.

25. Putting it simply, it is highly unusual for judges to foreclose the inquiry at hand – let alone take a firm position that no question concerning reparation can be considered – *without* having heard and considered submissions on the matter. Regrettably, that is the effect of the decision of my esteemed colleagues. I cannot join them in it.

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26. To the foregoing concerns, I must also add the following. To conflate considerations of punitive justice with those of reparative justice – and say that this Court cannot entertain questions about reparation for victims when a case against the accused has been terminated – will create more confusion and anxiety about the administration of justice in this Court. There are many reasons for this worry. For

one thing, it may make it difficult for the victims and their sympathisers – a critical constituency of this Court – to accept acquittals at the ICC. And it may make it even more difficult for them to accept the idea that a case may be terminated at the ICC on grounds that the Prosecution has not made out a case for the defence to answer. Such outcomes will begin to feel to them like a 'failure' of justice at the ICC. The resulting moral pressure may, in turn, create a concern among other important constituencies of the Court, who may then have been given reason to worry that the Court and its judges may be operating under pressure to ensure convictions at all costs. Neither concern augurs well for this Court. And they are avoidable simply by delinking questions of reparation from those of conviction, to the extent possible.

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27. In the circumstances, I am constrained to observe that in my reasons in the no-case decision of 5 April 2016, I raised certain questions on the subject of reparation.[15] Those questions remain to be answered. The Majority decision of today has not foreclosed those questions: it only deferred their answers for, perhaps, another day and another case, when submissions have been fully received on them. I see no reason to withdraw either the questions themselves or the remarks that accompanied them.

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28. In the final analysis, the following must also be stressed. There is a critical need to recall here that the role of the ICC as an instrument of justice – including reparative justice – is only complementary. In that regard, the ICC can only be a court of last resort. The primary responsibility for the administration of justice remains with the States – also possibly augmented by other complementary regional arrangements that do not in any way jeopardise the role of the ICC as a court of last resort.

28. That being the case, the existence of the ICC should not result in a situation in which national Governments may feel free to abdicate their responsibility to attend to the needs of justice for their own citizens. This is particularly the case as regards the responsibility for reparative justice, where the concerned Government had failed in the first place to prevent the harm that so engaged the need for reparative justice. In this connection, I am encouraged to learn from the submissions of the Victims' Counsel that the Government of Kenya appears to have recognised their

[15] See *Prosecutor v Ruto and Sang* (Decision on Defence Applications for Judgments of Acquittal), *supra*, paras 204 to 209.

responsibility to attend to the reparation needs of victims of the Kenyan post-election violence of 2007/2008. I can only strongly encourage the Government in that effort and to see that commitment through regardless of the question of the punitive responsibility of anyone – though the latter question must also be attended to as a separate matter.

29. As today's decision shows, this Chamber makes no reparation order. The matter of reparation is now in the hands of the Government of Kenya and those of the Trust Fund for Victims – in the latter case, purely as a matter of their own grace and discretion un-modulated by any intervention by the Chamber – or possibly before an appropriate international human rights body.

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30. Lastly, there are some questions that arise from certain observations and arguments made in the application of the Trust Fund for Victims.

31. I note that in their request, the Trust Fund asserts that 'it is an independent body from the Court'.[16] The submission even urges 'that it should be considered an "organisation" within the meaning of rule 103(1) of the Rules.'

32. In my view, such proclamations of independence may need to be approached with great care. I make no definitive determination on the question at this time, since the Trust Fund was not given an opportunity to make submissions. But in contemplating the matter, the following considerations will need to be kept in mind. First, as noted earlier, the Rome Statute has now integrated reparative justice into the framework of administration of justice at the ICC. That being the case, an orderly and coordinated approach to the administration of justice must engage the question whether it can truly be said that the Trust Fund for Victims is 'an independent body from the Court.' Second, the Trust Fund's *raison d'être* is necessarily beholden to the establishment of the Court, in the sense that without the establishment of the Court, the Assembly of States Parties would have established no Trust Fund for Victims. Indeed, the establishment of the Trust Fund was precisely contemplated in article 79 of the Rome Statute, 'for the benefit of the victims of the crimes within the jurisdiction of the Court.' Third, nothing in article 79 says that the Trust Fund is 'an independent body from the Court.' Notably, the Rome Statute was clear in indicating 'independence' when it was felt necessary to make that designation – as was the case with judges [article 40] and the Office of the Prosecutor [article 42(1)].

[16] See paragraph 6 of their Request for leave to submit observations: ICC-01/09-01/11-2036.

Even when indicating such independence, the Statute did not go so far as to speak of independence 'from the Court'. In particular, even in its independence, the Office of the Prosecutor remains within the overall authority of the judges, for the necessary purposes of the administration of justice. Finally, in paragraph 7 of the ASP resolution establishing the Trust Fund, it is clearly contemplated that 'the activities and projects of the Trust Fund and the allocation of the property and money available to it' are 'subject to the decisions taken by the Court.' All these and more are factors to be borne in mind when asserting that the Trust Fund is 'an independent body from the Court.'

33. In my predisposition to receive the submissions of the Trust Fund in the matter at hand, it would not be necessary to treat the Trust Fund as an 'organisation' for purposes of rule 103(1). It is enough that it is an entity – however one may choose to characterise its relationship with the Court – which possesses special expertise that puts it in position to make submissions that the Chamber may find helpful in the disposition of a matter before it. In the work of the Chamber, such submissions were regularly sought and received – as a matter of prudence – from specialist entities within the Court.

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

Chile Eboe-Osuji
(Presiding)

Dated this 1 July 2016

At The Hague, The Netherlands