Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

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

Date: **15 June 2016**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR

v.

WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public
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', plus 3 Annexes

Source: **Wilfred Nderitu, Common Legal Representative for Victims**

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

The Office of the Prosecutor
Fatou Bensouda
James Stewart
Anton Steynberg

Counsel for the Defence for William Samoei Ruto:
Karim AA Khan, QC,
David Hooper, QC
Essa Faal, Shyamala Alagendra

For Joshua arap Sang
Joseph Kipchumba Kigen-Katwa
Caroline Buisman

Legal Representatives of Victims
Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massidda
Orchlon Narantsetseg

The Office of Public Counsel for the Defence

States' Representatives
Githu Muigai, S.C.;
Attorney General, Republic of Kenya

Amicus Curiae

Other
Trust Fund for Victims

REGISTRY

Registrar
Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Isabelle Guibal

Other

Submissions:

> "…Victims… need to find meaningful justice in… this Court in which they [have] the eventual right to seek and obtain reparations. Short of this, Your Honours, the criminal justice process will remain faceless…
>
> They look up to you to remove from them the tag that they are the redheaded stepchild of the criminal justice process… The victims… feel that through you they can… walk along the road from 'justice denied to justice restored'.
>
> The violence of 2007 and 2008 affected the lives of many people, including many women, children, and the elderly… There are many children whose lives were drastically and brutally affected by their witnessing death, human injury, and material destruction, and other dangerous conditions that exposed them to the potentiality of harm from known and unknown sources. Many of them were disrupted at school and in their neighbourhoods, and effectively compelled to move from neighbourhoods and neighbours that they were familiar with to a life of living in tents, with their parents now having to wait for handouts from charitable organizations and well-wishers. These child victims, along with their parents, were stripped of their sense of personal dignity. Their trust in the world, in spirituality, and in deeply held beliefs about social order, justice and humanity was fundamentally upset, and replaced with cynicism, suspicion and resentment for humanity…
>
> [The Court] bear[s] the burden of reaffirming the international community's faith in the goodness of humankind by administering justice and thereby positively influencing the emotional recovery of the victims, including the many women and children and other vulnerable groups."
>
> - *Opening Statement by the Common Legal Representative for Victims, 10 September 2013*
>
> "This trial is about <u>obtaining justice</u> for the many thousands of victims of the Post-Election Violence and ensuring that there is no impunity for those responsible, regardless of power or position."
>
> - *Opening Statement by the Prosecutor, 10 September 2013*[1]

Introduction:

1. This filing is consequential upon the invitation by the Presiding Judge of Chamber V(A), His Honour Judge Chile Eboe-Osuji, for victims to express their views and concerns in relation to reparation or assistance in lieu of

[1] https://www.icc-cpi.int/iccdocs/otp/130909-OTP-Opening-AddressEng.pdf. The underlining of the words "obtaining justice" appears in the original text of the Prosecutor's Opening Address and is attributed to her.

reparation in the Judge's Reasons contained in the Majority Decision on Defence Applications for Judgments of Acquittal ("the Decision")[2].

2. Immediately following the Decision, the Government, through senior officials who included the President and the Attorney General, amongst others, expressed its commitment to addressing the plight of victims. On the same day that the Decision was rendered, President Uhuru Kenyatta made a statement in which he said as follows:

> *Each and every victim of this unfortunate happening matters. Not one of them has been forgotten. Their suffering demanded of us as leadership to seek reconciliation. My Deputy and I campaigned and were elected on a platform to unite and reconcile our motherland. When you entrusted the leadership of the country to our administration, you made us responsible for the healing and reconciliation of our people.*
>
> *Kenya has come a long way since the dark days of 2008. We have made peace. We have given ourselves a new constitution and a new political order. We have resettled and compensated many victims, and continue to respond to the outcomes of that unfortunate period of our history.*[3]

3. The Attorney General, Prof. Githu Muigai, also made a statement immediately upon delivery of the Decision, in which he stated as follows:

[2] ICC-01/09-01/11-2027-Conf+Anxs

[3] http://www.president.go.ke/2016/04/05/updated-from-paris-france-president-kenyattas-statement-on-icc/

> *The Government of Kenya welcomes the termination of the last two cases relating to citizens of the Republic of Kenya and arising from the post-election violence of 2007/8.*
>
> *The government looks forward to re-energising the process of resettlement of IDPs; full compensation of victims; and national healing and reconciliation.*
>
> *The government is committed to strengthening of local judicial institutions to detect, to deter, and, if need be, to prosecute crimes that may arise out of circumstances similar to those of 2007 and 2008.*
>
> *To this end, the government welcomes the assurance of the Chief Justice and the Judicial Service Commission that an international crimes division of the High Court is to be inaugurated in the next two weeks.*[4]

4. For its part, the national bar association, the Law Society of Kenya (LSK), also made a public statement[5] on 11 April 2016 in which it called for the establishment of an independent High Court Division to exclusively deal with crimes against humanity, in order "to protect citizens from recurrence of political violence and criminality after General Elections". The LSK President, Mr. Isaac Okero, reminded the State that despite the fact that Kenya is just about to enter another General Election season, victims of the 2007 post-election violence – including some internally displaced persons who received paltry monetary compensation - were still struggling with trauma. He further said (in light of the Court's

[4] http://www.the-star.co.ke/news/2016/04/06/ags-statement-on-the-termination-of-the-icc-cases_c1326576?platform=hootsuite

[5] http://lsk.or.ke/index.php/component/content/article/1-latest-news/558-lsk-calls-for-high-court-crimes-division

observations on witness interference and political meddling), and it is submitted, that "peace without truth and justice is a fragile peace".

5. Against this background, it was necessary to allow the passage of some reasonable period of time after the delivery of the Decision before making this filing for a number of reasons:

   i. The finding in the Decision that this case was marked by "a troubling incidence of witness interference and intolerable political meddling"[6] potentially enhanced the risk of negative reactions against victims and therefore called for a cooling-off period;

   ii. It was necessary to fully understand and monitor the reaction of the Government of Kenya to the Decision, particularly in relation to the general plight of victims and specifically regarding the invitation to for victims to express their views and concerns on the question of reparation or assistance in lieu of reparation; and

   iii. There is need to send out a public and general alert on worsening inter-ethnic relations and political tensions in Kenya ahead of General Elections scheduled for August 2017. It is understood that the purpose of this filing is primarily to express victims' views and concerns in relation to reparation or assistance in lieu of reparation, but it is nevertheless considered desirable to contextualize through the filing the fragility of the current Kenyan socio-political situation, and the real likelihood that victims of the 2007/2008 and of previous episodes of ethnic violence could find themselves re-

[6] Paragraph 464 of the Majority Decision

victimized and re-traumatized. Unless checked, the current situation could also result in new victims. This filing is therefore also an SOS.

Reparation as an International Law Obligation:

6. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("The Basic Principles")[7] were adopted and proclaimed by the United Nations General Assembly Resolution 60/147 of 16 December 2005 during the General Assembly's 64th Plenary Meeting. The Basic Principles affirm "the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law in a systematic and thorough way at the national and international levels."[8]

7. The Basic Principles further recognize the moral obligation on the part of the international community by honouring the victims' right to benefit from remedies and reparation[9]. More importantly, the Basic Principles recognize that honouring the victims' right to reparation is a reaffirmation of international law in the field[10]. Put in another way, ensuring that victims receive effective reparation is to confirm the validity and correctness of international law. Thus, the victims' *right* to reparation

[7] The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law are available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
[8] See the recital clause in the Basic Principles
[9] The recital clause in the Basic Principles refers to this moral obligation as "keep[ing] faith with the plight of victims, survivors and future human generations".
[10] *ibid.*

becomes in international law an *obligation* on the part of a State, and is also binding in relations between States and between Nations.

Reparation as a Domestic Legal Obligation on the Part of a State:

8. In the case of Kenya as a State, this obligation in international law finds vitality primarily through the adoption of the Basic Principles, and the State's ratification of the Rome Statute of the International Criminal Court. The ratification by the State of the Rome Statute, and the adoption of the Basic Principles, then becomes a ceding of the State's *national* jurisdiction. This means that the State has a reversionary *national* obligation to ensure the realization of an effective right to reparation for victims.

9. The Basic Principles place an obligation on the State to respect, ensure respect for and implement international human rights law and international humanitarian law. This obligation emanates from Treaties of which the State is a party, customary international law, and the domestic law of the State[11]. The obligation of the State extends to providing victims of a human rights or humanitarian law violation with "equal and effective access to justice"[12], irrespective of who may ultimately be the bearer of responsibility for the violation, and "effective remedies to victims, including reparation".[13] Moreover, a person shall be considered a victim "regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim".[14]

[11] Principle 1
[12] Principle 3(c)
[13] Principle 3(d)
[14] Principle 9

10. More importantly, Principles 11 and 15 provide for "adequate, effective and prompt" reparation to victims for harm suffered, and to that end the State is required to "make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law".[15]

11. Indeed, this reversionary national obligation on Kenya's part is also recognized in the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012.[16] Section 11(4) of the Act provides that the Government shall"…bear the primary duty and responsibility for preventing and protecting from internal displacement, preparing for it and mitigating its consequences, protecting and assisting internally displaced persons throughout the Republic, and creating conditions conducive to and providing durable and sustainable solutions for internally displaced persons".

12. Furthermore, Section 20(1) of the Kenya's International Crimes Act[17] sets out various forms of assistance in respect of which the ICC may make a request to Kenya as a State Party. Section 20(2)(a) then provides that nothing in the said section:

    (a) limits the type of assistance that the ICC may request under the Rome Statute or the ICC Rules (whether in relation to the provision of information or otherwise); or

[15] Principle 12(d)
[16] No. 56 of 2012.
[17] Chapter 60 of the Laws of Kenya

(b) prevents the provision of assistance to the ICC otherwise than under this Act, including assistance of an informal nature.

13. It is therefore within the contemplation of the International Crimes Act[18] that the ICC may request Kenya to provide *any form* of assistance. It is argued that the nature of assistance that the ICC could request therefore goes beyond "judicial assistance" in the (narrower) sense in the Rome Statute but could include a request for assistance in ensuring that victims of the post-election violence obtain reparations.

14. It is therefore regrettable that on 8 June 2016, a Bill of Parliament seeking to repeal the International Crimes Act was tabled in Parliament and has already gone through the first reading[19]. The Bill was tabled on the same day that the 2016/2017 National Budget Speech was read, and this fact raises a reasonable suspicion that the Bill may have been surreptitiously tabled on that day when it stood a very high chance of being overshadowed by the Budget Speech. Whether the Bill eventually becomes law will be an important factor in determining the commitment of Kenya in addressing impunity. Passage of the Bill will effectively mean that one of the most important and effective avenues for addressing matters of international criminal justice will have been removed. It is submitted that the existence of diplomatic avenues envisaged under the International Crimes Act for the making of requests between the ICC and Kenya as a State Party is under a real threat.

15. It is further submitted that *effective* reparation or assistance in lieu of reparation can only take place in a situation where there is a proper legal

[18] *ibid*.
[19] Annex 1

framework for international criminal justice in place, coupled with a peaceful socio-political environment. There is therefore a real danger that in the event that the International Crimes Act is repealed (and with the backdrop of a potentially violent political period), there would not be *effective* reparation or assistance in lieu of reparation for victims on whose behalf the assistance or reparation is now sought.

16. In short, victims of the 2007/2008 post-election violence run the real risk of being left without a remedy. Their expectations to the effect that the ICC process would allow them to walk along the road from 'justice denied to justice restored' which were voiced during the CLR's Opening Statement are once again on the brink of being dashed. More importantly, the danger of re-victimization and re-traumatization of victims of past crimes against humanity, and the danger of creating new victims, looms large. The situation is a time bomb waiting to explode.

Victims of the Post-Election Violence are Entitled to Reparation for <u>Harm Suffered:</u>

17. As noted in the Decision, the available evidence and the admissions of the parties confirmed the occurrence of the post-election violence, and that the violence resulted in serious harm to the victims.[20] The CLR agrees with and adopts the remarks of the Presiding Judge of Trial Chamber V(A) to the effect that:

> *…[T]he only matter of evidential difficulty implicated in the Chamber's majority decision concerns only the responsibility of the accused for that violence… [T]he victims of the post- election violence*

[20] paragraph 196 of the Decision, concurring opinion of His Honour Judge Chile Eboe-Osuji.

should not be left in the cold, because the proceedings before this Chamber were polluted by undue interference and political meddling which obscured an accurate assessment of the criminal responsibility of the accused.[21]

There is No General Principle of Law Making Conviction a *Sine Qua Non* for Reparation:

18. The CLR agrees and submits, as noted by the Presiding Judge[22], that the *Lubanga* Appeals Chamber judgment[23] on the issue of reparation did not lay down any principle making the conviction of an accused person a prerequisite for reparation. More importantly, the CLR agrees with the Presiding Judge that "there is no general principle of law that requires conviction as a prerequisite to reparation."[24] As pointed out by the Appeals Chamber in *Lubanga*, the granting of a reparations order directed at the Trust Fund for Victims or against a convicted person are not mutually exclusive concepts[25]. It is argued, by the same token, that even where there is no conviction (as in this case), reparations may nevertheless be ordered, directed at the Trust Fund for Victims, or against a third party (e.g., a State) with an obligation in international law to provide reparations.

19. It is a fundamental international law principle that where violations of international law are committed, reparation shall be made. As early as 1928, the International Court of Justice had recognized the right to reparation as a basic rule of international law. In Judgment No. 8 in the

[21] Paragraphs 197, 198
[22] *vide.,* paragraph 199 of the Majority Decision
[23] ICC-01/04-01/06-3129
[24] *vide.,* paragraph 201 of the Majority Decision
[25] ICC-01/04-01/06-3129, paragraph 70.

Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction) (the *Chorzów Factory (Jurisdiction)* case), the Court stated as follows:

> *It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.*[26]

20. Further, it appears that within the context of the ICC, a principle making conviction the *sine qua non* for the right to reparation would be inconsistent with the legislative intent of the Assembly of States Parties in making the Rome Statute and establishing the Court. In this regard, it is to be noted that Article 75(6) of the Statute provides that nothing in Article 75 *"shall be interpreted as prejudicing the rights of victims under national or international law"*.

21. The CLR submits that even if there were to be a principle making conviction a condition precedent for the right to reparation, such a principle could only logically mean that reparations would not be available where there was an acquittal. The CLR therefore submits that in the specific circumstances in which the charges against the accused persons in this case were vacated, it cannot be said that the right to reparation dies with the vacating of the charges. This is more so given the Trial Chamber's observation that there was "a troubling incidence of

[26] p. 21 of the judgment.
See http://www.icj-cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf

witness interference and intolerable political meddling"[27] intended to work for the benefit of the accused persons[28].

Responsibility of States for Internationally Wrongful Acts, the 'Duty to Protect', and Failure of the State to Discharge that Duty:

22. Additionally, it is a general principle under the 'Responsibility of States for Internationally Wrongful Acts'[29] that "[e]very internationally wrongful act of a State entails the international responsibility of that State".[30] Quite independently of the two Kenya cases which were referred to the ICC, the question could arise whether the 2007/2008 post-election violence in Kenya could also be seen within the context of an 'internationally wrongful act' on the part of the State. The Basic Principles provide[31] that "a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law".

23. In *Belgium v. Spain - Barcelona Traction, Light and Power Company, Limited (New Application: 1962) - Judgment of 5 February 1970 - Second Phase* (the *Barcelona Traction* Case),[32] the International Court of Justice remarked that:

> *…an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those*

[27] Paragraph 464 of the Majority Decision
[28] Paragraphs 156 and 195 of the Majority Decision on Defence Applications for Judgments of Acquittal
[29] Adopted by the International Law Commission at its 53rd session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. Text reproduced is as it appears in the Annex to the United Nations General Assembly Resolution 56/83 of 12 December 2001, and corrected by Document A/56/49(Vol. I)/Corr.4.
[30] Article 1
[31] *vide.,* Principle 15
[32] Judgments [1970] ICJ 1; ICJ Reports 1970, p 3; [1970] ICJ Rep 3 (5 February 1970). *Vide.,* http://www.worldlii.org/int/cases/ICJ/1970/1.html

> *arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations* erga omnes.
>
> *Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, *p. 23); others are conferred by international instruments of a universal or quasi-universal character.*

24. In the case of Kenya, the failure to adequately protect its population before and during the 2007/2008 post-election violence could therefore be attributed to the State under international law but, more importantly, also constituted a breach of an international obligation of the State both *erga omnes* and as a matter of treaty obligation under the Rome Statute. It is therefore submitted that Kenya as a State had a duty to protect its citizens and all other persons who found themselves on its territory, drawing upon its adoption (alongside all other members of the United Nations General Assembly) of the commitment to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity[33].

25. Moreover, there is evidence in the Waki Commission Report and in

[33] *vide.,* paragraphs 138-139 of the 2005 World Summit Outcome Document

various other reports that the State failed in its responsibility to adequately prevent the violence, including incitement to violence.[34]

26. Indeed, this failure on the part of the State appears to have been acknowledged by President Uhuru Kenyatta during his State of the Nation Address before both Houses of Parliament on 26th March 2015[35] when he stated as follows:

> *We have witnessed violence linked to elections which has left many Kenyans dead, maimed and dispossessed. In 2007-2008, this reached its most tragic expression with the post-election violence that left 1,300 Kenyans dead and more than 650,000 displaced from their homes across the country. Collectively, these incidents have disunited us and held our people hostage to this tragic history by providing the foundation and rationale for cynical and destructive politics of hate and division.*
>
> *In an effort to confront this past, the Truth, Justice and Reconciliation Commission (TJRC) undertook an inquiry into past injustices. Their report is before this House, and I urge the Hon. Members to process it without undue delay.*
>
> *My fellow compatriots, the Government has made efforts to relieve the*

---

[34] In his Reasons contained in the Majority Decision, the Presiding Judge, His Honour Chile Eboe-Osuji remarks that:

> *…[T]he Waki Commission reported that 'the pattern of violence showed planning and organization by politicians, businessmen and others who enlisted criminal gangs to execute the violence.' It would betray a very grave misunderstanding on the part of anyone to cite the majority decision of this Chamber as contradicting the Waki Commission in their finding that the 2007 election was characterised by a culture of political violence in Kenya, or even that the violence in the Rift Valley region had been planned.*

[35] http://parliament.go.ke/the-national-assembly/house-business/hansard?start=165

plight of victims, particularly those of the post-election violence of 2007/2008. While these efforts have been lauded internationally, most recently by the African Union (AU) report that recognized that Kenya has set a positive standard to be emulated, I recognize that it is impossible to fully compensate for the loss of life and the magnitude of suffering.

Yesterday, I received the Report on the 2007/2008 Post Election Violence Related Cases from the Office of the Director of Public Prosecutions (DPP), a copy of which is annexed to my Report on National Values. In all, there were 6,000 reported cases and 4,575 files opened... [T]he Office of the DPP recognizes there were victims and recommends that these cases be dealt with using restorative approaches.

…There… exists the promise of restorative justice…

…My administration… is building on the efforts of the last government to advance the resettlement, reconciliation and relief to internally displaced persons, and I am committed to continuing these efforts as necessary.

Hon. Members, notwithstanding the recommendation of the Truth, Justice and Reconciliation Commission (RTJRC) Report, I have instructed the Treasury to establish a fund of KShs. 10 billion over the next three years to be used for restorative justice.

Fellow Kenyans, the time has come to bring closure to this painful past; the time has come to allow ourselves the full benefit of a cohesive, unified and confident Kenya, as we claim our future. My brothers and sisters, to move forward as one nation, I stand before you today on my own behalf,

on behalf of my Government and all past governments to offer the sincere apology of the Government of the Republic of Kenya to all our compatriots for all past wrongs.

I seek your forgiveness and may God give us the grace to draw on the lessons of this history to unite as a people and together, embrace our future as one people and one nation.

27. The CLR submits that the above instances are not an exhaustive list of 'internationally wrongful acts' committed by Kenya as a State. The numerous démarches engaged into by the State and by the African Union (at the State's urging) amounted to an abdication of the State's treaty obligations under the Rome Statute. These initiatives were also aimed at the equally wrongful act of dissuading witnesses and victims from participating in the ICC process.[36]

28. In addition to the foregoing, the stated purpose of the International Crimes Act is "to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions"[37]. Incidental to this is the ending of the culture of impunity founded on cyclic violence related to elections which was also referred to in the Waki Report, and supported by the expert testimony of Mr. Hervé

[36] The political campaign, together with the issue of witness interference and other wrongful acts, are dealt with in more detail at paragraphs 138 to 181, and 205 and 211-213 of the Decision.

[37] *vide.*, preamble to the Act

Maupeu (P-0464)[38]. It is submitted that, on this score, there is an obligation on the part of Kenya as a State to provide reparation to victims of the post-election violence as part of its responsibility for internationally wrongful acts, and as part of its failure to discharge its duty to protect. In this regard, it is argued that had earlier cycles of violence been stemmed, then the risk of violence in 2007/2008 would have been drastically minimized.

Social Contract Between Kenya as a State, and its Inhabitants:

29. It is further submitted by the CLR that as a matter of social contract, the Government of Kenya bears a moral obligation towards its citizens (and, by extension, towards all inhabitants within its boundaries). The legitimacy of the authority of the State over the individual is founded upon the individual's consent to cede some of his/her freedoms and submit to the State's authority, in exchange for protection of the remaining rights of the individual.

30. The social contract theory cannot be better exemplified in Kenya than in the context of the 2007 General Elections where the State so desired legitimacy and, conversely, the individual equally required protection of his/her rights. Where the rights of the individual go unprotected in the social contract model, reparation becomes a matter of moral obligation, and a matter of natural law, on the part of the State. To quote from C. Fred Alford in *Psychology and the Natural Law of Reparation*:[39]

> *Natural law is rooted in nature… [and] originates in a direct*

[38] *vide.,* ICC-01/09-01/11-T-88-CONF-ENG ET, transcript of 17 February 2014, pages 57 and 58, ICC-01/09-01/11-T-89-ENG ET WT, transcript of 18 February 2014, particularly pages 57, and 75-84, and ICC-01/09-01/11-T-90-ENG ET WT, transcript of 19 February 2014, pages 34-35, 38-39, 58-61.

[39] C. Fred Alford, Psychology and the Natural Law of Reparation, pp. 115-116. 2006, ISBN-13 978-0-511-22144-6

experience of the goodness of nature. For reparative natural law, natural law is rooted in the experience of hating those we love, an experience that leads to guilt, and a strong desire make reparation to those we love. Doing so restores an original experience of the goodness of nature in which we can share, but need not devour.

The desire to make reparation is strong, but left untutored it is likely to be expressed in sentimental and selfish ways. Living in decent communities one learns to cultivate pity[40]*. One is able to do so because one feels contained by a fleshy human web of relationships, allowing one to think and feel at the same time…*

…Reparation is an experience of binding moral obligation, based on the guilt of having hated and harmed (at least in one's imagination, and often in reality) those whom one loves and cares for. For children, parents are the most likely targets of reparation. For adults, the widow, the orphan, and the stranger are the traditional Biblical stand-ins. Just open your eyes and look around, and you will see the victims of hate and greed everywhere. Being an adult means making reparation not just for one's own transgressions, but for the transgressions of all the groups to which one belongs, including one's nation and, indeed, the human race… [R]eparative natural law, like the traditional natural law, binds nature and moral obligation…

31. There was no appeal proffered by the Defence to challenge the Trial

[40] The word 'pity' in this passage is understood to mean compassion, understanding or regret shown by others towards those in less fortunate circumstances, as opposed to pity in the sense of self-absorbed despondency by those in unfortunate circumstances.

Chamber's finding of "a troubling incidence of witness interference and intolerable political meddling[41], which was found to have been intended to work for the benefit of the accused persons[42]. Neither did Kenya as a State Party entitled to participate in the proceedings with leave of the Chamber make any filing to the Chamber with a view to setting the record straight on the two issues of witness interference and political meddling. In the absence of any appeal by the accused persons or other process by the State challenging the finding of the Presiding Judge, it is submitted that an adverse inference can and ought to be attributed to the State. In this regard, it is submitted that the State had and continues to have an obligation under the Rome Statute and the International Crimes Act to ensure that the work of the Court was not interfered with, as part of its resolution to "guarantee lasting respect for and the enforcement of international justice"[43]. The State therefore must bear the moral obligation arising from the fact that the case was declared a mistrial, rather than ending with an unqualified verdict as to whether or not the accused persons had a case to answer.

32. By consequence, the State's duty to protect the victims' right to a fair criminal process, and to guarantee their right to reparation, is called to question. It is submitted that in the circumstances of the case, the existence of political meddling in the case was a negation of the social contract between the State and the victims, for which the State bears a moral, legal and political burden.

Kenya has Restorative Legislation in Place:

[41] paragraph 464 of the Reasons of His Honour Judge Chile Eboe-Osuji, (Presiding)
[42] paragraphs 156 and 193 of the Decision
[43] *vide.,* Preamble, Rome Statute

33. The Presiding Judge noted that "the criminal injuries compensation schemes in many national jurisdictions do not require conviction as a prerequisite to reparation"[44], and gave the examples of New Zealand, Ontario (Canada), the United Kingdom, Western Australia, and the European Convention on Compensation of Victims of Violent Crimes.

34. Indeed, even before the instruction by the President to the national Treasury for the establishment of the KShs. 10 billion fund during last year's State of the Nation Address[45], Kenya was one of the national jurisdictions with a 'no conviction compensation scheme' in relation to victims of the post-election violence.[46] Prior to the presidential instruction, the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012[47] had been enacted, and is still law. The Act provides for a fund known as the "Humanitarian Fund" to mitigate the effects of, and resettle, victims of the 2007/2008 post-election violence. The Fund itself was established by Regulation 3 of the Government Financial Management (Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence) Regulations, 2008 (Legal Notice Nos. 11 and 17 of 2008).

---

[44] paragraph 201

[45] http://parliament.go.ke/the-national-assembly/house-business/hansard?start=165

[46] The KShs. 10 billion under this Fund proposed during the 2015 State of the Nation Address and which is to be grown over a period of 3 years from 2015 (in contradistinction to the Fund established by Regulation 3 of the Government Financial Management (Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence) Regulations, 2008 (Legal Notice Nos. 11 and 17 of 2008) must be understood to be for restorative justice in respect of "all past wrongs", as alluded to in the State of the Nation Address. However, the Humanitarian Fund provided for in the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 and which had an initial capital of KShs. 1 billion is exclusively for victims of the post-election violence.

[47] Act No. 56 of 2012

35. Specifically, it was contemplated under Regulation 3(2) that the Fund would resettle persons displaced as a result of the violence[48], replace basic household effects destroyed as a result of the violence[49], enabling the victims of the violence to restart their basic livelihood[50], and reconstruct basic housing as well as rehabilitate community utilities and institutions destroyed as a result of the violence[51].

Pressing Views and Concerns by Victims:

36. The CLR reports that since the commencement of his activities with victims in the field in early 2013, many victims have consistently their concerns over lack of assistance from the Government. Where assistance has been given, most of these who have received it have lamented that the level of assistance has not been satisfactory. These concerns have been voiced and reported in several Period Reports on the General Situation of Victims and Activities of the Victims Participation and Reparations Section (VPRS) and the Common Legal Representative for Victims.[52]

37. Apart from the low level of assistance, it is important that the question of appropriate assistance is addressed. Many victims require psychosocial support, but the main focus has been on resettling victims (and then, only those who are living in camps) to the exclusion of addressing other needs that they might have. Many victims participating in the case have generally expressed the concern that the Fund administered by the Government has not been equitably administered, and that it has not been transparent and accountable. Victims have also expressed concerns that

[48] Regulation 3(2)(a)
[49] Regulation 3(2)(b)
[50] Regulation 3(2)(c)
[51] Regulation 3(2)(d)
[52] See Annex 2

the Fund has been shrouded in corruption and have blamed this on the fact that the Fund is largely administered by government officials rather than by a broad-based committee.[53] In addition to this, the rehabilitation of victims (as opposed to the rehabilitation of destroyed community utilities and institutions) has not been expressly provided for in the Act. Further, little is known about the capitalization of the Fund beyond the fact that the initial capital of the Fund was set at KShs. 1 billion.[54]

38. With regard to the separate Fund announced in 2015, there is still no known structure in place for administering the fund, leading to speculation as to when and how it will eventually be disbursed to the victim community. This is a matter of particular concern given the fact that the Cabinet Secretary for Finance announced during the Budget Day Speech on 8 June 2016 that the Government had set aside a further sum of

[53] Section 12(3) of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 provides that the Committee shall consist of:

(a) a Chairperson appointed by the President;
(b) the Principal Secretary of the Government Department for the time being responsible for matters relating to internal displacement;
(c) the Principal Secretary of the Government Department for the time being responsible for matters relating to internal security;
(d) the Principal Secretary of the Government Department for the time being responsible for matters relating to finance;
(e) the Principal Secretary of the Government Department for the time being responsible for matters relating to lands;
(f) the Principal Secretary of the Government Department for the time being responsible for matters relating to justice and constitutional affairs;
(g) the Attorney-General;
(h) the Director of Public Prosecutions;
(i) the Chairperson of the Kenya National Commission on Human Rights;
(j) the Chairperson or a Commissioner from the National Lands Commission;
(k) two persons appointed by the Cabinet Secretary to represent the non State actors and donor community;
(l) and two persons of opposite gender appointed by the Cabinet Secretary and nominated by internally displaced persons from amongst their number in such manner as may be prescribed.

[54] Regulation 5 of the Government Financial Management (Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence) Regulations, 2008 (Legal Notice Nos. 11 and 17 of 2008)

KShs. 6,000,000,000/= towards resettlement of internally displaced persons[55]. This was in addition to the sum of KShs. 2,200,000,000/= set aside during the 2015/2016 budget,[56] yet victims continue to live in abject poverty. There are also no indications that known legal representatives of victims (whether within the ICC context or outside of it) or community-based and non-governmental organizations dealing with victims and other stakeholders have been or will be consulted in any way, with a view to assisting in the coordination of assistance to victims.

39. The CLR therefore submits that the provision of assistance by the Government is really a matter that should be addressed urgently.

Who is Entitled to Reparations?

40. Accordingly, CLR agrees that the question of reparation or *ex gratia* assistance in lieu of reparation for the victims of the 2007/2008 post-election violence is ripe for examination. The CLR submits that the examination of this question must necessarily be looked into within the broader context, that is to say within the context of not only the *participating victims* in this case, but in the context of *all victims* affected by the Kenyan situation arising out of the post-election violence, i.e., victims of the situation.

41. The CLR is alive to the fact that his mandate, in the narrower sense, only extends to 'victims of the case', but also recognizes that the parameters of victim reparation go beyond the case. In this regard, the CLR adopts the definition of 'victims' set out in Rule 85 of the Rules of Procedure and

---

55 http://www.treasury.go.ke/downloads/category/105-budget-2016-2017.html?download=452:2016-budget-statement

56 http://www.treasury.go.ke/downloads/category/31-budget-speeches.html?download=106:budget-statement-2015-2016.

Evidence. The CLR submits that 'victims' include all natural persons who suffered harm as a result of the commission of crimes set out in Articles 5(b) and 7 of the Statute within the context of the post-election violence, irrespective of whether those crimes were eventually charged either in this case or in *The Prosecutor v. Francis Muthaura et al.*[57] In other words, all that is necessary is that the Court should have had jurisdiction over the crimes, but it need not have exercised its jurisdiction over them. This definition of the term 'victim' finds support in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[58]. The Declaration defines 'victims' as follows:

> *"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.*

And Why Now?

42. There has generally been a lack of genuine investigations and prosecutions of those responsible for the post-election violence. Attempts for the establishment of mechanisms such as the creation of an effective International Crimes Division within the judiciary to address such cases, have stalled.[59] It serves well to reproduce the statement of the Attorney General, Prof. Githu Muigai, made immediately upon delivery of the

[57] ICC-01/09-02/11

[58] https://www.unodc.org/pdf/compendium/compendium_2006_part_03_02.pdf

[59] "I Just Sit and Wait to Die" Reparations for Survivors of Kenya's 2007-2008 Post-Election Sexual Violence, Human Rights Watch Report, 15 February 2016, https://www.hrw.org/report/2016/02/15/i-just-sit-and-wait-die/reparations-survivors-kenyas-2007-2008-post-election

Decision on Defence Applications for Judgments of Acquittal. He stated as follows:

> *The Government of Kenya welcomes the termination of the last two cases relating to citizens of the Republic of Kenya and arising from the post-election violence of 2007/8.*
>
> *The government looks forward to re-energising the process of resettlement of IDPs; full compensation of victims; and national healing and reconciliation.*
>
> *The government is committed to strengthening of local judicial institutions to detect, to deter, and, if need be, to prosecute crimes that may arise out of circumstances similar to those of 2007 and 2008.*
>
> *To this end, the government welcomes the assurance of the Chief Justice and the Judicial Service Commission that an international crimes division of the High Court is to be inaugurated in the next two weeks.*[60]

43. More than 2 months after this statement, absolutely nothing further has been heard of the proposed International Crimes Division of the High Court, which the Chief Justice (who now retires on 16th June 2016) had said was "at an advanced stage" way back in late November 2012.[61] As reported in a publication of Kenyans for Peace with Truth and Justice (KPTJ),[62] the Attorney General has himself on at least two occasions misrepresented the fact that the International Crimes Division was yet to

---

[60] http://www.the-star.co.ke/news/2016/04/06/ags-statement-on-the-termination-of-the-icc-cases_c1326576?platform=hootsuite

[61] https://iwpr.net/global-voices/kenyan-chief-justice-announces-special-court

[62] "A Real Option for Justice? The International Crimes division of the High Court of Kenya" http://dspace.africaportal.org/jspui/bitstream/123456789/34936/1/a_real_option_for_justice_the_international_crimes_division[1].pdf?1

be established. It is noteworthy that one of those occasions was in the course of submissions in *The Prosecutor v. Uhuru Muigai Kenyatta*[63] in April 2013[64], while the other one was on the sidelines of the Assembly of States Parties in November 2013. At the time the misrepresentations in the *Uhuru Kenyatta* case were made, both the Kenya cases were scheduled to go for hearing in April 2013, and the hearing of the current case had already commenced by November 2013 when the second instance of misrepresentation was made. Now that the pressure relating to the two case has somewhat dissipated, it is doubtful whether there is any political will to jumpstart the proposed International Crimes Division, which was intended to try middle level perpetrators.

44. The CLR submits that there still needs to be a concerted effort towards bringing perpetrators of the post-election violence to book, as a form of justice for the victims. To do otherwise would be to ignore or hide from obvious signs of danger; to bury one's head in the sand, as it were. Unless genuine efforts are made in this regard, there can be no guarantee of non-repetition. This guarantee finds life when measures to prevent the recurrence of past violations are taken. As stated earlier in these submissions, inter-ethnic relations and political tensions in Kenya are already worsening in the run-up to next year's General Elections as evidenced by the headlines on 14 June 2016 in the three dailies with the widest circulation in Kenya.[65]

[63] ICC-01/09-02/11

[64] *vide.*, Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to file Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, ICC-01/09-02/11-713, at paragraph 39

[65] See Annex 3

45. In addition to the foregoing, it is submitted that the dissemination of information about past violations and the taking of measures towards genuine reconciliation at the grassroots have been very slow. Persons and civil society organizations that were involved in the ICC process have felt a sense of victimization, or an outright feeling of non-protection, while the National Cohesion and Integration Commission and other governmental agencies or departments charged with the facilitation of mechanisms for monitoring conflict resolution and preventive intervention have in most cases been reactionary, and have had little impact. The Government needs to more proactively undertake reconciliation programmes as a reparative measure, particularly as the country prepares for yet another general election period.

As to Specific Questions Posed by the Presiding Judge in the Decision:

46. Accordingly, the CLR answers the question asked by the Presiding Judge at paragraph 208 of the Majority Decision (as to whether the Rome Statute leaves scope for the ICC to require the Government to make adequate reparation to the victims of the post-election violence) in the affirmative. In this regard, the CLR submits that in all circumstances of this case, the State has so "meddled itself into the jurisdiction of the ICC" that it can be required, and indeed ought to be required, as a matter of international law to make adequate, effective and prompt reparation to the victims of the post-election violence. The CLR reiterates that past failure on the part of the State to protect all persons on its soil is a relevant consideration in this connection. That failure extended to the Government having ultimately been unwilling to conduct meaningful investigations into the violence, with a view to punishing the perpetrators. More importantly, the subsequent failure of the State to adequately ensure that victims interests and expectations for justice were protected at all times through active

deterrence of conduct that could (and eventually did) interfere with the course of justice squarely lays the obligation to provide reparations on the Government.

47. As to the question whether the requirement that the jurisdiction of the ICC for purposes of a reparation order ordinarily engages only in relation to individuals and not a State is lost by the mere fact that the wrongful acts mentioned above are those of the State, the CLR answers in the negative. Article 5 of the Responsibility of States for Internationally Wrongful Acts, 2001 provides that:

> *The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.*

48. Thus, the conduct of individuals in positions of authority may be imputed to the State. Under Article 31, the responsible State is under an obligation to make full reparation for injury caused by the internationally wrongful act. Full reparation shall take the form of "restitution, compensation and satisfaction, either singly or in combination".[66]

49. The CLR submits that having established that the State is amenable to the jurisdiction of the Court in the specific circumstances of this case, then the State would be under a duty to comply with the orders of the Court.

[66] Article 34

Failing compliance, the Court would be entitled to make a finding of non-compliance and refer the State to the Assembly of States Parties.

50. Even if the CLR were wrong in his answers to the questions above, it is submitted that an analogy may be drawn between the United Nations Organization in the *Reparations Case*[67] and the Assembly of States Parties in bringing an international claim against Kenya as a State Party with a view to obtaining reparation for victims of the post-election violence, in the event that no adequate, effective and prompt reparations are made available. Although the *Reparations Case* involved agents of the United Nations, as opposed to here where the victims are not agents of the Assembly of States Parties, the Assembly of States Parties can, like the United Nations as an organization, base the present claim on a breach of obligations due to itself. By the same token, it is submitted that such action may be taken before an appropriate international human rights body within the United Nations system.

Trust Fund for Victims:

51. The CLR further submits that the time is ripe for the Trust Fund for Victims (TFV) to implement its assistance mandate in relation to victims of the 2007/2008 post-election violence in Kenya. This assistance is particularly called for in connection with victims of sexual and gender-based violence and others with severe scarring due to burns sustained in the violence, especially in Eldoret and Naivasha. These victims continue to suffer immense trauma. The TFV's assistance would also go to assist other victims of the violence and their families with psychological, physical and material support to enable them rebuild their lives and live in dignity and,

[67] Reparation for Injuries Suffered in the Service of the United Nations, advisory Opinion of April 11, 1949, ICJ Reports, 1949, p. 174, http://www.icj-cij.org/docket/files/4/1835.pdf

where possible, reintegrate into the communities in which they lived before the violence. The need for reconciliation and reintegration is underscored by the rising inter-ethnic tensions, and this makes the TFV's intervention rather urgent.

Classification of This Filing:

52. This filing is classified as 'Public' as it does not contain any confidential information and is consequential upon a publicly made decision.

Conclusion, and Relief Sought:

53. The CLR submits that victims are entitled to reparations from the Government of Kenya as a matter of international and domestic legal obligation, and based on the social contract theory. In particular, the CLR states that this duty arises due to acts and omissions on the Government's part which amount to internationally wrongful acts. The CLR also submits that the assistance mandate of the TFV should be invoked with a view to alleviating the physical and psychological well-being and dignity of the victims of the post-election violence. The prevailing political situation in the country and the long passage of time (8 ½ years) since the occurrence of the violence are two factors that make assistance and reparations for victims merit urgent consideration.

54. Accordingly, the CLR requests the Trial Chamber:

i. to find that the Government of Kenya bears an obligation to provide adequate, effective and prompt reparation to all victims of the 2007/2008 post-election violence for various forms of harm suffered;

ii. 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;

iii. if need be, to invite further submissions from the parties and participants including the Government of Kenya and the Trust Fund for Victims and/or give further directions on the appropriate types and modalities of providing reparation or assistance in lieu of reparation to the victims; and

iv. to make such further orders and give such other directions as it shall find fit in the circumstances.

Respectfully submitted,

WILFRED NDERITU

Common Legal Representative for Victims

Dated this 15th June 2016

In Nairobi, Kenya