Barasa v Cabinet Secretary, Ministry of Interior and National Co-Ordination & 3 others; Nderitu & 2 others (Interested Parties) (Constitutional Petition 488 of 2013) [2014] KEHC 7542 (KLR) (Constitutional and Human Rights) (31 January 2014) (Judgment)

Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination & 6 others [2014] eKLR

Neutral citation: [2014] KEHC 7542 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 488 OF 2013

RM MWONGO, J

JANUARY 31, 2014

IN THE MATTER OF ARTICLES 1,2,3,10,20,21,22,23,258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 41, 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE INTERNATIONAL CRIMES ACT, 2008 IN RESPECT OF THE REQUEST FOR ARREST AND SURRENDER OF THE PETITIONER TO THE INTERNATIONAL CRIMINAL COURT PURSUANT TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

AND

IN THE MATTER OF THE ENFORCEMENT OF WARRANT OF ARREST ISSUED BY THE INTERNATIONAL CRIMINAL COURT AGAINST THE PETITIONER ON 2 ND AUGUST, 2013

BETWEEN

WALTER OSAPIRI BARASA ..... PETITIONER

AND

CABINET SECRETARY MINISTRY OF INTERIOR AND NATIONAL CO-ORDINATION ..... 1ST RESPONDENT

HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION ..... 3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 4TH RESPONDENT

AND

WILFRED NGUNJRI NDERITU ..... INTERESTED PARTY

OKIYA OKOITI OMTATAH ..... INTERESTED PARTY

REV. JOHN MBUGUA ..... INTERESTED PARTY

Constitutionality of arrest and surrender procedures under the International Crimes Act

The High Court of Kenya addressed a constitutional petition challenging the validity of arrest and surrender proceedings initiated against the petitioner, Walter Osapiri Barasa, under the International Crimes Act, 2008, following a warrant issued by the International Criminal Court (ICC). The petitioner alleged that the proceedings violated his fundamental rights, including the right to fair administrative action and hearing, and claimed that Part IV of the Act conflicted with the Constitution and the Criminal Procedure Code. The Court upheld the constitutionality of the International Crimes Act and its implementation. It held that Kenya's obligations under the Rome Statute, as domesticated, took precedence within the framework of the law and did not infringe on constitutional safeguards. The petition was dismissed, with the Court affirming the validity of the Minister's actions under the Act.

Reported by John Ribia

International Law *- treaties and conventions - nature and extent of application of treaties - supremacy of the Constitution and sovereignty of the people vis-a-vis the Rome Statute and conventions ratified by Kenya.*

Constitutional Law *- fundamental rights and freedoms - request for arrest and surrender of a suspect by the International Criminal Court - where the ICC had issued a warrant of arrest to be effected by the High Court of Kenya - whether the High Court had jurisdiction to order arrest and surrender of the Petitioner to ICC - Whether in the absence of regulations made by the Minister prescribing procedures for dealing with requests by the ICC, that would invalidate the proceedings against the Petitioner - whether the Petitioner was entitled to security - International Crimes Act No 16, of 2008 section 29 - Rome Statute articles 25(3) (a);70(1)(c),;89 - Criminal Procedure Code (cap 75) section 89.*

Brief facts

The Petitioner was a former intermediary for the International Criminal Court prosecutor in the context of investigations relating to the 2007 post elections violence. It was alleged that he was criminally responsible for interfering with prosecution witnesses by attempting to corrupt and influence the witnesses, in contravention of article 70(1)(c) of the Rome Statute and was therefore being sought by ICC to answer to these charges. The ICC Registrar had issued a request for arrest and surrender of the Petitioner which was received by the Cabinet Secretary of Interior and National Co-ordination and forwarded to the High Court of Kenya for execution in accordance with section 29 of the International Crimes Act No 16 of 2008 (the "ICA").

The issuance of the warrant was what triggered the Petitioner to file the instant Petition.

Issues

i. Whether the supremacy of the Kenyan Constitution overrides obligations arising from international treaties, such as the Rome Statute, ratified and domesticated into Kenyan law.

ii. Whether Part IV of the International Crimes Act, 2008, governing arrest and surrender to the International Criminal Court, is constitutional under Kenyan law.

iii. Whether the International Criminal Court is obligated to consult with State Parties before asserting jurisdiction over individuals within those States.

iv. Whether the petitioner's right to a fair hearing under Article 50 of the Kenyan Constitution was violated by the issuance of an arrest warrant without prior notification or access to supporting evidence.
v. Whether the absence of regulations under Sections 172 and 173 of the International Crimes Act invalidates proceedings initiated under Part IV of the Act.
vi. Whether exceptional circumstances under Section 19(2) of the International Crimes Act exist to render the petitioner's arrest and surrender to the ICC unjust or oppressive.
vii. Whether the petitioner should be tried in Kenya or surrendered to the ICC, considering Kenya's concurrent jurisdiction over offences against the administration of justice.
viii. Whether the petitioner's entitlement to security, under the Constitution, extends to protection from arrest by agents of the ICC.
ix. Whether the High Court of Kenya has jurisdiction to consider the legality of ICC-issued warrants of arrest under the framework of the International Crimes Act.

Held

1. Under the Rome Statute, the ICC could neither exercise police powers, nor could its personnel have a direct right of arrest. The request therefore together with accompanying documentation and identifying information under article 91 of the Rome Statute was transmitted for execution to the Cabinet Secretary, Ministry of Interior and Co-operation of Kenya, by way of a request for cooperation pursuant to article 89 of the Rome Statute.
2. To acquire the force of law under the Kenyan Constitution, treaties and conventions had to undergo domestication. It was recognized that treaties were laws, consented to by all parties in the comity of nations who sign them, obligating States that had ratified or acceded to them comply with them particularly when dealing with other State parties as well as relevant international organizations. The 1969 Vienna Convention on the Law of Treaties (the 1969 Vienna Convention) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (the 1986 Vienna Convention) had provided the yardstick on how to deal with treaties and conventions.
3. Once a treaty became part of a state's law, a state party was obligated to perform the treaty regardless of conflicts with its internal law. Suffice to say, internal law included a State's Constitution. That was provided for in article 27 of the 1986 Vienna Convention which Kenya had ratified.
4. The obligation of a State Party to comply with a treaty, especially where the State had not expressed any reservations thereto could not be denied or abrogated. A State could only invoke the provisions of its internal law where the same had been expressed as reservations before the ratification of such treaty. Some countries had however, expressly stated that their internal laws and most especially their Constitution was supreme to treaties. The United States of America was one such example.
5. The Rome Statute had established the International Criminal Court. It was one of the treaties signed by Kenya and was ratified on 15th March 2005, and Kenya did not express any reservations to any of the provisions of the Statute. Article 120 of the Rome Statute had expressly prohibited State Parties from entering any reservations. the enactment by Parliament of the ICA, 2008 thus domesticated the Rome Statute giving it legal teeth within the jurisdiction of Kenya.
6. Under section 4 of the ICA, the Kenyan Parliament was very clear that certain provisions of the Rome Statute would have the force of law in Kenya. In the case before the Court, the subject matter of the proceedings instituted by the ICC was the issuance of a warrant of arrest which was duly transmitted to the Kenyan authorities by way of a request for assistance relating to international co-operation, in terms of the provisions of the Rome Statute. Therefore, section 4 of the ICA and Part 9 of the Rome Statute were invoked and those were amongst the provisions which the Parliament of Kenya had enacted as having the force of law in Kenya.
7. Kenya, through a process of domestication, and the people of Kenya in exercise of their sovereign will through their constitutionally mandated representatives in Parliament, had in exercise of such

sovereignty, ratified, adopted, incorporated and received the Rome Statute, excluding the provisions not domesticated, as part of the Laws of Kenya under the supremacy of the Constitution. That being so, the effect was that the Rome Statute formed part of the laws of Kenya. Being a statute through a process of ratification and domestication of the Rome Statute was in terms of article 2(6) of the Constitution, thus, under the Constitution, is subordinate to the Constitution

8. In determining whether an Act or a provision was unconstitutional, the overall obj ect and purpose of the Act ought to be considered. By parity of reasoning, so also must the object ofthe provision within the scheme of the Act be considered.
9. The primary role of the Court is to interpret the law as enacted by Parliament and that entailed giving effect to the legislative intent of Parliament. Thus, the Court was not concerned with what ought to be, but with what was.
10. In impugning a provision of law as unconstitutional, the Complainant ought to have juxtaposed the article of the Constitution which was invoked against the provision challenged and demonstrate how they did not square with each other. However, the Petitioner did not demonstrate as to how Part IV of the ICA on arrest and surrender when juxtaposed with articles 27, 28 and 29 ofthe Constitution, were flawed. Under the ICA, once the Cabinet Secretary had received the transmitted warrant and supporting documents from the ICC, he was required to satisfy himself that the request was duly supported, and if so, to notify the Judge of the request and seek issuance of an arrest warrant.
11. The Cabinet Secretary was not required to inquire whether there was reasonable and probable cause for issuance of the warrant of arrest under the provisions of the ICA. Under article 5 8 of the Rome Statute, it was for the ICC Trial Chamber to make that inquiry.
12. No similar obligation as provided for under article 58 ofthe Rome Statute was placed on the custodial state or the Cabinet Secretary to inquire as to the reasonableness and probably cause for an arrest. In addition, under article 59(4) of the Rome Statute, it was not open for a custodial state to consider whether a warrant of arrest was properly issued in accordance with article 58(1)(a) and (b) of the Rome Statute. Articles 58 and 59 ofthe Rome Statute both fall under Part 5 of the Statute and thereby acquired the force of law in Kenya pursuant to section 4 of the ICA.
13. It was unimagineable that a panel of ICC Judges from different backgrounds, cultures and states would be biased against a private individual they have had no prior connection with. Even if it was found that there was misconduct on the part of the prosecutorial investigators, it would have to be demonstrated that it would potentially have a ripple effect on the fairness or impartiality of a trial Chamber of three Judges.
14. There was a critical difference between surrenders and extradition. An extradition was surrender from one state to another state pursuant to treaty or agreement, whereas surrender was the delivering up of a person by a State to the ICC as defined in article 102 of the Rome Statute.
15. The ICC was a Court which as far as Kenya was concerned, was one established by a statute acceded to and ratified pursuant to article 2(6) of the Constitution. Such statute therefore constitutionally formed part of the laws of Kenya and the ICC's activities had been identified and recognized in the domesticating Act under the provisions of section 4 of the ICA as having the force of law in Kenya. The ICC was therefore a Court duly recognized and incorporated by the Constitution as a court with which in terms of the preamble and objects of the ICA, Kenya ought to cooperate with in the performance of its functions.
16. Articles 162(1) and 162(3) of the Rules under the Rome Statute gave discretionary powers to the ICC in relation to the exercise of its jurisdictional discretion where these was dual jurisdiction.
17. The ICC was under no obligation to inform the State Party or the Petitioner prior to commencing on the exercise of its discretion, or that the Petitioner had a specific right to be tried in Kenya.

18. The Rules of natural justice entitled a right to be heard and fairly to be supplied with information to enable a reasonable response. However, the rule was in general applicable to conduct which led directly to a final act or decision.
19. The question as to whether or not the Cabinet Secretary breached the Petitioner's rights to a fair hearing and fair administrative action had to be examined in the following context: the subject at hand; and in light of the nature of the proceedings; and taking account of whether the Cabinet Secretary's action was a final act or decision; and the procedure under which the decision wass taken; and the objects of the law regulating his actions.
20. Whether the Petitioner was entitled to be provided with material and to fair hearing at the pre-arrest stage, had to be viewed through the lenses of the issues at hand, and the overall object of the ICA. According to its long title the ICA aimed, among other things, to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions. Therefore, whatever interpretation was adopted by the Court, it had to ultimately, and also efficiently and effectively be geared towards the achievement of that goal.
21. Parliament had not intended that when an international court such as the ICC had issued a warrant for the arrest of a suspect for transmittal to a State Party to act upon in furtherance of the principle of complementarity, that the State Party is then required to conduct a further hearing; and that such hearing was to be with full representation of the suspect and full disclosure of the material upon which his arrest was sought; and that the object of such hearing was to determine whether it really ought to arrest him.
22. It was neither novel nor uncommon that a public officer who had to make a decision whether to charge a person or to take a certain action in furtherance of another, may not be required to hear the affected party prior to making that decision.
23. There was no requirement for hearing the Petitioner at the prearrest stage. However, if the suspect was to be arrested, the provisions of article 49 of the Constitution on the rights of arrested persons would automatically kick in. It was to be remembered that, section 25(1) of the ICA required confidentiality in the manner in which the Minister, the Attorney-General or any employee dealt with requests for assistance from the ICC.
24. Under the Kenyan laws there was no provision that a person at the pre-arrest stage was entitled to a hearing or to be provided with material that was to form the basis of the charge. Those rights were available to the Petitioner after arrest and throughout the process thereafter. It included the process before the ICC if, eventually, an order of surrender were to be finally made against the Petitioner after his arrest.
25. An arrest in Kenya as stipulated under section 89 of the Criminal Procedure Code was lawful with or without the issuance of a warrant. All that was required was either the production before a magistrate of an arrested person or a complaint signed by a magistrate. It was not unusual, however, that a person suspected of having committed an offence was arrested without the opportunity of being heard. There was no doubt that an arrest interfered with the fundamental rights of a person, in that upon arrest he might be placed in custody, and his movements limited and freedoms restricted. Therefore, the right to liberty could only be deprived on such grounds and in accordance with such procedure as established by law.
26. Upon arrest, under the Constitution, a person's right to a hearing and to challenge the grounds for arrest could not be curtailed, except under the law. In some countries such as the United States of America, before being arrested, a person had rights that accrued to them, which were read to them by the arresting officer. Such prearrest rights were commonly referred to as the *Miranda Rights* or the *Miranda Rule*. Even under international law norms, the minimum standards expressed the right of every persn to liberty and security of the person, except on grounds and in accordance with procedures established by law.

27. There was no right forum to vent the issues relating to appropriateness of the issuance of the arrest warrant and therefore the Petitioners allegations were pre-mature. The ICC proceedings in respect of a warrant of arrest were special proceedings which did not entitle the Petitioner to an opportunity to be given a hearing prior to his arrest.
28. The aspect of surrender was dealt with under sections 39-45 of ICA. The process was simply that if a person was brought to the High Court under Part IV, which included an arrest under warrant, the Court had to determine whether such person was eligible for surrender. The criterion for eligibility was also set out in section 39(3) of the ICA. It must also be borne in mind that under section 29 of the ICA, the Minister's role was fairly circumscribed, and even if the Court issued a warrant of arrest, it was open to the Minister under section 31(1) ICA to apply for the cancellation of the warrant. Therefore, it was premature for the Petitioner to have raised the issue of refusal to surrender on account of exceptional circumstances as there was no basis yet for the exercise of the Minister's discretion to refuse surrender.
29. It was the discretion of the Minister to determine whether or not to make regulations. He had not done so, but that did not invalidate the actions of the Minister who, had received by transmittal a warrant of arrest for notification to a judge. The ICA was clear that the laws of Kenya applied. The Criminal Procedure Code had provisions for a procedure for the issuance of a warrant, although the procedure involved a magistrate. Nothing prevented the High Court acting in accordance with the ICA playing the role of the magistrate under the CPC, given that the High Court had unlimited original jurisdiction in civil and criminal matters.
30. It would be wrong for the Court to intervene on the merits of the Minister's decision unless the Petitioner proved that the proceedings commenced by the Minister: (a) had resulted in a failure to realize the intention of the Act; or (b) resulted to an impediment in the exercise of fundamental rights or freedoms of the Petitioner; or (c) resulted in a situation so unfair, irrational or unreasonable that any reasonable person in the Minister's position would, in the circumstances, have readily made such regulations. (d) Amounted to a failure of a glaring and fundamental duty of the Minister which the court would be entitled to remedy with an order to compel him to make such regulations. The Petitioner was not able to demonstrate that any of the above criteria applied in his case. Accordingly, there was no basis upon which to hold that the proceedings commenced by the Minister were invalid, on account of his not exercising his discretion to promulgate rules under sections 172 or 173 of the ICA.
31. For good administrative order and judicial convenience, it was necessary that where a warrant was sought to be issued pursuant to a Notice and Request, and the same had been brought before a Judge, it is deemed to be a criminal proceeding and a file should be opened. The file became constituted as the repository of all documents and proceedings in that matter, present and future. Taking cognizance of the statutory requirements for confidentiality under section 25 of the International Crimes Act, it was proper that such a file be under the supervision of the Judge who was seized of the matter for consideration.
32. In the circumstances and the constitutional attitude towards procedural strictures, there was no harm that the proceedings could be commenced under the same file as the constitutional petition in the instant case.

Petition allowed in part to the extent that the order for security would remain in force pending further orders in a previous application before the Court.

Citations

East Africa

1. *Matiba, Kenneth Stanley Njindo v Attorney General* Civil Appeal No 142 of 1994 - (Followed)

2. *Kiriro wa Ngugi & 6 others v Truth, Justice and Reconciliation Commission & 6 others* Miscelleneous Civil Case 192 of 2013 - (Followed)

3. *Republic v Council of Legal Education & 3 others* Miscellaneous Civil Application No 385 of 2013 - (Followed)

4. *Kenya Anti-Corruption Commission v Lands Limited & 8 others* [2008] 508 - (Followed)

5. *Kilonzo, Diana Kethi & another v Independent Election & Boundaries Commission & 10 others Petition No 359 of 2013 - (Followed)*

6. *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No 108 of 2009 - (Followed)

7. *Republic v Minister for Home Affairs & others ex parte Sitamze [2008]* 2 EA 323 - (Followed)

8. *De Souza v Tanga Town Council* [1961] EA 377 - (Mentioned)

9. *Torroha v Republic* [1989] KLR 630 - (Explained)

10. *Juma & others v Attorney General* [2003] 2 EA 46 - (Mentioned)

11. *Rono v Rono & another* [2005] 1 KLR 538; (2008) 1 KLR (G&F) 803 - (Followed)

12. *Wanjiku, Beatrice & another v Attorney General & others* Petition No 190 of 2011 - (Followed)

13. *Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security & others Petition No 3 of 2011 - (Mentioned)*

14. *Momanyi, Samuel G v Attorney General & another* Petition No 341 of 2011 - (Mentioned)

15. *Mwakwere ,Chirau Ali v Robert Mabera & 4 others* Petition No 6 of 2012 - (Mentioned)

South Africa

1. *Doctor's for Life International v Speaker of National Assembly and others* [2006] ZACC 11; 2006 (12) BCLR 1399 - (Followed)

India

2. *Re Application by Bahadur* [1986] LRC (Const) 545 - (Followed)

3. *Maharashtra State Board of Secondary & Higher Secondary Education & another v Kumar Sheth* 1984 AIR 1543; 1985 SCR (1) 29 - (Followed)

United Kingdom

1. *Khawaja v Secretary for the Home Department & another 1983] 1 All ER 766*

2. *Mahon v Air New Zealand* [1984] 3 All ER 2011;[1984] AC 808 - (Mentioned)

3. *Kanda v Government of Malaya* [1962] AC 322; (1962) 28 MLJ 169 - (Mentioned)

4. *Salomon v Customs and Excise Commissioners [1967] 2 QB 116* - (Mentioned)

5. *Garlandv British Rail Engineering Ltd* [1983] 2 AC 751 - (Mentioned)

6. *Maclaine Wason & Co Ltd v Department of Trade and Industry [1990]* 2 AC 418 - (Mentioned)

7. *Duke v GEC Reliance Ltd* [1988] AC 618; [1988] 1 CMLR 719; [1988] 2 WLR 359 - (Mentioned)

8. *Pickstone v Freemans Plc* [1988] 2 All ER 803; [1989] AC 66; [1988] 3 WLR 265 - (Mentioned)

9. *Brind v Secretary of State for the Home Department* [1991] 1 AC 696 - (Mentioned)

10. *O'Donoghue v South Eastern Health Board* [2005] 4 IR 217; [2005] IEHC 349 - (Mentioned)

12. *Local Government Board v Arlidge* [1915] AC 120 - (Mentioned)

13. *Selvarajan v Race Relations Board* [1975] I WLR 1686 - (Mentioned)

14. *R v Immigration Appeal Tribunal ex parte Jones* [1988] I WLR 477; [1989] Imm AR 210 - (Mentioned)

15. *Wiseman v Borneman* [1969] 3 All ER 275; [1971] AC 297; [1969] 3 WLR 706 - (Followed)

United States of America

1. *Reid v Covert,* 354 US 1 (1957) - (Followed)

2. *US v Butler,* 297 US 1 (1936) - (Followed)

3. *Miranda v Arizona,* 384 US 436 - (Followed)

Texts & Journals

1. Bennion, F., (Ed) (2008) *Statutory Interpretation* London: Lexis Nexis 5th Edn p 631

2. Delany, H.,(Ed) (2009) *Judicial Review of Administrative Action* London: Round Hall Ltd 2nd Edn p 272

3. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1987) *Halsbury's Laws of England* London: Butterworths 5th Edn Vol 61 p 639

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1, 2(4)(5)(6);10; 12(1);22(3) (b)(d)(4);24; 25; 27; 28; 29; 35; 47; 49;50(2)(c)(d)(j)(k);60; 86; 87(3);94(5);157;159(2)(d) - Interpreted

2. International Crimes Act, 2008 (Act No 16 of 2008) sections 4, 9-19, 29-30,31(1);35-62; 39;42;43;63-75;172;173;174 - (Interpreted)

3. Criminal Procedure Code (cap 75) sections 29, 89, 91-177 - (Interpreted)

4. Extradition (Commonwealth Countries) Act (cap 77) - In general

5. Constitution of Kenya, 2010 Sixth Schedule section 7(1) - (Interpreted)

6. Treaty Making and Ratification Act, 2012 (Act No 45 of 2012) - In general

International Statutes

1. Rome Statute of the International Criminal Court, 2002 (Act No 27 of 2002) articles 4(2); 25(3)(a); 58(1)(a)(b); 59(1)(4); 70(1)(c) (2); 89;91

2. Rules of Procedure and Evidence under the Rome Statute, rules 117(3); 162(1)(3)

International Instruments

1. Vienna Convention on the Law of Treaties (VCLT), 1969 article 27,46

2. International Covenant on Civil and Political Rights (ICCPR), 1996 article 9

JUDGMENT

Background

1. Following the post election violence of 2007-2008 in the Republic of Kenya, the International Criminal Court at the Hague (the "ICC"), in December, 2010, indicted some Kenyan leaders deemed to be most responsible for the situation in Kenya. The confirmed cases of the leaders are: *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (the Ruto Case), the hearing of which commenced on 10th September, 2013, and is ongoing; and The *Prosecutor v Uhuru Muigai Kenyatta* (the Kenyatta Case), which is yet to commence.

2. It is common ground that the Petitioner is a former intermediary for the ICC Prosecutor in the context of the investigation relating to the situation in Kenya. On 2nd August, 2013, pursuant to an *ex parte* application by the ICC Prosecutor dated 18th July, 2013, under article 58 of the *Rome Statute of the International Criminal Court* (hereinafter the *Rome Statute*), the Single Judge of Pre-Trial Chamber II of the ICC issued a warrant for the arrest and surrender of the Petitioner. The Petitioner is alleged to be criminally responsible for three counts of corruptly influencing witnesses and attempting to corruptly influence witnesses at, or near, Kampala in the Republic of Uganda. These are offences against the administration of justice in terms of article 70(1)(c) and article 25(3)(a) of the Rome Statute. He is sought by the ICC to answer to those charges in the case of *The Prosecutor v Walter Osapiri Barasa*, No ICC-01/09-01/13 (the Barasa Case).

3. Following the issuance by ICC of the orders for arrest and surrender, and request for search and seizure, the ICC Registrar issued an under seal request for arrest and surrender ("the Request") of the

Petitioner on 18th September, 2013. It is trite that under the *Rome Statute* the ICC does not exercise police powers, nor do its personnel have a direct right of arrest. Accordingly, the Request - together with accompanying documentation and identifying information under article 91 *Rome Statute* - was transmitted for execution on 23rd September, 2013, to the Cabinet Secretary, Ministry of Interior and Co-operation of Kenya, by way of a request for co-operation pursuant to article 89 *Rome Statute*. It was received by the Cabinet Secretary on 4th October, 2013. He forwarded it to the Principal Judge, High Court of Kenya, under cover of a letter dated 9th October, 2013, in accordance with section 29 International Crimes Act No 16, of 2008 of Kenya (the "ICA").

4. Given that the Prosecutor had announced the issuance of the arrest warrants soon after transmission of the Request, the matter acquired great public notoriety through the national and international press and other media. This publicity triggered the filing of this petition by the Petitioner on 8th October, 2013. He also filed two notices of motion under certificate of urgency in anticipation of arrest, on 8th and 9th October, 2013. The motions were initially brought before Odunga, J, who issued a temporary order that the Petitioner be accorded police protection from arrest. He further directed that the matter be heard by the Principal Judge of the High Court.

5. After hearing the parties for purposes of directions, I noted in my ruling of 18th October, 2013, that the filed Petition and the Cabinet Secretary's Request for arrest were disparate matters. Accordingly, I directed with respect to the Petition, that all parties do complete filing of various pleadings and responses in preparation for hearing of the Petition. With respect to the Request for arrest, I directed that the Director of Public Prosecutions, on behalf of the State, do file a formal complaint through a miscellaneous application under section 89 of the Criminal Procedure Code, cap 75 of Kenya. In light of the provisions of section 29 ICA, I made no order for service of the complaint on the Petitioner. That aspect of the directions is the subject of an appeal pending before the Court of Appeal, Kenya.

6. Upon compliance by the parties with the various directions given, I heard the Petition on 4th and 11th December, 2013. The Request for arrest by the Cabinet Secretary is, by consent of the parties, pending hearing and consideration upon issuance of this judgment.

Parties

7. The Petitioner, Mr Walter Osapiri Barasa (hereinafter Mr Barasa), is a journalist and a resident of Eldoret town. He is represented by Kibe Mungai, Advocate, and has been personally attending hearings in this matter.

8. The 1st Respondent is the Cabinet Secretary of the Ministry of Interior and National Co-ordination, Kenya, (hereinafter referred to as the Cabinet Secretary). The 2nd Respondent is the Attorney General of Kenya (hereinafter referred to as the AG). The 3rd Respondent is the Director Public Prosecutions of Kenya, represented by Kioko Kamula and Victor Mule, both State Counsels. The 4th Respondent is the Inspector General of the Kenya Police. The 1st, 2nd and 4th Respondents are represented by Stella Munyi of the AG's Office.

9. Wilfred Ngunjiri Nderitu, Okiya Okoiti Omtatah and Rev John Mbugua are the 1st, 2nd and 3rd Interested Parties respectively. The 1st Interested Party acts as counsel for the victims in the Ruto Case, and represents himself in these proceedings. Mr Omtatah and Rev Mbugua are also self- represented.

The Petition & the Petitioner's Case

10. The Petition is dated 8th October, 2013 and is supported by Mr Barasa's Affidavit. Through it , he seeks the following orders:

1. "A declaration be issued to declare that the procedure set out in Part IV of the International Crimes Act, 2008 in respect of Arrest and Surrender of Persons to the International Criminal Court is fundamentally flawed and invalid under articles 1, 10, 24, 27, 29, 35, 47 and 50 of *the Constitution*.

2. A declaration be issued to declare that by dint of article 1, 2, 24, 27, 29, 35 and 47 and 50 of *the Constitution* read with sections 9-19 of the International Crimes Act, 2008 the Respondents are enjoined to ensure that the Petitioner is tried before a competent Court in Kenya for offences against administration of justice alleged against him by the International Criminal Court.

3. A declaration be issued to declare that the First and Second Respondents have violated the Petitioner's fundamental rights and freedoms enshrined in Articles 27, 28, 29, 35, 47 and 50 of *the Constitution* by commencing proceedings under Part IV of the International Crimes Act, 2008 before notifying and furnishing the Petitioner with the information and evidence upon which the International Criminal Court seeks his arrest and surrender.

4. A declaration be issued to declare that by dint of articles 2, 10, 27, 29, 47 and 50 of *the Constitution* the Respondents are enjoined under section 19(2) of the International Crimes Act, 2008 to refuse the request for arrest and surrender of the Petitioner to the International Criminal Court in view of the existing exceptional circumstances that make it unjust and oppressive to surrender the Petitioner to the ICC for prosecution.

5. A declaration be issued to declare that by dint of articles 20, 24, 27, 29 and 50 of *the Constitution* the Respondents are prohibited from instituting and/or maintaining proceedings affecting the Petitioner under Part IV of the International Crimes Act, 2008 unless and until the First Respondent makes the Regulations provided for under sections 172 and 174 of the said Act.

6. An order of prohibition be issued to restrain the First Respondent from conducting proceedings under Part IV of the International Crimes Act, 2008 for the Arrest and Surrender of the Petitioner to the International Criminal Court unless and until the Director of Public Prosecutions has made the decision under section 19(2) on whether the existing exceptional circumstances make it unjust or oppressive to surrender the Petitioner to the International Criminal Court for prosecution.

7. Pursuant to article 23, 24, 27,29,35,47 and 50 of *the Constitution* an order of certiorari be issued to bring to the High Court an quash the decision of the First Respondent to request a Judge to issue a warrant for the arrest of the Petitioner pursuant to section 29 of the International Crimes Act, 2008 and any proceedings that may have been undertaken pursuant to the said Request.

8. An order of mandatory injunction be issued to compel the First and Second Respondents to furnish to the Director of Public Prosecutions (Third Respondent) a copy of the Request of the International Criminal Court for arrest and surrender of the Petitioner and supporting documents in order for the Third Respondent to determine under Section 19(2) of the International Crimes Act, 2008 whether the existing exceptional circumstances make it unjust or oppressive to arrest and surrender the Petitioner to the International Criminal Court.

9. A mandatory order of injunction be issued to compel the Inspector General of Police - the Fourth Respondent - to provide the Petitioner with such security as may be necessary to protect the Petitioner from arrest by investigators or Agents of the International Criminal Court in the event of an order by this Honourable Court that the Petitioner be tried in Kenya - before a

competent Court for the offences against administration of justice alleged by the International Criminal Court.

10. Any further order or relief that the Honourable Court deems fit, just and expedient to uphold the rule of Law and protect the Rights and freedoms of the Petitioner under *the Constitution*."

11. Subsequently, Mr Barasa filed supplementary Affidavits in support of his petition, and in particular regarding the ICC's alleged subversion of administration of justice. These included Affidavits by Samuel Kimeli Kosgei, Simon Kipkolum Rotich and ICC Witness KWN (P-0336 or K-0336) whose depositions attest to manipulation and coercion by the ICC investigators and prosecution team.

12. The Deponents of these Affidavits allege numerous instances and acts of mistreatment and misconduct by officers of the ICC Prosecution. These include alleged threats of prosecution if they did not co-operate with the Prosecutor; alleged attempts to illegally arrest the deponents when they declined to co-operate; and alleged coercion to give false testimony in Mr Ruto's case. Ultimately, one of the questions arising is whether by dint of such improper actions and misconduct of the Prosecutor's officers, even if true, the Petitioner is unlikely to obtain a fair hearing by the ICC.

13. At the commencement of his submissions, the Petitioner canvassed over-arching questions about the Supremacy of *the Constitution*, the sovereignty of the people of Kenya and the national values and principles of governance espoused by *the Constitution* as relevant to these proceedings. He argued that the Court must reflect judicial fidelity to these first principles in determining whether the Petitioner should be arrested and surrendered to the ICC to stand trial, rather than mechanically applying Part IV of the ICA.

14. In addition to the above, the Petitioner's written and oral submissions based on the Petition and supporting documentation were clustered along the following ten arguments, which he considered to be issues for determination:

    a). Whether ICC was enjoined to inform the State Party prior to commencing exercise of its jurisdiction over Petitioner

    Mr Barasa concedes that, by virtue of article 70 of the Rome Statute as read with rule 162 of the Rules of Procedure and Evidence under the Rome Statute (hereinafter The Rules) and section 18 of the ICA, both the High Court and the ICC have jurisdiction to try offences against the administration of justice.

    He premises his contention on article 70(2), Rome Statute, and rule 162(1), of the Rules. By virtue of article 70(2) international co-operation in respect of ICC proceedings under that article is required to be governed by the domestic laws of the requested State.

    Further, Counsel argues that under rule 162(1) of the Rules, the ICC should have consulted with State Parties that may have concurrent jurisdiction before deciding whether to exercise its jurisdiction. Consequently, Mr Barasa argues that the Courts of a state party rank in priority to the ICC, since Kenya could lawfully invoke its right to request the ICC to waive the exercise of its jurisdiction under rule 162(3).

    Mr Barasa therefore submits that the proceedings against him necessarily violate article 70 of the Rome Statute.

    b) The Constitutionality of Part IV of the ICA

Mr Barasa contends that the law and procedure applicable to his arrest and surrender to the ICC as prescribed under Part IV of the ICA, are unconstitutional and in violation of his rights. In this regard, he points to sections 29 and 89 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya, (the CPC), by which the power to arrest any person is only exercisable where a police officer or other arresting person has reasonable or probable cause to believe that an offence has been committed by the person sought to be arrested. In addition, he argues that under sections 91 to 177 of the CPC, an accused person may be compelled to appear in court through either summons or warrant of arrest. section 101 of the CPC also provides that a warrant of arrest may only be issued where a complaint based on a reasonable and probable cause is made upon oath that a person has committed an offence. He argues that issues to do with legality of any warrant of arrest and probable cause for commission of offences are justiciable, and can be dealt with under the laws of Kenya. According to his counsel, Mr Kibe, it is not clear whether those rights are justiciable in the ICC under the Rome Statute.

The Petitioner therefore contends that the Cabinet Secretary cannot exercise his role and discretion under section 29 of the ICA unless he has reasonable grounds and probable cause to believe that the Petitioner has committed the alleged crimes under the Rome Statute and the ICA. His function is not merely a messengerial one of executing the request of the ICC. In acting, he must have regard to Constitutional provisions and, in particular, articles 27, 28 and 29 of *the Constitution*.

According to Mr Kibe, the Part IV of the ICA is unconstitutional insofar as it allows the Minister to arbitrarily make key decisions affecting the liberty of an individual. In the absence of regulations governing the process to be followed by the Minister, a lacuna exists which is prejudicial to Mr Barasa.

c. The Right to a fair hearing

In his Supplementary Affidavit filed on 30th October 2013, Mr Barasa deposed that: "I am convinced that there can be no fair trial for me before the ICC as contemplated by article 50 of *the Constitution*." He argued that it would be a contravention of *the Constitution* to issue a warrant of arrest and/or surrender him to the ICC unless the Court is satisfied that the ICC can guarantee him minimum standards of justice set out in article 50 of *the Constitution*.

The Petitioner impugns the procedure employed in the issuance of the warrant against him. He avers that the Minister was enjoined to notify him of the ICC's request before he could lawfully request the High Court to issue a warrant against the Petitioner by dint of articles 27, 29, 47 and 50 of *the Constitution*.

Mr Barasa also asserts that the information regarding the charges he allegedly faces has not been disclosed to him and that he could therefore not defend himself against these issues in the dark. It was submitted that article 35 of *the Constitution* on access to information applies to all Kenyans, whether guilty or free, and he was entitled to this right.

On the right to a fair hearing before being condemned, Mr Barasa relied on the cases of another (1983) 1 All ER 766; and Kenneth Stanley Njindo Matiba v Hon Attorney General, Nairobi Civil Appeal No 142 of 1994 (CA) On the necessity for a person entrusted with decision-making to base his decision on evidence that has probative

value from carrying on a reasonable enquiry, he relied on Mahon v Air New Zealand (1984) 3 All ER, 201 and De Souza v Tanga Town Council (1961) EA, 377

d. The Constitutionality of the Cabinet Secretary's decision

Mr Barasa impugns as unconstitutional the Cabinet Secretary's decision of 4th October, 2013 notifying the High Court of the ICC's request for the arrest pursuant to section 29 of the ICA. He argues that under articles 47 and 35 of *the Constitution*, the Cabinet Secretary was enjoined to notify him of ICC's request and supporting documents, and give written reasons for his action. To these he was entitled under article 35 on the right to information. He argues that the Cabinet Secretary was enjoined by articles 27, 29, 47 and 50 of *the Constitution* to accord him a hearing given that he had notified the Cabinet Secretary that he was contesting the ICC's decision to arrest him. Cumulatively, the decision and action of the Cabinet Secretary strips the Petitioner of the sovereign protection of the Kenyan State envisaged by article 1 of *the Constitution*. Mr Kibe was emphatic that the Cabinet Secretary was discharging a judicial not administrative role.

e. Whether exceptional circumstances under section 19 ICA exist prior to commencement of proceedings

Mr Barasa avers that exceptional circumstances exist in his case which the Respondents ought to have taken into account. These include the fact of the disagreement between him and ICC's investigators over the handling of the Ruto Case in the ICC that triggered the arrest warrant against hKihma;waanjad tvhSaet ctrheetaIrCy Cfo raltlheeg eHdolympereDfeerpreadrtmchenatrg&es against him owing to his refusal to co-operate with the ICC investigators to implicate one of the accused persons in the Ruto Case.

He faults the role of the ICC in the matter claiming that it was not the only court that had jurisdiction to try the case. Further, that the Cabinet Secretary's impugned letter of 4th October, 2013, is based on the faulty assumption that ICC is the only forum for a trial. It was submitted by Counsel that the Petitioner ought to be given a chance to determine in which forum he wished to be tried.

It was further submitted on behalf of the Petitioner that the question of injustice or oppression of the Petitioner at the ICC ought to have been decided before the Minister's decision.

f. Whether the Petitioner should be tried in Kenya, if at all, or at the Hague (the issue of Forum)

Mr Barasa submitted that the ICC lacked the jurisdiction to hear the matter as it was not a Court duly established under *the Constitution* pursuant to article 50(2)(d). By extension, therefore, this Court lacked jurisdiction to entertain the applications for arrest and surrender to the ICC.

The ICC forum was also impugned on the ground that the Petitioner was entitled to a public trial and the ICC was not such an open court under *the Constitution*, and would deny the Petitioner a fair trial.

Reliance was placed on the Court of Appeal decision in Torroha v Republic, [1989] KLR, 630 where it was held that one cannot be extradited where there is no guarantee for a fair trial and where the trial is of a political character. It was submitted that the

trial of the Petitioner at the ICC would amount to a political trial as the genesis of the Kenyan cases at the Hague relate to post election violence (PEV) which were offences committed within a political context.

g) Whether the absence of Regulations under Sections 172 & 173 ICA invalidates the Proceedings commenced by the 1st Respondent

The argument by Mr Barasa under this head is that there is a legislative lacuna in that there are no regulations made by the Minister under the ICA prescribing the procedure to be followed in dealing with requests made by ICC. This lacuna has worked to the prejudice of the Petitioner, in that the directions earlier given by the Court were invented to fill the gap, hence compromising the independence of the Court.

Any such regulations should contain safeguards in compliance with articles 27, 28, 29, 47 and 50 of *the Constitution*.

h. Whether the Petitioner is entitled to the evidence and information in support of ICC's request for his arrest and surrender Mr Barasa submits that he is entitled to all the rights of an accused person under article 50(2) (c), (j) and (k) of *the Constitution*. These include the right to adequate time and facilities to prepare his defence; the right to be informed of the evidence the prosecution intends to rely on, and access to the same; and the right to adduce and challenge evidence. He argues that the fact that he is a suspect or accused before the ICC does not derogate his right to that information.

For these propositions he relies on Kanda v Government of Malaya (1962) AC 322 and Juma & others v Attorney General (2003) 2 EA, 46 (HCK). He points out that there is a cherished principle in Kenyan courts that at the earliest stage in criminal proceedings an accused person is entitled to all the evidence against him.

i. Whether the High Court has jurisdiction to order arrest and surrender of the Petitioner to ICC

Two arguments are made by Mr Barasa to question this Court's jurisdiction to entertain the Request transmitted by the 7. Whether the absence of regulations under sections ICC.

The first is that in light of the fact that the Respondents have not yet determined whether Mr Barasa should be tried in Kenya or at the ICC, the 1st Respondent has acted prematurely in invoking the court's jurisdiction under Part IV of the ICA. Thus, until his right to trial in Kenya has first been exhausted, the 1st Respondent is not entitled to invoke the Court's jurisdiction.

The second is that the ICC not being a court established under *the Constitution* under article 50(2)(c), the High Court cannot order his arrest and surrender.

j. Whether the State should provide the Petitioner with security Mr Barasa argues that he is entitled to all the rights, privileges and benefits of citizenship, including the right to security. Given the allegations of attempts by ICC officials to abduct and arrest him, he will require and is entitled to security until at least the conclusion or determination of the Ruto Case.

The 3rd Respondent's Case

15. The 3rd Respondent opposes the Petition. He states that the 3rd Respondent generally represented the State in criminal matters, and was thus representing the State Party to the extent that the Request for the arrest warrant was a criminal matter. He avers that the 3rd Respondent acted within the provisions of *the Constitution* in the discharge of his functions and mandate with respect to the ICC request for assistance. Mr Kamula argued that the Cabinet Secretary's request for surrender under section 29 of the ICA is not the subject of the Petition presently before court.

16. According to Counsel, Mr Barasa has sufficient safeguards to protect his rights should the Court issue the warrants of arrest within the provisions of sections 29-30 of the ICA. Further, he will also be entitled to canvas the issues raised in the Petition at the appropriate time.

17. On the Petitioner's assertion as to the absence of rules made in accordance with section 173 of the ICA, Mr Kamula denied that such gap left the Petitioner unprotected. He submitted that under section 37 of the ICA, proceedings under the Act, including a request for arrest and surrender, are to be conducted as if the suspect was a subject of a criminal charge. He thus enjoys all the rights under the Criminal Procedure Code, the ICA and *the Constitution*. Further, the subject of the request for arrest is entitled to apply at the appropriate time for bail and for supply of evidentiary material under article 50 of *the Constitution* and to assert his rights as accorded by article 49 of *the Constitution*.

18. In response to the Court's query, it was Counsel's submission that article 59 Rome Statute was applicable to the current proceedings, but that the implementing statute is the ICA. Accordingly, unless there is a lacuna, the ICA is sufficiently elaborate on the procedures especially relating to offences under the article 70 of the Rome Statute. Counsel submitted that these procedures are set out under the ICA from sections 19-47.

19. Counsel further submitted that the Petitioners' assertions that the DPP, Attorney General and Cabinet Secretary were required to identify exceptional circumstances at this stage were based on a misapprehension of the law. According to Counsel, section 19(2) of the ICA should be read together with sections 39, 42 and 43 of the ICA, which provide for determination of eligibility and procedure for surrender. Thus, it is after transmittal of the request for arrest to the High Court, that the Court is then required to determine the eligibility for arrest and for surrender.

20. In Counsel's submission, if the High Court determines that the subject is eligible for surrender and so orders, then the final decision as to whether to surrender lies on the Minister under section 42 of the ICA. Further, Counsel submitted that in making his decision, the Minister could cite exceptional circumstances under section 19 of the ICA as reasons for declining to surrender should he find such to be the case. Counsel equated the proceedings for request and surrender under the ICA to extradition procedures under The *Extradition (Commonwealth Countries) Act* cap 77.

21. Mr Kamula finally submitted that the Request or application by the state filed in court for the issuance of the warrants of arrest, and the Petition filed by the Petitioner, are not causes being heard in parallel. He pointed out that the Request was transmitted to the Court which then ordered the State to file a formal application. The State has not appeared in Court to make representations on the Request, and the parties are presently before court in respect of the Petition. At the appropriate time and when required by the Court, they would make their representations on the Request for arrest which remains pending in Court.

The 1st, 2nd & 4th Respondents Case

22. Ms Munyi, Counsel for the 1st, 2nd & 4th Respondents opposes the Petition together with the Applications. Counsel fully associated herself with the pleadings and submissions by the 3rd Respondent, indicating that she had nothing to add.

The 1st Interested Party's Case

23. The 1st Interested party, through Mr Nderitu, opposes the Petition together with the Applications. Counsel relied on his replying Affidavit and also made oral submissions.

24. As regards the Petitioner's contention to be furnished with information, Mr Nderitu submitted that it would amount to a complete reversal of the system of justice if a person sought to be arrested were to be given access to information and documents for the intended arrest. Counsel submitted that the rights crystallized under article 49 are those of an arrested person. The rights to information under article 49 of *the Constitution*, therefore, apply in respect to a person arrested and not to one pending arrest. According to Mr Nderitu, it would be a mockery of the system of justice if every person sought to be arrested were to be informed of reasons, as the duty of the state to arrest overrides the right to liberty of the person. Further, that the Petitioner would also be qualified for release under article 59(4) Rome Statue which draws its life from article 2(6) of *the Constitution*.

25. Mr Nderitu asserted, regarding the issue of the Request for arrest and surrender under Part IV of the ICA, that an arrest would amount to a legally recognized limitation of the Petitioner's rights under *the Constitution*. As such, it should be given effect within the provisions of the Act. Further, Counsel argued that the Petitioner had not demonstrated what illegality there is in connection with the process so far, and the Petitioner could only challenge the process in terms of its constitutionality or legality. Accordingly, both sections 29 and 30 of the ICA are intended primarily for application by Kenya as a State Party through the relevant Officers of the State. He argued that it was clear from the preamble to the IC A that the Act was intended for purposes of co-operation as contemplated under sections 29 and 30 of the IC A-in furtherance of the principle of complementarity. As such, the duty of this Court was to complement the functioning ofthe ICC under the Rome Statute. Additionally, under section 30 ICA, the judge may only hear other reasons which affect the exercise of his discretion. An example would be a situation where the Petitioner was so ill that he should not be surrendered, in which case the judge could give reasons for refusal to surrender.

26. With regard to the question ofthe regulations to be made under sections 172& 173 ofthelCA, Mr Nderitu submitted that the ICA is neither vague nor wanting in terms of procedures for arrest and surrender. He pointed out that sections 35-62 of the ICA contain elaborate procedures in connection with remand, bail, surrender and restrictions on surrender. Under sections 63-75 ICA, there are provisions with regard to appeals against determination of eligibility to surrender and discharge. It was Mr Nderitu's submission that the ICA is not an Act intended for the Petitioner vis-d-vis court institutions and that it is primarily intended between Kenya as a State Party and the ICC under the Rome Statute.

27. In answer to the Court's query whether the subject is entitled to make representation on the hearing of a Request, Counsel asserted that under article 59(1) ofthe Rome Statute, a State Party is obliged to immediately take steps to arrest a suspect in respect of whom a warrant is issued. Thus, it is not open to Court to consider whether or not the warrant of arrest was properly issued. It was Mr Nderitu's submission that section 30 ofthe ICA is not wide enough to allow an exchange between the State Party, the subject and the High Court.

Further, that section 29 of the ICA entitles the Cabinet Secretary, if he is satisfied that the Request is supported by the information and documents required by article 91 of the Rome Statute, to request issuance of a warrant. According to Mr Nderitu, there is no basis for a Petitioner to seek to forestall the Cabinet Secretary's action or the Court's subsequent action under sections 29 or 30 ofthe ICA.

28. With regard to the Petitioner's suggestion that the provisions ofthe ICA must be read with article 157 ofthe Constitution, Mr Nderitu submitted that at this stage of the process there is no exercise of prosecutorial powers by the DPP and that the power relating to cooperation of Kenya as a State Party in relation to the ICC primarily vests in the Cabinet Secretary. According to Mr Nderitu, the DPP was brought into these proceedings firstly because the Petitioner made him a party, and secondly because of their quasi-criminal nature. It was Mr Nderitu's submission that there is a distinction between the Petition, which is a civil matter, and the Request under section 29 of the IC A, which essentially has criminal characteristics.

29. As regards the Petitioner's assertion on the contravention of article 35 of *the Constitution*, Mr Nderitu submitted that, within the context of these proceedings, the right to information could be invoked by an arrested person. Further, that the rights under article 35 of *the Constitution* are limited in terms of articles 24 and 25 of *the Constitution* which do not exclude the rights alleged by the Petitioner.

30. Mr Nderitu denied that the Request for arrest and surrender amounted to unfair administrative action in terms of article 47 of *the Constitution*. As regards fair hearing as enshrined under article 50 of *the Constitution*, Mr Nderitu asserted that this argument does not avail to the Petitioner as no dispute exists since article 59(4) of the Rome Statute forecloses the inquiry into the propriety of an ICC warrant. In any event, he argued, the Request for arrest is not does not amount to a trial.

31. Counsel submitted that Kenya's sovereignty under article 1 ofthe Constitution must be exercised in accordance with and respecting *the Constitution*, including recognizing that under article 2(6) of *the Constitution*, treaties entered into form part of it. Further, he urged that section 4 of the ICA gives the Rome statute the force of law, averring that section 19 of the ICA makes provision for the hierarchy of laws as to arrest and surrender.

32. Counsel submitted that article 70 of the Rome Statute gave the ICC jurisdiction over offences against the administration of justice. Further, that article 70(2) states that the principles and procedures of ICC are supplemented in its Rules of Procedure and Evidence and by the domestic laws of the requested State.

33. With regard to the supplementary Affidavits filed in support ofthe Petition, Mr Nderitu asserted that their veracity cannot be ascertained.

34. Finally, on the reliance placed by the Petitioner on rule 162 of the rules, Mr Nderitu submitted that the ICC has discretion, but no obligation, to consult States. In addition, the offences adverted to were allegedly committed in Uganda, not Kenya, and it would be inappropriate to try such offences in Kenya.

The 2nd Interested Party's Case

35. Mr Omtatah, the 2nd Interested Party, submitted in support of the Petition that *the Constitution* was Kenya's Supreme law. According to him, for any treaty to have legitimacy under article 2(4), it must conform to *the Constitution*. Thus, whilst article 159 of *the Constitution* vests judicial authority upon courts established by *the Constitution*, the ICC is not established by or under *the Constitution* of Kenya, and has no capacity to place a Kenyan on trial. According to Mr Omtatah, the referral of cases to

the ICC amounts to discarding Kenya's sovereignty on the basis of necessity and as such, pleadings containing necessity to adhere to the Rome Statute should be disregarded.

36. Mr Omtatah submitted that the ICA was an attempt to smuggle the ICC into Kenya under article 2(6) of *the Constitution*. Under that article and under the law on treaties, he argued, any treaty which the political or Executive Arms of Government chose to ratify must conform to *the Constitution* of Kenya. Therefore, a treaty whose content or impact is unconstitutional cannot be ratified.

37. It was the 2nd Interested Party's case that the Petitioner is entitled to all his constitutionally protected rights in accordance with article 12(1)(a) and article 50 of *the Constitution*. Accordingly, Mr Omtatah asserted that the Petitioner is entitled to be furnished with all the information he seeks and/or requires in the Petition.

38. According to Mr Omtatah, the Rome Statute was irregularly ratified by the political arms of government, with the result that the ICC's jurisdiction in Kenya is unconstitutional, null and void. As such the ICC is not part of the judicial structure of Kenya. Further, he argued that treaties cannot override *the Constitution* and no aspect of sovereignty can be ceded to the ICC. Finally, Mr Omtatah questioned the constitutionality of the ICA, which according to him, domesticated the irregularly and illegally ratified Rome Statute.

The 3rd Interested Party's Case

39. Rev Mbugua, the 3rd Interested Party supported the Petition. He submitted that *the Constitution* is the Supreme Law of the Republic and thus binds all persons and all State organs at all levels of Government.

40. The 3rd Interested Party avers that the Petitioner is entitled to a fair hearing in accordance to article 50 of *the Constitution*. He must be given an opportunity to respond to the case against him, which was not done in respect of the warrant issued by the ICC. He also sought disclosure of the information regarding the charges against Mr Barasa pursuant to article 35 of *the Constitution*.

Determination

41. Several matters have been canvassed by the parties in the present petition. However, the core issue is whether the Petitioner's fundamental rights have been violated in such respects that this Court should not proceed to hear the pending application for grant of an order of warrant of arrest against the Petitioner in line with section 30 of the ICA. Having heard the parties and considered their submissions and all documentation availed by them, I am of the view that in order to ultimately answer the core issue, the following related issues arise for determination:

    1. The issue of the Supremacy of *the Constitution* and sovereignty of the people vis a vis the Rome Statute and similar treaties
    2. The Constitutionality of Part IV of the ICA
    3. Whether ICC was enjoined to inform the State Party prior to commencing the exercise of its jurisdiction over the Petitioner
    4. The Right to fair hearing
    5. The Constitutionality of the Cabinet Secretary's decision seeking arrest
    6. Whether exceptional circumstances under section 19 ICA exist prior to commencement of proceedings

7. Whether the Petitioner should be tried in Kenya, if at all, or at the Hague (the issue of forum)

8. Whether the absence of Regulations under sections 172 & 173 ICA invalidates the Proceedings commenced by the 1st Respondent

9. Whether the Petitioner is entitled to the evidence and information in support of ICC's request for his arrest and surrender

10. Whether the High Court has jurisdiction to order arrest and surrender of the Petitioner to ICC

11. Whether the State should provide the Petitioner with security

42. In the discussion below, I have merged some of the issues where, on close perusal, they tend to dovetail. I commence with the first issue.

The supremacy of *the Constitution* and sovereignty of the people vis-a-vis the Rome Statute and conventions ratified by Kenya

43. The Petitioner, and also the 2nd Interested Party, sought to que whether this Court would maintain judicial fidelity to *the Constitution* whether it would mechanically apply the Rome Statute, which brought to the fore the issue of the Supremacy of *the Constitution*. Article 1 of *the Constitution* of Kenya, 2010 vests sovereign power upon the people of Kenya. Article 2(1) provides that *the Constitution* is the Supreme Law of the Republic of Kenya and binds all persons and all State organs at both levels of government. Further, by article 2(4) any law inconsistent with *the Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of *the Constitution* is invalid. Article 2(5) then states that the general rules of international law form part of the Kenyan Laws.

44. It is beyond argument that Kenya, being a member of the United Nations and in its co-existence with others in the comity of nations, recognizes international laws, treaties and conventions, particularly those that have been ratified by her. Thus, article 2(6) of *the Constitution* provides that:

> " Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

45. As such member of the United Nations, Kenya has ratified various international treaties and conventions. Such treaties and conventions in so far as they had been specifically incorporated as part of the law were recognized under the then Constitution. In the case of Mary Rono v Jane and William Rono, Court of Appeal at Eldoret, Civil Appeal 66 of 2002, the Court of Appeal stated that:

> " .. .There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated.

In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle

7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states:

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[22] That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. In Longwe v International Hotels 1993 (4 LRC 221), Justice Musumali stated:

> ... ratification of such (instruments) by [a] nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute." [Emphasis supplied]

46. The afore-cited decision of the Court of Appeal was rendered well before the promulgation of the present Constitution of Kenya. *The Constitution*, 2010, has cemented the place of international law, treaties and conventions alike. As cited above, article 2(6) of *the Constitution* recognizes any treaty or convention ratified by Kenya as forming part of the law of Kenya.

47. It may be further noted that such treaties and conventions as were ratified by Kenya before the promulgation of *the Constitution*, 2010, continue to be in force by virtue of section 7(1) to the Sixth Schedule ofthe Constitution, which provides as follows:

> " All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

48. In light of the above, there is a reconciliable tension between article 2(6) and article 94(5) ofthe Constitution, 2010, which vests Parliament with the sole mandate to make law. Article 94(5) ofthe Constitution provides that:

> " No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under the authority conferred by this Constitution or by legislation".

Pursuant to that article, Parliament enacted the *Treaty Making and Ratification Act*, 2012 that came into effect on 14^ December, 2012. The preamble in that Act states that it is an Act of Parliament to give effect to the provisions of article 2(6) of *the Constitution* and to provide the procedure for the making and ratification of treaties and connected purposes. However, that Act is applicable only to treaties concluded by Kenya after the commencement of the Act, and does not apply to the Rome Statute.

49. In the case of Beatrice Warjiku & another v the Attorney General & others, Petition No 190 of2011, the debate as to the Supremacy of *the Constitution* vis-a-vis treaties and conventions as ratified by Kenya, was discussed , withMajanja J, observing as follows:

> " I take the position that the use of the phrase 'under this Constitution' as used in article 2(6) of *the Constitution* means that the international conventions and treaties are 'subordinate'

to and ought to be in compliance with *the Constitution*. Although it is generally expected that the government through its executive ratifies international instruments in good faith on the behalf of and in the best interests of the citizens, I do not think the framers of *the Constitution* would have intended that international conventions and treaties should be superior to local legislation and take precedence over laws enacted by their chosen representatives under the provisions of article 94

....Article 2(5) and (6) regulates the relationship between international law and national law in two ways. First, by placing the issue of international law within the supremacy clause, the supremacy of *the Constitution* is emphasized in relation to international law. Second, the application of international law in Kenya is clarified to the extent that it (is) not left in doubt that international law is applicable in Kenya.

The nature and extent of application of treaties must be determined on the basis of the subject matter and whether there is domestic legislation dealing with the specific issue at hand." [Emphasis supplied]

50. To acquire the force of law under our Constitution, treaties and conventions have to undergo domestication. It is recognized that there are laws, consented to by all parties in the comity of nations who sign them, obligating States that have ratified or acceded to them to comply with them particularly when dealing with other States parties as well as relevant international organizations. The 1969 Vienna Convention on the Law of Treaties (the 1969 Vienna Convention) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (the 1986 Vienna Convention) provides the yardstick on how to deal with treaties and conventions.

51. The 1986 Vienna Convention defines a treaty as follows:

"(a) 'treaty' means an international agreement governed by international law and concluded in written form:

between one or more States and one or more international organizations; or between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) 'ratification' means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(d) 'reservation' means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization."

52. Once a treaty becomes part of its law, a State Party is obligated to perform the treaty regardless of conflicts with its internal law. Suffice to say, internal law includes a States' Constitution. This is provided for in article 27 of the 1986 Vienna Convention which Kenya has ratified-and provides that:

1. . A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty

3. The Rules contained in the preceding paragraphs are without prejudice to article 46."

Article 46 states that:

1. . A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith."

53. Thus the obligation of a State Party to comply with a treaty, especially where the State has not expressed any reservations thereto cannot be willy-nilly denied or abrogated. A State can only invoke the provisions of its internal law where the same have been expressed as reservations before the ratification of such treaty. Some countries have, however, expressly stated that their internal laws and most especially *the Constitution* is supreme to treaties. The United States of America is one such example. In the case of Reid v Covert, 354 US 1 (1957), the Supreme Court stated that:

> " This Court has regularly and uniformly recognized the supremacy of *the Constitution* over a treaty".

54. The Rome Statute establishes the International Criminal Court. It is one of the treaties signed by Kenya. It was ratified on 15th March 2005, and Kenya did not express any reservations to any of the provisions of the Statute. Indeed, article 120 of the Rome Statute expressly prohibits State Parties from entering any reservations. The prohibitory provision provides that:

> " No reservations may be made to this Statute"

55. The preamble to the Rome Statute emphasizes, inter alia, the fact that:

> " ..the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions," [emphasis supplied]

Article 4 of the Rome Statute indicates what is the legal status and the powers of the International Criminal Court. In particular, article 4(2) provides that:

> " The Court may exercise its functions and powers, as provided in this Statute on the territory of any State Party.."

56. The enactment by Parliament of the ICA, 2008, thus domesticates the Rome Statute giving it legal 'teeth' within the jurisdiction of Kenya. It came into operation on 1st January, 2009. The preamble states that, it is:

> " An Act of parliament 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. Section 3 of the Act is also binding on the Government. [Emphasis supplied].

57. Under section 4 of the ICA, the Kenya Parliament was very clear that certain provisions of the Rome Statute shall have the force of law in Kenya. That section provides inter alia that:

> " 4
>
> (1) The provisions of the Rome Statute specified in subsection (2) shall have the force of law in Kenya in relation to the following matters-
>
> (a) the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests.
>
> (b) ....
>
> (c) the bringing and determination of proceedings before the ICC;

Subsection (2) of the ICA states that:

> " The relevant provisions of the Rome Statute are-
>
> (a) ..
>
> (h) Part 9 (which relates to international co-operation and judicial assistance);"

58. In the present case, the subject matter of the proceedings instituted by the ICC is the issuance of a warrant of arrest. It was duly transmitted to the Kenyan authorities by way of a request for assistance relating to international co-operation, in terms of the provisions of the Rome Statute. Clearly therefore, section 4 of the ICA and Part 9 of the Rome Statute are invoked. These are amongst the provisions which the Parliament of Kenya has enacted as having the force of law in Kenya.

59. In light of the foregoing, it is evident that Kenya, through a process of domestication, and the people of Kenya in exercise of their sovereign will through their constitutionally mandated representatives in Parliament, have in exercise of such sovereignty, ratified, adopted, incorporated and received the Rome Statute, excluding the provisions not domesticated, as part of the law of Kenya under the supremacy of *the Constitution*. That being so, the effect is that the Rome Statute forms part of the laws of Kenya to the extent stated. Being a statute through a process of ratification and domestication the Rome Statute is, in terms of article 2(6) of *the Constitution*, thus "under *the Constitution*", and hence is subordinate to *the Constitution*. These are findings I can clearly make, and I so find and hold.

The Constitutionality of Part IV of the ICA

60. This is the next issue that arises for determination, and concerns the constitutionality or otherwise of the provisions of Part IV of the ICA. The Petitioner strenously argued that the process of arrest and surrender provided under Part IV of the ICA is unconstitutional in as far as it offers no safeguards and allows the Minister to 'mechanically' make key decisions affecting the liberty of an individual. Counsel contended that the ICA Act, in particular Part IV, vested much power on the Minister in respect of what counsel regarded as serious issues of deprivation of fundamental rights and freedoms.

61. I have already made a finding that the stipulated parts of the Rome Statute are part of the laws of Kenya and have the force of law in Kenya. Although I have so found, it is critical to determine whether there are parts of the ICA-domesticating the Rome Statute -that could be considered on a proper interpretation, to fall short of the standards under our Constitution and therefore be held unconstitutional.

62. In determining whether an Act-or a provision therein-is unconstitutional, the overall object and purpose of the Act must be considered. By parity of reasoning, so also must the object of the provision within the scheme of the Act be considered. Such has been the established principle in a chain of cases including: Murang'aBar Operatorsand another v Minister cfState for Provincial Administration and Internal Security and others Nairobi Petition No 3 of 2011 (Unreported), Samuel GMomanyi v Attorney General and another Nairobi Petition No 341 of 2011 (Unreported), Hon Chirau AU Mwakwere v Robert Mabera & 4 others, Nairobi Petition No 6 of2012 (Unreported)

63. In the case of Doctor's for Lfe International v The Speaker National Assembly and others (CCT12/05) [2006] ZACC II the constitutional court of South Africa noted as follows regarding the Court's role in maintaining the delicate balance between its role as the guardian and enforcer of constitutional values and principles on the one hand, and deference to legislative and executive functions, on the other:

> " What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of *the Constitution* and the rule of law including any obligation that Parliament is required to fulfill in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand." (at Para 70)

64. In this regard, the following sentiments expressed by Lenaola J in Kiriro wa Ngugi & 6 others v The Truth, Justice and Reconciliation Commission & 6 others, Mise Civil Case 192 of 2013 at para 13, are apposite:

> " Lastly, it must be understood that our Constitution is Government. The Judiciary should be alert of that fact specific in creating boundaries between the organs of and should particularly be careful not to usurp the role of Parliament even as it checks the excesses of the Executive by use of the powerful tools of judicial review."

65. Francis Bennion in Statutory Interpretation observes at page 631 of his text:

> " It is an important principle of public policy to respect the comity of nations, and obey treaties which are binding under public international law. '...there is a primafacie presumption that Parliament does not intend to act in breach of [public] international law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred."

(Citation attributed to the cases of Salomon v Customs and Excise Commissioners [1967] 2 QB 116 per Diplock LJ at 143; Garland v British Rail Engineering Ltd [1983] 2 AC 751 at 771, Maclaine Wason & Co Ltd v Department of Trade and Industry [1990] 2 AC 418; Duke v GEC Reliance Ltd [1988] AC 618; Pickstone v Freemans PLC. [1989] AC 66; Brind v Secretary of State for the Home Department [1991] 1 AC 696).

66. The primary role of the Court is to interpret the law as enacted by Parliament, and that entails giving effect to the legislative intent of Parliament. Thus, the Court is not concerned with 'what ought to be' but with 'what is'. This is what is exemplified in the Indian Case of Re Application by Bahadur [1986] LRC 545 (Const), where it was stated:

> "I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown."

67. Further guidance is availed in the dissenting decision of the US Supreme Court in US v Butler, 297 US 1 [1936], where it was observed that:

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government." [emphasis supplied]

68. In its majority opinion in that same case, the US Supreme Court held that:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of *the Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of *the Constitution*; and, having done that, its duty ends." [emphasis supplied]

69. In the Indian Case of Maharashtra State Board of Secondary and Higher Secondary Education and another v Kurmarstheth [1985] LRC as cited in Republic v The Council of Legal Education [2007] eKLR, the Court stated thus:

> ".It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the court to examine the merits or demerits of such a policy because its scrutiny has to

be limited to the question as to whether the impugned regulations fall within the scope of the regulation."

70. Given the pronouncements in the cited authorities and in the context of this case, I am convinced that the benchmark set out by the majority in the Butler Case is a useful principle which our courts should apply. I adopt the principal that in impugning a provision of law as unconstitutional, the complainant must juxtapose the article of *the Constitution* which is invoked against the provision challenged and show how they do not square with each other.

71. Applying this principal, I have carefully considered the Petitioner's submissions in respect of this issue. He impugns Part IV of the ICA as unconstitutional on two limbs. Firstly, on the ground that the arrest procedures do not meet the threshold found in sections 28, 89 and 101 of the Criminal Procedure Code, cap 75 which provides for an arresting officer to exercise the power of arrest only if he has reasonable and probable cause. Secondly, that the Cabinet Secretary's role in such exercise cannot be a merely messengerial and arbitrary one, but that he should pay regard to articles 27, 28 and 29 of *the Constitution*.

72. From that argument, I take it that the constitutional provisions which are alleged to be violated are articles 27, 28 and 29. These relate to equality and freedom from discrimination; human dignity; and freedom and security of the person. However, Part IV of the ICA on arrest and surrender has thirty seven sections, ie sections 28 to 75. Other than for Counsel's expressions of unconstitutionality, there was no demonstration as to how these various provisions of the ICA when juxtaposed with the cited constitutional provisions, are flawed. Under the ICA, once the Cabinet Secretary has received the transmitted warrant and supporting documents from the ICC, he is required to satisfy himself that the request is duly supported, and if so, to notify the Judge of the request and seek issuance of an arrest warrant.

73. With regard to the question whether there was reasonable and probable cause for issuance of a warrant of arrest, I do not consider that that was a question which the Cabinet Secretary was required to inquire into under the provisions of the ICA. Indeed under article 58 of the Rome Statute, it is for the ICC Trial Chamber to make that inquiry and be satisfied, after initiation of an investigation, and:

> "on the application of the Prosecutor [to] issue a warrant of arrest of a person, if having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
>
> a) there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
>
> b) the arrest of the person appears necessary."

74. No similar obligation is placed on the custodial state or the Cabinet Secretary to inquire as to reasonableness and probable cause for an arrest. In addition, under article 59(4) Rome Statute it is not open to a custodial state to consider whether the warrant of arrest was properly issued in accordance with article 58(1)(a) and (b) of the Rome Statute. It may be recalled that articles 58 and 59 of the Rome Statute both fall under Part 5 of the Rome Statute and thereby acquire the force of law in Kenya pursuant to section 4 of the ICA.

75. In light of the foregoing, the Petitioner has not shown that the provisions of Part IV of the ICA undermine the stated articles of *the Constitution*. I am therefore unable to reach the conclusion that the Petitioner has proved that Part IV of the ICA or indeed the Act as a whole is un-constitutional.

Whether ICC was enjoined to inform the State Party prior to commencing the exercise of its jurisdiction over the Petitioner and Whether the Petitioner should be tried in Kenya, if at all, or at the Hague

76. In line with the perspective from which the Petitioner argued these issues, it is necessary to cluster them as they are closely related in germane respects.

77. It was not disputed that under article 70 of the Rome Statute as read with rule 162 of the rules and section 18 of the ICA that both the High Court and the ICC have jurisdiction to conduct proceedings in respect of offences against the administration of justice. However, the Petitioner holds the view that art 70(2) Rome Statute and rule 162(1) and (3) require the ICC to consult a state party that has jurisdiction.

78. Further, the Petitioner interprets article 50(2)(d) of *the Constitution* to mean that the ICC, not being a court established "under" *the Constitution*, it is not open for a trial of the Petitioner to be held at the Hague. The petitioner therefore argues that the ICC has no jurisdiction to try him, as that would be contrary to the right to be tried by a court established under *the Constitution*.

79. Additionally, this argument was hoisted upon the holding in the Torroha Case (supra) that extradition is not permissible where a fair trial cannot be guaranteed or the trial is of a political nature. It was sought to demonstrate that a trial at the Hague would be unfair by reference to the affidavit evidence of Samuel Kimeli Kosgei, Simon Kipkolum Rotich and ICC Witness KWN (P-0336 or K-0336). Their depositions allege manipulation and coercion by the ICC investigators and prosecution team.

80. In respect of the argument grounded on the depositions and the Torroha case, it is abundantly clear to me that there are at least two significant distinctions with this case which defeat the Petitioner's position. The first is that, in respect ofthe complaint regarding the manner of handling the depositions, there is a difference between the Prosecution's officials and the Court itself. It would be for that Court to make a determination on any complaint in respect of the prosecution's actions, as that would be the proper forum.

81. In my view, it is difficult to imagine that a panel of ICC Judges from different backgrounds cultures and states would be biased against a private individual they have had no prior connection with. Even if it was found that there was misconduct on the part ofthe prosecutorial investigators, it would have to be demonstrated that this would potentially have a ripple effect on the fairness or impartiality of a trial Chamber of three Judges.

82. The second distinction is that extradition is not the subject ofthe Petition, and therefore the holding in Torroha is irrelevant. Besides that, there is a critical difference between surrenders and extradition. An extradition is surrender from one state to another state pursuant to treaty or agreement, whereas surrender is the delivering up of a person by a State to the ICC as defined in article 102 ofthe Rome Statute.

83. I think that when dealing with the issue of the supremacy of *the Constitution* vis-a-vis the Rome Statute, I concluded that the Rome Statute was properly a part of the law of Kenya. Following the argument in that holding, it follows naturally and as a matter of law, that where such law of Kenya allows for proceedings under a court there-under, there is no necessary inconsistency with *the Constitution*.

84. This position is arrived at taking into account that the ICC is a Court which is, as far as Kenya is concerned, one established by a statute acceded to and ratified pursuant to article 2(6) of *the Constitution*. Such statute therefore constitutionally forms part of the law of Kenya; and the ICC's activities have been identified and recognized in the domesticating Act under the provisions of section

4 of the ICA as having the force of law in Kenya. The ICC is therefore a Court duly recognized and incorporated by *the Constitution* as a court with which, in terms of the preamble and objects of the ICA, Kenya must cooperate in the performance of its functions.

In this regard, section 4(1)(c) ICA provides that certain specific provisions in the Rome Statute do have the force of law including, inter alia, all those in relation to the following matters:

> "(c) . the bringing and determination of proceedings before the ICC."

85. With regard to rules 162(1) and 162(3) of the rules, I find that they give discretionary powers to the ICC in relation to the exercise of its jurisdictional discretion where there is dual jurisdiction. These Sub-rules provide as follows:

> "(1) Before deciding whether to exercise jurisdiction, the Court may consult with States Parties that may have jurisdiction over the offence..
>
> (3) The Court shall give favourable consideration to a request from the host State for a waiver of the power of the Court to exercise jurisdiction in cases where the host State considers such waiver to be of particular importance"

86. In addition to the fact that the ICC cannot be forced to exercise its discretion as to jurisdiction in a particular way, there is neither any evidence availed by the Petitioner, nor has there been any suggestion by the DPP, that the State did in fact make a request to the ICC to waive its jurisdiction, in accordance with sub-rule 3 of rule 162 of the rules. As such, the Petitioner's argument as to waiver, also fails.

87. Consequently and in conclusion on the two issues under consideration, I do not find that the ICC was under any obligation to inform the State Party or the Petitioner prior to commencing on the exercise of its discretion, or that the Petitioner has a specific right to be tried in Kenya.

The Right to a fair hearing; and Whether the Petitioner is entitled to the evidence and information in support of ICC's request for his arrest and surrender; and The Constitutionality of the Cabinet Secretary's decision

88. I have merged these three issues as I consider that they cover largely the same ground.

89. The Petitioner impugns the procedure employed in the issuance of the warrant against him. He contends that he was not given ample opportunity to be heard prior to the Cabinet Secretary transmitting the request for issuance of the warrant of arrest against him. He avers that the Cabinet Secretary was enjoined to notify him of the ICC's request before he (the Cabinet Secretary) could lawfully request the High Court to issue a warrant against the Petitioner by dint of articles 27, 29, 47 and 50 of *the Constitution*.

90. He also impugns the Cabinet Secretary's decision of 4th October, 2013, to notify the High Court of the ICCs request for arrest. He asserts his entitlement under article 35 of *the Constitution* to the right to information. It is therefore the Petitioner's case that his fundamental rights and freedoms were violated by the action of the Minister in commencing proceedings under Part IV of the ICA before notifying and furnishing him with the information and evidence upon which the ICC seeks his arrest and surrender

91. The DPP on the other hand rejects the Petitioner's contention stating that there was no legal provision requiring the Petitioner to be informed of the request by the ICC. Further, he asserted that there was no legal requirement that the Petitioner be granted a hearing by the Cabinet Secretary prior to forwarding the ICC Request to the Judge. The DPP termed as misconceived the Petitioner's assertion that the

respondents were in contravention of *the Constitution* by commencing proceedings under Part IV of the ICA before notifying and furnishing him with all relevant information. Pointing out that the arrest warrant was yet to be issued by the Judge, The DPP argued that once the Petitioner was arraigned in court, either in execution of the arrest warrants or voluntarily, he would be entitled to be furnished with the request dossier and to canvas issues raised in that regard. Finally, he said that the Petitioner had not demonstrated that the respondents would deny the Petitioner this right.

92. The arguments herein call to the fore the question of due process in administrative action. It is true that, as a component of the rules of natural justice, a party is entitled to a reasonable opportunity to know the basis of allegations against it. This right is not limited only to cases of a hearing as in the case of a court or before a tribunal, but also in respect of administrative acts (See O'Donoghue v South Eastern Health Board [2005] 4 IR 217).

93. The Petitioner relied, inter alia, on the holding in the seminal case of Khawaja v Secretary of State for the Home Department and another [1988] 1 All ER, 765 where the House of Lords stated as follows:

> " Where an executive officer's power to make a decision which would restrict or take away a subject's liberty was dependent on the existence of certain facts the Court was not limited merely to inquiring whether the executive officer had reasonable grounds for believing that those precedent facts existed when he acted. Instead the Court had to be satisfied on the civil standard of proof to a high degree of probability that those facts did in fact exist at the time the power was exercised"

94. In Hilary Delany's book, Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272, the following principle of administrative action is well captured:

> " Even where no actual hearing is to be held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."

95. It was observed by this Court in the case of Kenya Anti-corruption Commission v Lands Limited & 7 others [2007] eKLR , that:

> " Constitutional provisions are procedural safeguards aimed at ensuring due process before any right to property can be taken away and also incorporating the right of hearing. The right to hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of *the Constitution* must be implied in every Act especially, the right to due process and it cannot be taken away. Constitutional rights cannot be taken away without due process. [Emphasis supplied]

96. The nature and extent of the right to due process including the right to be heard must however be examined within the context of each case. In the case of Diana Kethi Kilonzo & another v IEBC & 2 others, Petition No 359 of 2013, this Court observed thus:

> " We agree with the submissions of Counsel for the respondents that what would constitute a fair hearing and accord with the rules of natural justice will vary and depending on the circumstances of each case. In this regard, the words of Tucker LJ in Russell v Duke of Norfolk (1940) 1 All ER 109, at 118 relied on by the Respondents are instructive:

'The requirements of natural justice must depend on the circumstances of the case, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth .. one essential is that the person concerned should have a reasonable opportunity of presenting his case.'

97. The question as to whether or not the requirement of a fair hearing is met will depend on the circumstances of each case. The Court of Appeal in Kenya Revenue Authority v Menginya Salim Murgani, Civil Appeal No 108 of 2009 cited, with approval, the authorities in Local Government Board v Arlidge [1915] AC 120, 132-133, Selvarajan v Race Relations Board [1975] I WLR 1686, 1694, and R v Immigration Appeal Tribunal ex parte Jones [1988] I WLR 477, 481 where the following principle was upheld:

> "(a) hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made..."

98. There is no question that the rules of natural justice entail a right to be heard and fairly to be supplied with information to enable a reasonable response. However, this rule is in general applicable to conduct which leads directly to a final act or decision. This position is restated in Halsbury's Laws of England, Fifth Ed, Vol 61, at 639, where, commenting on the right to be heard, it is stated:

> "The Rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or recommendation on which a subsequent decision may be founded."

99. In the present case, therefore, the question as to whether or not the Cabinet Secretary breached the Petitioner's rights to a fair hearing and fair administrative action must be examined in the following context: the subject at hand; and in light of the nature of the proceedings; and taking account of whether the Cabinet Secretary's action is a final act or decision; and the procedure under which the decision is taken; and the objects of the law regulating his actions.

Whether the Petitioner was entitled to be provided with material and to fair hearing at the pre-arrest stage, must also thus be viewed through the lenses of the issues at hand, and the overall object of the ICA. According to its long title the ICA aims, among other things, to:

> "... enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions. " [Emphasis supplied].

Therefore, whatever interpretation is adopted by the Court, it must ultimately, and also efficiently and effectively be geared towards the achievement of this goal.

100. A careful perusal of section 29 and 30 of the ICA leaves me unconvinced that Parliament intended that when an international court such as the ICC has issued a warrant for the arrest of a suspect for transmittal to a State Party to act upon in furtherance of the principle of complementarity, that the State Party is then required to conduct a further hearing; And that such hearing is to be with full

representation of the suspect and full disclosure of the material upon which his arrest is sought; and that the object of such hearing is to determine whether it really ought to arrest him.

101. It is neither novel nor uncommon that a public officer who has to make a decision whether to charge a person or to take a certain action in furtherance of another, may not be required to hear the affected party prior to making that decision. In the case of Wiseman v Borneman [1969] 3 All ER, 275 a tax tribunal was required to take into consideration the taxpayers' statutory declarations, a certificate from the tax authority and counter statement, and to determine whether there was a prima facie case for proceeding in the matter. It did so without giving the taxpayers an opportunity or right to see and answer the counter statement. The House of Lords held that:

> " ... in following the procedures laid down by the Act and not extending it to give taxpayers the right to see and answer the counter-statement, the tribunal was not acting unfairly or contrary to the rules of natural justice"

102. In the above case, Lord Reid made the following lucid statement, which I think well expresses the sentiment I share in this matter, with regard to whether the Petitioner was entitled to a hearing before issuance of an arrest warrant:

> " Every public officer who has to decide whether to prosecute or raise a proceedings ought first to decide whether there is a prima facie case but no one supposes that justice requires that he should seek first the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

103. I have therefore come to the conclusion, in light of all the above, that there is no requirement for hearing the Petitioner at the prearrest stage. However, should the suspect be arrested, then the provisions of article 49 of *the Constitution* on the rights of arrested persons automatically kick in. It is to be remembered that, section 25(1) of the ICA demands confidentiality in the manner in which the Minister, the Attorney-General or any employee of dealing with requests for assistance from the ICC. The section states that:-

> " (1) A request for assistance and any documents supporting the request shall be kept confidential by the Kenyan authorities who deal with the request, except to the extent that the disclosure is necessary for execution of the request."

In this regard, Kenyan authorities include the Attorney General and the Minister among others.

104. My decision is further informed by the fact that the Rome Statute requires that all issues in relation to the question of arrest and surrender be handled in accordance with the domestic law. Article 59 of the Rome Statute provides as follows:

> " A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9"

105. Part 9 of the Rome Statute, referred to above, relates to international co-operation and judicial assistance. It is one of the parts given the force of law in Kenya under the ICA. Article 86 in that Part imposes a general obligation on a State Party to cooperate with the ICC, and article 87(3), obliges the State to keep confidential a request for co-operation except to the extent necessary for its execution.

106. The law in Kenya relative to the conduct of arrests is the Criminal Procedure Code, cap 75. I have widely researched the position regarding the pre-arrest rights of a suspect, and even under our local laws there is no provision that a person at the pre-arrest stage is entitled to a hearing or to be provided with material that is to form basis of the charge. These rights are available to the Petitioner after arrest and throughout the process thereafter. This includes the process before the ICC if, eventually, an order of surrender were to be finally made against the Petitioner after his arrest.

107. Under the Rome Statute, article 59 provides for arrest proceedings in the custodial State and article 60 provides for certain safeguards upon surrender of the person to the ICC. In addition, the ICC Rules also contain safeguards to the person in question. For instance, Part IV of the Rules contains provisions with regard to 'Procedures in respect of restriction and deprivation of liberty.' Sub-rule (3) of rule 117 even provides for room for challenge at the ICC, on whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1(a) and (b).

108. Sections 89 of the CPC on institution of criminal proceedings, complaints and charges, and on warrants of arrest provides as follows:

> " 89
>
> (1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.
>
> (2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction
>
> (3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.
>
> (4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer" [emphasis supplied]

109. The above provisions clearly show that an arrest in Kenya is lawful with or without the issuance of a warrant. All that is required is either the production before a magistrate of an arrested person or a complaint signed by a magistrate. It is not unusual, however, that a person suspected of having committed an offence is arrested without the opportunity of being heard. There is no doubt that arrest interferes with the fundamental rights of a person, in that upon arrest he may be placed in custody, and his movements limited and freedoms restricted. Therefore, the right to liberty can only be deprived on such grounds and in accordance with such procedure as established by law. Upon arrest, under our Constitution, a person's right to a hearing and to challenge the grounds for arrest cannot be curtailed, except under law. In some countries such as the United States of America, before being arrested a person has rights that accrue to them, which are read to them by the arresting officer. Such pre-arrest rights are commonly referred to as Miranda Rights or the Miranda Rule.

110. The Miranda rule emanates from the US Supreme Court decision in the case Miranda v Arizona, 384 US 436, 86 SCt 1602 (1966). The rule holds that:

> " a criminal suspect in police custody must be informed of certain constitutional rights before being interrogated. The suspect must be advised of the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed if the suspect cannot afford one. If the suspect is not advised of these rights or does not validly waive them, any evidence obtained during the interrogation cannot be used against the suspect at the trial (except for impeachment purposes)".

111. Even under international law norms, the minimum standards express the right of every person to liberty and security of the person, except on grounds and in accordance with procedures established by law. Article 9 of the International Covenant on Civil and Political Rights, 1996 (ICCPR) provides as follows:

> " 1. Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

112. Article 9 sub-article 2 (ICCPR) provides that "Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

In addition sub-article 3 provides for bringing an arrested person promptly before a judge or other officer authorized by law to exercise judicial power. Such arrested person is to be brought promptly to trial. There is no indication that an arrest in itself or the issuance of a warrant of arrest is either unlawful or unreasonable.

113. In light of all the foregoing, I find that this is not the right forum to vent the issues relating to appropriateness of the issuance of the arrest warrant. The petitioner's allegations are therefore premature at this stage. Accordingly, I find and hold that the ICC proceedings in respect of a warrant of arrest are special proceedings which do not entitle the Petitioner to an opportunity to be given a hearing prior to his arrest.

Whether exceptional circumstances under section 19 ICA exist prior to commencement of proceedings and Whether the absence of regulations under sections 172 & 173 ICA invalidates the Proceedings commenced by the 1st Respondent 114. I have also elected to determine these two issues together, under different limbs

115. With regard to the first limb, the Petitioner's position is that exceptional circumstances exist pursuant to section 19 of the ICA which, had the respondents not ignored, they would have noted that he would suffer oppression and injustice, and declined to commence the arrest process. He argues that the exceptional circumstances include the disagreements he had with the ICC Prosecutorial officers.

116. Section 19(2) of the ICA was referred to. It states in relevant part, as follows:

> "...a request for surrender or other assistance that relates to an offence involving the administration of justice may be refused if in the opinion of the Minister or the Attorney-General, as the case may be, there are exceptional circumstances that would make it unjust or oppressive to surrender the person or give the assistance required" [Emphasis supplied]

117. The answer to this complaint is easily resolved by looking at the provision itself. First, it is clear that the Minister or AG may refuse co-operation where he considers there are such exceptional circumstances. Second, his discretion to refuse co-operation is only in respect of the act of refusing a surrender request. The stage at which the issue of surrender arises is different from the stage at which arrest is dealt with.

118. The aspect of surrender is dealt with under sections 39-45, ICA. The process is simply that if a person is brought to the High Court under Part IV, which includes an arrest under warrant, the Court has to determine whether such person is eligible for surrender. The criterion for eligibility is also set out in section 39(3) ICA.

119. It must also be borne in mind that under section 29 of the ICA, the Minister's role is fairly circumscribed as already discussed in detail. In addition even if the Court issues a warrant of arrest, it is open to the Minister under section 31(1) ICA to apply for the cancellation of the warrant.

120. In my view therefore, it is premature for the Petitioner to raise the issue of refusal to surrender on account of exceptional circumstances as there is no basis yet for the exercise of the Minister's discretion to refuse surrender. The stage for determination of eligibility for surrender comes later.

121. The Petitioner's second limb is simply that the ICC assumed it was the only court that had jurisdiction to try the case. This is a subject on which I have already made a determination, holding that both Kenyan courts and the ICC have jurisdiction, and that the ICC was not under any legal obligation under rule 162 of the rules to consult with the State before deciding on the exercise of its jurisdiction.

122. In the result this ground fails.

123. I now turn to the issue whether the absence of regulations made by the Minister pursuant to sections 172 & 173 of the ICA, prescribing procedures for dealing with requests by ICC, invalidates the proceedings by the 1st Respondent.

124. Sections 172 and 173 provide as follows:

> " 172. The Minister may make regulations not inconsistent with this Act for any of the following purposes -
>
> (a) prescribing the procedure to be followed in dealing with requests made by ICC, and providing for notification of the results of action taken in accordance with any such request;.."
>
> 173. without limiting section 174, the Minister may make regulations to implement any obligation that is placed on State Parties by the ICC Rules if that obligation is not inconsistent with the provisions of this Act" [Emphasis supplied]

125. It is true that the Minister has not made any regulations under any of the stated sections. Indeed, at the time when this matter was before me for directions, I did issue a direction that the Minister's notice under section 29 ICA was to be filed by way of a miscellaneous criminal application. The petitioner argues that this lacuna compromised the independence of the court and was detrimental to him.

126. In issuing the directions on 18th October, 2013, I took note of Part IV and section 28 ICA, under which the Request to the Court had been made. I restate hereunder what I said then:

> 63. "....My reading of articles 22(3)(b); 22(3)(d); 22(4) and 159(2)(d) of *the Constitution*, persuades me that *the Constitution* demands that the rules providing for judicial proceedings in respect of protection of fundamental rights should satisfy certain important minimum criteria in relation

to procedures. I am able to identify at least three such minimum criteria. The first is that formalities relating to the commencement of proceedings should be kept to a minimum. The second is that the court shall not be unreasonably restricted by procedural technicalities and justice shall be administered without undue regard thereto. The third is that absence of clear rules cannot limit the right of any person to commence court proceedings

64. I am persuaded that these criteria, or criteria along similar lines, should also provide overarching guidance to the procedure which I should direct for the expeditious determination of the matters before me.

65. For good administrative order and judicial convenience, it is necessary that where a warrant is sought to be issued pursuant to a Notice and Request, and the same has been brought before a Judge, it is deemed to be a criminal proceeding and a file should be opened. The file becomes constituted as the repository of all documents and proceedings in that matter, present and future. Taking cognizance of the statutory requirements for confidentiality under section 25 of the International Crimes Act, it is proper that such file be under the supervision of the Judge who is seized of the matter for consideration.

66. In this case, and given the circumstances and the constitutional attitude towards procedural strictures, there is no harm that the proceedings may be commenced under the same file as the constitutional petition herein.

67. I will therefore make the orders and directions which follow, for the expeditious and just determination of the matters before me.

Orders and Directions Issued by the Court:

1. In respect of the Notification and Request

    1. The 1st Respondent as the State Party, shall, for good order and administrative convenience, file in this Court by way of a miscellaneous application under the present file reference, a formal Notification and Request through a complaint or application to institute the proceedings therein;

    2. The said Notification and Request in a)1, above, shall be substantially in the form of a complaint under section 89 of the Criminal Procedure Code, with necessary alterations and shall contain the statutory matters set out in section 29 of the International Crimes Act, No 16 of2008...."

126. I consider that the rationale for the directions remains valid. No aspect of the directions seems to me to have caused any prejudice the Petitioner, and none has in fact been shown. In any event, the High Court has inherent jurisdiction and a constitutional duty to ensure that a matter is heard on its substantive merits and with the least possible disruption on account of formalities or technicalities.

127. In addition, it is to be noted from the wording of the sections that it is entirely a matter for the discretion of the Minister whether or not to make regulations under those sections. He has not done so. Does that render invalid the actions of the Minister who, having received by transmittal, a warrant of arrest for notification to a judge? I do not think so. The ICA is clear that the laws of Kenya apply. The CPC has provisions for a procedure for the issuance of a warrant, although the procedure involves a magistrate. I see nothing to prevent a High Court judge acting in accordance with the ICA playing the role of the magistrate under the CPC, given that the High Court has unlimited original jurisdiction in civil and criminal matters.(see article 165(3)(a)).

127. In the case of Rep v Minister for Home Affairs ex parte Sitamze [2008] 2 EA 323 this Court made a determination on when the Court can intervene with the mandate of a Minister exercising his discretion under rules. The Court held that it would be wrong to intervene with the merits of the Minister's decision except in the following circumstances:

    1. Where there is abuse of discretion
    2. Where the decision-maker exercises his discretion for an improper purpose
    3. Where the decision-maker is in breach of the duty to act fairly
    4. Where the decision-maker has failed to exercise statutory discretion reasonably
    5. Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power
    6. Where the decision-maker fetters that discretion given
    7. Where the decision-maker fails to exercise discretion
    8. Where the decision is irrational and unreasonable

128. In the present case the Minister has not exercised his discretion to make regulations under sections 172 and 173 ICA. Thus, borrowing from the Sitamze case, I can readily think of some basic criteria which would underpin an action to impugn such failure of the Minister. In my view, some of the facts which the Petitioner would have to prove include that the failure to make such regulations:

    1. has resulted in a failure to realize the intention of the Act; or
    2. results to an impediment in the exercise of fundamental rights or freedoms of the Petitioner; or
    3. results in a situation so unfair, irrational or unreasonable that any reasonable person in the Minister's position would, in the circumstances, readily have made such regulations
    4. amounts to a failure of a glaring and fundamental duty of the Minister which the court would be entitled to remedy with an order to compel him to make such regulations

129. I am not satisfied that the Petitioner was able to demonstrate that any of the above criteria applied in his case. Accordingly, I do not consider that overall there is any basis upon which to hold that the proceedings commenced by the Minister are invalid, on account of his not exercising his discretion to promulgate rules under sections 172 or 173 of the ICA.

Whether the High Court has jurisdiction to order arrest and surrender of the Petitioner to ICC

130. Considering that I have already found that Part IV of the ICA is not unconstitutional, I have no difficulty in answering this issue in the positive. The High Court has such jurisdiction.

Whether the State should provide the Petitioner with security

131. Hon Justice Odunga had in an earlier ruling granted interim orders for security to be provided to the Petitioner. It is irrefutable that the Petitioner, like any other citizen, is entitled to all the rights privileges and benefits of citizenship including the right to security. He sought such security until at least the conclusion of the Ruto Case. However, I am prepared to, and do hereby, extend the order for security until further orders are issued in Misc Criminal Application 488/2013.

Disposition

132. For all the foregoing reasons, I come to the following conclusions and issue the following orders:

133.

(a) The Petitioner's prayers numbered (a) to (h) set out in the Petition are hereby declined.

(b) The Petitioner's prayer (i) is granted to the extent that the order for security shall remain in force pending further orders in Miscellaneous Criminal Application No 488 of 2013.

(c) Miscellaneous Criminal Application No 488 of 2013 shall be fixed for hearing pursuant to previous orders on a date agreed with Counsel.

134. I make no orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2014

R.M. MWONGO

PRINCIPAL JUDGE,

HIGH COURT OF KENYA

Judgment read in open court in the presence of:

1. Mr. Kibe Mungai Advocate for the Petitioner

2. Ms. Stella Munyi for the Attorney General for the 1st 2nd and 4th Respondents

3. Mr. Kioko Kamula and Victor Mule for the DPP for the 3rd Respondent

4. Mr. Wilfred Nderitu the 1st Interested Party - Absent

5. Mr. Okiya Omtatah Okoiti the 2nd Interested Party - Absent

6. Rev John Mbugua the 3rd Interested Party.