REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Constitutional Reference 12 of 2010

JOSEPH KIMANI GATHUNGU……APPLICANT

-VERSUS-

1. THE ATTORNEY-GENERAL …….RESPONDENTS
2. INTERNATIONAL CRIMINAL COURT
3. KITUO CHA SHERIA…….1ST INTERESTED PARTY
4. CENTRE FOR JUSTICE FOR VICTIMS OF CRIMES AGAINST HUMANITY……..2ND INTERESTED PARTY
5. LAW SOCIETY OF KENYA……...3RD INTERESTED PARTY
6. INDEPENDENT MEDICO-LEGAL UNIT……..4TH INTERESTED PARTY

KENYA SECTION, INTERNATIONAL COMMISSION OF JURISTS…….….AMICUS CURIAE

RULING

A. FRAMEWORK AND BACKGROUND

The applicant moved the Court by Originating Notice of Motion dated and filed on ***22nd September, 2010***, brought under Articles 1,2,3,23,159-170 (inclusive), 258 and 259 of the Constitution of Kenya, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The application is an indictment of the recently-launched operations of the International Criminal Court in Kenya, in the aftermath of an outbreak of violence and consequential destruction of human life, following the general elections of ***December, 2007***.

In the package of national reforms initiated to restore peace and establish social and political safety-nets, a central pillar was the new Constitution, which was approved by referendum, and promulgated in a grand ceremony on ***27th August, 2010***. It is this Constitution, and the attendant institutions, that the applicant extols, as he questions the legality of the current investigative activities of the International Criminal Court.

B. *CONTESTING THE LEGALITY OF THE INTERNATIONAL CRIMINAL COURT'S ACTIVITIES: THE APPLICANT'S PRAYERS*

The applicant's prayers are set out as follows:

(1) "THAT the Court be pleased to declare that the involvement of the 2nd respondent in the affairs of Kenya in general, and in particular in the investigations and possible prosecutions of the perpetrators of the post-2007 general-elections [violence] violates Articles of the Constitution of Kenya and, therefore:

(a) THAT the 2nd respondent be ordered not to involve itself in the investigations of post-2007 Kenyan general elections; and

(b) THAT 2nd respondent be ordered not to prosecute any Kenyan in the International Criminal Court on account of any acts or omissions resulting from the acts of violence perpetrated during and after the 2007 general elections in Kenya".

(2) "THAT the Court be pleased to order that full investigations be carried out by the relevant organs of the Kenya Government in respect of the violence that occurred during and after the 2007 general elections and all other incidents of violence commonly referred to as 'tribal clashes' particularly in 1992 and in 1997 and for all the perpetrators of such crimes, if any, to be prosecuted in the constitutionally-established Courts in Kenya".

(3) "THAT this Court be pleased to declare that 2nd respondent's acts of investigating and threatened prosecutions of any Kenyan in the International Criminal Court contravenes the constitutional provisions and, as such, that such acts of the 2nd respondent are null and void and of no legal consequence; and further, that the agreement signed between the respondents on or about *3rd September, 2010* ***far exceeds the statutory provisions contained in the International Crimes Act, 2008 and, without prejudice to the above prayers, the said agreement should be declared null, void and of no legal consequence".***

The grounds founding the application, for the material part, may be thus set out:

(i) that, following the post-election mediation initiatives of former UN Secretary-General *Dr. Kofi Annan*, ***the Waki Commission recommended resort to the process of criminal justice, failing which the names of some ten suspects kept in a sealed envelope would be handed over to*** *Dr. Annan* ***to place before the International Criminal Court – and in the end the sealed envelope was so handed over;***

(ii) that, as the contemplated local trial process did not take place, the sealed envelope was ultimately passed on to the ICC Prosecutor, *Mr. Luis Moreno-Ocampo* ***who has subsequently visited Kenya several times and "takes every opportunity to threaten that, very soon, he shall be placing at least two Kenyans [before]…the ICC to face criminal charges relating to the post- 2007 general elections";***

(iii) that, on *4th August, 2010* ***Kenyans, by popular vote, approved the then proposed new Constitution; this Constitution was later promulgated on*** *27th August, 2010* ***and "has dramatically changed literally all aspects of…..Kenya's way of life", with notable aspects being –***

(a) all sovereign power is vested in the people;

(b) all judicial authority is vested in the people, but the people have delegated that authority to be exercised on their behalf by the Supreme Court, the Court of Appeal, the High Court, the Magistrate's Court, local tribunals, and Kadhi Courts;

(c) any person who purports to exercise a power not expressly conferred upon him or her by the said Constitution, acts in vain, and such actions are null, void, and wanting in legal and moral authority;

(d) any Kenyan has the right to approach the Court to ensure the rule of law reigns supreme;

(iv) that, the International Criminal Court (ICC) is not provided for in the Constitution as an organ capable of either investigating any crimes occurring in Kenya or hearing and determining the guilt or innocence of any such alleged criminals; and, notwithstanding that the ICC is part of the law of Kenya, the Constitution is the supreme law of the land and the Constitution does not recognize the ICC as a competent Court in Kenya;

(v) that, to allow the ICC to operate in Kenya violates the letter and spirit of the Constitution; and it "amounts to surrender of the sovereignty of Kenya to foreigners which is totally untenable";

(vi) that, whereas the Constitution provides for a separation of powers, the legislature making laws, the Executive investigating crimes and providing security, the Judiciary hearing and determining issues of rights of subjects including trial rights – the ICC has assumed investigative, prosecutorial and adjudicatory roles all running together, and this violates the rules of natural justice

and,** ipso facto**, offends the spirit of the Constitution;

(vii) that, whereas by Chapter 10 of the Constitution of Kenya all judicial authority is derived from the people and is exercised by Courts and tribunals established thereunder, the ICC, under that Constitution, "is neither a Court nor a tribunal that has been established"; and notwithstanding that under Kenya's International Crimes Act, 2008 (Act No. 16 of 2008) the ICC was authorized to operate in Kenya, yet, on account of Articles 159, 160, 161, 162 and 169 of the Constitution, it was necessary after the promulgation date [**27th August, 2010**] to establish the International Criminal Court as a local Court or tribunal, for it to operate legally in Kenya.

(viii) that, whereas all judicial bodies in Kenya operate under the Constitution and will be subject to the jurisdiction of a Constitutional Court in case of a violation of the Constitution, the operations of the ICC "do not recognize the existence of the constitutional order existing in Kenya and, in particular, would not be liable to supervision by the Constitutional Courts, meaning that the ICC operates as though it is superior to the Constitution of Kenya";

(ix) that, following the entry into force of Kenya's International Crimes Act, 2008 (Act No. 16 of 2008) on** 1st January, 2010 **(before the promulgation of the Constitution of Kenya, 2010), an agreement was signed between the respondents herein (on** 3rd September, 2010**) which is** ultra vires **insofar as it "almost turns the ICC into a diplomatic mission on Kenyan soil and thereby amounts to a complete surrender of sovereignty by Kenya";

(x) that, "in the 1992 and 1997 general elections there were State-organised and State-financed attacks on members of a particular tribe by another tribe, and this also occurred [during] the post-2007 general elections albeit on a much larger [scale]…..and all the perpetrators of these violent attacks should be brought to book by being prosecuted in the Kenyan Courts".

The applicant supplied evidence by way of an affidavit sworn on **22nd September, 2010**; but at this stage, no evidence is to be considered, for when this case came up for hearing on ***27th October, 2010***, learned counsel ***Mr. Boniface Njiru***, for 2nd Interested Party, indicated that he had a preliminary objection, filed on ***22nd October, 2010***.

C. PRELIMINARY ISSUES OF LAW

(a) Is this a tenable suit?

For 2nd Interested Party, the Notice of Preliminary Objection was brought, regarding the **justiciability** of the applicant's cause; the **jurisdiction** of the Court to hear and determine the cause; and the **role of international law in the context of Kenya's new Constitution.**

After hearing counsel on the mode of accommodating the preliminary objection under the main cause, the Court made a ruling, in which the following passage occurs:

"A preliminary objection must be concerned essentially with points of law which would affect the process of entry into the substance of the case. Whenever a preliminary objection to any proceedings is raised, the normal procedure is to hear it, and then determine whether it succeeds or fails; and where it fails, then the merits of the main cause are heard……

"By the logical process of the nature of preliminary objections, and taking into account that most counsel urge that the objection be heard, it is appropriate that I should allow a hearing of the preliminary objection at the very beginning."

(b) Is the ICC amenable to suit proceedings?

Learned counsel, ***Mr. Njiru*** submitted that the constitutive law of the ICC, i.e the Rome Statute, clothes that Court with immunity; Article 48(1) provides that:

"The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes".

The Government of Kenya had gone further and, under the Privileges and Immunities Act (Cap. 179, Laws of Kenya), published Legal Notice No. 170 of **29th September, 2010**, specifically named the ICC as a body enjoying privileges and immunities. The said Legal Notice bears the title, **the Privileges and Immunities (The International Criminal Court) Order, 2010**, and states that the ICC "shall have the immunities and privileges set out in Part I of the Fourth Schedule of the Act" – and the immunities in that category are immunities **from suit and legal process.**

Being immune from suit and legal process, ***Mr. Njiru***, representing the 2nd Interested Party, submitted, the applicant's suit by way of the Originating Notice of Motion of ***22nd September, 2010*** was, as against the ICC, not tenable. The application, counsel urged, was bad in law.

(c) The domain of the Executive and the domain of the Judiciary

Counsel urged that the prayers sought by the applicant could not be granted, because they confounded the proper roles, respectively, of the Executive Branch and the Judicial Branch: matters relating to foreign States and international organizations (such as the ICC) belong to the Foreign Affairs docket of the Executive, which is the better judge in that regard, than the Judicial Branch; and it is the Executive, rather than the Judiciary, which will have ready access to information relating to the recognition process in respect of international organizations; the arrangement regarding power and privilege for the ICC under the Rome Statute, was a matter falling more within the Executive's competence than that of the Judiciary.

(d) National and international jurisdiction

Mr. Njiru submitted that the Rome Statute had special provisions on the jurisdiction of the ICC: Article 119 (1) provides:
"Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."
Counsel urged that Kenya, as a party to the Rome Statute, had committed herself to the terms of Article 119 on jurisdiction.
The issue of jurisdiction was considered by the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, in ***Prosecutor v. Dusko Tadic a.k.a "Dule",*** Decision of **2nd October, 1995**; and the basic principle was explicated as follows (at p. 5):
"This power [to determine own competence], known as the principle of '*Kompetenz-Kompetenz'* ***in German or '****la compétence de la compétence****' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction'. It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done……"***
Mr. Njiru submitted that since the ICC does indeed have powers to determine its own jurisdiction, this was not a matter for the High Court of Kenya: and consequently, this Court lacks jurisdiction to entertain the applicant's case, especially considering that the ICC had authorised the commencement of the investigations taking place in Kenya. The Pre-Trial Chamber II of the ICC, after deliberations, made its ***compétence de la compétence*** ruling on **31st March**, **2010**, as follows:
"Thus, on the basis of the available information examined, the Chamber concurs with the prosecutor that the alleged crimes against humanity occurred on the territory of the Republic of Kenya, for which reason the Court's jurisdiction (*ratione loci****) under article 12(2)(a) of the Statute is satisfied" (****Situation In the Republic of Kenya****, March 31, 2010 (No. ICC – 01/09), para. 178).***
Counsel submitted that since the ICC was a judicial organ with the competence to make binding decisions and issue orders, its decision on jurisdiction was now ***res judicata***, and the High Court had no jurisdiction to decide the question; and if the applicant had a valid application to make, he would have to bring it before the ICC. In this respect, counsel submitted, Kenya's State organs had their positions defined in Article 12 (1) of the Rome Statute, which provides:
"A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5".
The crimes referred to in the said Article 5 are: the crime of genocide; crimes against humanity; war crimes; the crime of aggression. In relation to such crimes, learned counsel submitted, States parties to the Rome Statute had agreed to cede some of their jurisdiction on crime.

(e) International law in the context of the Constitution of Kenya, 2010

Starting from the terms of Article 2(5) of the Constitution, that –
"The general rules of international law shall form part of the law of Kenya",
Mr. Njiru urged that the two relevant institutions, the ICC [Article 1 of the Rome Statute] and the Assembly of States Parties [Article 112 of the Rome Statute] form part of the law of Kenya; and that on this account, the ICC **did** become a functional Court in Kenya, once the treaty became operational in Kenya, ruling out the need for new local legislation. Such a position is further assured by the enactment in Kenya of the **International Crimes Act, 2008** (**Act No. 16 of 2008**), section 4(1) of which states that –
"The provisions of the Rome Statute……shall have the force of law in Kenya…."
By virtue of the International Crimes Act, 2008, counsel submitted, the ICC became a **Kenyan Court,** in respect of the crimes named in Article 5 of the Rome Statute: the crime of genocide; crimes against humanity; war crimes; the crime of aggression.
By this **interface** of the national and the international criminal-law jurisdiction, counsel urged that Kenya, in its complexion of criminal jurisprudence, had adopted the "monist" typology, dispensing with the need for a specific domestication of international law. While the International Crimes Act, 2008 introducing the operation of the Rome Statute, entered into force on ***1st January, 2009***, the **Constitution,** which was promulgated on **27th August, 2010** carries a **transitional clause** [Sixth Schedule, clause 7(1)] which stipulates that:
"All law in force immediately before the effective date [*27th August, 2010****] continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution".***

(f) Is the Applicant's case endowed with *locus standi****?***

Learned counsel ***Mr. Buti***, for the Law Society of Kenya [3rd Interested Party] submitted that the appellant lacked the ***locus standi*** to contest the competence of the ICC to conduct its operations in relation to the incidents of post-election violence.
In the first place, the ICC itself determines the preliminary question of jurisdiction; this is clear from Article 19 (1) of the Rome Statute which provides:
"The Court shall satisfy itself that it has jurisdiction in any case brought before it."
Secondly, by Article 17 of that Statute. "**the Court shall determine that a case is inadmissible where:**
(a) The case is being investigated or prosecuted by a State which has jurisdiction, *unless* ***the State is unwilling or unable genuinely to carry out the investigation or prosecution……"***
Although the terms of Article 17 give room for a party to challenge the jurisdiction of the ICC on the admissibility of a particular case, ***Mr. Buti*** submitted that the applicant herein lacked the ***locus*** to make such a challenge, for the Statute specifies the categories of persons who may make such a challenge. Article 19(2) of the Statute provides:
"Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
(c) A State from which acceptance of jurisdiction is required under article 12."
Mr. Buti submitted that the applicant herein did not fall within the category of persons recognized as entitled to contest either the general jurisdiction of the ICC, or its jurisdiction to admit a particular case for investigation and/or prosecution.
Lack of ***locus standi*** for the applicant was also attributed to the fact that no trial date had been set by the ICC, in relation to Kenya's post-election violence; and so it was **not time yet** for any challenge to be made by virtue of Article 19(2) of the Rome Statute.

(g) Is the ICC in conflict with the national judicial order?

Responding to the preliminary objections, learned counsel, ***Mr. Gikandi*** for the applicant, submitted that the ICC lacks the competence to involve itself in Kenya's judicial domain, a domain which takes notice of local circumstances, such as: the emergence since the post-election violence, of a new Republic

founded on the Constitution of Kenya, 2010; the emergence of a new legal framework based on the shifted ***grundnorm***; the re-alignment of the interplays of the country's organs of governance, in the aftermath of the post-election violence; the new source of moral direction for organs of governance – "We the people of Kenya"; new directions of national sovereignty.

Counsel submitted that the vital question raised by the applicant was: the International Criminal Court even when seen as embedded in the International Crimes Act, 2008 – is it superior to, or **subject** to the Constitution? The latter was the answer, as counsel urged; for Article 1(1) of the Constitution provides that "**All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution**", and "the people don't share the sovereign power with the ICC…"; this sovereign power is delegated to named State organs, namely Parliament, the Executive, the Judiciary and Independent Tribunals.

Mr. Gikandi urged that, by Article 2(1) of the Constitution, the said Constitution "is the supreme law of the Republic and binds all persons and all State organs"; that "the ICC and any other person cannot claim to exercise any part of the governance authority"; and that since, by Article 2(4) of the Constitution, "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency", the Rome Statute if inconsistent with the Constitution, is invalid. So strongly cast in learned counsel's perception, was this doctrine on the Constitution; he insisted that all counsel espousing the alternative view had fallen into a misapprehension, insofar as they had equated the Rome Statute with the Constitution; he invoked Article 3(1) which provides that: "Every person has an obligation to respect, uphold and defend this Constitution". So, contesting the submission that the applicant would appear more as a busybody, as he lacked ***locus standi, Mr. Gikandi*** urged that the applicant was in compliance with Article 3(1), and was, on the contrary, defending the Constitution.

Mr. Gikandi urged that the Constitution as promulgated on ***27th August, 2010*** was the formula for guaranteeing ***fair hearing*** in justiciable matters; and he invoked that concept as provided for in Article 50 of the Constitution:

"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right -

(a) to be presumed innocent until the contrary is proved;

b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay……."

Mr. Gikandi urged that the framework for a fair trial is guaranteed by the foregoing provisions, but not by non-national regimes such as that exemplified by ***the ICC***.

Counsel submitted that, by Article 159(1) of the Constitution, **"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution"**; and that by Articles 163, 164 and 165 the Constitution had established a Supreme Court, a Court of Appeal and a High Court, operating on the basis of several dedicated enactments, for the delivery of justice as ordained by the Constitution. On those foundations, counsel postulated that the High Court, for instance, cannot be devoid of jurisdiction; so it stood to question, whether the ICC had been vested with a higher jurisdiction. ***Mr. Gikandi*** submitted that since the ICC was not mentioned in the Constitution, it followed that, that Court had not emerged from **Article 169 of the Constitution**, by virtue of which Parliament could establish Subordinate Courts, and vest them with jurisdiction.

(h) Where national law meets international law

The interplay between national law and international law was the main issue taken up by ***Mr. Njiru*** in his response. Counsel called for judicial notice of the fact that the Kenyan State, just like any other State, has no autonomous existence outside the framework of the community of nations; and that on this account,

her regime of law and her constitutional order, interface with those of other States under the over-arching umbrella of **international law**; and the beacons of international law take different forms, one of these being the **multilateral treaties** to which Kenya and other States are parties; the Rome Statute is one of such treaties, and it establishes the International Criminal Court to prosecute and to judge, in the event of the commission of certain named categories of offences. Counsel urged that there was no gainsaying the supremacy of the Constitution of Kenya territorially, even as one acknowledges that the people of Kenya, in respect of whom sovereignty is expressed, have acknowledged expressly the role of international law in Kenya.

Learned counsel, ***Mr. Justus Munyithya*** for the 1st Interested Party (Kituo Cha Sheria) expressed agreement with ***Mr. Njiru***, and called for attention to Article 2(5) and (6) of the Constitution of Kenya, 2010; Article 2(5) thus stipulates:

"The general rules of international law shall form part of the law of Kenya";

and Article 2(6) provides:

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

Mr. Munyithya urged that the foregoing provisions aptly covered the current ICC activities in Kenya, in respect of the destruction wreaked by the post-election violence of 2007 and 2008. Counsel urged that the Rome Statute under which the ICC operates, is well anchored in Kenya's regime of constitutional law.

Learned counsel ***Mr. Buti*** for the Law Society of Kenya (3rd Interested Party), submitted that the interface of the national and the international regime flowed both ways; apart from being expressly declared by the Constitution of Kenya, 2010, it was affirmed too, in the tenth preambular declaration of the Rome Statute, with the States Parties –

"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".

Mr. Buti submitted that the evidence of such complementarity of the Kenyan and the Rome Statute criminal-law regimes was further reaffirmed in Kenya's International Crimes Act, 2008 which bears a tell-tale preamble in the following terms:

"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".

The foregoing line of argument was adopted also by learned counsel ***Mr. Otieno***, representing the Kenya Section of the International Commission of Jurists which had been admitted to the proceedings herein, in the capacity of ***amicus curiae***. ***Mr. Otieno*** submitted that the Republic of Kenya had assumed responsibility under certain international treaties and conventions; and that the governing law in respect of such obligations, is that Kenya is not to run its domestic affairs in a manner that derogates from them. This well-established principle is expressed, for instance, in Advisory Opinion OC – 14/94 of 9th December, 1994: ***International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*** [Requested by the Inter-American Commission on Human Rights]; and the pertinent passages may be set out here:

(i) "35. International obligations and the responsibilities arising from the breach thereof are another matter. Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions…..These rules have also been codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties".

(ii) "50. The Court finds that the promulgation of a law that manifestly violates the obligations assumed by a State upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the State in question."

(i) Post-Election Violence in Kenya 2007-2008: Does this properly fall to the jurisdiction of the ICC?

The answer of counsel for the respondents and the Interested Parties is, ***Yes;*** and this is also the position taken by the ***amicus curiae***. Learned counsel found validation in that standpoint from facts recorded in

the proceedings of the ICC's Pre-Trial Chamber II, dated **31st March, 2010** [No. ICC – 01/09]; the Pre-Trial Chamber addresses the principle of complementarity in the national and international criminal jurisdiction, and thus states [para.53]:

"53. With respect to complementarity, the Chamber underlines that the first step concerns the absence or existence of national proceedings. Article 17(1)(a) of the [Rome] Statute makes clear that the Court 'shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'. In its judgment of 25th September, 2009 the Appeals Chamber interpreted this provision as involving a twofold test:

'[I]n considering whether a case is inadmissible under article 17(1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a state having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the Statute'."

In that context the Pre-Trial Chamber reviewed the facts on the ground in Kenya, and stated (para.183) that: "since there is a lack of pending national proceedings against 'those bearing the greatest responsibility for the crimes against humanity allegedly committed', the Prosecutor submitted the possible case(s) to arise from his investigation into the situation 'would be currently admissible'"; and on that basis, the Chamber:

"*authorizes* ***the commencement of an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of the Court committed between 1st June, 2005 and 26th November, 2009".***

D.JUSTICIABILITY, JURISDICTION, CONSTITUTION: IS THE APPLICATION TENABLE IN LAW? – A FINAL ASSESSMENT

Whether or not the International Criminal Court has jurisdiction to operate in Kenya, is a question addressed with focus by counsel for the respondent, the Interested Parties and the ***amicus curiae***; they are in agreement that an international tribunal such as the ICC is well recognized to have ***compétence de la compétence*** – an initial capacity to determine whether or not it has the jurisdiction to hear and determine a case coming up before it. Counsel submit that the ICC, acting within the terms of the Rome Statute, has already determined that it indeed has jurisdiction. The ICC has gone further to determine the second jurisdictional question: whether the special facts of post-election violence in Kenya (2007-2008) render the matter justiciable before that Court. The ICC has determined that, on the facts, it has jurisdiction to investigate, hear and determine the cases arising from the post-election violence.

Such submissions, in my opinion, are well grounded in point of law, and I have not found them qualified by the applicant's contentions.

The main thrust of the applicant's case, at this stage, is that Kenya's new Constitution [promulgated on ***27th August, 2010***] has instituted an iron-clad judicial set-up, emanating from the sovereign will of the local electorate, which peremptorily rules out any role for the ICC, in redressing any criminal acts occurring in Kenya. Learned counsel, ***Mr. Gikandi*** has acclaimed the genius of the new Constitution, and has extolled its organic linkage to the sovereignty of the people, urging that insofar as this Constitution does not expressly provide for the Rome Statute which establishes the ICC, the ICC forms no part of Kenya's criminal justice system and its operations merely offend the Constitution. Counsel, hence, urged that it is apposite, and is a triable question, to challenge the ICC's presence in Kenya, as the applicant seeks to do by the Originating Notice of Motion of ***22nd September, 2010***.

Prior to the ***27th August, 2010*** Kenya's governance was based on the Constitution of **1969**, which incorporated sweeping amendments effected over a five-year period, to the original **Independence Constitution** of **1963**. I take judicial notice that, whereas the **1963** Constitution was an elaborate document marked by delicate checks-and-balances to public power, the **1969** Constitution had trimmed off most of these checks-and-balances, culminating in a highly centralized structure in which most powers

radiated from the Presidency, stifling other centres of power, and weakening their organizational and resource-base, in a manner that deprived the electorate of orderly and equitable procedures of access to civil goods. Judicial notice is taken too of the fact that the Constitution of **2010** derived its character, by a complex and protracted law-making process, from the history of popular grievance associated with the limitations of the earlier Constitution. It is not surprising, in the circumstances, that the applicant has founded his claim, at least in part, in his faith in the new constitutional order.

It emerges from the submissions of counsel appearing before the Court, that whether under the **1963** or the **1969** or the **2010** Constitution, Kenya remains a member of the community of nations, and subject to the governing law bearing upon States as members of that community.

Therefore, the Constitution of **2010** is **not** to be regarded as rejecting the role of international institutions such as the ICC. Indeed, from the express provisions of the Constitution, "**the general rules of international law shall form part of the law of Kenya**"; and Kenya remains party to a large number of multilateral international legal instruments: and so, by law, Kenya has obligations to give effect to these. One of such Conventions is the **Rome Statute** which establishes the International Criminal Court. Such evidence as is expressed in the documents filed before this Court, shows that Kenya has not declined to abide by the terms of the applicable instruments of international law.

A scrutiny of the several Constitutions Kenya has had since Independence shows that, whereas the earlier ones were designed as little more than a **regulatory formula** for State affairs, the Constitution of **2010** is dominated by a "**social orientation**", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions. Such a public-values orientation, in my opinion, readily interfaces with the objectives of ***international law,*** such as are integrated in the Rome Statute, as regards intractable crimes such as those of genocide, war crimes, and crimes against humanity.

Kenya's new Constitution requires those exercising judicial authority to be guided, ***inter alia***, by the "principles of the Constitution" [Article 159 (2) (e)], and such principles are defined in Article 10 (2) (b) as –

"human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized".

Such values, in the conviction of this Court, are unlikely to be given fulfilment by Kenya acting in isolation, or on the basis of mere invocations of the positive aspects of the Constitution; it is essential for the due fulfilment of those principles, and in the instant matter, to recognize and facilitate the role of the International Criminal Court acting within the framework of the Rome Statute.

Therefore, in my judgment, the applicant's challenge to the operations of the ICC has no legal foundation, apart from invoking a jurisdiction which is not available. The matter raised by the applicant is, in my opinion, not justiciable.

The preliminary objection on points of law, thus, succeeds; and I hereby dismiss ***in limine*** the applicant's Originating Notice of Motion of ***22nd September, 2010***.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this **23rd** day of **November, 2010**.

J. B. OJWANG
JUDGE

Coram: ***Ojwang, J.***
Court Clerk: ***Ibrahim***
For the Applicant: ***Mr. Gikandi***
For the 1st Respondent: **Mr. J. Ondari**
For the 1st Interested Party: **Mr. Justus Munyithya**
For the 2nd Interested Party: **Mr. B. Njiru**
For the 3rd Interested Party: **Mr. Buti; Mr. Joseph Munyithya**
For the 4th Interested Party: **Mr. Joseph Munyithya**
For ***Amicus curiae***: **Mr. Otieno**