REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: R.M MWONGO, PRINCIPAL JUDGE)

CONSTITUTIONAL PETITION NO. 488 OF 2013

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 2ND AUGUST, 2013

BETWEEN

WALTER OSAPIRI BARASA…..…….. PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF INTERIOR

AND NATIONAL CO-ORDINATION..…….…….…….…….1ST RESPONDENT

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

THE DIRECTOR OF PUBLIC PROSECUTIONS……..…….3RD RESPONDENT

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

AND

WILFRED NGUNJIRI NDERITU…..…….……1ST INTERESTED PARTY

OKIYA OKOITI OMTATAH……...…….……..…2ND INTERESTED PARTY

REV. JOHN MBUGUA…..……...…….3RD INTERESTED PARTY

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:

a. **"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.**

b. **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.**

c. **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.**

d. **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.**

e. **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.

f. **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.**

g. **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.**

h. **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.**

i. **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.**

j. **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 ***Khawaja v Secretary for the Home Department& Anor (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 him; and that the ICC allegedly preferred charges 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 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 **ICA** that the Act was intended for purposes of co-operation as contemplated under **sections 29** and **30** of the **ICA –** in furtherance of the principle of complementarity. As such, the duty of this Court was to complement the functioning of the 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 of the regulations to be made under **sections 172 & 173** of the **ICA**, 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-à-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)** of the **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** of the **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** of the **ICA**.

28. With regard to the petitioner's suggestion that the provisions of the ICA must be read with **Article 157** of the **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 co-operation 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 **ICA**, 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** of the **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 of the 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:

a. ***The issue of the supremacy of the Constitution and sovereignty of the people vis a vis the Rome Statute and similar treaties***

b. ***The Constitutionality of Part IV of the ICA***

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

d. ***The Right to fair hearing***

e. ***The Constitutionality of the Cabinet Secretary's decision seeking arrest***

f. ***Whether exceptional circumstances under Sec 19 ICA exist prior to commencement of proceedings***

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

h. ***Whether the absence of Regulations under Sec 172 & 173 ICA invalidates the Proceedings commenced by the 1st Respondent***

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

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

k. ***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 question whether this court would maintain judicial fidelity to the **Constitution**, or 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 vs. 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** of the 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)** of the **Constitution, 2010,** which vests Parliament with the sole mandate to make law. **Article 94 (5)** of the **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 14th 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 Wanjiku & Another vs. the Attorney General & Others, Petition No. 190 of 2011,*** the debate as to the supremacy of the Constitution vis-à-vis treaties and conventions as ratified by Kenya, was discussed , with Majanja 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 vs. Covert, 354 U.S. 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'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others*** **Nairobi Petition No. 3 of 2011 (Unreported),** ***Samuel G. Momanyi v Attorney General and Another*** **Nairobi Petition No. 341 of 2011 (Unreported),** ***Hon. Chirau Ali Mwakwere v Robert Mabera & 4 others,*** **Nairobi Petition No. 6 of 2012 (Unreported**

63. In the case of ***Doctor's for Life International v The Speaker National Assembly and Others 9CCT12/05)[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*****, Misc. Civil Case 192 of 2013** at para. 13, are apposite:

> **"Lastly, it must be understood that our Constitution is specific in creating boundaries between the organs of Government. The Judiciary should be alert of that fact 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 prima facie 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 U.S Supreme Court in ***U.S v Butler,* 297 U.S. 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] *e* KLR,** 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, i.e. ***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 **Art 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 **Art 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 of the 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 of the 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 of the 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** of the **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 Anor [1988] 1 AllER, 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]*** **e*KLR*** , 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 <u>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</u>.**
> [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 L J in Russell vs Duke of Norfolk (1940) 1All 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 Vs Arlidge*** **[1915] A.C. 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 counterstatement, 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 counterstatement. 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 *pre-arrest* 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 co-operate 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.

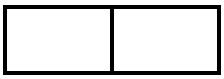
106. The law in Kenya relative to the conduct of arrests is the **Criminal Procedure Code, Cap 75.** I have widely researched the position regarding the pre-arrest rights of a suspect, and even under our local laws there is no provision that a person at the *pre-arrest* stage is entitled to a hearing 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 U.S Supreme Court decision in the case ***Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 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 Sec 19 ICA exist prior to commencement of proceedings

and

Whether the absence of Regulations under Sec 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 <u>may</u> 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 <u>may</u> 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:

a. **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 of 2008…."**

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 tha 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:

a. has resulted in a failure to realize the intention of the Act; or

b. results to an impediment in the exercise of fundamental rights or freedoms of the petitioner; or

c. 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

d. 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.