

PARLIAMENT OF KENYA

THE SENATE

SPECIAL SITTING

THE HANSARD

Tuesday, 10th September, 2013

*The Senate met at the Kenyatta International
Conference Centre at 2.30 p.m.*

[The Speaker (Hon. Ethuro) in the Chair]

PRAYERS

QUORUM CALL AT COMMENCEMENT OF SITTING

The Speaker (Hon. Ethuro): Order, hon. Senators. We need to determine if we have a quorum.

The Clerk of the Senate (Mr. Nyegenye): Mr. Speaker, Sir, we have 45 hon. Senators in the House. We have a quorum.

The Speaker (Hon. Ethuro): Let us proceed with today's business.

COMMUNICATION FROM THE CHAIR

CONVENING OF SPECIAL SITTING OF THE SENATE TO DEBATE MOTION ON WITHDRAWAL OF KENYA FROM THE ROME STATUTE

The Speaker (Hon. Ethuro): Hon. Senators, let me take this opportunity to welcome you all to this special sitting of the Senate that has been convened by the Speaker at the request of the Majority Leader as set out in our rules of procedure.

Hon. Senators, I wish to take a moment to indulge you to make the following Communication on the circumstances under which this special sitting was convened. You will recall that the Senate adjourned on Thursday, 1st August, 2013 and was to reconvene on Tuesday, 17th September, 2013 in accordance with the Senate Calendar, pursuant to Senate Standing Order No.28. Subsequently, on Monday, 2nd September, 2013, in accordance with Standing Order No.29 (1), the Speaker received a request from the Senate Majority Leader, Sen. (Prof.) Kindiki, to appoint a day for a special sitting of the Senate to deliberate on a Motion asking the Government to initiate the process of Kenya's withdrawal from the Rome Statute of the International Criminal Court (ICC).

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For the benefit of hon. Senators, Standing Order No.29 (1) states as follows:-

“Whenever during a Session the Senate stands adjourned, whether or not a day has been appointed for the next meeting, the Speaker may, on the request of the Senate Majority Leader or the Senate Minority Leader, appoint a day for a special sitting of the Senate.”

Hon. Senators, the Speaker considered the request against the criteria set out in Standing Order No.29(2) which states as follows:-

“The Speaker may allow a request under paragraph (1) if the Speaker is satisfied that the business proposed to be transacted relates to the matters specified under Standing Order 59 (*Definition of Special Motions*) or other urgent and exceptional business as the Speaker may allow.”

The Speaker noted that the business proposed to be transacted is not one falling under the definition of Special Motions as defined under the provisions of that particular Standing Order. The Speaker was, however, satisfied that given the sensitivity and the magnitude of the nature of the subject matter contained in the Motion on the Republic of Kenya, it was not only urgent, but also exceptional business as envisaged in the following Standing Order and accordingly appointed today, Tuesday, 10th September, 2013 for the special sitting.

In accordance with Standing Order No.29 (3), I notified all hon. Senators of the sitting through a special issue of Gazette Notice No.123735 dated 4th September, 2013.

Hon. Senators, Standing Order No.29 (3) states as follows:-

“The Speaker shall, by notice in the Gazette, notify the Senators of the place, date and time appointed for the special sitting of the Senate.”

The Gazette Notice read as follows:-

“Notice is given to all Senators that pursuant to Standing Order No.29 of the Senate Standing Orders, on the request of the Senate Majority Leader, I have appointed Tuesday, 10th September, 2013 as a day for a Special Sitting of the Senate. The special sitting shall be held at the Senate Chamber, 1st Floor, Kenyatta International Conference Centre, Nairobi commencing at 2.30 p.m. The business to be transacted at the special sitting shall be a Motion relating to the membership of the Republic of Kenya to the Rome Statute of the International Criminal Court (ICC).

In accordance with Standing Order No.29(5) of the Senate Standing Orders, the business specified in this notice shall be the only one before the Senate during the special sitting, following which the Senate shall stand adjourned until Tuesday, 17th September, 2013 at 2.30 p.m. in accordance with the resolution of the Senate made on Thursday, 1st August, 2013.”

Distinguished Senators, let me, therefore, conclude this Communication by bringing to your attention the provisions of Standing Order No.29(5) which states as follows:-

“Whenever the Senate meets for a special sitting under paragraph (1), the Speaker shall specify the business to be transacted on the day or days appointed and the business so specified shall be the only business before the Senate during the special sitting, following which the Senate shall stand adjourned until the day appointed in the parliamentary calendar.”

Hon. Senators, I trust that we are now reading from the same page on the circumstances relating to the sitting, the purpose of the sitting, the business before the Senate and what happens after this particular sitting. It is my sincere hope that you will debate this Motion on the basis of its merits or demerits and give this matter of immense public interest, your highest consideration befitting your higher calling while maintaining the dignity and decorum of the state organ of the Senate which you have been called upon to serve. You have always done this as the Senate. Kenyans expect the same from every contributor to this Motion.

I thank you.

Sen. (Dr.) Khalwale: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. (Dr.) Khalwale?

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, I thank you for making the clarification. In fact, I was very concerned about the meaning of Standing Order No.29 (2). Indeed, you have correctly said that this Order gives you the latitude to make a decision on any matter which is urgent and exceptional. I agree with you on this. But I beg that you listen to me on this Standing Order because I am convinced that whereas the Standing Order gives you the latitude to do so, however, there are other compelling reasons which have taken away from you what has been given to you by Standing Order No.29(2) under this particular Motion. I say this for the following reasons:-

One, when you look at the Treaty Making and Ratification Act, it requires that a Motion of this nature should have first been tabled at a sitting of the Cabinet by the respective Cabinet Secretary in consultation with the Attorney-General. After the Cabinet meeting has decided that this kind of Motion should proceed, then it will be brought to Parliament. In your Communication, you have not told us whether the Senate Majority Leader presented any document to the effect that this matter was before the Cabinet and the Cabinet decided that it should be tabled in the Senate.

This is important because that Act requires that during that information, there should be a memorandum outlining amongst other things, what the national interest of this kind of Motion would be. Indeed, the House would like to know the national interest of withdrawing from the ICC.

Secondly, the memorandum should also indicate the constitutional implications, including whether now that we are contemplating withdrawing from the ICC, or whether we also want to amend Article 2(5) and Article 2(6) of our Constitution which provides---

Sen. Bule: On a point of order---

Sen. (Dr.) Khalwale: You will have your time, Sir! This provides that any treat--

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Sen. Bule: On a point of order, Mr. Speaker, Sir.

Sen. (Dr.) Khalwale: I am on a point of order!

The Speaker (Hon. Ethuro): Order, Sen. Bule! Sen. (Dr.) Khalwale is on a point of order.

Hon. Senators: He is taking one hour!

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, this is so important. Therefore, I beg the hon. Senators to bear with me. That is besides the memorandum.

Mr. Speaker, Sir, the other reason which I beg that you find that you cannot permit this Motion is that this Motion, in my view, according to the Constitution, should have been preceded by a report from the President to Parliament showing what he has done to ensure that Kenya meets its international obligations as far as the ICC is concerned. It is only after he has tabled this kind of report, after the two houses have debated it, that we would then be saying: "Given what the President has done in his report, we can now consider approving withdrawing from the ICC or not."

Thirdly, we are---

Hon. Senators: He is taking too long!

The Speaker (Hon. Ethuro): Order, hon. Senators. Let us allow him to conclude.

Sen. (Dr.) Khalwale, proceed.

Hon. Senators: He should refer to the Standing Orders!

Sen. (Dr.) Khalwale: I am commenting on what the Chair has read and quoting the relevant sections of the law.

Hon. Senators: Order, Sen. (Dr.) Khalwale! You should address the Chair.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, we know we are members of the ICC. I know the Chair is busy, but if he had time, he would have found out that as we walked in, this matter is currently and actively going on at the ICC. Since we are members of the ICC, should we not find that by discussing this matter in the House, this would be *sub judice* which is contrary to our rules?

Hon. Senators: Aaah! *Maliza!*

The Speaker (Hon. Ethuro): Conclude now, Sen. (Dr.) Khalwale.

Sen. (Dr.) Khalwale: Finally, Mr. Speaker, Sir, in view of the importance of what is going on and its implications on the nation, do we want to go down in history as a Senate which attempted to intimidate the ICC, just the same way that intimidation has been attempted through injunctions and recalling of witnesses? I beg that you find that we cannot proceed with this Motion.

Thank you.

Hon. Senators: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Before I entertain more points of order, they must be real points of order. Sen. (Dr.) Khalwale raised about four issues. Three of them are points of arguments on whether the Cabinet met. Perhaps if he listens to the Senate Majority Leader when moving the Motion, he will be able to determine on the issue of demonstrating national interest, constitutional implications and whether a report has been made by the President. The Chair cannot really help you on these kinds of issues. Those are issues that you should be able to canvass from the Senate Majority Leader and the people supporting the Motion. If he does so, then he will be answered.

The only question that he appropriately addressed to the Chair was the question of *sub judice*. When you look at the issues that are in the body of the Motion, there is

nothing there that is *sub judice*. In any case, the Standing Orders actually allow the Speaker, even on a matter that is actively in court, for Parliament to debate. We considered all those issues and I am satisfied.

For the benefit of Sen. (Dr.) Khalwale and other hon. Senators, that is why I took the trouble to communicate from the Chair on the basis of Standing Order No.29, so that we are all reading from the same page. I am glad you acknowledged that.

Sen. Orengo!

Sen. Orengo: Thank you, Mr. Speaker, Sir. I seek guidance from the Chair in relation to this matter because my worry is that the decision to have this matter discussed without giving us some broad outlines on how the Chair arrived at this decision, may be, in the future, abused. You may sometime in the future, be confronted with a situation where the leaders of the Majority or the Minority may bring before you matters which, on the face of them, would not be characterized as urgent or exceptional business.

I stand guided that in making that decision, the Speaker must give some guidelines as to what constitutes a matter which is urgent and which is exceptional business. The answer to that question lies in the Standing Orders. My proposition is that if we look at Standing Order No.59, what are categorized as special motions are motions that require intervention which will lead to something being done in terms of the Constitution or the law. It is not just an open slate whereby, for example, if I wanted, probably, one of the members of Parliament to be impeached or his character discussed, then I can come to the Chair and say: "This is an urgent matter which requires discussion." We have seen this in the past when Dr. Karanja's character was discussed in the House as an urgent matter. The issue of hon. Charles Njonjo was also discussed as an urgent matter.

Mr. Speaker, Sir, I want you to be patient with me because this decision we are making--- Because this is the inaugural Senate, we must set the standards that, in future, anybody sitting on your Chair will be able to determine what is urgent and what is exceptional.

If you look at the various provisions of the Constitution which are mentioned in Standing Order No.59--- In all those provisions from Article 102 to Article 240, you will find that the Constitution says that without a resolution of Parliament that cannot happen. For example, if we want to go to war, a resolution of Parliament is required. If there is a question of Division of Revenue as provided under the Standing Orders, there is a resolution of Parliament which is required.

Mr. Speaker, Sir, allow me to take you through one of those provisions to demonstrate my point. Normally, Parliaments are busy with many other things and cannot just be called any time. Article 102 deals with the term of Parliament and how it can be extended. Article 102(2) says:-

"When Kenya is at war, Parliament may, by resolution supported in each House by at least two-thirds of all the members of the House, from time to time extend the term of Parliament by not more than six months at a time."

Therefore, a resolution of Parliament is required under that particular article.

If you look at Article 145 – these are all provisions in which Parliament is required by law and the Constitution to do something. Article 145 is in relation to the President by impeachment. Article 145(1) says:-

“A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President—”

This Article talks about something that Parliament is required to do to lead to certain circumstances.

Mr. Speaker, Sir, Article 188 talks about boundaries of counties. Article 188(1) says:-

“The boundaries of a county may be altered only by a resolution—

(a) recommended by an independent commission set up for that purpose by Parliament;”

Again, a resolution of Parliament is required. Since I know some hon. Senators want to fly to The Hague tonight and they may not be listening to me very well---

(Laughter)

If you read all the other articles---

Sen. Murkomen: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. Murkomen?

Sen. Murkomen: Mr. Speaker, Sir, is it in order for Sen. Orengo to insinuate that any human being and particularly a distinguished hon. Senator who is flying to The Hague has no ability to listen? What is the relationship between somebody flying out at 11.00 p.m. and being able to listen to the hon. Senator at this Senate sitting? We are a very serious House.

Sen. Orengo: Mr. Speaker, Sir, the Senate Majority Leader said that he has stopped all hon. Senators from flying to The Hague. They intended to go, but they have been stopped. Some of them are kind of captive, they are not listening.

(Laughter)

The Speaker (Hon. Ethuro): Order, Sen. Orengo. You have been challenged and fairly so, to demonstrate whether a Senator sitting in this Chamber at 2.55 p.m.----

Sen. Bule: Mr. Speaker, Sir, is the----

The Speaker (Hon. Ethuro): Order, Sen. Bule! Assume your seat. The good thing is that Sen. Orengo will be considered quite solid and experienced in the House on parliamentary proceedings. Sen. Bule will be considered a first timer, but they are all behaving the same way.

(Laughter)

Under the circumstances, I will not be harsh to either. But just to mention that the challenge by Sen. Murkomen to you Sen. Orengo was whether the two different times for

two different activities can actually influence the way you behave, especially when one comes earlier than the other one. You did not respond to that.

Secondly, you went further to import issues that have not been seized by this House. I have not heard a single word from the Senate Majority Leader telling this House that somebody is travelling. For you to claim that the Senate Majority Leader has communicated to you, those are extraneous matters. Wait until the Senate Majority Leader speaks, then you can deal with him at that particular point.

Conclude, Sen. Orengo.

Sen. Orengo: Mr. Speaker, Sir, in order not to take away what I was saying, I withdraw those remarks and apologise, if that will help Sen. Murkomen. But I know he will end up there anyway. So, giving him a little joy does not hurt.

(Laughter)

So that other hon. Senators can have an opportunity to contribute, all I am saying is that in view of the letter and spirit of the Constitution, where you make a decision, the basis and foundation of that decision should be made known. We want to be accountable in the manner we make decisions.

Mr. Speaker, Sir, you have not told us why the Chair deemed the matter to be urgent or exceptional business. You also did not tell us whether you decided it was an urgent matter, but not an exceptional business. We need to understand where the Speaker rests with this matter. Is it urgent or exceptional business?

Mr. Speaker, Sir, looking at the Motion, without discussing it, I see nothing which is urgent because this is really---

An hon. Senator: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Let him conclude. He is actually talking to the Speaker. I am sure the Speaker does not require your assistance at this point.

Sen. Orengo: Mr. Speaker, Sir, the way the Motion has been framed, for example, the first resolution that he wants us to make is:-

“To urge the Government to immediately take appropriate steps necessary to deal with this matter for the good and in the best interests of the country;”

Which are these appropriate steps that they cannot take without the resolution of the House? That is why I am saying it was necessary for you, in the spirit of the Standing Orders, with regard to Special Motions, that there is something in the Constitution which says something needs to be done. For example, if Kenya is going to war, there is a resolution of the House that is required. But this resolution is just talking about appropriate steps. Which are these steps?

The other resolution says:-

“Continue to cooperate with the ICC with regard to the ongoing cases before the ICC in accordance with the International Crimes Act (No. 16) of 2008 and other relevant laws of Kenya;

This is already in the law. What do you want us to do? So I would add---

The Speaker (Hon. Ethuro): Order, Sen. Orengo! You are now moving to murky waters!

Sen. Orengo: No, I am just urging---

The Speaker (Hon. Ethuro): You are addressing the Motion and we are yet to reach there.

Sen. Orengo: Mr. Speaker, Sir, I am just saying on the face of it. I would wish that another Senate and another Speaker making a similar decision will be able to know the basis of your decision by saying what we can categorise as urgent and what is exceptional business or this is a matter that is completely subjective. If we are told that these are subjective matters which a Speaker can sit in his office and just make a decision without objective consideration which can be put on the table of the Senate, then the Chair should tell us, so that next time, if I have a little incident of cattle rustling, I just need to mention this to the Senate Minority Leader and the Senate will be recalled because he has so requested. This must be laid out clearly.

Thank you, Mr. Speaker, Sir.

Sen. Murkomen: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Yes, Sen. Murkomen?

Sen. Murkomen: Mr. Speaker, Sir, first of all, Sen. Orengo is challenging your authority and decision, which you have already made. Standing Order No. 29(2) provides that:-

“The Speaker may allow a request under paragraph (1) if the Speaker is satisfied that the business proposed to be transacted relates to the matters specified understanding order 59 (*Definition of special Motions*) or other urgent and exceptional business as the Speaker may allow.”

The Speaker (Hon. Ethuro): Order, Sen. Murkomen!

I have always informed the House that you should not respond on behalf of the Chair. Raise your own concerns because the way you are moving is the way the Chair intended to do. So, you are declaring me redundant which I am not going to agree.

(Laughter)

Sen. Murkomen: Mr. Speaker, Sir, it is just a quick question I wanted to contextualize. Is Sen. Orengo in order to try to change the provisions of Standing Order No.29 to imagine that the Standing Order requires you to give reasons when it basically talks about discretion of the Chair?

The Speaker (Hon. Ethuro): Well done!

Sen. Kiraitu?

(Sen. Orengo stood up in his place)

What is it, Sen. Orengo?

Sen. Kiraitu, allow Sen. Orengo some little time.

Sen. Orengo: Mr. Speaker, Sir, I specifically heard the Chair, at the conclusion of the submission of my brother, Sen. Murkomen; you said “well done.” But when I finished, you just looked at me---

(Laughter)

Can the Chair explain that?

The Speaker (Hon. Ethuro): As I allow Sen. Kiraitu a chance, let me just dispose of that one. The Chair felt that Sen. Murkomen was actually responding the way the Chair would have responded. So, on that account, he deserved a “well done.” The second one and I think more fundamentally was the fact that he paraphrased; he regretted himself from the way he paraphrased that same question. Actually that is why I was giving the “well done” business. As for you, I will respond properly.

(Laughter)

Sen. Kiraitu?

Sen. Murungi: Thank you, Mr. Speaker, Sir.

I am rising on a point of order following the guidance from the Chair which was sought by Sen. James Orengo. The Senator said that it was necessary for you, as the Speaker, to set a precedent in this House by giving reasons as to what would make you consider a matter to be urgent and exceptional and, therefore, under what you could allow a Motion like the one we are just about to debate.

Mr. Speaker, Sir, there is absolutely no requirement in the Standing Orders for such a request to be made for the Speaker to be required to give reasons as to how he decided that a matter is urgent and exceptional. The second part of the Standing Order (29)(2) says as follows:-

“---or other urgent and exceptional business as the Speaker may allow.”

So, really, this gives the Speaker unfettered discretion. It is for him, in his own wisdom and mind, to make an absolute determination as to whether a matter is urgent and exceptional. In this case, you have already made that decision. That is why we were recalled and we came. Some of us have come from far away because of the decision that you made.

Mr. Speaker, Sir, the Senator was completely out of order to come to request the Speaker to give reasons. This is not a court of law. This is a matter that is entirely in your discretion and you could have told the Senate Majority Leader “This matter is not urgent or exceptional and, therefore, in my discretion, I am not going to summon a special session of the Senate.” Or if, as Sen. Orengo said, you could be asked because some cattle rustling has taken place, that we should be called, then in that occasion you could still exercise your discretion if you thought the matter of the cattle rustling was urgent and exceptional and called us. Or if you thought it was not, then you could say no, because it is really in your absolute discretion to do so.

So, Mr. Speaker, Sir, in my humble opinion, this is a matter that you do not even need to respond to.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Order, hon. Members! Let me really dispose of this matter so that we can proceed to the Motion. As you realize, the interventions are really arguing on the Motion.

First, I want to confirm and appreciate the contribution by Sen. Orengo in the sense that nobody acts or works in a vacuum; even the Speaker or even the Senator must be a person who has some base and rationale for doing something. But where I missed the boat which he had joined was at the emphasis of Standing Order No.59 and he forgot the Standing Order as correctly observed by Sen. Murkomen and Sen. Kiraitu.

The operational word, Sen. Orengo, is “or.” So, you concentrated on the first bit where I should make a decision, which is the Articles of the Constitution, but that is not what this Motion is about. This Motion is about the other “or”. My simple understanding of the word “or” – the English that I learned in Turkana – is “alternative.” It is not both; it is this one or the other one. Sorry for using the same word “or;” but I just wanted to make the emphasis so that it is very clear. So, you argued very well. I have had an occasion to teach. Sometimes I used to say that you can answer an issue very well, but; is it relevant to the question? Indeed, you asked it and Sen. Kiraitu also mentioned it.

First, it is not the job of the Speaker to convene the House when it is on recession. That is why we have a calendar; it is a resolution of the House. But then the Standing Orders have given me a window of opportunity of any other time. That responsibility is not given to the Speaker or to any other Senator, but it is given to two Senators. That is, the Senate Majority Leader and the Senate Minority Leader. So, you cannot even argue that the Standing Orders are favouring one side of the divide. That is really a job for them, and you can petition either of them. Now, it is up to them to petition the Speaker and convince him that this is a matter that requires the House to be recalled. Indeed, for your information, cattle rustling is a major issue. It is not a small one. Assuming there is an invasion---

Sen. Orengo: I qualified it!

The Speaker (Hon. Ethuro): Assuming there is an invasion of cattle rustling on a small community like El Molo which decimates a whole village or a whole community, is that not a matter that any of them can canvass to the Speaker and the Speaker will see that for the sake of humanity, that is a matter that we should discuss? Or even, for instance, to take the point home, an attack on Migingo Island; which others consider a rock, but for us, we consider it to be our place. If there was a serious attack on Migingo Island, would that not be a serious matter? Would you not want the House to pronounce itself on that particular matter? If any of them convinces me and I am convinced – and, again, agreeing with Sen. Kiraitu, this is an issue where it is you to convince the Speaker. Once the Speaker is convinced as I am convinced now, then the matter will be brought here. I want to thank Sen. Orengo because he has actually come because he has heard my notice to convene. So, I think he agrees with it.

So, let us leave it really there. I think we have ventilated on this matter. We should be able to proceed. Let us deal with the issues as they come.

Next order.

(Several hon. Senators stood up in their places)

Order! Let us hear the Senate Majority Leader first. I will recognize you if you still insist.

MOTION

WITHDRAWAL OF KENYA FROM THE ROME STATUTE OF THE ICC

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Mr. Speaker, Sir.

Mr. Speaker, Sir, I beg to move the following Motion:-

THAT, aware that the Republic of Kenya promulgated a new Constitution on 27th August, 2010 which made fundamental changes in the governance of the Republic---

I am sorry, Mr. Speaker, Sir, I will move this Motion in an amended form. It reads:-

THAT, aware that the Republic of Kenya promulgated a new Constitution on 27th August, 2010 which made fundamental changes in the governance of the Republic; appreciating that the Republic held its first general elections under the new constitution on 4th March, 2013, at which the President and Deputy President amongst other elective office holders were lawfully and popularly elected; fully cognizant of the International Criminal Court (ICC) indictments; further appreciating that the three Kenyans currently facing charges at the ICC including the President and the Deputy President have fully complied with the ICC's conditions and requirements; concerned that the conduct of the investigations and judicial processes of the ICC in the Kenya cases have been politicized and selectively applied; noting that the 53 Member States of the African Union adopted a Resolution during the Assembly of Heads of State in July 2013 denouncing the approach adopted by the ICC in the Kenya cases and calling upon the ICC to defer the cases to the Kenyan Judiciary; further noting that the sitting President and the Deputy President of the Republic are facing the prospect of prolonged court attendance at the ICC requiring their physical presence at the Court at The Hague; cognizant that this situation has serious implications on the sovereignty, good governance and stability of the Republic; the Senate urges the Government to immediately take appropriate steps necessary to deal with this matter for the good and in the best interests of the country and specifically to address, among others, the following:

1. Continue to cooperate with the ICC with regard to the ongoing cases before the ICC in accordance with the International Crimes Act (No.16) of 2008 and other relevant laws of Kenya;

2. urgently petition the relevant organs of the ICC to consider the possibility of conducting the trial through a variety of methods, including video link and to review the trial calendar to ensure that the country is not inconvenienced by the absence of the President and the Deputy President and especially during the celebration of 50 years of Kenya's Independence in December, 2013.

3. Pursue with the relevant organs of the ICC and with the United Nations Security Council with a view of deferring back to the Kenyan Judiciary, the cases against the three Kenyans at the ICC in line with the unanimous resolution of the African Union (AU) Heads of State and Government; and

4. commence and conclude the processes required for the withdrawal by Kenya from the Rome Statute of the ICC adopted by the United Nations Diplomatic Conference of Plenipotentiaries on 17th July, 1998 in accordance with the relevant laws of Kenya and the pertinent Articles of the Rome Statute to ensure that in future all criminal matters are handled by the Kenyan Judiciary.

The Speaker (Hon. Ethuro): Yes, Sen. Kajwang! I thought he was just reading the Motion.

Sen. Kajwang: Yes, Mr. Speaker, Sir. That is the point. I am following the Motion that I have and I am listening also very carefully to what professor is reading and they do not seem to be---

(Loud consultations)

Listen to me! I just want to be sure that you have, first of all, approved his application to amend this Motion so that we proceed with the amended Motion, knowing what it is. So, you need to ask him to first move the Motion before amending this Motion because this is the Motion before the House.

(Loud consultations)

Protect me, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Order, Sen. Kajwang! I would have protected your right to be heard, except that your second sentence was that you have been listening. If you have been listening then you would have heard the Senate Majority Leader correcting himself that he is moving an amended Motion. The Motion he is reading is the one before me and I was following as he was reading. That is the Motion that I approved. That is a fair request.

In terms of circulation, the Senate Majority Leader, it is your responsibility to ensure that sufficient copies are given to all Senators. That is just a request and has nothing to do with approval.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, in fact, I have already requested the Clerk to have the Motion circulated.

Sen. (Dr.) Khalwale: On a point of order, Mr. Speaker, Sir. If from the word go the Senate Majority Leader is amending the Motion and we have come here prepared for a different Motion, surely on the rule of equity, do you think--- when we shall challenge him, shall we be talking about the same Motion?

The Speaker (Hon. Ethuro): Order, hon. Senators! This House has rules of engagement called the Standing Orders. I want to believe that Sen. (Dr.) Khalwale, being prolific in production of business in this House---. In your previous life, you must have had occasion to come on the Floor of the House with an amended Motion. That is what our Standing Orders allow. We also know that for you to amend a Motion, it must not materially alter the substance of the Motion. That is why the approval of the Speaker is being sought when a Member moves an amended Motion. That is the concern of Sen. Kajwang and I allayed that fear that the Motion is being moved as amended as per our Standing Orders and that an amendment cannot alter the substance of the Motion. If it did, I would be the first one to reject it.

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Speaker, Sir. I want to point out to the Chair that in accordance with the provisions of Standing Order No.45 (3), this Motion is incompetent. In accordance with the provisions, I want to urge the Chair to reject it. Standing Order No.45---

The Speaker (Hon. Ethuro): Order, Sen. Wetangula! Just resume your seat. Every Senator has a right to seek the Chair's intervention. So, let us not appear to be---

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir---

The Speaker (Hon. Ethuro): I do not want you to start in the sense that the Mover of the Motion has only read it; he has not moved the Motion. So, let the Motion be owned by the House. I will then allow you to say why we should not deal with it. These are procedures we have been practising; so let us not try to undo what we have done for a long time.

Sen. (Prof.) Kindiki!

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Mr. Speaker, Sir. On 17th July, 1998, an important event took place in the City of Rome, Italy. This was the signing by 120 countries of the Rome Statute that established the International Criminal Court (ICC). At that time, Kenya did not participate in that conference. But in 2005 on the same day, which is also curious, Kenya signed and ratified the Rome Statute of the ICC. However, the scheme of pursuing international justice under the Rome Statute over the years has been replaced with a lot of worry, concern and challenge.

As I begin my remarks to move this Motion, I want to declare my past interaction with the Rome Statute in various capacities. First of all, I am a counsel who is listed to parties in the international criminal law before the ICC. I also want to declare that for 12 years, I lectured in international law, including international criminal law in many universities, including the University of Nairobi. I also want to declare my interest that during the confirmation of charges that took place in The Hague--- I am being reminded that some of the best Senators we have in this House are beneficiaries to my humble contribution as a professor of international law.

Having said that, Mr. Speaker, Sir, we also want to say that I have also been involved in the confirmation of charges as counsel. Finally, as an academic, I have

written extensively on the role of international law and the fight against impunity, the role of international society and international institutions to address things that are brought by human rights violations that are gross and systematic.

The Speaker (Hon. Ethuro): Senator from Migori.

Sen. (Dr.) Machage: On a point of order, Mr. Speaker, Sir. My name is Sen. (Dr.) Machage from Migori.

Whereas we appreciate the Curriculum Vitae (CV) of the Mover of the Motion, you did in your own words order that sufficient copies of the Motion as amended should be made immediately for distribution to hon. Senators. We have not seen that, neither have we seen if his CV is in that Motion as amended. Would I, therefore, be in order to request you, in your wisdom, allow for a few minutes for us to get the amended Motion, so that we participate fully in what the hon. Mover is talking about?

The Speaker (Hon. Ethuro): I will do both. I will allow the Mover to proceed as I also allow the amended Motion to be circulated and knowing Sen. (Dr.) Machage's capacity to comprehend things, I have absolutely no doubt that he will catch up.

The Senate Majority Leader!

The Senate Majority Leader (Sen. (Prof.) Kindiki: Mr. Speaker, Sir, the main problem---

Sen. (Dr.) Kuti: On a point of order, Mr. Speaker, Sir. I just want to say that observing from the time you initiated discussion on this Motion, there have been so many interruptions. Where I come from, you tie the camel's legs so that it does not go far. So, would I be in order to request that the Mover be allowed to finish and minimal interruptions be allowed on this Motion?

The Speaker (Hon. Ethuro): Order, Sen. (Dr.) Kuti, in fact, the Mover had been allowed to proceed and you interrupted. So, that Standing Order should start with your good self.

Proceed, Senate Majority Leader.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, what was created or crafted as an institution to shield vulnerable populations from the ravages of law and massive gross systematic human rights violations has been turned into a vehicle for pursuing international politics in the most rudimentary and most discriminatory, most capricious and racist manner.

Mr. Speaker, Sir, the main problem with the Rome Statute is the existence of an unsupervised prosecutor who can roam large from country to country, arrest people who he thinks do not suck up to international neo-colonial ideology, a rogue prosecutor who is not accountable to anybody, who can tarnish people's careers, shatter people's lives and even without any recourse or without any reparations---

Sen. Orengo: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. Orengo!

The Senate Majority Leader (Prof. Kindiki): I am just giving my opinion and my understanding on the role of the prosecutor in the Rome Statute and particularly, one Louis Moreno Ocampo.

The Speaker (Hon. Ethuro): Order, Senator! Definitely, you could not be giving any other opinion apart from your own.

Sen. Orenge: On a point of order, Mr. Speaker, Sir. Until we amend the International Crimes Act, the ICC is part of the Kenyan judiciary and part of the Kenyan judicial system. Under the Standing Orders, you cannot bring a Kenyan institution into disrepute unless you have taken steps to amend this Act. The language that he is using, I am beginning to believe that he was kicked out of the ICC because otherwise he should be there defending people but he was kicked out to come back---

(Loud consultations)

The Speaker (Hon. Ethuro): Order, Senators! Sen. Orenge has this way of making a good point and then just diluting it. Indeed, it is true and I was getting concerned with words like “racist” but they were just preliminary opening statements. You need to wait until, maybe, they are repeated time and again then you can get concerned. In terms of an opening statement, I think the Senate Majority Leader could do it, but more importantly, Sen. Orenge, you are imputing an improper motive on the Senate Majority Leader in the sense that he was kicked out. Are you assuming that his role as an attorney at the ICC is better than his role as a Senate Majority Leader in this House? I would imagine that he is better serving the nation here than elsewhere.

Sen. Murkomen: On a point of order, Mr. Speaker, Sir. Sen. Orenge has made one of the most preposterous assertions against the Senate Majority Leader; that he was kicked out. Could he table the evidence that shows that the Senate Majority Leader was kicked out? If not, he should withdraw and apologize. If he repeats it, I do not think such a Senator will be fit to sit with us in this House.

The Speaker (Hon. Ethuro): Sen. Orenge, let us just conclude this.

Sen. Orenge: Mr. Speaker, Sir, whatever I say, I say with seriousness. The CV of the Senate Majority Leader was not a matter of debate. He brought his character into the debate. He has taught law. He has represented people at the International Criminal Court (ICC). But the fact of the matter is that he is not there now and one of his clients is still there. So, what do I need to substantiate?

The Speaker (Hon. Ethuro): Order, Sen. Orenge! You know you are a senior Member of this House and the House appreciates your contributions. Just maintain that. You know greatness has an element of humility and the issue is imputing improper motive on a Member. The operational words are “kicked out.” I would not even want to go the way of Sen. Murkomen by demanding evidence or whatever. I just want, for the purposes of us proceeding, that you withdraw those words and apologize. You have always done it and there is no harm doing it again; the gentleman that we know you are.

Sen. Orenge: Mr. Speaker, Sir, I said what I said because of the Senate Majority Leader bringing his character into this Motion. That is the only reason. It took a long time on this, that he is a practitioner before that court in a case which is going on when he is out. So, next time, he should be very careful when he is making statements in this House because you cannot have your cake and eat it. If you think that we should not talk about your character, then leave your character out and talk about the Motion.

But having listened to what you have said and because I respect you so much, I do not want the substance of this Motion to be taken away. I will get time when I will be

giving my contribution and I think it is a very important Motion in certain respects. I will withdraw the word “kicked out” and apologize, but I would say that his services were terminated.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Mr. Speaker, Sir. Sen. Orengo seems to know many things, including contractual relationships between me and my clients. Thank you for protecting me. I think we should go on with this Motion because that is what has brought us here.

In my view, we all know what happened in this country in 2007/2008. We regret the deaths of people that occurred during that time and as a country, we all stand here in shame, without exception. All Kenyans failed and especially the leadership of Kenya failed the people of Kenya at the hour of need. I groan and it pains me to sit here and listen to people pontificating; people who benefited from the events of 2007/2008 directly as a result of that violence until the National Accord was signed. Certain people flew flags for the first time in their lives. They are here today looking at Kenyans in the face and using the script of the Pharisees, beating their chests in a holier than thou attitude and claiming that they can look at the people of Kenya in the eye and say that they are not guilty of the blood of the people of this country.

Mr. Speaker, Sir, as a citizen and as a leader in this country with young children who will one day grow up and, possibly in their generation, assume certain roles of participating in this country, I want to say that we failed as a nation and the reason for my Motion is for us as the elected representatives of the people of Kenya to say, never again will we expose our country and our people to such degradation and humiliation.

Today about 7,000 kilometres from here, a trial has opened. That trial concerns two citizens of this great Republic; William Samoei Ruto and Joshua arap Sang. In a short while, the trial of a third Kenyan, His Excellency the President of our country, will open. There is nothing as humiliating, painful and embarrassing to us, as a nation, than for us to watch the three sons of this country being harangued, looked down upon and tormented simply because there are things we ought to have done and we did not do; and simply because we are still playing politics with our country. We are playing politics with the boundaries of this country and the flag and the national anthem of our nation.

Mr. Speaker, Sir, I am not the type who goes about boasting about my CV. In any case, if anything I have said is not true, you can easily google. In fact, I coached my words very carefully. I first declared my interest so that you can contextualize.

An hon. Senator: What is google?

(Laughter)

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, somebody should be shown the direction of the Chair because some of my not so digital colleagues are asking what googling is.

Having said that, on a more serious note, I would like to say that at the heart of the matter, the proceedings that have began today and will continue for the next several years in this country represent the darkest moments in Independent Kenya and all

Kenyans must wear sackcloth and mourn that the dignity of our land has been shredded into tatters.

In my professional life, having interacted with some of these cases, I now know with the benefit of hindsight that a group of people can sit down and concoct fiction and lies and stories from the moon and present them to an incompetent investigator who is looking for fame and becomes the basis of bringing the whole country into the kind of charade that this country is going through right now. I will be surprised, and I say this without any fear of contradiction, that those cases will not succeed. But that is not for me to decide; time will tell. I am certain that no amount of concoction or fiction can withstand the strength and vitality of truth.

So as we stand together with our three brothers who are bearing the burden of the shame of the nation and the rest of us are pretending to be saints and prophets, I want to say that that process will come to an end. I am also aware of what the Rome Statute says about countries that want to exit that framework. It is for that reason that part of this Motion is alive to the fact that the ongoing cases involving three Kenyans are not affected. But even if, in accordance with Article 127 of the Rome Statute, those cases are not affected, it is not too late for those of us who are patriotic enough, those of us who mourn for the dignity and pride of our country to do whatever it takes to reduce and redeem the shame of our motherland by asking a number of things which my Motion outlines.

Mr. Speaker, Sir, first, I want to say that it is my belief that if we have to demonstrate to the world that as a country and a State party – even the suspects have also said it – that we are willing as a country governed by the rule of law to continue co-operating with the court with regard to the ongoing cases. That the International Crimes Act must continue to operate for that purpose and until those cases are either terminated or dealt with accordingly. That is why my Motion is coached in the words that I have explained.

Secondly, we believe it is not too late for those cases to be deferred back to our country. I want to bring to the attention of the Senators that two weeks ago, an interesting vote took place in the Netherlands. This was a vote involving 13 of the judges of the ICC. The question before the judges was whether the Kenyan cases should be returned home or not. Nine of those judges with no Kenyan participating in that vote decided that those cases are better handled in Kenya and they gave their reasons. They said that the Judiciary had improved and a special division of the High Court on International Crimes had been created.

I shudder to think that today, in the pursuit of small politics that has ruined this country, that there are Kenyans who are still pushing for our people to go and be humiliated abroad when a good number of judges of that court are saying that these cases are better handled in Kenya. Even the four judges that voted against that decision gave their reason which is even more curious. They explained that they objected because they got a last minute letter from one Kenyan. I am not trying to belittle any Kenyan, but I am wondering who is this single Kenyan who has the capacity to sway a decision when the whole country and the whole continent of Africa has been praying and talking to the ICC,

dialoguing with them and yet the ICC has turned a deaf ear on the issue of deferral of cases.

Sen. Murkomen: On a point of information, Mr. Speaker, Sir.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, I wish to be informed by Sen. Murkomen.

Sen. Murkomen: That Kenyan, Mr. Speaker, Sir, is called Gladwell Otieno. She was a petitioner against President Uhuru Kenyatta and Deputy President Ruto, assisting a coalition represented in this House.

Sen. Kajwang: On a point of order, Mr. Speaker, Sir.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, thank you for the information I have received.

Sen. Kajwang: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Order! Order, Senators! I am not sure whether some of this information is really helping us!

(Laughter)

(Sen. Kajwang stood up in his place)

What is it, Sen. Kajwang?

Sen. Kajwang: Mine is a more substantive issue, Mr. Speaker, Sir. When we name names of members of this society who are not Members of this Senate and who have no capacity to come in here and defend themselves, unless you lay on the Table of this House evidence that there was such communication, then you must withdraw and apologize, because this kind of thing caused so much pain and tribal animosity unnecessarily. This is what has taken us to the ICC and this is what we are fighting in this country. Could you ask Sen. Murkomen to withdraw or substantiate in writing to show us that letter?

The Speaker (Hon. Ethuro): What is it, Sen. Wetangula?

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, if from his opening remarks we can take Prof. Kindiki seriously, this is supposed to be a very serious Motion to be debated without broadsides; without this rehearsed information; without dragging in names of persons who cannot come here and defend themselves.

(Applause)

Mr. Speaker, Sir, I want to urge you to direct these two first-timers that this is serious business and it should remain so.

The Speaker (Hon. Ethuro): Order! Order! Order, Senators! I tend to agree with the Senate Minority Leader and the Senator from Homa Bay. I think I would also pronounce myself on it; some information, even if factual and good, may not be useful at a particular point in time. You should have waited to be challenged and then you can offer the information. For the particular points made by both of them, I think the Senate

Majority Leader was actually proceeding in the proper manner; he was not dropping any names; those names were dropped by another one---

(Laughter)

Really, for all the reasons that Sen. Wetangula and Sen. Kajwang have said, that this is a very serious Motion; and, also, I had communicated earlier in my communication because I said let us debate this Motion on the basis of its merits and demerits. So, let us not allow things that can just take away the important issues that the Mover is actually raising, so that we will really proceed along those lines. So, Sen. Murkomen, I would not want you to substantiate anything because you are not being challenged. All you are being asked is to allow the Motion to flow smoothly without that kind of information.

Proceed, Senate Majority Leader.

(Sen. (Prof.) Anyang'Nyong'o stood up in his place)

What is it, Sen. (Prof.) Anyang'Nyong'o?

Sen. (Prof.) Anyang'-Nyong'o: Mr. Speaker, Sir, I thought that the Senate Majority Leader, realizing the seriousness of this Motion, would stick to facts and proper information and not innuendoes and speculation.

Mr. Speaker, Sir, I think it is important to go on record for Sen. Murkomen to withdraw what he said---

(Applause)

Knowing the mood in this country, the said lady could easily be killed by goons.

(Loud consultations)

No; it is not a fact as far as this House is concerned; no, it is not a fact!

The Speaker (Hon. Ethuro): Order! Order, Sen. Keter! Let us listen to Prof. Anyang'-Nyong'o.

Sen. (Prof.) Anyang'-Nyong'o: Mr. Speaker, Sir, this is very serious because a judicial process in the Hague is not something whose substance and information all of us have. Indeed, to isolate a piece of information and put it within the context in which the Senate Majority Leader is speaking, I think it is unfair to that citizen and it can easily be misinterpreted by the emotional gangs out there. So, I am very serious. If somebody is saying I wrote a letter, that is another context altogether, and I can talk about it.

Further, Mr. Speaker, Sir, could I ask this House that this attitude of intimidation is undemocratic; it is very undemocratic, very unconstitutional and archaic. I would expect some civility from some of these vigilant Senators.

(Laughter)

The Speaker (Hon. Ethuro): Order! Order! Order, Senators! This is the scenario I was trying to avoid; this is a scenario we must avoid!

Sen. Murkomen, you heard my admonition to the Senator from Siaya and he accepted. I am yet to hear you accept it. I know, of course, that you can still remain adamant, but you know the consequences of that. You may be called upon to substantiate and produce evidence, but I do not think it is in the interest of anybody, including your good self, to pursue that particular part. Just apologize and we proceed so that the Senate Majority Leader can conclude his submissions.

Sen. Murkomen: Mr. Speaker, Sir, I think there are two ways of dealing with this matter; one is to apologize if I am not sure. Two is to substantiate, which I am willing to do. The President of the Trial Chambers that is trying the Deputy President and Mr. Sang, in his ruling, disclosed the same information and I am willing to come and table this information any time to the House. Even if you want me to table it tomorrow, I will.

Sen. (Prof.) Anyang'-Nyong'o: On the website?

Sen. Murkomen: Or I just google and show you in the website. Really, it is not a new story; it is there; it is public information.

The Speaker (Hon. Ethuro): Order! Order! Order, Sen. Murkomen! I gave you options---

(Sen. Murkomen remained standing in his place)

Resume your seat! You do not look at the Chair in that manner particularly when the Chair is on his feet!

(Laughter)

The Chair can only be on his feet when he considers the matter serious, or else he is at liberty to still communicate while seated.

I gave you two options; there is the easy option and then there is the difficult option. If you pursue the difficult option, you will have to pursue it to its logical conclusion, which means producing evidence to support it, and it must be now because this is a special session. This Motion is only for this afternoon; it cannot be for tomorrow. So, you must confine everything you do within the allotted time. So, the difficult option may be too difficult for you even to prosecute. So, just go by this option.

Sen. Billow: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. Kerrow? I hope you are not adding fuel to the raging fire.

Sen. Billow: Mr. Speaker, Sir, I want your guidance. Where information is available on a public website of an institution like the ICC, which is not privileged, do we require any substantiation? This is a matter on which I need guidance, because in this country, there is a law that was passed in 2009 on the use of electronic messages and information. So, if your information is on a website of a public institution like the ICC, do we need to substantiate? I need clarification on that.

The Speaker (Hon. Ethuro): Let us hear Sen. (Dr.) Machage before Sen. Murkomen.

Sen. (Dr.) Machage: Mr. Speaker, Sir, you have explicitly given a ruling on this matter and given an order. Are these hon. Members in order to question your authority?

(Applause)

Sen. Murkomen: Mr. Speaker, Sir, I think, to allow the Senate Majority Leader to proceed, I will withdraw what I said until I finish Googling, and then I will come back later to substantiate. Until then, I withdraw and apologize.

(Applause)

The Speaker (Hon. Ethuro): What is it, Sen. Kiraitu?

Sen. Murungi: Mr. Speaker, Sir, this is a very serious Motion, and that is why we came from our recess. You see what is happening here is that there is even an attempt to make sure that this Motion is not properly debated. All these side shows are intended to derail this Motion.

Mr. Speaker, Sir, would I be in order to request you to exercise your powers under Standing Order No.1; to rule out all points of order and interjections until the end of this Motion?

(Laughter)

The Speaker (Hon. Ethuro): Since I have not heard from the other gender, I will allow the last point of order from Sen. Ong'era.

Sen. Ong'era: On a point of order, Mr. Speaker, Sir. Is Sen. Kiraitu in order to say that we are now having side shows here when we are discussing important national issues that concern Kenyans?

(Loud consultations)

The Speaker (Hon. Ethuro): Order, hon. Senators! Indeed, the suggestion by Sen. Kiraitu would be very attractive to a Speaker, who does not seem to know his job.

(Laughter and applause)

But for your speaker, who is your servant, he must go by the Standing Orders. Standing Orders allow points of order; Standing Orders also allow him to curtail them if he feels that the points of order are being abused. So, we will cross that bridge once we reach there. For the issue raised by the Senator for Mandera, yes, it might be in public information, but this House is not seized of that information. The responsibility is on the one who provides that information to bring it. Then once the source is attributable, we will accept it; so, that is not the issue. But the most important--- Because we must verify

independently that, that information is available even in the website. But I think more fundamentally, the issue that we are all trying to---

I think all of you, in your respective submissions through the points of order, have made it abundantly clear that this Motion is so important and so grave a matter that we must give it its due recognition, importance and significance. So, issues that really do not help us proceed with the Motion in this particular instance, we should really desist from them. The concern of Sen. Kiraitu is not totally misplaced; it was the same concern raised by Sen. (Dr.) Kuti, and it is the same concern raised by the rest of you. If I look at the clock before me, it is 4.00 p.m., and we have not even proposed the question. So, that is why I am calling upon each and every Senator at least to allow the Mover to conclude, we second the Motion and then propose it; then we can entertain more of your points of order.

Proceed, Senate Majority Leader.

The Senate Majority Leader (Sen. (Prof.) Kindiki: Mr. Speaker, Sir, I will also try and shorten my remarks so that other people can contribute to the Motion.

What has happened, if I can continue from where I left, is that a few people especially from the Non-Government Organisations (NGOs) world decided to convert the misery and the tragedy that befell our country into a money-minting business where a few citizens have converted themselves into running rings and organisations in the name of victims support. These are people who have been responsible and have been used by foreigners to cook up the stories and bring up the kind of friction that is now being witnessed before the International Criminal Court (ICC). As I said, we should be all ashamed as Kenyans. No Kenyan should be clapping or celebrating at such a time as this, when our country is going through what is happening at the moment.

In my Motion, other than the deferral--- As I emphasized, if even the foreigners themselves are saying that this matter should be deferred to Kenya, how much so should Kenyans do? So, I want to see which one of us, as leaders, would want to look at these things with sobriety. I want to agree that due to the importance of this Motion, we should tone down our rhetoric. This is not the time to blame each other. Let us look forward. For me, as the Mover of this Motion, the forward looking nature of this Motion is that we are saying that because of the negligence of all of us in 2007/2008, the six Kenyans who have already stepped in The Hague will be the first and the last Kenyans there.

It is for that reason that my Motion is urging the Government to initiate the process that will lead to the withdrawal of the country from the Rome Statute so that in future, when we are confronted with these kinds of problems, we can be able to solve them locally.

Mr. Speaker, Sir, I think I am concluding my submission but the consultations are too loud. You can help me because I do not think I am being heard.

(Loud consultations)

The Speaker (Hon. Ethuro): Order, Senators! Let us allow the Senate Majority Leader to proceed.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Mr. Speaker, Sir.

In conclusion, I just want to say that I believe this is a matter of national interest irrespective of who is charged. Today, it is the three Kenyans who are there; tomorrow, we do not know who is next. If as a country we cannot resolve these matters in our country, then we have no business proclaiming our sovereignty. It may be something of note, as I wind up, that some of the greatest funders of this court themselves do not subscribe to the Rome Statute. The reasons they have given are the same that I am urging Kenya to give. The reasons are simple; that you have no mechanism of controlling a prosecutor who is unsupervised and who, through his own whims, can drag people through long and expensive processes without any kind of compensation even if they are acquitted.

With those so many remarks, I want to urge this Senate to debate this Motion soberly and approve it. I have said that if this Motion is passed, we will also use other mechanisms as a country, and I want to be part of that process to petition the relevant organs. If an individual's letter can be heard, why should a letter from the Senate Majority Leader of the Upper House not be listened to by the President of the ICC? Why not? So, we will be pursuing this matter beyond the approval of this Motion.

With those many remarks, I beg to move this Motion and request Sen. Elachi to second. Thank you, Mr. Speaker, Sir.

Sen. Elachi: Mr. Speaker, Sir, I stand to second this Motion hoping that today, as the Senate, we will all be in agreement because we were not part of Party of National Unity (PNU) or Orange Democratic Movement (ODM). We must look at these issues while considering the country. We come here and swear by the Bible that we will say the truth but I think Kenyans wonder about our political leaders because most of them here were Ministers and most benefitted from the 2007/2008 post-election violence. They benefitted after the National Accord because some of them became Ministers---

Sen. (Dr.) Machage: On a point of order, Mr. Speaker, Sir. Whereas I appreciate what the gracious Senator is trying to say, she has made a very dangerous statement. It is true that some Senators here were Cabinet Ministers but it is not true that any of them benefitted; otherwise she should lay evidence on this Table. Who benefitted from the last historic event?

Sen. Elachi: Mr. Speaker, Sir, when we talk of benefits, Kenyans remember the negotiation of the National Accord at the Serena Hotel. Today, we have made it so political that we are forgetting that at that time, we did not have CORD and JUBILEE. Some of them today, as we speak, the Deputy President is in The Hague, because he was the lieutenant of ODM. He is the one who made the Prime Minister to be the Prime Minister. Let us first appreciate that before you vilify.

(Loud consultations)

Mr. Speaker, Sir, I beg for your protection, I think I am right as I say that. Even today the video that showed---

Sen. Muthama: On a point of order, Mr. Speaker, Sir. The contributions we are making here are being watched by Kenyans. As we are talking now, we still have Kenyans in the camps and in the streets. When they hear the leaders themselves saying that after some Kenyans were killed, there are those who benefitted, the biggest question is: Who is that person who benefitted and cannot be prosecuted? Let us be careful with what we are saying here. This is a very serious Motion and we really need to be careful with what we are saying.

Sen. (Dr.) Khalwale: On a point of order, Mr. Speaker, Sir. The issue of some people benefitting has now come from two contributors; the Mover and the Seconder. In view of the history of this matter, since you know that the National Accord created these positions which were given on either side, the country was stabilized, it is important that the Chair pronounces from there that those people did not benefit but stabilized the country, otherwise we are sending the wrong message and inflaming emotions.

Sen. Orengo: On a point of order, Mr. Speaker, Sir. I am just concerned about what the Majority Whip has said, which may get into record, and may be used as evidence. She said specifically that the Deputy President is before the ICC because he was in ODM. Does she have some information and evidence that she is offering to the court and justifying why the Deputy President should be at the ICC? I thought he should not have been there in the first place.

The Speaker (Hon. Ethuro): Sen. Elachi, if you recall when the Senate Majority Leader was moving, I made it very clear that we should avoid things that will invite more interventions. In any case, you are seconding. So, just conclude so that we can proceed.

Sen. Elachi: Mr. Speaker, Sir, I think history is very bitter but I agree.

When you look at the cases today, the most important thing that we need to ask ourselves as Kenyans is whether the process has been fair especially in the Office of the Prosecutor. It would be wrong for us to say that the judges have not been fair. Indeed they have been fair to Kenya but the Office of the Prosecutor has made the process more difficult for the country because most of the time the office uses the media to communicate to the country and even to give a statement. That is why the issue has become more politicized. As Kenyans, we now want to see a process where the prosecutor will respect the jurisdiction of the country and also respect the fact that we have a state and a government, and there are institutions through which they can communicate.

While I second, I need to urge that it is important to appreciate that we did wrong but in between, we have come up with institutions that can work. We also need to remember that whichever way the cases go, this is our country and we must respect all Kenyans and especially those who vote for us. They vote for us because they believe we can put our country together. When we come here and say that we want to cover things and yet Kenyans saw what happened, it would be unfair. It is also good to say that we did wrong and also appreciate that those who are at The Hague did not do it for their own good. They did not do any violence to anyone. Let us agree that what we are saying today is that those who are The Hague are not the ones who caused the violence. That is wrong. The Waki Report says that violence was spontaneous but when you listen to arguments today, you will think that it was organized. The report that we are following, which is the

Waki Report that was tabled on 15th October, says that it was spontaneous. So, how have we changed? Today, we are here and we want to debate but we are not looking at where we came from and where we are.

Have we achieved any peace? Are we somewhere as a country? No. We want to say that everything is the same but we have moved ahead because we have a judiciary. Why can we not appreciate that the Judiciary can work for us and take care of the cases? Why is it not clear today that even Waki never gave the opportunity to the authority that gave him the mandate; that is, the President, to see the names? Instead he gave the names straight to The Hague. I think it was unfair.

It is now important for Kenyans to know the identities of the 20 names in the envelope. Are we being fair to the six individuals? We need to know everyone now. It would be fair for the Senate to call for the envelope now. Those who were in the Cabinet know the names but it is time we sort out our mess. Thank God we have in the Senate people who have been Ministers for many years.

With those few remarks, I beg to second.

(Question proposed)

The Speaker (Hon. Ethuro): Hon. Senators, this kind of Motion requires 30 minutes per contributor. In order to allow many Senators to contribute---

Hon. Senators: Ten! 20!

The Speaker (Hon. Ethuro): Order, Senators! Why does everybody seem to want to aid the Chair this particular afternoon? I propose 10 minutes per contributor with the exception of the Senate Minority Leader who usually has 60 minutes but for purposes of today, you have 30 minutes.

The Senate Minority Leader (Sen. Wetangula): Thank you, Mr. Speaker, Sir. Given the time you took in just proposing the Motion, it vindicates my earlier attempt to tell you how incompetent it is under Standing Order 45(3). But having denied me the opportunity to pursue that argument, I will make a contribution.

If you watched a documentary on Steve Biko, the late hero and freedom fighter in South Africa, there is a doctor there who says that most patients do not die from the diseases they suffer from, but they die from complications arising out of the treatment they receive. I think that those who are prosecuting this Motion are actually creating complications that are undesirable, unhelpful and are not in the interest of even our President, the Deputy President and Mr. Joshua Arap Sang.

Mr. Speaker, Sir, listening to the moving of the Motion, one could feel very sad and very sorry indeed. We stand here pained and carrying a collective shame as a country that our compatriots are being prosecuted at The Hague. This is not a matter that anyone of us is happy about. History is clear. I was one of the eight Kenyans who sat at Serena and painstakingly went through this process for a long time, sitting for long hours up to 3.00 a.m. When the matter went to Parliament – you were there with me, so were many others – we spoke clearly and openly. In fact, I for one, was called names when I said that Serena has delivered, the matter has moved to Parliament, let Parliament legislate and let us have Kenyan solutions to Kenyan problems. People did not want to hear that.

For us to take the path we are taking, we must interrogate ourselves as to whether we are helping our President, the Deputy President and the young Sang. Does the passing of this Motion terminate the cases that are pending at the ICC? This is a big question we should ask ourselves. Why was the ICC visited on Kenya? These are some of the issues we should be addressing which unfortunately the Mover of the Motion engaged in unhelpful polemics that did not provide further clarity on why this Motion is before us at this time.

Mr. Speaker, Sir, I will always stand for Kenyan problems being resolved in Kenya. But I also believe that Kenya is a nation among a community of nations. The President of this country is a good friend of mine, so is the Deputy President and Arap Sang. I have visited him in his house. I would not want any calamity to be visited on them. But where did the first drop of rain land on us and why are we at The Hague? It is not enough to stand here and say: "Those who benefitted and those who did not". Those things do not help this country.

If you look at the broad picture of the world, does even withdrawing from the Rome Statute to which we are a signatory absolve us from international criminal responsibility if it arises in this country? It does not! Slobodan Milosevic, the warlord of Yugoslavia was arrested, prosecuted and died at The Hague but Yugoslavia was not a signatory. Charles Taylor, the President of Liberia, is in jail at The Hague and Liberia has never signed the Rome Statute. Jean Pierre Bemba from Congo, the warlord from Goma, is at The Hague but Congo has never signed the Rome Statute. General Bashir, the President of Sudan is at The Hague, but Sudan has never signed the Rome Statute. So what are we trying to achieve? Courage is not courage if you use it to knock your head against the wall. It is called stupidity.

Sen. Bule: On a point of order, Mr. Speaker, Sir.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, obviously he does not understand what I am saying.

The Speaker (Hon. Ethuro): What is it, Sen. Bule?

Sen. Bule: Mr. Speaker, Sir, is Sen. Wetangula in order to use the word "stupid?" He should know that we are all Africans and we must all Africanize. He is not mentioning that all the leaders he has talked about are all Africans. We cannot hesitate to say that Africans---

The Speaker (Hon. Ethuro): Sen. Wetangula, you do not need to respond to that. That was not a point of order.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, for the information of all, Slobodan Milosevic is a Yugoslav from Yugoslavia. It is not in Africa.

Mr. Speaker, Sir, what are we asking for in this Motion? I heard very clearly from His Excellency the President and his Deputy that they will fully co-operate with the court and they are already co-operating. That is why the Deputy President is there. Why are we trying to foul the mood with this kind of Motion? The Deputy President was not arrested and taken to The Hague. He boarded a plane and went on his own volition. I salute him for obeying the rule of law whether it is local or international. As the matter is going on, here we are saying that we continue co-operating; this is rhetorical. It does not make any sense because we are co-operating. Then after affirming that we will continue co-

operating, we are saying that we pull out. Why the contradiction in the same vein in the Motion?

The Senate Majority Leader Sen. (Prof.) Kindiki: On a point of order, Mr. Speaker, Sir. I appreciate the sentiments of the Senate Minority Leader, but is he in order to mislead this House on two points? First, as the seasoned lawyer that he is, he is not distinguishing the difference between co-operation by individual suspects and the co-operation by government as a State party to the Rome Statute. In fact, it is *amicus curiae* in this proceeding.

Secondly, is he in order to mislead the Senate by saying that we are contradicting ourselves? The Motion is very clear; the co-operation that is being urged is “co-operation” with regard to the ongoing cases until they are terminated.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, from the body language, you can see how nervously my learned junior is speaking. He does not even believe in what he is saying. I am very clear in what I am saying. It is my opinion that the contents of the Motion are contradictory.

The Speaker (Hon. Ethuro): Order Sen. Wetangula! I think you raised your issues and you have been challenged. Instead of responding to them, you are trying to look at the body language. That was not on offer. What was on offer was on two issues. So, respond to them!

The Senate Minority Leader (Sen. Wetangula): That is very true, Mr. Speaker, Sir. Paragraph one wants us to continue co-operating and paragraph three wants us to pull out; is that not a contradiction? It is so clear.

Mr. Speaker, Sir, if you allow me to proceed---

The Speaker (Hon. Ethuro): Order! Order, Sen. Wetangula! I cannot allow you to proceed because I looked at these issues also. If you look at the first one, it says:-

“continue to cooperate with the ICC with regard to the ongoing cases before the ICC in accordance with the International Crimes Act (No. 16) of 2008 and other relevant laws of Kenya;”

There are two cases. The third request is to:-

“pursue with the relevant organs of the ICC and with the United Nations Security Council with a view of deferring back to the Kenyan Judiciary, the cases against the three Kenyans at the ICC in line with the unanimous resolution of the African Union (AU) Heads of State and Government;”

This is a request for a deferral. They are not contradicting.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I can point out further contradictions; that, that request for a referral to deal with the UN was rejected already, and he knows---

The Speaker (Hon. Ethuro): No, just deal with the current contradictions.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I have said and it is on record that I do not for a minute support the idea of Kenyans being tried in foreign jurisdictions; but that we are there, what do we do? This is what I am asking, and you listened to the Mover of the Motion who put more darkness on the situation than shading light. This is what I am saying.

Mr. Speaker, Sir, if you allow me, I can go on.

The Speaker (Hon. Ethuro): But nobody has interrupted you!

The Senate Minority Leader (Sen. Wetangula): Okay, Mr. Speaker, Sir.

(Laughter)

Mr. Speaker, Sir, why are we where we are and why did we invite the international community to come to Kenya? The Mover of the Motion at one point rightly said that it was the bad behaviour of the political class; I agree with him. He also said that we have a new Constitution in Kenya; and I agree with him. He also said that we have attempted to reform our institutions; I agree with him on that one also. But the big question is: Do we have reformed Kenyans? The same political class that put us where we are is the same political class we have today!

I do not want to engage in finger pointing and name calling, unlike what my colleagues did, but I want to point out that as a country, we must be careful of how we conduct our affairs. The dignity that is staked of a country is dependent on how you stand by what you do. If you sign an international treaty and the next day, through rehearsed choruses, you stand up and you want to abrogate that treaty; if a new government comes into office and all of a sudden, a Minister, through excitement, suspends and cancels all licenses given to investors, then what message are we sending to the world? What is the value of our word as a country? What is the value of our word as a Government? What is the value of our act as a country? Who is going to sit down, even as we look for international loans, to sign on pen and paper with a country that simply wakes up and says “I signed that treaty in error and, therefore, I abrogate it?” It is a very dangerous move that we are trying to take.

Mr. Speaker, Sir, *maji yakimwagika hayazoleki* is a Swahili saying. The case of the President, the Deputy President and Mr. Sang are unfortunately there; you cannot reverse it! They, themselves, have graciously said that they will co-operate, and they are co-operating. Now, those cases are *fait accompli*; why are we trying to pull out of a situation and a process that served as a deterrent? Look at the introduction of multipartyism in Kenya, people were slaughtered like chicken in 1992/1993. In 1997, people were killed; in 2002, people died---

(Sen. Murungi spoke off record)

It does not matter, Sen. Kiraitu; and, please, stop heckling; you are a senior lawyer!

(Laughter)

Mr. Speaker, Sir, in 2007---

(Sen. Murungi stood up in his place)

The Speaker (Hon. Ethuro): What is it, Sen. Kiraitu?

Sen. Murungi: Mr. Speaker, Sir, have you heard what the Senate Minority Leader has just said; that I am a senior lawyer and I am heckling? All I said is that this man was in KANU when those people were being killed and tortured. He has no authority to come and lecture us here!

(Applause)

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, you know very well---

(Sen. Moi stood up in his place)

The Speaker (Hon. Ethuro): What is it, Sen. Moi?

Sen. Moi: Mr. Speaker, Sir, you heard what the heckler said, imputing improper motives on Sen. Wetangula; did Sen. Wetangula even say--- Where was he when the massacres were there in 2007/2008?

Sen. Kajwang: He was in KANU!

(Laughter)

The Speaker (Hon. Ethuro): Order! Order!

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I thank the distinguished Senator for Baringo for that very positive remark. The distinguished Senator for Meru should know that our current President was always in KANU until a year ago; so, I do not know what he is implying.

Mr. Speaker, Sir, in 2007, hell broke loose in this country; we know the history. In 2012/2013 – and I stand to be corrected – because of the deterrent of the imminent hovering of our country by a force elsewhere, the politicians of this country behaved themselves; they maintained vigil, peace and after the elections – an election that was hotly disputed and whose outcome is still questionable – has left Kenyans still at peace.

Sen. Wangari: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. Wangari?

Sen. Wangari: Mr. Speaker, Sir, is the leader of the few in the House in order to mislead this House that those elections that were upheld even by the Supreme Court are still in dispute?

Hon. Senators: Yes!

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I want you to protect me; some new colleagues should understand the difference between a personal opinion and whatever else they believe. That is my opinion; I am entitled to it and I will continue saying so.

(Applause)

Mr. Speaker, Sir, we were peaceful in 2013, and now that we are only three years and 11 months to the next elections, why are we rushing to remove what is a legal deterrent to bad behaviour in politics?

(Applause)

What are we planning? Because three years and 11 months down the road, we are going back to the ballot and we want to see that whoever wins in whatever questionable manner, we do not kill each other the way we did in the year 1992, 1997, 2002 and 2007. That is the reason why I want to urge these Senators – those who are wailing louder than the bereaved – not to look at this matter because of the exigencies of today. I have no doubt in my mind that if my learned junior was not lent the opportunity to be the Senate Majority Leader in this House, he would not have spoken the way he did, because I know him very well as a lawyer and a colleague. I know his thinking and I know what he stands for, but that is a topic for another day.

Mr. Speaker, Sir, I want to urge this House and Senators that whatever you do--- I always remember the good old John Michuki – may God rest his soul in eternal peace – that is a man who always spoke the truth. You may recall that in 2002/2003 when President Kibaki came into office, good old John Michuki stood up and said: “Now we do not need to agitate for a new Constitution; we just wanted a new Constitution to remove President Moi. Now that he is gone, we do not need a new Constitution.”

Mr. Speaker, you were in Parliament with me when we were debating the Rome Statute; and you remember what our good old colleague said. He said: “We want a local tribunal because we can control and determine who is jailed and who is not.” You were in the House with me. I am not saying this to disparage Mzee Michuki; I am just saying that he is a man who spoke his mind. He was a wonderful man; when he said let us have seatbelts for matatus, everybody put on a seatbelt, and he believed in one philosophy; reward and punishment. That is what he always said.

Mr. Speaker Sir, I want to urge these Senators that, regardless of whichever side you are, it is the interest of this country that we are protecting. We cannot be a country that jumps in and out of agreements. Let me remind you of what I said here in the first week of our sitting. There was a Prime Minister of Pakistan who was called Zulfikar Ali Bhutto who was overthrown by the army. But when he was the Prime Minister, a Bill was brought to the House to allow Queen’s Counsel (QC) from the United Kingdom (UK) to practice law in Pakistan. The law was passed and he refused to assent to it. When he was overthrown by the army, locked up and charged with treason, no lawyer in Pakistan could touch him. He went to the UK to bring a QC and he was shown the law he had refused to assent to. *Ukiona mwenzako akinyolewa, tayarisha kichwa chako.*

Mr. Speaker, Sir, on behalf of the alternative leadership in this House, we oppose this Motion.

(Applause)

The Speaker (Hon. Ethuro): Sen. Kiraitu.

Sen. Murungi: Thank you, Mr. Speaker, Sir. Despite what happened at the beginning, I actually think my learned junior, who is the leader of the few in the House, has made some important contribution to this House. We were in the Cabinet with him – we would not disclose to you what happened there – but there was one thing that the Grand Coalition Government was very clear about; and that was that the trials of the post-election violence should be handled through a local tribunal---

(Sen. Hassan spoke off record)

Yeah, I am giving you credit for that.

Mr. Speaker, Sir, a Bill was even brought to Parliament establishing a local tribunal, but it was rejected by the National Assembly.

Sen. Wetangula said that we should have a Kenyan solution to Kenyan problems, that one I do agree with him 100 per cent. They say that the sky is blue and that whether you sing and dance that the sky is green, it will never been green. I want to urge my learned junior, irrespective of the circumstances that have come in between, if there is a fundamental belief that we should handle Kenyan problems through the Kenyan solutions, then he should not change his mind.

What is at stake here is a very serious matter. Indeed, the entire Independence project of this country is at stake. People talk about agreements but colonialism was introduced in Africa through agreements. Have you forgotten the Maasai Agreement? There were similar agreements all over and the sanctity of the agreements is not the end of it in law. We have to unpack the agreements to see whether they are just, fair or whether they are oppressive to the people of the countries that are intended to be bound by those agreements.

Mr. Speaker, Sir, what is at stake here is another attempt to recolonise Africa. The cases before ICC, 18 of them, are all from the African continent. The Milosevic case---

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Speaker, Sir. I have never disputed that Sen. Murungi is my senior, so he does not have to belabour it. He is my senior and so is Sen. Kembi-Gitura and Sen. Orengo.

Is Sen. Murungi in order to mislead the House when there is a case of Radovan Karadzic from Yugoslavia also pending at The Hague? Is he in order to say that all the 18 cases are from Africa?

Sen. Murungi: Mr. Speaker, Sir, I wish he was a bit more patient because I was coming to that. For those who are familiar with happenings in international law, there is a new project, again conceived in the West, called promoting the rule of law abroad. For all these projects including the International Criminal Court (ICC), the funding is put together by the West and not by you. It is put together under that project of promoting the rule of law abroad. It is intended to look at countries which “are supposed to have weak, ineffective, dysfunctional governments, dysfunctional police and dysfunctional judiciaries.” It would be a very sad day when learned Senators come here and agree that Kenya should be classified as those countries with weak, dysfunctional governments, police and judiciary.

We should be very careful about the language which is being used. When the initial colonisation took place, the Europeans did not say they were coming to colonize Africa. They said they had come to civilize Africa and win Africa for the Lord. We should be very suspicious of the language like promoting the rule of law abroad because it could be another notion for civilizing Africa. The Europeans came to save Africa from barbarism. They came to save Africa because due to barbarism, people were killing each other and so on. So, they have come again on a new notion of civilizing the African nations but now under the guise of promoting the rule of law abroad.

Mr. Speaker, Sir, very many people died fighting for Independence in this country and the struggle that we are involved in today is the same struggle that Jomo Kenyatta, Jaramogi Oginga Odinga, Bildad Kagia, Mzee Oneko and others were involved in. I believe, wherever Jaramogi is, he will turn in his grave when he listens to the language of some of the people who are talking here, saying that since we cannot handle our things, we should allow the Europeans to do it instead of us.

Mr. Speaker, Sir, this is a very sad moment and time has come for us to reclaim our dignity. Time has come for us to reclaim our Independence and it is not like there is nothing we can do; because the language I hear is that we are throwing up our hands and saying that there is nothing we can do. Even if there is nothing you can do, you can stand here and talk. Time has come for the Senate which represents the sovereignty of the people of Kenya to stand up and be counted. You will be counted by the way you vote for this Motion. Are you voting for recolonisation of Kenya or are you voting for the Independence of Kenya? Are you voting for the dignity of the black man?

We have done various things and it would be sad to say that the Supreme Court and the Judiciary led by Justice Willy Mutunga is a dysfunctional judiciary. We have carried out reforms. I know that when this law was passed and we agreed to be taken to the ICC, it was a very different Kenya and we were in a very weak moment in our history. Now, Kenya is back on its feet and with all the African Union (AU) Heads of State meeting in July in Addis Ababa, saying that let Africa be given a chance to solve its own problems, at least the world should have listened to them. The AU made a very important statement and that is why we are supporting this Motion; in line with the resolution passed by the AU. Let us reclaim our Independence. Even if those trials have begun, it is not too late to say that they should come home.

Mr. Speaker, Sir, a prosecution is a prosecution. Even a case can be terminated at any stage before judgement is delivered. So, it is not too late for us to say that the President from the court, who can listen to a letter from one lady, should also listen to the cry of the Senate; that this process be rethought. Let us be given back our brothers for trial in Kenya. There are processes of appeal and what have you. Indeed, a lot has been done at political level to do political justice to other victims of crimes in this country.

With those few remarks, I beg to support.

Sen. Murkomen: On a point of order, Mr. Speaker, Sir. I promised the House earlier when I had mentioned the name of one Gladwell Otieno regarding this discussion here that I was going to withdraw and apologise until I substantiate, which I did. The document which I have here is authored by the International Criminal Court (ICC) judges on 26th August, 2013, decision of the plenary of the judges. On paragraph 33 the

dissenting judge, who is the President of the Trial Chamber, was concerned with the politicization of this case which is relevant to this Motion. The relevant paragraph says:-

“Take for example an open letter to the President of the court by one Gladwell Otieno purportedly written for the Kenya Peace Truth and Justice just two days ahead of the plenary.”

The other statement says:-

“The paradox in all that is, of course, is that the author of the open letter was precisely engaged in an act of politicization of the case by writing an open letter to the authorities of the court in an ongoing case and in relation to a decision pending in the court.”

I have distributed about ten copies of the same decision to some distinguished Senators but I will lay this one before the House.

The usefulness of this document is to say that if a court of that magnitude can be influenced by one individual, it must also be influenced by the decision of this House.

(Sen. Murkomen laid the document on the Table)

The Speaker (Hon. Ethuro): Order, Senators! I confirm that this document is actually signed. So, it is legitimate.

Sen. Dr. Khalwale!

Sen. (Dr.) Khalwale: Thank you, Mr. Speaker, Sir. Indeed, at this stage we are in a political and legal quagmire as a country. Listening to the lawyers, whom I would like to lead me in this kind of debate, I am amazed at how they are reading the Rome Statute. The Rome Statute, and Mr. Speaker, you know, does not take you there for trial unless you do not fulfill two conditions. The first one is that either you are unwilling to sort yourself out in your country or you are unable. That is the Rome Statute.

This means that with all the good things my colleagues have said here about fixing the future so that we do things locally, when in future we start demonstrating that we are willing to do it locally and we are able to do it locally, nobody shall take you to The Hague. That is the law. For this reason, I want to disclose here and now, and with all due respect to some of you Senators who do not know us, we have walked this terrain for many years. Unknown to some of you, even President Uhuru and Deputy President Ruto, are closer to some of the Senators in the Opposition than they are to you. We are therefore not here advocating for a case of a quick fix for the Deputy President and the President. We are here because there are two types of people in The Hague. We have the accused, they are praying for justice and we have the victims, they are also praying for justice.

My dear Senators, so distinguished the way we are, why can we not promote national cohesion by insisting that let there be justice for those who are at The Hague as the accused and those who have gone there to seek for justice as victims? That is the Kenya we must build today. I say these things knowing very well that I come from Kakamega. The inability of exhaustive investigations has made it difficult for people to understand properly the history, genesis and content of post-election violence. Who does not know that people died in Kakamega in their hundreds? I never saw William Ruto and

Uhuru Kenyatta in Kakamega killing people. So, how can we be so cheap, driven by tribal emotions to think that when the bull fighter is speaking, it is because he does not come from the tribes of the President and the Deputy President?

I am saying that we will defend the interests of the accused and defend even more vigorously the interests of the voiceless victims. How do you do it? You do it by acknowledging the simple fact that the process at The Hague is being presided over by your seniors. You are so junior compared to your colleagues at The Hague. Have some respect for your colleagues even if I am not your colleague. Please do! The process at The Hague is being presided over by legal experts together with judges and these people will be guided, not by the politics of Kenya and not by the ethnicity in Kenya; they will be guided by points of law and the weight of evidence.

Mr. Speaker, Sir, even as we speak now, many Kenyans know that there are a lot of witnesses who are pulling out. So, if witnesses are pulling out of the case, it means that the weight of the evidence is slowly going down. So, why spoil it with this thoughtless Motion that now wants to give the impression that we are not for The Hague? We must oppose this Motion. I really have no words to reiterate what Sen. Wetangula has said; that we owe it to the ongoing cases at The Hague for the tranquility that we had after the elections of 4th March, 2013. This was because there was a deterrent. You are all adults and you have children. If you are attacked by thieves or thugs in your home and then you buy a dog; when another group of thieves come and attack the village and do not come into your home because you have a dog, you do not wake up and tell your wife and children that you sell your dog. The dog is the ICC.

I am saying that this Senate should not miss out on this great opportunity. We must allow Kenya to remain a member of the community of nations of the world; respected. Do not cheat yourself that the international legal process only sorts out violence. We also go to the international legal processes for arbitration on serious trade matters. So if we pull out, how shall we fix the situation when we need arbitration between us and some of these Chinese who have started coming into our country?

Mr. Speaker, Sir, I would like to finally suggest a way forward. If, indeed, we are committed to this country, we should be thinking of life beyond ourselves, life beyond Uhuru, Ruto and Sang. We should say; what is in Article 16 of the Rome Statute and then we pursue it for posterity. We should be saying; what is there in Article 7 of the United Nations Charter and then we pursue it. What is there is very brief. They are simply saying that if we pursue that route, we have to convince the United Nations Security Council that continued investigation and prosecution will lead to the absence of peace and stability in Kenya. If we are all agreed that it is because of these ongoing investigations and prosecutions that gave us stability at the beginning of this year, it, therefore, means that even that door of Article 16 of the Rome Statute and Chapter 7 of the United Nations Charter is closed. Let us fight impunity and ensure that our children live in peace. Ladies and gentlemen, let us vote “NO” to this Motion.

I oppose.

Sen. Kipchumba: Thank you, Mr. Speaker, Sir. I am so hurt. I feel so bad. I am one person that has been a victim of bad governance. I have been a victim of violence and especially political violence. I feel sad that I am among people who might not be part of the ordinary Kenyans. The suffering that Kenyans go through might not be experienced at this level. I just want us to reflect back and ask some few questions as I stand here: Did the post-election violence really take place? Did it actually hurt people? In 2013, we are behaving like people who are heartless and insensitive. There were people who died not because they did anything but because either they were part or belonged to a certain political alignment in 2007/2008. We are now behaving as though people never died just because they belonged to a certain ethnic group and not by choice. We behave like people never suffered just because they were not strong enough to fight back the aggressors.

Mr. Speaker, Sir, it reminds me of a young man who was on a wheel chair on 31st of December in Free Area, Nakuru. After being kicked out of his wheel chair; while trying to crawl out of the place, he was hacked with a *panga* on his back. The process of ICC was called upon by our leaders who were in Parliament then. I was not a Member. It is very clear that the retired President, Hon. Mwai Kibaki and the Prime Minister, tried so hard and suffered one evening in Parliament trying to convince Members of Parliament to have a local tribunal.

I want to pose some three questions: What actually happened in 2007/2008? Unless we go through the process that is on, we might not get the truth. After 4th March, 2013, even when we disagreed, people were very careful knowing that there was an eye watching. First of all, I just want to wish His Excellency the President, the Deputy President and Joshua arap Sang well and success; I pray that they be vindicated. But one thing that must happen is that those people who suffered must also get justice. Those who planned any violence must also be called to account.

An hon. Senator: The real ones!

Sen. Kipchumba: I do not know them and you do not know them.

Mr. Speaker, Sir, does pulling out at this time help our hon. Members? No, it does not. But for political purposes, we might think that it will. As I end my contribution, I have two sayings in my tribe, the Tugen---

An hon. Senator: You are Luo!

Sen. Kipchumba: I am not Luo, please!

(Laughter)

“The truth sleeps on the ground and the lies and falsehoods sleep up the tree. But the enemy shall come and eat the lies up the tree and leave the truth which is lying under the tree.”

(Applause)

An hon. Senator: Tell them!

Sen. Kipchumba: Another saying in Swahili: “*Mkuki kwa nguruwe mtamu; kwa binadamu mchungu.*”

Ningependa---

(Laughter)

I am sorry, Mr. Speaker, Sir. Just to conclude, I pray that they will not raise emotions among our people. Let us not be emotive; the words of leaders change the moods of people. Today, I have the privilege of standing here, but 20 or 30 years from now, I might not be alive, but I would wish to leave a legacy; that when I had the chance of telling the truth, I said it.

(Applause)

Today, I want to strongly tell you that there are people who planned revenge attacks and they should be called to account. Those Kenyans who just spontaneously got violent should reconcile; and there must be a truth and justice reconciliation before we pull out.

Mr. Speaker, Sir, I beg to oppose the Motion.

(Applause)

The Speaker (Hon. Ethuro): Sen. Kembi-Gitura.

(Sen. Muthama stood up in his place)

What is your point of order, Sen. Muthama?

Sen. Muthama: Mr. Speaker, Sir, this is just to inform the Chair that I have consulted with my colleagues here and looking at the time, with ten minutes, we will have only six speakers from now. So, we have agreed that we do at least five minutes each so that we can have between 12 and 14 contributors.

The Speaker (Hon. Ethuro): Is that the mood of the House?

Hon. Senators: Yes!

Hon. Senators: No!

The Speaker (Hon. Ethuro): Every contributor shall have five minutes.

Proceed, Sen. Kembi-Gitura.

Sen. Kembi-Gitura: Thank you, Mr. Speaker, Sir. But you made that ruling after you had given me time; so, I believe mine will be 10 minutes.

An hon. Senator: Five!

The Speaker (Hon. Ethuro): Yours will be 10 minutes.

Proceed.

Sen. Kembi-Gitura: Thank you very much, Mr. Speaker, Sir. For my part, I must say as I stand here, that I have had an issue with the Rome Statute long before what happened. If you look at the Rome Statute, to which we are a party, Article 11 on jurisdiction says:-

“The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”

It means that all the crimes and other things that were done to us at that time were barred by the Rome Statute and, therefore, were not subject to the ICC; and that worries me tremendously.

Mr. Speaker, Sir, at one point in time in our lives when the Rome Statute was being canvassed, if you recall because I do, the American Government went around the whole world entreating the world under Article 98, not to allow the articles mentioned in Article 98. They came to Kenya, if you can recall, and Kenya was very strong and adamant on that point, and it rejected the American request. But the question that we must ask ourselves is: Why did the United States of America, right from the inception, decline to accede to the Rome Statute? Why did it also say that if any state should arrest an American involved in war crimes or otherwise, it would be an act of war against the American Government? I submit that the Americans were talking about the sovereignty of the country and they knew the things that could happen and that is the reason they were so adamant about the Rome Statute.

Mr. Speaker, Sir, I was the Ambassador to Belgium for three-and-a-half years, and the issue we are discussing now came before all the embassies in Europe and America, and these issues were discussed when we were working so hard to have the cases deferred back to Kenya. It was because when Kofi Anan was here after the violence of 2008, certain conditions were made; among them was what came to be called Agenda Item No.4. Our country, pursuant to the agreements that were reached then, worked very hard towards dealing with and attaining the matters contained in Agenda Item No.4. Amongst these was the Constitution that guarantees the rights of persons, a reformed Judiciary and also there was the issue of governance.

We, as a country, have worked very hard towards attaining all these issues. We have a new Judiciary, we have a Supreme Court that came out very strongly after the elections of 2013 and made a decision that was accepted by both the parties. The reason for this is that all the parties agreed that we have institutions and that we must continue to nurture them; and we must respect our institutions as much as we can. If we do not support our institutions, we are building them for nothing. If we do not build these institutions, we shall never be able to adequately deal with issues of governance.

Mr. Speaker, Sir, Article 16 of The Rome Statute talks about deferral of cases. Sen. (Dr.) Khalwale has referred to it. He has also referred to Chapter 7 of the United Nations (UN) Charter. These are important provisions because the deferral of these cases can be done and an application for them can be made at any point – even now after the cases have commenced. The truth of the matter is that we, as a nation, have made an application and very impassioned pleas for deferral of these cases, actually, on more than one occasion. But the truth of this is that our application for deferral has never been refused; the truth is that it has never been heard. The UN Security Council decided as if we did not have a matter to bring before them, and did not even open the doors for us to state our case.

It was an important case for deferral, and I stand here in support of this Motion the way it is framed; that our Government must continue to do what is best for our

country. One of those things is the deferral of these cases so that our President and his Deputy, if they have any case at all, those matters are dealt with the competent Judiciary, an institution that we continue to build in this country.

Mr. Speaker, Sir, all I am asking, what I have asked and what continues to be asked for is: Why has the UN Security Council, part of the Big Five which are not even signatories to the Rome Statute, refused to open the doors to Kenya to state its case? This is because under Agenda Item No.4, we have done a lot of things as a nation that call for and justify a deferral. In March this year---

An hon. Senator: On a point of information, Mr. Speaker, Sir.

Sen. Kembi-Gitura: I do not want to be informed at this time.

(Laughter)

In March this year, Kenyans, in a free, fair and democratic election, chose their leaders; and they chose their leaders while very seized about what happened in 2008. What happened in 2008 was very unfortunate indeed because we lost lives, and very many people were displaced. What have we done about it? As early as last week, we have continued to settle the Internally Displaced Persons (IDPs) in good faith, pursuant to Agenda Item No.4.

Therefore, Mr. Speaker, Sir, I would want to submit that it is time again that our case must be listened to, particularly now that we have a President and a Deputy President that we have elected together; and because we are a sovereign State and we cannot afford to be without a President and Deputy President in the country at any one time.

I am happy that at least the International Criminal Court (ICC) has seen some sense and has made a ruling towards that. But how do we know and how do we have control of the rulings that they are going to make taking into account that our nation has continued to heal very well? The bandages are out and the wounds are healing. We are now working together as a nation. Therefore, I pose the question: Is this not the best time to give peace and hope a chance by letting our people to continue working in peace and harmony as a nation? How do we do this? First and foremost, is by respecting the will of Kenyans, the will that they expressed on 4th March, 2013 and then respecting sovereignty.

I was proud of my President when he made it clear to the whole world that regardless of anything else, we have a Constitution that says that we have a President and a deputy and both of them cannot be out of the nation at the same time. That made me feel very proud as a Kenyan because that is the way it should be.

Mr. Speaker, Sir, in finalizing, I would say that if the international community is acting in good faith; if they are not politicizing the situation in Kenya for reasons that we cannot understand now, then it is time to give continuity and peace a chance so that we can build on what we have now. This will give our people hope. We are leaders who have been elected and it is our role to continue to preach peace and unity as a nation. We cannot do it when at the same time our President and his Deputy are being tried in a foreign land because of fear of what could happen. What is going to happen? We have institutions now and we also have a Constitution now. What happened in 2007/2008,

however, unfortunate it was, we pray to God and we are going to work very hard as leaders to see that it does not happen again. Why should our leaders continue to languish in foreign countries when they have so much work to do to continue to bind and bring our people together?

Mr. Speaker, Sir, I submit that this is a Motion that every one of us here should support if they believe in this country, in our nationhood and in continued peace.

With those few remarks, I beg to support.

Sen. (Dr.) Machage: Mr. Speaker, Sir, allow me to move an amendment to the amended Motion as put to us by the Senate Majority Leader.

I beg to move:-

THAT, the Motion be amended by deleting the whole of Clause 4.

This is for the following reasons: If you look at our own Constitution, Section 2(5) says that the general rules of international law shall form part of the law of Kenya. If you look at Section 143(4), it says that the immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

Mr. Speaker, Sir, we are climbing the tree from the top. We should climb the tree from the bottom. Even if we pass the Motion as put to us by the Senate Leader of Majority---

The Speaker (Hon. Ethuro): Order, Sen. (Dr.) Machage. Is it possible to climb from the top?

Sen. (Dr.) Machage: Exactly, because it is not possible. Our own Constitution will still hold our people in The Hague. That is the truth. Whereas we would wish not to punish any Kenyan, what we are doing now is actually adding fuel to the fire that is already burning our two heads. We are irritating the prosecution process at The Hague. We are doing it at the wrong time and let me be quoted later when you will already have made this mistake. Parts 1, 2, 3 and 4 of Section 143 are clear that the President cannot be touched by the court. It is in the computer and it is being read by everybody. Why are we alerting them to this? Why are we putting Hon. Ruto and Hon. Kenyatta into problems by making an unwise move? Why now? Think about it. Think critically about it.

Even if we said that we pass this Motion, it would not come into effect until after 12 months from now. What would have happened? I think in this House, there are some people who are pretending that they support the President and the Deputy President but actually they want to burn them. Hon. Ruto and I opposed the draft constitution because of this process and nobody listened. Today, the Seconder of the Motion did not prohibit herself from actually nearly trying to say that Ruto is there by right. The HANSARD can say the truth about it. That is the truth. Let us not propel our two brothers to be convicted because The Hague Court will think that Kenyans are not interested. Let the law follow its course.

I beg to move and ask Sen. Hassan to second.

Sen. Hassan: Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Order, hon. Senators! What is going on is that the amendment is under process and it must be moved and seconded. Sen. Hassan is seconding.

Sen. Hassan: Thank you for that clarification, Mr. Speaker, Sir. I think I want to agree with the Senate Minority Leader when he said that Sub-Article 4 was a contradiction to Article 1 and, therefore, in terms of trying to polish the Motion and to make a statement but at the same time continue with our obligations under international mechanisms is to support this amendment.

I think Sen. (Dr.) Machage mentioned some of the limitations the Constitution places on us to act in futility including the Rome Statute of the ICC and none of us sees the merit or even the end result on how it assists the Kenyan situation.

Mr. Speaker, Sir, I must also talk about equality under the law. Today, we have convened a Special Session of the Senate, and the National Assembly did the same thing. But I think in terms of equality under the law, we need to also look at other situations globally where Kenyans have been submitted out of the willful actions of commission or omission by Government to international or foreign courts and processes. Why do I talk about this? First and foremost, after the 2007 General Elections, both parties asked for the intervention of the ICC. Initially, everybody thought it was a witch hunt. So, there was politicization of this process from the word go. It does not help as Sen. (Dr.) Khalwale says. What will help you are the facts that will mitigate your innocence in a court of law.

Even as I stand here today, there are Kenyans in foreign jurisdictions who have been handed over by the Kenyan Government and I wish this Motion could have sought to address the plight of all Kenyans across the world. There are Kenyans in Guantanamo Bay who have been submitted willfully to the barbaric jurisdiction of the United States. We also have Kenyans who have been submitted to the jurisdiction of Uganda and we know it. So if we are talking about all Kenyan citizens; that every Kenyan citizen must enjoy sovereignty and protection, what happened to sovereignty when we were handing over those other Kenyans to those jurisdictions without even a process that factored in the judicious nature to arbitrate and mitigate the constitutional provisions that allow these people to be accorded their rights under the law? These people were simply taken and renditioned to foreign jurisdictions. I think it is not right for us out of convenience to move this Motion because of might. I am very skeptical about the statements the African leaders are making.

Mr. Speaker, Sir, as much as the African Union (AU) is an institution that is a collection of the African States, it is sending an extremely negative message. I am worried for the rest of Africa. The withdrawal of Kenya and probably other African States opens the gate for unfettered impunity in Africa. Therefore, it is a wrong political message for us to send. We might be talking about Kenya having strong institutions; that we have built a new constitutional order which we are confident of; what about the other countries?

People are using the United States of America as the benchmark. Since when did the US become a benchmark to any of us? Why can we as Africans not set our own benchmarks in the sense that we do not reference to the US? The US is a country that has exhibited double standards in international affairs. In fact, they have something to learn from Kenya. Kenya can teach them how it is done with conviction and consistency. Therefore, it is wrong to put this issue as though there is foreign intervention. There was no foreigner who pulled the trigger in Kenya and no foreigner hacked any Kenyan. It is

important for us to see the conclusion of this process and after that, Kenyans can take stock in terms of how we can move forward and not backward.

Therefore, Kenya is setting an extremely dangerous precedent to the world because African leaderships will borrow from that wave of impunity. Just the fact that the ICC has not intervened in certain situations, I do not know at what point anybody here has raised any particular issue of conviction. I hear people talking about Palestine and Syria. Why have we not heard any of the proponents of this compassionate discussion take up---

(An hon. Senator stood up in his place)

What is wrong with this guy? Let me finish!

An hon. Senator: Address the Chair!

The Speaker (Hon. Ethuro): Order! Sen. Hassan, there are no guys in this House and you can only address the House through the Chair. Please proceed along those lines or else you run a real risk.

Sen. Hassan: Mr. Speaker, Sir, I apologize for that but I think when somebody is contributing to a debate, just because you disagree with his sentiments, you should not try to---

The Speaker (Hon. Ethuro): Order! Your time is up!

Sen. Hassan: Thank you, Mr. Speaker, Sir.

Hon. Senators: Put the Question!

The Speaker (Hon. Ethuro): Order, hon. Senators! There are no guys or time keepers in this House from the Floor except at the table.

(Question of the amendment proposed)

Sen. (Prof.) Anyang'-Nyong'o: Mr. Speaker, Sir, I would like to support the amendment for the reasons that have been given. But further, I would like to say that we seem to be applauding ourselves that we now have new judicial institutions that are working and yet our record of investigating and prosecuting human rights cases is quite miserable. If you look at the number of commissions that have been established, cases that have been there and concluded, we have a very poor record. Human rights cases since independence are enormous. Even recently, we had the Truth, Justice and Reconciliation Report (TJRC) which has never seen daylight. So we have very little evidence to convince the international world that the institutions that we have here are actually working because the evidence before the world is rather paltry.

Secondly, the curve of institutional maturity is still very early. Institutions are established and begin working, and a case like this, which is very serious, cannot really be trusted to a young institution. People have said here that what is important is for Kenyans not to be tried abroad. What is important is for Kenyans to receive justice. As far as I am concerned, as somebody said, let us look at the two sides of the case. Let us look at those who are now before the ICC as the accused and the victims. To what extent are the victims going to get justice here in Kenya when those who they are accusing are

the highest powers in the land? Is it really practical to expect them to get justice when the highest powers in the land are the ones who are going to execute things in this country? Let us be fair and get a neutral ground where both can be heard fairly and where justice can be done. But if we insist on speaking only on the one side of the case, we are being very partisan; we are not looking at all the Kenyans.

In any case, some of the issues which are being brought here are constitutional issues. If we are going to change them, we have to refer back to the people of Kenya because they are fundamental issues affecting human rights in this country. That is why this Constitution was passed, so that the ordinary Kenyan can be protected and defended. But here we are, only thinking of three people and not the victims. In any case, we cannot fault the ICC because it has even acquitted three people out of six. That is a very good record. Why do you fear that they are not going to acquit the others? If out of six, three have been acquitted, give the others a chance before the same court so that fairness can be done.

Mr. Speaker, Sir, the process started a long time ago and now we are trying to intervene in the middle. Is this really fair to those who have already been tried? Let those who were there with them also face the same justice so that justice can be seen to be done to all. In any case, when you look at the Motion - I was going to raise some very fundamental issues - it is not even grammatical in the way it is written. It should read: - "Address, among others, the following: Continued co-operation" and not "continue to co-operate." That is not very good!

(Laughter)

So, I hope that the writer can look at the whole thing and re-address it in proper English. This is not worth amending; it was just something that the writer should have taken care of if, indeed, he is a lawyer at the international court!

Thank you very much, Mr. Speaker, Sir. I beg to oppose.

Sen. Chelule: Thank you, Mr. Speaker, Sir, for this time. I support the original Motion, but now that I am here, I want to oppose the amendment. I know that we already have an institution that is able to deal with matters of our people in our country. I am talking today here knowing that under the new Constitution, we have institutions that have the capacity to address our issues. It is amazing that, today, Kenyans do not even have a right to attend those courts. Today, we know that our leaders are attending court cases in a foreign country and Kenyans do not even have a right to listen to that process in order to know what is going on in that court and yet, as a country, we have the capacity, through the Judiciary, to deal with these issues. I cherish our institutions because they have a structure. As we talk today, we are talking about the ICC which does not have any structure, especially in the investigations department, and we wonder how they do their investigations. Our institutions like the Judiciary in Kenya have a structure, especially the Department of Investigations. Thank you very much, Mr. Speaker, Sir.

With those few remarks, I oppose that amendment.

The Speaker (Hon. Ethuro): Order, hon. Senators! I, therefore, wish to put the Question, which is that the Motion be amended as proposed by Sen. (Dr.) Machage.

Before I take the vote, you need to know that this is a Motion not affecting counties. So, each Senator has a vote, whether elected or nominated.

(Question of the amendment put and agreed to)

Hon. Senators: No! No! No!

(Several hon. Members stood up in their places)

The Speaker (Hon. Ethuro): Order! Order! Order! Let me repeat the Question. Resume your seats, hon. Senators. Order, Senators! Resume your seats! Order! I think I have been infected by Sen. Chelule!

(Laughter)

I took it in the terms of the broader Motion. Let us specifically put the question on the amendment.

(Loud consultations)

Order! Allow Senators to challenge me; I have enough capacity to deal with such challenges. So, Sen. Wetangula, just relax!

I am repeating because I want to be very clear myself and I think that I owe you that one as your Chair. So, the Question is; if you vote in the affirmative, then you want the Motion to be amended as proposed.

Hon. Senators: Yes!

The Speaker (Hon. Ethuro): If you vote in the negative, then you do not want the Motion to be amended.

An hon. Senator: To remain the same!

The Speaker (Hon. Ethuro): Yes, you want the Motion to remain the same.

(The Senate Minority Leader consulted loudly)

Order, Senate Minority Leader! What is exciting you? I need to be very sure through us giving the loudest vote.

(Question of the amendment put and negatived)

(Several hon. Senators stood up in their places)

(Loud consultations)

The Speaker (Hon. Ethuro): Order, Senators! If you stand, it means that you want to contribute. If you want other things, you know what to say.

Hon. Senators: Yes!

The Speaker (Hon. Ethuro): So, I take it that you want to contribute.

(Loud consultations)

Yes, Sen. Orengo?

Sen. Orengo: Mr. Speaker, Sir, I have a very---

(Loud consultations)

Mr. Speaker, Sir, can I be protected? I want to make a very short presentation if I can be given the time. I wanted to put this thing clearly before the Senate; that if you look at the Rome Statute, among the two biggest issues is the doctrine of complementarity. This was something which was negotiated over the years and I know the Attorney-General Emeritus, Sen. Amos Wako, was involved in some of these negotiations because the state parties to the Rome Statute did not want states that were members of the ICC to be subject to the jurisdiction of that court, notwithstanding their own national courts and the sovereignty of those countries. So, that the principle of complementarity is such that the ICC will only come to a situation if those national courts have no capacity and cannot prosecute state cases.

The second principle was to allow the security council of the ICC to constitute the trigger mechanism for initiating cases before the ICC. Now, Mr. Speaker, Sir, three years ago, I was present when the President of the Assembly of State Parties, a Mr. Christian Wenaweser, who was the Ambassador of Liechtenstein, came here and met the Cabinet Committee which was dealing with ICC matters. He put the question to us in the presence of the President, and he asked: "Are you serious about bringing these cases back to Kenya? If you are serious about bringing these cases back to Kenya, have you read the Rome Statute carefully" instead of just running around? He told them "You are going to Addis Ababa; even if you go there ten times or a hundred times, the cases will not come back. If you go before the Security Council, the Security Council can only defer the cases in terms of Chapter 7 of the UN Charter when there is a regional conflict, not in any other situation." And he said what other states have done in the review conference which took place in Kampala. In that review conference when it was being held, one of the members of the bureau which has only three members was a Kenyan named Zachary Mwita.

Mr. Speaker, Sir, in the presentation that was given on behalf of the Republic of Kenya, the current Cabinet Secretary for Foreign Affairs was the one who gave the presentation and it is here. She gave Kenya's commitment to abide by the Rome Statute and ask other African states to do so. In fact, the African situation as it was at that time was given by Sen. Wako. I remember Sen. Wako giving a statement on behalf of the members of the state assembly. They were saying that if you want circumstances in which the cases can be deferred to Kenya, the only way out is to amend the Rome Statute. In fact, during the Kampala Review Conference, there was amendment on the law of crime of aggression which the Americans were very worried about and suggestions were given. What I am saying is that instead of suffering the repetition of

becoming a banana republic, instead of being part of the international community which believes in the principle of the United Nations (UN) and knowing the court is part of the mechanisms and structures of the UN, why can we not, within the confines of the assembly of state parties--- By the way, the majority of the members of the assembly of state parties are African countries and they can carry out these amendments. So, instead of crying wolf like somebody who has been forsaken, why can you not do the right thing? The only condition is that you can only amend the Rome Statute after seven years. It has been more than seven years and state parties have put amendments before review conferences and meetings of the state assembly. The Americans were against the definition of the word “aggression” from their own self interest. If the African countries have a self interest, why can they not go before the assembly of state parties and carry out an amendment under Article 124? If you take me on board, I can help you do a good job in a smart way instead of doing it in a foolish way.

The Speaker (Hon. Ethuro): Hon. Senators, we will have another three Members before I call upon the Mover to reply. If you become brief then we can accommodate a few more.

Sen. Wako, since you have been mentioned.

Sen. Wako: Mr. Speaker, Sir, thank you for giving me this opportunity to speak on this very important Motion. We have now reduced the time to five minutes so I will try to be very fast.

The Speaker (Hon. Ethuro): I am even encouraging that you reduce to three minutes on your own.

Sen. Wako: Mr. Speaker, Sir, first, I want to send a message to the President, the Deputy President and Mr. Sang. I want to remind them that when I was the Attorney-General of the Republic, I mentioned and made a statement that, in my opinion, there was no evidence on which they could be convicted and I stand by that opinion today. Furthermore, I do not think that the threshold to attract the jurisdiction of the ICC had been met. I made that statement and I still stand by it today. So, they should not panic. They should be calm and firm and do their work as President and Deputy President without these ICC matters weakening their resolve.

Furthermore, to me, the fact that as President and as Deputy President, they have nevertheless agreed to co-operate with the ICC demonstrates that they do actually believe that they are innocent. Otherwise, they would not be co-operating. Moreso, the fact that they were elected after they had been indicted before the ICC also shows that millions of people in Kenya also believe in their innocence and the ICC will also take a judicial note on that. I believe that they will be acquitted. So, let them proceed in that manner so that what we are doing here does not colour what they are doing there and which is going on very well.

Mr. Speaker, Sir, I want to declare my self-interest. In 1980, the Secretary General of the African Bar Association, the Commissioner of the International Commission of Jurists together with other leaders from other continents called for the establishment of the International Commission of Jurists in Tübingen, a town in Germany. I have been involved in the drafting of the Rome Statute. When it was adopted in Rome, I was a Vice-President for Africa. I prepared a Cabinet memo which agreed that

we ratify it. It is me who went to New York and deposited instruments of ratification of the ICC. I drafted the International Crimes Bill which domesticates that. I moved it in Parliament and it was enacted.

With that self-interest, let me say that this Motion, particularly on the issue of withdrawal - and I read paragraph 4 which I have just affirmed - we want to withdraw Kenya from the Rome Statute to ensure that, in future, all criminal cases are handled by the Kenyan judiciary. That is what is stated in Clause 4.

Mr. Speaker, Sir, the fact of the matter is, even if we were to withdraw today, as everybody has said, those cases will continue at The Hague and we will continue to co-operate. More importantly as somebody has said, the fact that we have withdrawn will not stop the Security Council in future from referring those cases to The Hague if a similar situation occurs in Kenya under Article 13(b) of the Rome Statute. That is why the President of Sudan is there. Sudan has not ratified the Statute, but he is there. It says that this will ensure that all future cases will not be done if we withdraw. This will not ensure that.

More fundamentally and that is what has not been stated here, there is what in the international customary law we call “the universal jurisdiction of national courts”. It is under that concept of international law that you will find some local courts in France issuing warrants of arrest against leaders in Rwanda; some national courts in Belgium issuing warrants of arrest against some leaders in Congo and Chad. That concept is there. So, the issue is: Would you rather be tried--- If such a situation arises and you are no longer members of the ICC, would you rather be tried by those magistrate courts in those developed countries, or would rather be tried by an attested institution such as the ICC?

The Speaker (Hon. Ethuro): Your time is up!

Sen. Wako: No. the red light has not yet come.

The Speaker (Hon. Ethuro): It has come now.

Sen. Wako: Then I have to stop there.

The Speaker (Hon. Ethuro): Yes, you have to stop there.

Sen. Keter!

Sen. Keter: Mr. Speaker, Sir, thank you for giving me this opportunity. I want to say that I support this Motion 100 per cent with all my mind, my soul and my everything. In fact, the Motion is so lenient because we should only have remained with Clause 4; that we are supporting withdrawal. I say so, because in the United States of America (USA) former President Clinton advised Bush not to ratify and he had reasons. According to him, the process of establishment of the ICC was flawed. As I am talking now, nothing has been done. No amendment has been done. Therefore, that process which established the ICC is still there and yet it was flawed. The USA went further and signed agreements with other governments not to allow any American to be handed over to the ICC.

Therefore, it is not something new; it has even been done by the Americans. Why are we shying away as Kenya? Why can we not take the lead as Kenya? Why are we thinking about other nations? Why are we singing the tune of the whites? This is our country and, therefore, if Americans and China are not there--- We are not talking about the current cases. If somebody thinks that Americans do not fight amongst themselves, even Kenyans do not fight amongst themselves.

An hon. Senator: Really!

Sen. Keter: Yes. What happened in 2007 and 2008 is regrettable. We wanted investigations to be done. What pains me is when I see the three Kenyans who are facing criminal charges at The Hague knowing very well and having participated in the General Elections of 2007 that nobody planned violence. Nobody planned anything. It was spontaneous and it is regrettable.

Mr. Speaker, Sir, today I saw the prosecutor playing a video of installation of Hon. Ruto as an elder like so many of us do over the weekends and she said that this was to make him the leader. This pains me because it is wrong. The investigators who we thought are internationally educated are worse than even our own investigators in the villages. The judges whom we thought would not listen to lies and who were supposed to be very well versed with the law, the *wazees* at home are better than them. Our courts are much better than the ICC. If proper investigations were done, I do not think those three Kenyans who are facing the charges would be facing them. What happened is that Ocampo came here as a tourist. We entertained him and provided him with security. This man was using a bicycle in Netherlands, but when he came to Kenya a whole Cabinet Minister was waiting for him at the airport with a security detail. A flight was prepared for him using tax payers' money to fly him to Maasai Mara. It is a shame as a country to entertain such people. That should be the last. We should not entertain them anymore.

As I conclude, this Motion is not talking about the withdrawal of the cases which are pending before the ICC. We have read the law very well. We know that our intention to withdraw from the ICC will take a year. However, we are doing it for posterity; for our children. We do not want our children to go to The Hague.

Sen. Ongoro: Thank you, Mr. Speaker, Sir. Before I state whether I am supporting or not supporting, I want to take you down memory lane. For the avoidance of doubt, I want to remind all of us in this House that I am the immediate former Member of Parliament for Kasarani Constituency; one of the hotspots that suffered almost 50 per cent of the violence. In my constituency, we lost 130 people. For some strange reason, all the people who died in my constituency happened to have been my chief campaigners. Probably, in this Senate, nobody feels the pain of post election violence the way I do. I lost my personal driver who was shot at 10.30 a.m. with a packet of milk in his hands.

If you have forgotten, I was in the list of the first six that were published in the local dailies with His Excellency Uhuru Kenyatta, His Excellency William Ruto, Sally Kosgei, Hon. Balala and Hon. Henry Kosgey. I feel the pain that these three Kenyans are feeling, probably, more than all of you. I feel the pain because I know what it feels like to be accused falsely. I feel the pain of wanting to be vindicated. I have walked that route.

In the Tenth Parliament, I remember which side I took; I supported vehemently the establishment of a local tribunal. I supported it because I was directly affected. I wanted a local tribunal that would give me an opportunity to look at my accusers in the eye and one that would provide a healing process so that I would know who is accusing me. But, if you remember, we were thoroughly beaten on the Floor of the House. The slogan then was: "Do not be vague, go to The Hague." I cried, but all the same we had to accept defeat.

Mr. Speaker, Sir, over the years, this process has now been politicized beyond belief. While I was supporting a local tribunal, we did not support the withdrawal from the Rome Statute. We have had many *ad hoc* committees and tribunals whose findings are never publicized. If they are, their recommendations are never implemented. I have heard my colleagues say that if I want to become the President of this nation, all I have to do is to eliminate all my competition and then ascend to the presidency and say: “Now that I am a President, I cannot be prosecuted.” The political sword is double edged; it will cut on one side and come on the other side.

Mr. Speaker, Sir, I want us to be sober. This Motion was brought at a very wrong time. The implications internationally are that we are trying to hide something. Honestly speaking, as one who might still end up at The Hague anyway, or any other place, I want a process that is devoid of political interference and that does not have any ethnic overtones. Under the circumstances, I believe that our brothers have got a wonderful chance to be vindicated at The Hague. After the verdict is given that they are innocent, nobody will cry foul and say: “They were vindicated because the judge happens to come from the same ethnic group with them.” In my opinion, we are blind to some issues and raise political temperatures for no reason. Why do we not allow this process, which in my opinion, I have a sixth sense that tells me that they are going to be vindicated and not just locally, but internationally so that even as they travel internationally anybody who was suspecting that they were involved in anything will know that these were leaders who were completely innocent.

The Speaker (Hon. Ethuro): Sen. Ongoro, your time is up! Sen. Murkomen!

Sen. Murkomen: Thank you, Mr. Speaker, Sir, for giving me this opportunity to contribute to this Motion. I stand to support the Motion for the following reasons.

One, when the Rome Statute was passed, it was expected that the ICC would be a court which would observe greater standards of human rights protection in dealing with matters of justice. However, I have a great issue with the manner in which the prosecutor carried out the prosecutions and investigations. When Moreno Ocampo came to Kenya, I had seen him on television as a scary man with a huge moustache. I attended a public forum here in Nairobi where I asked him: “How will you insulate yourself from the fact that these cases might be political, particularly because of the beneficiaries, in this case the chief principals, former President Kibaki and Mr. Raila Odinga? I remember he said three times: “I do not care.” Moreno Ocampo announced to the whole world that Kenya would be used as an example. It is now very clear to us, that investigations were not done.

Two, it is also clear that witnesses were coached. That is why they are unable to contain any witness. They do not have any witness up to now to produce in court. This court is being used to get to political ends. These are not my words. They are the words of the judges in the document that I tabled earlier, that people are using the court for purposes of blocking others politically. How do you explain that Uhuru Kenyatta is supposed to carry the burden of the Party of National Unity (PNU) single-handedly? That he was the only responsible person on behalf of PNU. How do you explain that William Ruto, who was not a running mate of Raila Odinga, is supposed to carry political responsibility? How do you explain a situation where the court is saying: “When William

Ruto was coronated to be a Kalenjin Elder, that he was actually preparing himself to cause violence? We know that even this past weekend; I was coronated to be a Kalenjin warrior.

(Laughter)

Mr. Speaker, Sir, you were there. Was I given the power to cause violence? Recently, we were at Sen. Kivuti's home. He was given something beautiful as an Embu Elder. We are subjecting our country to a court that does not understand the cultural values, expectations and the practices of our fore fathers. We are saying we will sit before a *Mzungu* who does not know how to wear the "monkey thing". Is this fair?

Mr. Speaker, Sir, I oppose this court for the simple reason that it is not living up to the expectations of the people of Kenya. Some Senators have said that if we withdraw from the ICC we will be a banana republic. The court was set up for banana republics. Kenya is not a banana republic!

An hon. Senator: Correct! We are a cassava republic.

(Laughter)

Sen. Murkomen: Mr. Speaker, Sir, an hon. Senator has said we are a cassava republic. We should forget this court and join more progressive countries like China and the United States of America (USA) who are not members of this banana republic court. That is the reason why, for posterity, we must get out of this court.

Lastly, before we move from this court, I am proposing that our country should be able to initiate an amendment that will say that a country which is not a member of the ICC cannot be tried by the ICC. Once we get out of this court, in the next one or two years, after the amendment, then we will walk home together knowing that we are no longer subject to such a court for any reason.

Mr. Speaker, Sir, our great men, Joshua Arap Sang, William Ruto and Uhuru Kenyatta are just, but sacrificial lambs. They are hanging on the cross on behalf of all of us. Time has come, as the Senate, as an important institution, to stand and say that we will no longer allow a situation where our leaders will hang on the cross. We will come to a time when we will say our country can stand on its feet.

I support, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Majority Leader!

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, how many minutes do I have?

The Speaker (Hon. Ethuro): You have five minutes.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Five only?

The Speaker (Hon. Ethuro): Yes, five minutes only.

(Several hon. Senators withdrew from the Chamber)

(Loud consultations)

Hon. Senators: Aaaah! CORD here!

The Speaker (Hon. Ethuro): Order, hon. Senators!

Proceed, Senate Majority Leader!

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, I want to donate one minute to Sen. Moi, two minutes to Sen. G.G. Kariuki and then I will use the remaining two minutes.

Sen. Moi: Mr. Speaker, Sir, I stand here to support the Motion because of what is on the ground. We have heard the legal arguments on this issue. But what is on the ground are the facts. The facts are that the two communities which bear the greatest burden of the clashes were the Kikuyus and the Kalenjins. We have not chosen, as a community, to pursue retribution. We have chosen restorative justice that stresses reconciliation and peaceful co-existence. The ICC will have retributive justice. That will not help the cause of peace. We need building blocks to a peaceful Kenya and confidence building of one nation of many tribes. I request all my colleagues to promote peace, love and unity.

With those few remarks, I beg to support.

Sen. G.G. Kariuki: Mr. Speaker, Sir, it is unfortunate that I have been here for long, but I have to speak the last. What I want to say is completely different from what has been said here.

One, the political environment of any country is what determines the action of politicians. Here, we are acting as politicians because we represent all Kenyans in this House. Anybody who doubts why we are behaving this way as a Government party needs to know that this is the only time where we must interrogate all the agreements that we have signed with foreign nations, so that we are able to discover whether we are in the right or wrong.

Mr. Speaker, Sir, I repeat that the political environment is what determines political action. Those who think that we may have lost our direction need to know that we will not sit here, as Kenyans, to see our President and Deputy President being crucified in a foreign land. This is most unfortunate. It is high time that we start thinking critically. We went further to request the President and Deputy President to ignore these kinds of arrangements.

The Speaker (Hon. Ethuro): Your time is up, Sen. G.G. Kariuki.

Sen. G.G. Kariuki: Thank you, Mr. Speaker, Sir.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, how many more minutes are remaining? I only require one minute to reply. If I have an extra minute, I can donate that it to Sen. Kagwe.

The Speaker (Hon. Ethuro): One minute, Sen. Kagwe.

Sen. Kagwe: Mr. Speaker, Sir, since I only have one minute, I just want to clarify one thing that is being repeatedly said in this House regarding this Motion. It is important for us to establish clearly that as we support the Motion by the Majority Leader, we are saying that by withdrawing we are rectifying mistakes that were made. We made mistakes in the years 1999, 2000 and 2005. Just because we signed the agreement does not mean that we continue with same mistake. In fact, when the USA signed the

agreement in 1999 and later realized that they had made a mistake, not only did they withdraw from the Statute, but they actually enacted the American Service Members Protection Act of 2002 which said that if the ICC arrests an American soldier, the American President has the right to ask the military to occupy the ICC and release anybody who is there.

The Speaker (Hon. Ethuro): Order, your time is up. One minute is 60 seconds!

Sen. Kagwe: Mr. Speaker, Sir, I beg to support.

The Speaker (Hon. Ethuro): Sen. Billow, you have one minute to make your contribution.

Sen. Billow: Mr. Speaker, Sir, you had announced earlier that I have two minutes. That is before Sen. Kagwe made his contribution. So, I should be entitled to my two minutes.

The Speaker (Hon. Ethuro): Order, Senator. I do not remember that announcement. It has since been revised to one minute.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, I want to plead with the Chair to give one minute each to Sen. Sang, Sen. Wamatangi and Sen. Mugo. I will need one minute to reply. I do not know about my friend, Sen. Billow. He is demanding for two minutes. We need guidance.

The Speaker (Hon. Ethuro): The guidance is as follows: I will give one minute to each hon. Senator mentioned as follows: Sen. Sang, Sen. Mugo, Sen. Wamatangi and, finally, the Senate Majority Leader.

Sen. Sang: Mr. Speaker, Sir, it is unfortunate that the discussions that have taken place in this House the entire afternoon have focused on only one item yet we have four items. I want to emphasise the fact that one of the issues that we have raised in this Motion is to persuade the ICC to consider the issue of a video link. It was very embarrassing this morning to see the Deputy Head of State being cornered at one of the seats of the ICC and the entire nation was watching. How much more humiliating is it going to be to see the Head of State seated at that corner? It is important for this House to pass a resolution asking the ICC to consider the issue of a video link. If you look at the Rome Statute, it does not talk about physical presence. Presence can also be achieved through a video link. That is very important.

The other issue is---

The Speaker (Hon. Ethuro): Your time is up! Sen. Mugo, following the example of Sen. Sang, raise one issue and conclude it.

Sen. Mugo: Mr. Speaker, Sir, I support the Motion. I also add that this is a political court which cannot give justice. The court has admitted that politics is involved in this case. It looks like the prosecutor is an extension of the opposition politics of Kenya. Where they could not win, they are trying to come to power through the back door, thinking that the President can remain there and they will *vuruga* here and take over.

As a Senate, we must insist that the cases be brought back home. The President and the Deputy President are the pride of any nation. When they are humiliated there, the whole of Kenya is humiliated. What the prosecutor is doing is an affront to the Kenyan people.

I support.

Sen. Wamatangi: Mr. Speaker, Sir, I will spend my one minute in laying the record straight because an impression has been created that this Motion has been brought here purposely and expressly just to benefit the current cases at the ICC. This is not so by a Senate which knows its mandate.

In brevity, I want to say that since this country got Independence, our political landscape has been distorted. That distortion was started by colonialists for their own interests. In 2010, we got a new Constitution. We have been members of the ICC for five years. The question we should be asking ourselves on behalf of this nation is: Has the ICC served this country right for those five years? If the ICC tomorrow made a pronouncement in any case on these matters, would it be of help to this nation? Would it bring peace to this country?

I support this Motion and say the cases should be brought back home.

The Speaker (Hon. Ethuro): Time up, Sen. Wamatangi!

Finally, the Senate Majority Leader! You have one minute.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, with those many remarks, I beg to move the Motion.

Thank you.

(Applause)

(Question put and agreed to)

(Applause)

ADJOURNMENT

The Speaker (Hon. Ethuro): Hon. Senators, it is now time to adjourn the House. The Senate, therefore, stands adjourned until Tuesday, 17th September, 2013, at 2.30 p.m.

The Senate rose at 6.30 p.m.