IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO & MURGOR, JJ.A)

CIVIL APPEAL NO. 105 OF 2012

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 274 OF 2011

BETWEEN

THE ATTORNEY GENERAL …….....…….....1ST APPELLANT

MINISTER OF STATE FOR PROVINCIAL

ADMINISTRATION AND INTERNAL SECURITY….....2ND APPELLANT

THE KENYANS FOR JUSTICE AND

DEVELOPMENT TRUST (KEJUDE)……....……3RD APPELLANT

AND

THE KENYA SECTION OF INTERNATIONAL

COMMISSION OF JURISTS……...…….…RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Nairobi by (Ombija, J) dated 28th November 2011 in H.C. Misc. Crim. Appl. No. 685 of 2010)

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JUDGMENT OF THE COURT

We cannot begin the consideration of this appeal without first setting out the historical perspective of the idea of establishing an international criminal court. That history, though important for the background of the matter before us, is long and often contentious. But for the space and opportunity we have in this judgment we shall do our best to summarize it and present that history as accurately as we can.

While efforts to create such a court can be traced to the early 19th century, the story began in earnest in 1872. It is said that Gustav Moynier – one of the founders of the International Committee of the Red Cross made a proposal for a permanent court in response to the crimes and atrocities committed during the Franco-Prussian War. Prior to this period, trials for violations of the laws of war were tried by *ad hoc*

tribunals constituted by the victor in most cases. Although both sides of the conflict agreed that serious violations were committed, they failed to punish those responsible or even to enact the necessary legislation. Moynier presented a proposal for the establishment by treaty of an international tribunal at a meeting of the International Committee of the Red Cross on 3rd January 1872. Although his proposal did not succeed, its relevance remains to this day. See Article by Christopher Keith Hall (1998), '**The first proposal for a permanent International Criminal Court**', International Review of the Red Cross, No. 322.

The next serious call for an international criminal justice system came with the 1919 Treaty of Versailles, which brought World War I to an end. It envisaged an *ad hoc* international court. The Leipzig War Crimes Trials were a series of trials held in 1921 to try the Kaiser and other alleged German war criminals of World War I before the highest German court the Reichsgericht in Leipzig, where seventeen Germans were put on trial for suspected war crimes in twelve trials.

Then came the World War II, at the end of which the victorious Allied governments, led mainly by France, the then Soviet Union, the United Kingdom, and the United States established the first international criminal tribunals to prosecute high-level political and military officials for their roles in the war crimes and other wartime atrocities. The International Military Tribunal (IMT) was set up in Nuremberg, Germany, to prosecute and punish the major German war criminals. Another tribunal, the International Military Tribunal for the Far East (IMTFE) was created in Tokyo, Japan, to try and punish Far Eastern war criminals. The Charter of the International Military Tribunal (or Nuremberg Charter) outlined the tribunal's constitution, functions, and jurisdiction. The jurisdiction of the IMT was to try and punish persons who committed Crimes against Peace, War Crimes and Crimes against Humanity.

The IMT was the turning point in international criminal justice and there are important lessons to be drawn from its judgment rendered on 1st October 1946 in the case of **France and Others V. Göring (Hermann) and Others** (1946) 22 IMT 203. For example, to deal with impunity among the world leaders, the judgment, relying on **Article 7** of the UN Charter categorically declared that;

> **"…..Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of International Law. .....crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility. The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. …..**
>
> **On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law."**

The principle of individual criminal accountability for all who commit such acts was established as a cornerstone of international criminal law.

A few years later in 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, itself recognizing in resolution 260 of 9th December 1948 that;

"…..at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required".

Article I of that Convention characterizes genocide as **"a crime under international law",** and **Article VI** provides that persons charged with genocide

"**shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . ."**

Pursuant to this resolution the General Assembly invited the International Law Commission (ILC) to make recommendations for the establishment of an international judicial organ for such trials. Unfortunately, and like the earlier attempts, these efforts appear to have been abandoned.

Up to this stage it would appear that throughout history most perpetrators of war crimes and crimes against humanity went unpunished to the extent that it was reasonable to believe that they were in fact a law unto themselves and there was no judicial system for redress to the victims of their crimes. For instance, in Cambodia in the 1970s an estimated 2 million people were killed by the Khmer Rouge led by Pol Pot. In armed conflicts in Mozambique, Algeria and the Great Lakes region of Africa, Liberia, El Salvador and other countries the story was the same as enormous massacres of civilians was committed without those responsible being held to account.

Fast forward to a series of events in early 1990s that witnessed the resurgence of drug trafficking, the conflicts in Bosnia-Herzegovina and Croatia as well as in Rwanda and the attendant mass commission of crimes against humanity, war crimes, and genocide in these countries led the UN Security Council to establish two *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to hold individuals accountable for these atrocities. These *ad hoc* tribunals once again highlighted the need for a permanent international criminal court.

The following Statement by Kofi Annan, then United Nations Secretary-General, succinctly explains the primary objectives of the United Nations to secure universal respect for human rights and fundamental freedoms of individuals throughout the world and the thinking behind the establishment of an international criminal court. He explained;

> **"For nearly half a century, almost as long as the United Nations has been in existence, the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought . . . that the horrors of the Second World War, the camps, the cruelty, the exterminations, the Holocaust, could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time, this decade even, has shown us that man's capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response."**
>
> *(A Statement of Secretary-General Kofi Annan to the International Bar Association in New York on 11 June, 1997).*

This Statement was made a few years after the ILC had presented its final version of a draft statute for the establishment of the International Criminal Court (ICC) to the United Nations General Assembly (UN GA) in 1994. The draft was subjected to intense and extensive six sessions of the UN Preparatory Committee between 1996 and 1998, and involved UN member States and Non-Governmental Organizations (NGOs).

Based on this draft, the UN GA convened the "Rome Conference" (15th June to 17th July, 1998) in Rome, Italy, with 160 countries participating in the negotiations and more than 200 NGOs closely monitoring these discussions. After weeks of intense negotiations, 120 nations voted in favour of the adoption of the Rome Statute of the ICC, with seven nations, including the United States, Israel, China, Iraq and Qatar voting against the treaty and 21 States abstaining. The treaty finally came into force on 1st July 2002. See: UN Official Report, "*United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -1 7 July 1998"* Official Records Volume I, New York,

2002.

Apart from the general obligation imposed by the Statute on States Parties to cooperate fully with the Court in its investigation and prosecution of crimes, the States Parties are also enjoined to ensure that there are procedures under their national law for all of the forms of cooperation which are specified in the Statute. The legal system upon which the Rome Statute is anchored is on the premise that the primary competence and authority to initiate investigations of international crimes and to prosecute them is with States Parties national courts; that States Parties have the jurisdiction and the primary obligation to detect, investigate, prosecute and adjudicate the most serious international crimes, both under applicable international law and the Rome Statute; and that the ICC will only investigate and prosecute when national jurisdictions are unable or unwilling to do so genuinely. This is the principle of complementarity reproduced in the Preamble and **Articles 1** and **Article 17** of the Statute. The principle reflects a realization that it is preferable that such crimes are investigated and prosecuted in the country where they occurred. All States Parties are required to modify their national law to meet this obligation.

Kenya for its part passed the International Crimes Act, No 16 of 2008, which contains measures and judicial practice to comply with the overall objective of the Statute, to put *"an end to impunity for the most serious crimes of concern to the International Community as a whole"*. With this background in mind we turn to consider the appeal before us and this is how it got here.

As more detailed information of the atrocities in the bloody conflict in the Sudanese region of Darfur became available, the United Nations Security Council agreed to discuss the situation. But this came only after nearly 300,000 people had been killed and more than two million displacement in the conflict. On 31st March 2005, by Resolution 1593 reached pursuant to Chapter VII of the Charter of the United Nations, (the U.N. Charter) the Security Council, concerned that the situation in Sudan was degenerating into a threat to international peace and security, decided to refer the situation to the Prosecutor of the ICC and directed the Government of Sudan and all other parties to the conflict to cooperate fully with the ICC and its Prosecutor.

Sudan like Kenya is a member of the United Nations and is bound by the U.N. Charter. While Sudan has been a member since 1956, the latter did so on 16th December 1963.

In addition, Sudan has signed the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, (the Genocide Convention). Although on the other hand, Kenya has not signed the Convention, it has ratified the Rome Statute and in addition enacted the International Crimes Act in both of which genocide is categorized as one of **"the most serious crimes of concern to the international community as a whole".**

On 4th March, 2009, the Pre-Trial Chamber of the ICC issued the first warrant for the arrest of President Omar Ahmed Hassan Al Bashir, the President of the Republic of Sudan, on five counts of crimes against humanity committed in Darfur. A second warrant based on three counts of genocide was subsequently issued on 12 July, 2010. On 4th March, 2009 and 12 July, 2010 respectively, the Registrar of the ICC sent requests for cooperation to all States Parties to the Rome Statute asking them to arrest and surrender President Al Bashir if and when he travelled to those countries.

As Kenya celebrated the promulgation of a new Constitution on 27th August 2010, President Al Bashir was among the leaders from the region who were invited and indeed he did attend the historic occasion. Although it is a common factor that Kenya was aware of the two warrants to arrest President Al Bashir, it did not do so.

When the Kenya section of the International Commission of Jurists (ICJ-Kenya Chapter), the respondent, learnt that President Al Bashir was planning another visit to Kenya in October 2010 to attend an Inter-Governmental Authority on Development (IGAD) summit meeting in Nairobi, it filed an application in the High Court praying, in the main that;

"1. That this Honourable Court be pleased to issue a provisional warrant of arrest against one Omar Ahmad Hassan Al Bashir the President of Sudan.

2. That there be issued an order to the 2nd Respondent, the Minister of State for Provincial Administration, to effect the said warrant of arrest, if and when the said President Omar Ahmad Hassan Al Bashir sets foot within the territory of the Republic of Kenya".

The planned visit however did not take place as the Summit was moved from Kenya to Addis Ababa, Ethiopia. This development is significant as will become apparent shortly.

In the application, the respondent argued: (i) that the International Crimes Act, just like the Rome Statute, did not recognize immunity on the basis of official capacity; (ii) that Kenya had violated its obligations under international instruments and its own statute by hosting and failing to arrest and surrender President Al Bashir during his presence on Kenyan territory in August, 2010; and (iii) that under the International Crimes Act the respondent had the *locus standi* to seek a provisional arrest warrant from the High Court and serve it on the Minister of State for Provincial Administration and Internal Security (Minister for Internal Security) where the State had reneged on its obligations under the Rome Statute and the International Crimes Act.

The 1st and 2nd appellants argued in opposition to the application that, according to **Article 92** of the Rome Statute, it was only the ICC that could seek a provisional warrant of arrest. They further argued that **Sections 32** and **33** of the International Crimes Act were derived directly from **Article 92** of the Rome Statute, and therefore the interpretation of the former sections must be read together with that Article; and that accordingly, only the ICC could make a request for a provisional warrant of arrest. In their view therefore, the respondent lacked *locus standi* to make the application.

Kenyans for Justice and Development Trust (KEJUDE), the 3rd appellant through its trustees, **Andrew Okiya Omtata Okoiti** and **Augustinho Neto Oyugi,** had also filed a miscellaneous criminal application, **High Court Misc. Crim. Appl. No. 685 of 2010.** Through an order of consolidation, KEJUDE joined the proceedings as the third respondent. For their part, they had argued that the Vienna Convention on Diplomatic Relations was in conflict with the International Crimes Act. It further argued that the African Union (AU) had adopted a decision directing all African member States to withhold cooperation with the ICC, in respect of the arrest and surrender of President Al Bashir. The 3rd appellant further contended that this decision as well as repeated calls by AU to the United Nations Security Council to invoke **Article 16** of the Rome Statute and suspend the warrant of arrest against President Al Bashir, were binding on Kenya, a member State of the AU.

The High Court (Ombija, J) in a landmark ruling rendered on 28th November 2011 found, *inter alia*, that the doctrine of universal jurisdiction was a *jus cogens* obligation under international law and States were authorized to arrest and prosecute persons implicated in international crimes regardless of their nationality, status or place of commission of the crime; that for that reason the High Court had jurisdiction not only to issue a warrant of arrest against any person who was accused of committing a crime under the Rome Statute, but also to enforce the warrants issued by the ICC; and that the obligations under the Rome Statute were customary international law. The learned Judge also found that the respondent had *locus standi* on a platform of public interest litigation to bring the application. In his view, the respondent had a genuine interest in the development, strengthening, and protection of the rule of law and human rights, and that the orders it had sought were justiciable; that as a legal person, the respondent had the requisite mandate and capacity to enforce and/or execute the warrant and was at liberty to apply for warrants of arrest where the Government had failed, neglected, or refused to execute the same. But if the respondent had no capacity, the learned Judge opined that it was nonetheless free to bring an application for the prerogative order of mandamus which would be directed at the Minister in charge of Internal Security to arrest President Al Bashir should he come to Kenya in the future.

With that determination the learned Judge allowed the prayers for the issuance of a provisional warrant of arrest against President Al Bashir and a further order directing the 2nd appellant "to effect **the said**

warrant of arrest, if and when, the said President Omar Ahmad Hassan Al Bashir [Omar Al Bashir] sets foot within the territory of the Republic of Kenya". We emphasise **the said warrant of arrest,** to make it clear that the warrant the Minister was ordered to effect is the provisional warrant.

The appellants were aggrieved and in two separate appeals to this Court challenged the decision of the learned Judge. The two appeals were also consolidated and the following ten (10) grounds constitute a summary of the gravamen of their complaint.

1. That the learned Judge misinterpreted the role of the High Court vis-a-vis the International Criminal Court in the application of **Article 2(6)** of the Constitution of Kenya and the International Crimes Act.

2. That the matter presented before the Judge was not a proper case for application of international customary law or the doctrine of universal jurisdiction.

3. That he failed to appreciate that the immunity of a serving Head of State is guaranteed under the general rules of international law which are part of the laws of Kenya by virtue of **Article 2(5)** of the Constitution and that **Article 2(6)** qualifies any treaty to be ratified before becoming part of the laws of Kenya.

4. That he did not consider the fact that **Article 98** of the Rome Statute preserved the immunity from execution in respect of sitting Heads of State.

5. That the learned Judge failed to appreciate that sitting or serving heads of State enjoy functional immunity under the general rule of international law thereby making an error of both law and fact in his ruling.

6. That the learned Judge erred by failing to disclose the provision of Kenyan law that gave him the jurisdiction to issue a provisional warrant of arrest.

7. That the learned Judge by assuming that he had jurisdiction in the absence of invocation of any specific provision of either the Constitution or statute, assumed the role of an international criminal court judge.

8. That the learned Judge erred by concluding that the respondent had *locus standi* to present the application for provisional arrest warrant and by misapplying the provisions of **sections 32** and **29** of the International Crimes Act both of which are clear that only the Minister can present an application for a provisional warrant of arrest.

9. That the learned Judge erred by not considering the import of **Article 98** of the Rome Statute and by disregarding the delicate issues of immunity provided for in the Privileges and Immunities Act, the First Schedule to the Act and **Article 31** of the Vienna Convention.

10. That the learned Judge failed to appreciate that the issues before him were not justiciable under the "political question" doctrine or the "act of State" doctrine; questions which the court was not best suited to address.

Based on these grounds, we summarize below the arguments as presented before us by counsel.

Mr. Bitta, learned counsel for the 1st and 2nd appellants, impugned the decision arguing that the learned Judge failed to appreciate the relationship between the courts and the Executive in so far as separation of powers is concerned, particularly as regards matters relating to the Rome Statute; that the issue at hand being one of foreign relations, the only branch of Government that had the mandate to resolve it was the Executive; that since the dispute was political, it was not justiciable; that the warrants from the ICC were issued to the Minister for Internal Security or the Attorney General, the only persons recognized and charged with the responsibility of implementing the provisions of the International Crimes Act and the

Rome Statute; that the court failed to uphold the immunity of a sitting Head of State.

Mr Bitta further submitted that, since the attention of the learned Judge was drawn to the fact that Sudan is not party to the Rome Statute and therefore could not be bound by it, he erred in issuing the impugned orders. Counsel added that the learned Judge also made an error by ignoring the fact that at the time he issued the orders challenged in this appeal, Kenya had made commitments to the AU, binding itself not to comply with the requests for arrest of President Al Bashir, which commitment is recognized and sanctioned by **Article 98** of the Rome Statute.

In support of those submissions, Mr. Bitta referred us to the following: an article by **Prof. Paola Gaeta**, '*Does President Al Bashir Enjoy Immunity from Arrest?'* Journal of International Criminal Justice, Volume 7, Issue 2, 1 May 2009, Pages 315–332 ; the 2001 decision by the France Court of Cassation in the "**Gaddafi Case",** ILR, vol. 125, p. 508, at p. 509; the decision by the United States District Court for the Southern District of New York in the Case of **Tachiona v. Mugabe,** No. 00 CIV. 6666 (VM), p. 291; the Audiencia Nacional decision in the **"Kagame Case",** Auto del Juzgado Central de Instrucción No. 4, 6 February 2008, Fourth paragraph, No. 1, pp. 151-157**.**

For the 3rd appellant (KEJUDE), Mr. Mungai agreed fully with the foregoing submissions but added that Sudan was a friendly State with which Kenya would like to maintain the good relationship; that President Al Bashir as the Head of State of Sudan was immune from arrest while in Kenya; that the treaties provide for immunity of serving heads of State which the courts must respect because it serves a good purpose in international law and relations; and that Kenya and Sudan belong to a region mired in numerous political issues hence the two ought not to be antagonized. Since universal jurisdiction is not applicable in the circumstances of this case, the learned Judge could not exercise jurisdiction beyond that donated to the High Court by the Constitution or statutes.

On *locus standi,* learned counsel asserted that the enforcement of the International Crimes Act is in the province of the Executive branch of Government whose agents in the Act are the Attorney General and the Minister of Internal Security. That the implementation of the provisions of the Act is not justiciable as it is a political decision left to the Executive to make and no citizen can exercise such authority. The respondent therefore, according to the appellants, had no *locus standi* to present or prosecute that application.

Mr. Nderitu, learned counsel for the respondent on his part urged us to ignore the issue of jurisdiction of the High Court as it was not raised before the learned Judge; that in accordance with the celebrated decision of this Court in **Owners of the Motor Vessel "Lillian S" V. Caltex Oil (Kenya) Ltd** [1989] KLR 1, this complaint ought to have been raised in the first instance before the High Court; and that because the appellants recognized that the High Court had jurisdiction they articulated their case before it. On justiciability, counsel submitted that the point ought similarly to have been raised before the High Court.

Regarding the contention that the respondent had no *locus standi* to approach the High Court, counsel drew our attention to the predicament expressed by the learned Judge to the effect that despite two warrants for the arrest and surrender of President Al Bashir being in force, the latter came to Kenya on the 27th August, 2010 and the warrants were not executed. Counsel urged us to find that in the circumstances any person, including the respondent, had the capacity to apply to the High Court for provisional warrant of arrest; that the court complied with the provisions of **section 32** following the visit to Kenya by President Al Bashir and the apprehension that there was another planned visit; that as a matter of fact the meeting that President Al Bashir was planning to attend in Kenya had to be transferred to Addis Ababa due to the respondent's agitation on the Government of Kenya urging it to execute the warrant of arrest; that the Government once again invited President Al Bashir to the swearing in of President Uhuru Kenyatta in April 2013; and that there was every indication that he would indeed attend but due to sustained pressure from the respondent he did not attend.

Mr. Nderitu's response to the submissions on *locus standi* was that **Article 258** of the Constitution clothes any person with the capacity to institute and argue any matter under the Constitution. He submitted that

under international customary law, personal criminal responsibility is a recognized general principle; that although the Vienna Convention gave State agents immunity from criminal action, this was purely to ensure that diplomatic functions were not carried out under the fear of being arrested; that this protection was not intended to protect any individual from personal criminal responsibility for conducts amounting to international criminal acts. This is a fundamental principle of customary international law with the status of ***jus cogens***. It was because of this, according to counsel, that the Supreme Court of Appeal of South Africa in the case of **The Minister of Justice and Constitutional Development v The Southern African Litigation Centre** (867/15) [2016] ZASCA 17 found that the Government of South Africa ought to have arrested Al Bashir when he travelled to that country.

Counsel reminded us that even the International Crimes Act recognizes that Heads of State have no immunity for international crimes and crimes against humanity; and the basis of application of **Articles 98** and **27** in Kenya is **Article 2** of the Rome Statute. In view of the fact that **section 32** of the International Crimes Act does not impose any restrictions as to who may apply for a provisional warrant, the learned Judge was justified in issuing one upon being satisfied that the criteria set by statute were met.

Concerning Kenya's commitment to the AU resolution not to cooperate with ICC in effecting the warrants of arrest, counsel argued that by **Article 4** of the AU Act, one of the functions of the Union is to fight impunity and it could not renege on that objective.

The primary contention in this appeal is that the High Court did not have jurisdiction to entertain the application because, in the first place, Sudan is not a party to the Rome Statute; the matters before it were not justiciable being matters of politics and international relations; President Al Bashir, as a sitting Head of State was immune to our judicial process; the basis upon which the application for a provisional warrant of arrest was made had dissipated; and that the respondent lacked the necessary *locus standi* to institute and prosecute the application.

States Parties to the Rome Statute resolved to guarantee lasting respect for the enforcement of international justice. The preamble to the Rome Statute explains why it became necessary to establish the ICC, as follows;

> **"Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,**
>
> **Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world,**
>
> **Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,**
>
> **Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,**
>
> **Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,**
>
> **Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,**
>
> **……**
>
> **Determined to these ends and for the sake of present and future generations, to establish an**

independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

<u>Emphasising</u> that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

<u>Resolved</u> to guarantee lasting respect for and the enforcement of international justice"

Having so agreed, States Parties established the ICC with jurisdiction over persons charged with commission of the most serious crimes of international concern. This jurisdiction is to be complementary to national criminal jurisdictions.

What we need to stress from this preamble is the emphasis on international cooperation by States, the determination of States Parties to end impunity for the perpetrators of international atrocities and grave crimes and the complementary role of the ICC to the national criminal jurisdictions in combating those crimes through effective prosecution.

By **Article 2** of the Rome Statute ICC may exercise its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other State in respect of four specific crimes, genocide; crimes against humanity; war crimes and crime of aggression. Although the Statute confines the exercise of jurisdiction of the ICC to the boundaries of States Parties, non -State parties that are members of the United Nations under **Article 13(b)** are nonetheless expected to cooperate in the fight against international crime. Indeed the entire Part IX of the Statute is devoted to international cooperation and judicial assistance. States Parties are obligated to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court. The requests for cooperation is made by the Court to States Parties through diplomatic channels or through any other appropriate channel. **Article 87 (5) (a)** recognises that there may be situations when the Court may invite any State not party to the Statute to provide assistance on the basis of an *ad hoc* arrangement.

The provision reads as follows;

"87(5)(b) Where a State not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council."

With respect to waiver of immunity and consent to surrender, **Article 98** provides the guidelines for cooperation. The Court can request for surrender or assistance only if it would not require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State. In such a situation the Court must first obtain the cooperation or consent of the third State or sending State for the waiver of the immunity.

Finally on international cooperation, since the Court does not have its own police service, it relies on States Parties' cooperation to arrest and surrender suspects required by the Court. Under **Article 59** a State Party which has received a request for provisional arrest or for arrest and surrender is required to immediately take steps to arrest the person in question in accordance with that State's laws and the provisions of Part IX.

One of the expressed purposes for the establishment of the United Nations was to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all. According to the U.N. Charter, membership to the United Nations is open to all "peace-loving States" which accept the obligations contained in the Charter and are able and willing to carry out these obligations.

In order to create stability and well-being which are necessary for peaceful and friendly relations among

nations, the Charter also enjoins members to jointly or individually promote, *inter alia*, co-operation with the United Nations for the achievement of the purposes set forth in the Charter.

Having thus set out the nature, standards and levels of cooperation required of members and non-members to the Charter of the United Nations and the Rome Statute, we turn now to determine the arguments in this appeal.

It is a common factor that the Pre-Trial Chamber 1 of the ICC issued two warrants for the arrest of President Al Bashir, on charges of international crimes allegedly committed in his country. It is also not in dispute that although, like 138 other States, Sudan, under President al-Bashir, signed the Rome Statute on 8th September 2000 but unlike 123 other States, Sudan has not yet ratified the treaty, indicating that they no longer intend to become a party to the treaty. The fact that the Pre-Trial Chamber 1 issued a request to all States Parties to the Statute, including Kenya, to arrest President Al Bashir, is equally not in contention.

Likewise, President Al Bashir visited Kenya and had planned to do so once again when the respondent applied and obtained the provisional warrant for his arrest from the High Court.

It should be borne in mind that only a Pre-Trial Chamber may, at the request of the Prosecution, issue a warrant of arrest. On the basis of a warrant of arrest so issued, the Court may request either for the provisional arrest or the arrest and surrender of a person sought by the ICC. What, however concerns us in this appeal is the provisional warrants of arrest; their nature and the procedure for their issuance.

Whereas the Rome Statute refers simply to provisional arrest, the International Crimes Act on the other hand uses the terms "provisional warrant of arrest." But we think nothing serious turns on this distinction, which appears to us be an influence on the drafters of the Kenya Act by the provisions of Extradition (Commonwealth Countries) Act, where reference is repeatedly made of "provisional warrants". But in terms of **Article 92** of the Rome Statute, like **section 22** of the International Crimes Act, a provisional warrant will only issue in urgent cases once the Court makes a request for assistance. Because of the urgency of the request both the Statute and the Act permit the request to be made in any form which is capable of delivering a written record. However, this must be followed as soon as practicable by a formal request transmitted in the manner specified in **Article 87** and **section 21**, respectively, namely, through diplomatic channel to the Minister responsible for foreign affairs; or through any other appropriate channel that Kenya may designate.

The request must ultimately be transmitted to the Minister for the time being responsible for matters relating to national security; or the Attorney-General, as the case may be, or a person authorised by the Attorney-General to receive requests.

The respondent specifically petitioned the High Court to issue a "**provisional warrant of arrest"** against President Al Bashir and, secondly, it asked the High Court to order the second respondent to effect the said arrest warrant, if and when President Bashir visited Kenya.

From the law and procedure set out earlier in the preceding paragraphs with regard to warrants of arrest, we reiterate that a request for cooperation of whatever nature must, in the first instance, emanate from the ICC. It must be transmitted only through known channels and in a manner set out under the law, to the Minister or the Attorney General. In other words, the request would come from the ICC to a State as opposed to a citizen of that State. This should be clear from the plain language of **Article 59** which provides that;

> **"59. 1. A State Party which has received a request for provisional arrest or for arrest and surrender <u>shall</u> <u>immediately take steps to arrest the person</u> in question <u>in accordance with its laws</u> and the provisions of Part 9".** (Our emphasis).

Pursuant to Part 9, and specifically **Article 88** of the Statute, States Parties are enjoined to ensure that they promulgate procedures in their national laws to cater for all forms of cooperation under the Statute.

Relevant to this appeal, Kenya, in accordance with this edict enacted **sections 28, 29, 32** and **33** of the International Crimes Act stating thus with regard to provisional arrest warrant;

> **"32(1) A Judge of the High Court may issue a provisional warrant in the prescribed form for the arrest of a person if the Judge is satisfied on the basis of the information presented to him that-**
>
> **(a) a warrant for the arrest of a person has been issued by the ICC or, in the case of a convicted person, a judgment of conviction has been given in relation to an international crime;**
>
> **(b) the person named in the warrant or judgment is or is suspected of being in Kenya or may come to Kenya; and it is necessary or desirable for an arrest warrant to be issued urgently.**
>
> **(2) A warrant may be issued under this section even though no request for surrender has yet been made or received from the ICC.**
>
> **33. (1) If a Judge issues a provisional arrest warrant under section 32, the applicant for the warrant shall report the issue of the warrant to the Minister without delay.**
>
> **(2) The applicant shall include in the report to the Minister a copy of the warrant issued by the ICC, or the judgment of conviction, as applicable, and the other documentary evidence that the applicant produced to the Judge".** (Our emphasis).

Before a provisional warrant can issue evidence must be presented to the Judge in the High Court by *"the applicant"* that there is in force a warrant of arrest issued by the ICC or if the person wanted had been convicted, evidence of his conviction in the form of a judgment. Secondly, the Judge must be satisfied that the person named in the warrant is in Kenya or is suspected of being in Kenya or may come to Kenya at some future date. This information is supplied to the Judge by the "*applicant*".

The appellants' view was that the "*applicant*" envisaged under **Section 29** of the International Crimes Act, is the Minister in charge of Internal Security in the Republic of Kenya. Thus, according to them, the entity that ought to have presented the application for the provisional warrant was the State of Kenya through its agents recognized in law as opposed to the respondent or any other legal person or citizen. They emphasised that an application for a provisional warrant of arrest under **Section 32** of International Crimes Act, 2008 can only be made upon receipt of a request from the ICC under **Article 92** of the Rome Statute and that, since there was no evidence that such a request was ever made to the Kenya Government by the ICC, the High Court lacked jurisdiction to hear, determine or give orders sought in the application and in the same breath the respondent lacked the capacity to petition the High Court.

Sections 28, 29, 32 and **33** of the Act comprised in Part IV as well as **Articles 59, 89** and **92** of the Statute must be read together. Part IV deals with arrest and surrender to the ICC in two situations; where a request has been made by the ICC under paragraph 1 of **Article 89** of the Rome Statute for the arrest and surrender and secondly, where a request has been made under **Article 92** of the Rome Statute for the provisional arrest of a person accused or convicted of an international crime. **Article 89** deals with request to any State on whose territory a wanted person may be found for his arrest and surrender. In complying with the request States Parties are expected to do so in accordance with the Rome Statute and the procedure made under their national law. Under **section 29** of the International Crimes Act;

> **"If a request for surrender is received, other than a request for provisional arrest referred to in section 28 (2), the Minister shall, if satisfied that the request is supported by the information and documents required by article 91 of the Rome Statute, notify a Judge of the High Court in writing that it has been made and request that the Judge issue a warrant for the arrest of the person whose surrender is sought".** (Our emphasis).

To highlight further the distinction between a "*warrant*" and a "*provisional warrant,*" we reproduce

below Article 59 of the Rome Statute which enjoins State Parties States take immediate steps to respond to requests from the ICC for the execution of arrest warrants.

> **"59(1). A State Party which has received a request <u>for</u> <u>provisional arrest or for arrest</u> and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9".**

From the plain language of **section 33 (1)** the "applicant" for the warrant cannot be at the same time the same person as the Minister because the section requires the "*applicant*" to report to the Minister once the warrant is issued and to include in the report to the Minister a copy of the warrant issued by the ICC and the other documentary evidence that the "applicant" relied on before the Judge to obtain the warrant.

The Minister's other role where a provisional warrant has been executed by way of arrest of the person sought is spelt out in **section 34**. The High Court cannot commence the hearing of the application *inter partes* unless it has received a notice in writing from the Minister confirming that a request for the surrender of the person arrested has been transmitted to him (the Minister) by the ICC. Pending the receipt of this confirmation from the Minister, the proceedings may be adjourned**.**

It should be clear from **sections 29**, **33** and **59** as well as from the use of the highlighted phrase "**<u>other than a request for provisional arrest referred to</u> <u>in section 28 (2)</u>**" and the context in which the word "applicant" is used throughout the statute, that the person envisaged to apply for a provisional warrant of arrest is *"any person"* other than the Minister. *"Any person"* may include independent State prosecutorial agencies like the Office of the Director of Public Prosecutions (ODPP). To that extent and with respect, we think the dilemma the learned Judge alluded to was not without justification but real. By suggesting that any person can approach a High Court Judge to issue a provisional warrant, the drafters must have taken into account that dilemma, where the Minister may ignore or neglect to act on a request to effect a provisional arrest.

Even though **Article 59** places a duty on a State Party to which a request for provisional arrest or arrest has been sent to take immediately steps to arrest the person against whom a warrant has been issued by the ICC, Kenya did not arrest President Al Bashir when he came to Kenya.

Pursuant to the Rome Statute, Kenya promulgated its own procedures in International Crimes Act to cater for how it was going to cooperate with the ICC. That procedure, in the wisdom of the framers, allows any entity or person, including the ODPP, to apply to the High Court for a provisional warrant.

On the other hand, a different procedure is adopted where a normal warrant of arrest under Part IV **(section 28),** as opposed to a provisional warrant, has been issued and a request made by the ICC to Kenya to arrest and surrender a person required for committing an international crime; or a person who has been convicted by the ICC of an international crime. In that instance, the Minister will notify a Judge of the High Court in writing and request the latter to issue a warrant for the arrest of the person whose surrender is sought.

Therefore, just as the Minister can apply to the Judge to issue a normal warrant of arrest after receiving a request from ICC to arrest and surrender a person who is sought by the ICC, the respondent, we conclude, on the question of *locus standi*, was entitled to apply for the provisional arrest warrant.

Was the provisional arrest warrant moot, moribund and of no consequence by reasons that there was no urgency when it was issued and that the Summit upon which the visit of President Bashir upon which the warrant was predicated had been moved to another country?

The word "*provisional*" in its plain and ordinary meaning suggests something interim, temporary, limited in its application or dependent on circumstances, or subject to change or terms. Provisional arrest, therefore allows for the temporary arrest and detention of a person wanted for an international crime. Because the provisional arrest requests are made in cases of urgency, they seldom include enough information on which to base a determination by the court on whether to detain a person arrested. A

provisional arrest then affords the requesting State some time to assemble the documentation necessary for a formal surrender. Once a person against whom a warrant has been issued is traced, he may be arrested immediately even before a formal request for surrender can be prepared and presented for fear that any further delay may frustrate the execution of the warrant as the person may flee the jurisdiction of the court.

Article 96 of the Rome Statute and **section 32** of the International Crimes Act are clear that a request for provisional arrest or a provisional warrant will be made or issued only in urgent situations. According to **section 32** aforesaid, a Judge of the High Court may issue a provisional warrant if he is satisfied on the basis of the information presented to him that, among other things, the person named in the ICC warrant is in Kenya or **"is suspected of being in Kenya or may come to Kenya; and it is necessary or desirable for an arrest warrant to be issued urgently".**

The procedure under **sections 34** and **35** of the Act for effecting arrest pursuant to a provisional, though elaborate, is equally intended to achieve expedition in the determination of the question of arrest and surrender. We do not intend to consider that procedure here, suffice to emphasise that the hearing leading to the issuance of a provisional warrant is *ex parte.* That being so, the court seized of the application must satisfy itself, first, that *prima facie* it has jurisdiction and secondly, that the situation is one of urgency. Just like the procedures in municipal systems, the court has a duty, in issuing the provisional arrest warrant, to preserve rights and to ensure no prejudice is caused to any of the subjects of the dispute in the proceedings before their rights are determined with finality on merit.

The hearing at the *inter partes* stage is limited to the determination whether the person arrested is eligible for surrender in relation to the international crime or crimes for which surrender is sought. The court will also consider whether the person was arrested in accordance with the proper process and whether his rights and fundamental freedoms were respected in the process of his arrest. We only reiterate that *inter partes* hearing cannot proceed until the Minister furnishes the court with a notice in writing confirming that he has received from the ICC a request for the surrender of the suspect.

Whereas in Kenya the High Court can fix a date by which the Minister must transmit the notice, failing which the arrested person must be discharged, under **Rule 188 of the Rome Statute: Rules of Procedure and Evidence,** the time limit for receipt of the request for surrender and the documents supporting the request is 60 days from the date of the provisional arrest.

Other States Parties have enacted national procedure to comply with their commitment for cooperation with the ICC, in which they have limited the period within which a person provisionally arrested can be detained. For example, Slovak Republic in **section 505 (4) (4)** of its Criminal Procedure Code No. 301/2005 directs that provisional arrest may not exceed the period of 40 days from the moment of the person's detention or the presiding Judge may release the person provisionally arrested.

Section 11 of the Law on Cooperation with the International Criminal Court (ICC) Act enacted by The Federal Republic of Germany provides that when a provisional detention for surrender has been ordered, the order of detention for surrender must be rescinded when the suspect has been detained for a total of 60 days for the purpose of the surrender since the day of capture or provisional arrest.

In the preceding paragraphs we have illustrated in *extenso* the transient nature of provisional arrest or provisional warrants of arrest.

The provisional warrant was sought ostensibly because President Al Bashir was scheduled to attend the IGAD Summit in Nairobi. The Summit was, however moved to Addis Ababa. It is our view that by issuing a provisional warrant when well aware of these developments, the learned Judge misapplied the law.

Secondly, the application was presented on 18th November 2010 and argued on 9th December 2010 before the learned Judge. The Summit President Al Bashir had intended to attend in Kenya was to be held in November, 2010. So that by the time the application was heard the date had passed. That

notwithstanding, the learned Judge having heard the application on 9th December, 2010 reserved the ruling for 28th February, 2011, but did not deliver it. Instead it was finally rendered on 28th November, 2011. That is a period of nearly one year later. At this point the learned Judge ought to have acknowledged that the urgency which was the foundation of the application had dissipated and the warrant was stale.

The foregoing finding notwithstanding, the next question for our consideration and determination is whether the Government of Kenya was bound by international obligation to effect the two warrants of arrest issued by the ICC?

The application for a provisional warrant by the respondent was premised on the complaint that despite the existence of these warrants of arrest, President Al Bashir came to Kenya on the 27th August, 2010 and 1st and 2nd appellants "in utter disregard of their obligations under international law and the Laws of Kenya, failed to enforce the said warrants of arrest" and that the respondent was apprehensive that President Al Bashir would "again in the near future be coming into Kenya to attend a meeting convened by Kenya through the Intergovernmental Authority on Development (IGAD)" . The learned Judge concluded on this point that, although Kenya was bound to arrest President Al Bashir, it "refused, neglected and/ or ignored to comply with the ICC request even when the said President was in Kenya on 27th August, 2010".

Articles 1 and **4** of the Rome Statute establish the ICC as a permanent institution with international legal personality and **"the power to exercise its jurisdiction over persons for the most serious crimes of concern to the international community as a whole"**, such as, crimes against humanity, war crimes and crime of aggression. It exercises its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other State. It must be emphasised that although established as an independent court, the enforcement of its warrants remains with the States Parties, the broader international community and even in some cases with non-States Parties. As a result, both State Party and non - State Party are required under **Article 87** to cooperate with the ICC. Non-State Parties to the Statute cooperate with the court through an *ad hoc* arrangement or agreement. States Parties are, on the other hand enjoined to promulgate procedures under their national law to cater for all forms of cooperation specified under the Rome Statute.

There may, however, be situations that may impede compliance with an ICC. For example, where the request contains insufficient information or if the person sought to be surrendered cannot be located or where the investigations have determined that the person in the requested State is clearly not the person named in the warrant; or if the request would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State. In those circumstances the concerned State must immediately consult ICC for a resolution to the difficulty. In all other circumstances, the States are required to comply with and execute, in accordance with the law, all forms of requests from the ICC. For instance, in the instant case after sending a request to Kenya with respect to the impending possible visit to Kenya by President Al-Bashir in November, 2010, the Pre-Trial Chamber of the ICC, on 25th October, 2010 sought to know from Kenya whether there was any reason which would impede or prevent the arrest and surrender of President Al Bashir in the event he visited Kenya. The 1st appellant responded by confirming that IGAD meeting would not be held in Kenya and hence President Al Bashir would not be coming to Kenya.

To the extent that on this occasion the provisional warrant of arrest was spent for the reasons we have given earlier, it was impracticable to effect an arrest and surrender of President Al Bashir without his being physically in Kenya. The question we have posed above can therefore only relate to whether Kenya was bound by international obligation to effect the two warrants of arrest issued by the ICC on 4th March 2009 and 12th July, 2010, respectively which were subsequently followed also by two requests for cooperation of 6th March, 2009 and 21st July, 2010. Both the warrants and requests came way before the visit by President Al Bashir on 27th August, 2010. Despite Kenya being aware, indeed seized of the warrants and the requests, it invited and President Al Bashir indeed came to Kenya, attended the

promulgation of the Constitution and left. It is this failure to execute the warrants that formed the basis of the argument and a finding by the Court below that Kenya had abdicated its international obligation.

By ratifying the Rome Statute in 2005 and in subsequently enacting the International Crimes Act in 2008, Kenya made a conscientious decision to join 97 other nations in the combat of international crimes of genocide, crimes against humanity and war crimes. By **section 3** of the Act, the Government of Kenya bound itself to comply with its obligations under the Rome Statute and to fully implement the Rome Statute, whose provisions are, by the Act declared to have force of law in Kenya. The general expectation is that by ratifying the Rome Statute and enacting the International Crimes Act, the Government was acting on behalf of and in the best interests of the citizens of Kenya. Part of its obligation was to take immediate steps to arrest and surrender any person it may be requested to arrest and surrender by the ICC. Of course as a State Party it must also be aware that failure to comply with any request for cooperation would entitle the ICC to make a formal finding to that effect and thereafter to refer the matter to the Assembly of States Parties and even to the Security Council. Kenya failed to execute the warrant by arresting and surrendering President Al Bashir.

In explaining that failure the appellants cited the entitlement of President Al Bashir as Head of State to immunity under customary international law. They also relied on the decision of the African Union Assembly of Heads of States adopted in July 2009, at a Summit in Libya, directing all AU member States to withhold co-operation with the ICC in respect of the arrest and surrender of President Al Bashir; and finally that as a friendly neighbour to Sudan, Kenya would not take any action, including executing a warrants against President Al Bashir, that would jeopardise this relationship or threaten the lives and property of thousands of Kenyans living in Sudan. Before considering this question, we must conclude on this aspect of the appeal that, in view of all the clear facts in this matter, the Government of Kenya by inviting President Al Bashir to Kenya and failing to arrest him acted not only with complete impunity but also in violation of its international obligation.

The issuance of an arrest warrant against President Al Bashir, a sitting Head of State, is the second issue raised in this appeal; the question being whether a serving Head of State may rely upon immunity under customary international law to shield himself from proceedings before the ICC. To determine this question we must construe the provisions of **Articles 27** and **98** of the Rome Statute. To start with, **Article 27** provides;

> **"27. <u>Irrelevance of official capacity</u>**
>
> **1. This Statute <u>shall apply equally to all persons</u> without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official <u>shall in no case exempt a person</u> from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.**
>
> **2. Immunities or special procedural rules which may attach to the official capacity of a person, <u>whether under national</u> <u>or international law,</u> shall not bar the Court from exercising its jurisdiction over such a person".** (Our emphasis).

Article 27(1) and **(2)** above incorporates three core but related principles:

(i) that the Rome Statute applies to all persons without any distinction based on official capacity; (ii) official capacity cannot exempt a person from responsibility; and (iii) immunities or procedural rules cannot bar the ICC from exercising

jurisdiction.

By virtue of **Article 27,** all States Parties through ratification of the Rome Statute consent to waive any immunity under international law. This is the statutory basis for the requested State Party to arrest and surrender the wanted foreign Head of State of another State Party. Secondly and of more significance,

because **Article 27(2)** codifies rules of customary international law, it is our considered view that it applies even to Heads of State and officials of non- States Parties in situations envisaged under **Article 87 (5) (a) (b).** Under that Article the Court may invite any non-State Party to provide assistance on the basis of an *ad hoc* arrangement or agreement. As a matter of fact, where a non- State Party fails to comply with requests made pursuant to any such arrangement or agreement, the Court is permitted to inform the Assembly of States Parties or the Security Council just as it would do in the case of a States Party's failure.

On the other hand **Article 98** of the Rome Statute requires that;

> **"98. 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.** (Emphasis supplied)
>
> **3. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender".**

The construction and import of this **Article** and **Article 27** aforesaid has been controversial. On the one hand, **Article 27** declares that official capacity or status of the person sought to be arrested is irrelevant while on the other hand **Article 98** seems to suggest that States must respect the State or diplomatic immunity of a person of another State, which only that other State can waive. The clear purpose of the Article is to explicate when a State is exempt from its obligations of cooperating with the ICC.

The provision is, no doubt designed to avoid competing international obligations that may be imposed on a State. It acknowledges that a State may have other international obligations that may abrogate its duty to cooperate with the ICC. However, cooperation to waive immunity can nonetheless be obtained from non-States Party.

Under customary international law, a State arresting on its territory an incumbent Head of State who possesses immunity would be violating international law. The logical corollary of this is that there is an obligation on States under customary international law to arrest and prosecute any person, other than the Head of State, who is alleged to have committed certain crimes recognised under customary international law. Accordingly, in the circumstances presented by this appeal **Article 98 (1)** would preclude the ICC from proceeding with a request for arrest and surrender of President Al Bashir, if by doing so Kenya would be acting inconsistently with its obligations under international law with respect to the State or diplomatic immunity of President Al Bashir unless, of course Sudan was to waive the immunity of its President.

In considering this question, we bear in mind that diplomatic and consular agents as well as certain holders of high-ranking office in a State, such as the Head of State, or Head of Government possess immunity from criminal process or jurisdiction of other States in relation only to acts performed in their official capacity or on account of personal immunities. The former is what is referred to in international law as 'immunity *ratione materiae'* or 'functional immunity' and the latter, 'immunity *ratione personae'* or 'personal immunity'. Immunity *ratione materiae* is an immunity that attaches to the official act rather than the status of the official. It constitutes a substantive defence in international law to the effect that the individual official is not to be held legally responsible for acts which are, in effect, those of the State. Under customary international law and certain treaties the Head of State and diplomats accredited to a foreign State possess personal immunities *(ratione personae)* from the jurisdiction of foreign States.

The predominant justification for both categories of immunities is that they ensure the smooth conduct of international relations. They are essential for the maintenance of a system of peaceful cooperation and co-

existence among States. The International Court of Justice (ICJ) explained this rationale in **United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)**, 1979 I.C.J. 7 (Order of

Dec. 15) thus;

> **"There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies."**

Whilst it is commonly accepted that State officials are immune in certain circumstances from the criminal jurisdiction of foreign States or international courts or tribunals, there has been uncertainty about the extent of those immunities where the official is accused of committing international crimes.

We take the view ourselves that State immunity is accorded only to sovereign acts and is not available if the acts in question amount to international crimes. Crimes recognized as such under customary international law, for the most part, constitute violations of *jus cogens* norms and therefore cannot constitute sovereign acts. Because *jus cogens* norms supersede all other norms, they overcome all inconsistent rules of international law providing for immunity. Andrea Bianchi in his article ***"Immunity versus Human Rights,"*** European Journal of International Law 10, No. 2 (1999): 237-78, 265 postulates that:

> **"As a matter of international law, there is no doubt that *jus cogens* norms, because of their higher status, must prevail over other international rules, including jurisdictional immunities".**

This argument received support in **Siderman de Blake v. Republic of Argentina,** 965 F 2d 699, at 718 (CA 9th Cir. 1992) where the United States Court of Appeals, Ninth Circuit, said that;

> "**This argument begins from the principle that *jus cogens* norms 'enjoy the highest status within international law,' and thus 'prevail over and invalidate … other rules of international law in conflict with them'… since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*. In short, … when a State violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the State amenable to suit".**

When a State engages in acts which are contrary to *jus cogens* norms, then by implication it waives any rights to immunity for stepping out of the sphere of sovereignty. See **Prefecture of Voiotia v. Federal Republic of Germany** , Case No 11/2000 (4 May 2000) where the Supreme Court of Greece confirmed the decision of the Court of First Instance that acts which violate *jus cogens* norms do not qualify as sovereign acts. For that reason the court made an award of approximately 30 million dollars in damages for the atrocities and murder of nearly 300 civilians committed by German forces in the Greek village of Distomo. The two courts also held that Germany had, by implication waived its immunity by committing such acts.

A State which carries out or permits torture, war crimes, crimes against humanity, the crime of genocide, and the crime of aggression is in violation of customary international law. Under **Article IV** of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention):

> **"Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".**

We have no doubt that an exception to immunity exists in cases where the individual is responsible for crimes against humanity. In the result the State official, including a Head of State, is personally responsible for his crimes because customary international law is based on the appreciation that certain acts amounting to international crimes of individuals cannot be considered as legitimate performance of official functions of the State. See the decision of the ICTY Trial Chamber in the **Furundzija** case, No. IT-95-17/1-T (10 December 1998) where torture was classified as a crime against humanity.

This principle was first incorporated in **Article 227** of the Versailles Treaty, which provides for penalties for offences against the sanctity of treaties, whereby it Stated that: '**the Allied Powers publicly arraign William II of Hohenzollern, the former German Emperor, for a supreme offence against international morality and the sanctity of treaties'.** This principle was followed by the Charter of the Nuremberg Tribunal (IMT Charter), the UN General Assembly and the Genocide Convention of 1948. See also **Article 7** of the ICTY Statute, **Article 6** of the ICTR Statute, **Article 27** of the ICC Statute and the Draft Code of Crimes against the Peace and Security of Mankind. For the purpose of this appeal, **section 27** of the International Crimes Act is instructive. It stipulates in equally similar language to **Article 27** of the Rome Statute that;

> **"27. (1) The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for—**
>
> > **(a) refusing or postponing the execution of a request for surrender or other assistance by the ICC;**
> >
> > **(b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or**
> >
> > **(c) holding that a person is not obliged to provide the assistance sought in a request by the ICC.**
>
> **(2) Subsection (1) shall have effect subject to sections 62 and 115, but notwithstanding any other enactment or rule of law".**

Subject to the provisions of **sections 62** and **115** aforesaid, by this enactment, Kenya as a State acknowledged that the existence of any form of immunity attaching to the official capacity of any person whose arrest is sought by ICC would not be a ground for refusing to execute a request sought by the ICC for surrender or other assistance, including an arrest warrant, or for insisting that a person is ineligible for surrender, transfer, or removal to the ICC. We were not told that Kenya has consulted the ICC in terms of **sections 62** and **115** on any form of conflict regarding its obligations to Sudan or any other State for the ICC to determine whether or not **Article 98** of the Rome Statute applies to the request for execution of the arrest warrant and surrender.

The only argument made before us is the existence of diplomatic relations between Kenya and Sudan. We are, of course aware that that relationship dates back many decades. The two countries maintain embassies in their respective capital cities. Indeed Kenya played a focal role during the Sudanese conflict, taking in countless refugees both from what is now South Sudan and from Darfur, with tens of thousands of Sudanese migrants living in the vast Kakuma Refugee camp.

It is no wonder that it was Kenya that oversaw a ceasefire deal signed between South Sudan and Sudan that eventually led to the independence of the former and the end of the second Sudanese civil war.

Kenya clearly found itself in a rare geopolitical predicament when it was requested by the ICC to effect the arrest and surrender of President Al Bashir. The choice was between cooperating with the ICC and remaining true to the Africa Union resolution not to cooperate with ICC. In view of the law that we have set out in this judgment, the former was the only tenable legal choice for Kenya; that is, to demonstrate its commitment to champion the fight on global impunity. But by inviting President Al Bashir to the inauguration of a new Constitution, which ironically has one of the most progressive Bill of Rights in the region, the Government of Kenya itself acted with impunity and joined States like Malawi, Djibouti, Chad, Uganda and the Democratic Republic of Congo (See ICC Pre- Trial Chamber II decision No. ICC-02/05-01/09 dated 12th December 2011, 11th July 2016, 13th December 2011, 11th July 2016 and 9th April 2014 respectively) against which the ICC has issued non-cooperation decisions and reported their failure to arrest President Al Bashir to the Security Council as well as the Assembly of States Parties.

Article 2 (5) of the Constitution of Kenya declares that the general rules of international law are now part

of the law of Kenya. "General rules of international law," to borrow from the decision of this Court in **Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others,** CA No. 218 of 2014:

> **"116. …. are those rules that are peremptory principles and are norms of international law; they are the customary rules of international law or *jus cogens* in international law, they are those rules from which no derogation is permitted; they are globally accepted standards of behaviour; they are rules and principles that are applicable to a large number of States on the basis of either customary international law or multilateral treaties; the general rules of international law are not based on the consent of the State but are obligatory upon State and non-State actors on the basis of customary international law and peremptory norms *(jus cogens).*"** (Our emphasis).

The **Mitu-Bell** case (supra) and **Kituo cha Sheria & 7 Others v. Attorney General,** HCP Nos. 19 and 115 of 2013 have both confirmed that "general rules of international law" is the same thing as "customary international law".

We must emphasise that those general rules do not depend on consent of or ratification by States and no State or treaty can contract contrary to or out of them. **Article 53** of the Vienna Convention on the Law of Treaties is specific that;

> **"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character**".

Some of the largely accepted examples of those norms from which no derogation is permitted but are obligatory equally upon State and non-State actors include prohibition of; genocide, crimes against humanity, war crimes torture, piracy and slavery.

The crimes President Al Bashir is alleged to have committed are those in the category enumerated above and attract universal jurisdiction by any State in whose territory he may be found in accordance with the prevailing laws to arrest him. Apart from treaty obligations that we have discussed in the previous paragraphs, customary international law creates an obligation on all States, including Kenya, to arrest or prosecute him for those crimes. In **Prosecutor v. Furundžija,** (supra) at para. 156, the ICTY held that;

> **"At the individual level, that is, of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad".**

In **Pinochet** (No. 3) (supra), at 109 both Lords Browne-Wilkinson and Millett emphasised that a Head of State would only have immunity with regard to his acts as a Head of State but not with regard to acts which fall outside his role as Head of State; and that where a Head of State does acts within the remit of his office, he may be treated as the State itself and be entitled to the same immunity. According to two law Lords a Head of State will lose immunity in two instances, if he ceases to be a Head of State or if performs the functions of that office outside his capacity as Head of State.

Though generally speaking international law does not directly impose obligations on individuals personally, it has become an accepted part of international law that individuals who commit international crimes are accountable to the world for them; and that as a matter of general customary international law it is no longer in doubt that a Head of State will personally be liable if there is sufficient evidence that he

authorised or perpetrated those internationally recognised serious crimes alluded to above. It must be borne in mind that the very purpose of international criminal responsibility is to separate the responsibility of individuals from that of the State; and that the purpose of the ICC, and indeed of all other international criminal tribunals and courts is, as Stated in the preambles of the laws establishing them, to end impunity for international crimes and to punish perpetrators of atrocities, wherever they may occur. In this regard the judgment of the Nuremberg IMT in the case of **France and Others V. Göring (Hermann) and Others** (1946) 22 IMT 203 is instructive. It reminds us that;

> **"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced… The principle of international law which, under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law"**.

Indeed no circumstances can be invoked to justify torture, genocide, crimes against humanity, wars of aggression, piracy, trafficking in human beings or slavery. And more importantly, it cannot be a part of the function of a Head of State to commit these crimes. That is why **Articles 5** and **7** of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment creates obligation to extradite and exercise universal jurisdiction over persons responsible for these international crimes irrespective of their status or where the crime was committed. See similar provisions in **Article 9** of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind.

Apart from the aspect of customary international law alluded to in the preceding paragraphs, the ICC, in this instant situation and in accordance with **Article 13** of the Rome Statute, derived its jurisdiction over the war crimes in Darfur from the U.N. Security Council. There was nothing unusual with this because historically, international criminal courts or tribunals have acquired jurisdictions differently. For instance, the tribunals for the former Yugoslavia and Rwanda based their jurisdiction on Security Council powers under Chapter VII. The Tokyo Tribunal after World War II, on the other hand based its jurisdiction on Japan's consent, while the Nuremberg Tribunal drew its jurisdiction on the consent of the Allies.

Article 13(b) of the Rome Statute vests in the ICC the jurisdiction with respect to crimes of genocide; crimes against humanity; war crimes; and crime of aggression if, among other things;

> **"(a) ……**
>
> **(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."**

In March 2005 the UN Security Council by Resolution 1593 (2005) determined that the situation in Darfur, Sudan constituted a threat to international peace and security and referred it to the ICC. In doing so it decided that;

> **"2……. the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully."** (Our emphasis).

The plain and unambiguous mandatory language of the resolution- "**shall cooperate fully"**- compels Sudan, though not a State Party to the Statute, to cooperate fully with the ICC. On the other hand, and while stressing that non-State parties, (other than Sudan), have no obligation under the Statute, the Security Council-"**urges all"**- of them to cooperate fully with the Court.

The obligation imposed on Sudan by the Security Council must be traced to Sudan's membership of the United Nations and the fact that it has ratified a number of UN Human Rights Conventions by which it

has made binding international commitments to adhere to the standards and values laid down in these universal human rights documents. As a signatory to the UN Charter on 12th November 1956, Sudan undertook to uphold, promote and to act in accordance with the principles espoused in **Article 2** of the Charter. Among those principles are; to settle international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; and to give the United Nations every assistance in any action it takes. It consented to the obligation to comply with the provisions of the Charter, including decisions and resolutions of the Security Council made pursuant to Chapter VII.

Article 103 of the Charter reaffirms the primacy of the Charter in situations of conflict of obligations as follows;

> **"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"**.

Where the Security Council refers a situation to the ICC the territoriality and nationality regimes that would ordinarily restrict the Court do not apply. The reference enables the ICC to exercise jurisdiction over States that have not ratified the Rome Statute.

We agree, in this regard, with the holding by both the Pre-Trial Chamber of the ICC in **The Prosecutor v. Omar Hassan Ahmad Al Bashir**, ICC-02/05-01/09-302 made on 06 July 2017 and the South African Supreme Court of Appeal in the **Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others** [2016] ZASCA 17; 2016 (3) SA 317 (SCA), both of which confirmed that, one, sitting heads of States would ordinarily enjoy immunity under customary international law and, two, that, in principle, the ICC may not request a State party to arrest and surrender a country's head of a State not party to the Rome Statute without first obtaining a waiver of immunity. But the two courts reached the conclusion that, in the case of President Al Bashir, the "special regime" under the provisions of the U.N. Charter, to which both Sudan and South Africa (and even Kenya) are signatories were invoked to clothe ICC with jurisdiction.

Under **Article 25** of the Charter the members agreed **"… to accept and carry out the decisions of the Security Council in accordance with the present Charter"**. Thus, it can be argued that the Security Council, acting under Chapter VII of the Charter, effectively removed immunity with respect to President Al Bashir. This is an exception to the general rule that treaties may only create obligations for States that are party to that treaty and a third State cannot be bound by the provisions of a treaty without its express consent.

Under President Al-Bashir, Sudan signed the Rome Statute on 8 September 2000 but has not ratified it to this date. In a communication received on 27th August 2008, the Government of Sudan informed the UN Secretary General, as the depository of the Rome Statute, of the following:

> **"....., Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000." (See Declarations and Reservations to the Rome Statute, United Nations Treaty Collection)".**

Technically, therefore Sudan is not a State member to the Rome Statute because a mere signature without ratification, acceptance or approval does not establish the consent of a State to be bound. But under **Articles 10** and **18** of the Vienna Convention on the Law of Treaties 1969 the signature is significant as it creates an obligation on the signing State to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.

The Security Council having itself referred the Darfur situation to the ICC, it follows that the provisions of the Rome Statute, including the waiver of immunity set out in **Article 27 (2)** effectively applied to Sudan. With the referral Sudan would be treated as if it were a State party.

Article 87(5) of the Rome Statute recognises that a non-State party to the Rome Statute may be subject to

an obligation to cooperate with the ICC on an *'appropriate basis'*. The appropriate basis may include a resolution adopted by the Security Council. Thus, as we have pointed out, unlike States parties, the basis of the Government of Sudan's obligation to cooperate with the ICC is Resolution 1593. It is required to fully comply with the ICC's request for the execution of the arrest warrant and surrender. This is however, highly unlikely, given Sudan's previous failure to cooperate on the basis of its immunity.

Kenya, for its part, and this is the crux of this ground of appeal, is in the category of States parties to the Rome Statute, bound by both the Rome Statute and its own International Crimes Act. The arrest warrant and a request for cooperation were transmitted to all States parties. There is no dispute of the fact that indeed Kenya received the notification of the warrant of arrest. All States parties to the Rome Statute are by **Articles 59(1) 86** and **89(1)** under a general obligation to cooperate with the ICC: to arrest indicted individuals found within their territories: and a specific obligation to arrest and surrender an individual where a State has received a request to do so.

For Kenya the Rome Statute, which is a higher norm than the resolution, and customary international law imposed an overriding obligation to cooperate. Under customary international law, the UN Charter, the Rome Statute and the International Crimes Act, and as a UN Member State it was legitimate for Kenya to disregard President Al Bashir's immunity and execute the ICC's request for cooperation by arresting him, because under the concept of *pacta sunt servanda* embodied in **Article 26** of the Vienna Convention on the Law of Treaties, **"[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."**

Our own **Article 143(4)** of the Constitution supports the position of waiver of immunity for a crime for which the President may be prosecuted under any treaty to which Kenya is party, and which prohibits such immunity.

We cite this Article to emphasise, for the final time, and to conclude this ground, that Kenya was and is bound by its international obligations to cooperate with the ICC to execute the original warrant issued by the ICC for the arrest of President Al Bashir when he visited Kenya on 27th August, 2010 and in future should he return to Kenya if the warrants are still in force.

In so far as the orders granting provisional arrest and the one directing the Minister to effect the warrant are concerned, we readily agree that the appeal must succeed as there was no jurisdiction upon which to issue them. True, after President Al Bashir left Kenya, no present effect could be given to the order that the Government takes steps to arrest him upon coming to Kenya for the Summit that was cancelled. And, President Al-Bashir is not in Kenya today.

But that is not to say, however, that this appeal is moot. It would have been moot if the issues it raises had no practical effect or result. That is not the case with this appeal. In it, we have delineated the obligation of the Government of Kenya as regards the warrants issued by the ICC and suggested that, unless they are rescinded by the ICC, the warrants remain outstanding and can still be executed by Kenya. We have also declared that the Government's failure to effect the arrest of President Al Bashir breached relevant international instruments, our own Constitution and legislation. Those are important perspectives.

In the result, we allow the appeal with those expressed views in mind. Given its nature, we make no orders as to costs of the appeal.

Dated and delivered at Nairobi this 16th day of February, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

……..

JUDGE OF APPEAL

A.K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR