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 shall immediately take steps to arrest the person in question in accordance with its laws 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 for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9".**

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 "**other than a request for provisional arrest referred to in section 28 (2)**" 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. Irrelevance of official capacity**
>
> **1. This Statute shall apply equally to all persons 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 shall in no case exempt a person 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, whether under national or international law, 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".**