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**

**.....**
**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***