UNIVERSAL JURISDICTION AND SOUTH AFRICA'S PERSPECTIVE ON THE INVESTIGATION OF INTERNATIONAL CRIMES

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INTRODUCTION

Universal jurisdiction is an important yet contentious jurisdictional principle in international law, despite more than 100 states worldwide having universal jurisdiction legislation (Amnesty International *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World* (2012) 1–2). The principle has dominated discussions at both the international and African regional levels, with many voicing practical, political and policy concerns with regard to its application.

At the African regional level, the African Union ('AU') has addressed the principle in some of its resolutions. On the one hand, the AU has recognised universal jurisdiction as an international law principle that seeks 'to ensure that individuals who commit grave offences such as war crimes and crimes

against humanity do not do so with impunity and are brought to justice, which is in line with Article 4(h) of the Constitutive Act of the African Union [of 2002]' (see African Union *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction* 30 June–1 July 2008, Assembly/AU/14(XI) para 3). Article 4*(h)* of the Constitutive Act provides for the AU's right 'to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity'. This is listed as one of the key principles of the AU. On the other hand, the AU has raised concerns regarding the content, application and use of the concept. This relates particularly, as the AU avers, to its use by European States to indict African leaders. The AU believes that this has the effect of destabilising or impeding the political and socio-economic progress of African States and is a breach of their territorial integrity and sovereignty (Assembly/AU/14(XI) op cit para 5). Consequently, the AU has resolved that it will not execute warrants of arrests issued on the basis of the abuse of the principle of universal jurisdiction (see African Union *Decision on the Abuse of the Principle of Universal Jurisdiction* 15–16 July 2012 Doc EX.CL/731(XXI) para 6; see also Assembly/AU/14(XI) op cit para 5). It should however be noted that '[s]elective enforcement . . . [is] a problem in relation to international crimes, whatever the principle of jurisdiction invoked' (Robert Cryer, Håkan Friman, Darryl Robinson & Elizabeth Wilmshurst *An Introduction to International Criminal Law and Procedure* 2 ed (2010) 62). Selective enforcement is therefore not unique to the exercise of universal jurisdiction.

At the South African level, the application of universal jurisdiction came to the forefront in a high court case which stemmed from the government's failure to investigate acts of torture as crimes against humanity committed by Zimbabwean officials (*Southern African Litigation Centre and Another v National Director of Public Prosecutions & others* 2012 (10) BCLR 1089 (GNP), hereafter 'the *SALC* case'). The government had shown an unwillingness to institute an investigation into these acts. Hence, the court had to review the government's decision in this regard (para 1). This case reflects, through the lens of the court, South Africa's perspective on the exercise of universal jurisdiction, particularly in relation to the investigation of international crimes.

South Africa's perspective on the exercise of universal jurisdiction can also be seen through the Implementation of the Rome Statute Act 27 of 2002 ('the ICC Act'). This Act was at the core of the *SALC* case and will be discussed later in this note. Another piece of legislation that is a source on South Africa's perspective on universal jurisdiction is the Implementation of the Geneva Conventions Act 8 of 2012 ('the Geneva Conventions Act' or 'the GCA'). The Act permits the exercise of universal jurisdiction over breaches of the Geneva Conventions of 1949 and Protocols of 1977. These treaties apply in situations of armed conflict. The GCA was passed into law after the *SALC* judgment. Of relevance also is that on 29 July 2013 the South African Government formally promulgated the Prevention and Combating

of Torture of Persons Act 13 of 2013 ('the Torture Act'), with provisions that permit the exercise of universal jurisdiction over acts of torture. I will highlight below, albeit briefly, some relevant provisions in the GCA and the Torture Act that relate to the exercise of universal jurisdiction by South Africa.

It should be noted that in relation to the sources from which South Africa's perspective on universal jurisdiction can be derived, I limit myself to legislation and relevant jurisprudence, which are in my view clearer, precise and more credible in terms of reflecting the intentions of the State and 'binding' obligations in the exercise of universal jurisdiction. I therefore do not consider statements by government officials on the question of universal jurisdiction, though such statements may reflect state practice or a sense of state obligation, subject to the context in which they were made, including the nature and intention of the official making the statement. (John Dugard *International Law: A South African Perspective* 4 ed (2011) 26 and 36 acknowledges that evidence of state practice may be found in policy statements of government, and a sense of obligation, subject to certain conditions, may also be found in them.)

The relevant South African jurisprudence — the decision in the *SALC* case — draws a clear distinction between investigation and prosecution in the exercise of universal jurisdiction. A crucial issue in the case was whether an investigation can be initiated while those accused of committing the crime in question are not present in South Africa. This issue is important as it is linked to the controversial issue of the exercise of universal jurisdiction in absentia. As a result, I limit myself to the question of investigating international crimes in the exercise of universal jurisdiction in examining the case.

Before analysing the case, and in order to understand the issue in context, it is important to locate the principle of universal jurisdiction within the broader concept of jurisdiction, to consider its legal meaning and rationale, and to consider how states have gone about transforming it into an operative legal norm.

THE CONTEXT, MEANING, RATIONALE AND APPLICATION OF UNIVERSAL JURISDICTION

Universal jurisdiction is located within the broader concept of jurisdiction, which in turn refers to a state's power to regulate its affairs or assert sovereignty subject to its laws (Cryer et al op cit at 43). Two distinct yet intertwined arms of jurisdiction can be distinguished: prescriptive and enforcement jurisdiction (which are explained in Roger O'Keefe 'Universal jurisdiction: Clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735). In the criminal context, prescriptive jurisdiction denotes 'a state's authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling' (ibid at 736–7). This indicates the state's authority to criminalise conduct and to

punish persons that have committed the criminalised conduct. Enforcement jurisdiction denotes 'a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts' (ibid at 740). While states do not have enforcement jurisdiction outside their territories, prescriptive jurisdiction can be exercised extraterritorially. Additionally, universal jurisdiction is seen as a 'species' of prescriptive jurisdiction.

Generally, states can exercise jurisdiction over acts, including acts that occur outside of their territory, as long as there is no specific rule that prevents them from doing so (see *Lotus* (*France v Turkey*) Judgment No 9, 1927 PCIJ Reports Series A No 10 at 18–19). Traditionally, however, a basic principle of jurisdiction is that a state can exercise jurisdiction where a crime is committed within the state's territory (the territoriality principle); where a crime is committed by its national (the active personality principle); where the victim is its national (the passive personality principle); and fourthly where the state wants to protect its national security or interests (the protective principle) (see Ilias Bantekas *International Criminal Law* 4 ed (2010) 332 and 338–44). These four principles require the establishment of a link with the crime, the victim or the perpetrator which can either be territorial or personal. The fifth basis for the exercise of jurisdiction, however, does not require the establishment of such a link. This is referred to as the universality principle. Any state can exercise jurisdiction over crimes that fall under the universality principle. States have understood and incorporated the principle of universal jurisdiction in different ways, resulting in some uncertainties as to whether there is an agreed definition for the concept. As Van Den Wyngaert J pointed out in her dissenting opinion in the case of *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v *Belgium*) 2002 ICJ Reports 3, commencing at page 137 paras 44–5):

> 'There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways. . . . Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning and its legal status under international law.'

(The *Arrest Warrant* case concerned a warrant of arrest issued by a Belgian Court for the arrest of a Foreign Minister of the Democratic Republic of Congo ('DRC') for crimes against humanity and breaches of the Geneva Conventions. While the acts were committed in the DRC, Belgian national law gave jurisdiction to its courts to try such crimes irrespective of where they had been committed. The DRC brought a suit against Belgium in the ICJ arguing that Belgium acted unlawfully in asserting universal jurisdiction and ignoring the immunity of the minister — a suit which was ultimately successful. While the main judgment in this case does not engage with the concept of universal jurisdiction, the separate and dissenting opinions do, and these will be referred to in this note where relevant.)

Notwithstanding the ICJ's observation above, there have been efforts towards clarifying its meaning or at least providing a working definition of

the concept. A group of experts and legal scholars' efforts to clarify the concept resulted in the Princeton Principles on Universal Jurisdiction of 2001 (see Stephen Macedo (ed) *The Princeton Principles on Universal Jurisdiction* (2001), available at *http://lapa.princeton.edu/hosteddocs/unive_jur.pdf*). Principle 1(1) defines the concept as follows:

> '[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.'

Subsequently, in a 2005 resolution, the *Institut de Droit International* defined the concept as follows (para 1):

> 'Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.'

Accordingly, universal jurisdiction has been defined in legal writing as 'jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State' (see for example Cryer et al op cit at 50–1). The concept of universal jurisdiction is a marked departure from the usual rules of criminal jurisdiction.

While there could be some uncertainties regarding its definition, there is certainty regarding its legal rationale. The principle is justified on 'the basis of the severity of the crime and the undesirable consequences of impunity' (Beth van Schaack & Ronld C Slye *International Criminal Law and its Enforcement: Cases and Materials* 2 ed (2010) 113). In her dissenting opinion in the *Arrest Warrant* case, Van Den Wyngaert J confirmed this by stating that '[d]espite uncertainties that may exist concerning the definition of universal jurisdiction', the legal rationale for its exercise is 'very clear' ((supra) para 46). She stated further that 'the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its raison d'être is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries' (ibid para 46). The rationale behind the principle is therefore that 'some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or sacrosanct nature of national frontiers' (see Henry Kissinger 'The pitfalls of universal jurisdiction' (2001) 80 *Foreign Affairs* 86: a piece which raises concerns regarding the exercise of this universal jurisdiction). In the foreword to the 2001 Princeton Principles (op cit at 16), Mary Robinson, then United Nations High Commissioner for Human Rights, reiterates and fortifies Kissinger's words (emphasis supplied):

> 'The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled — *and even obliged* — to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim.'

Viewing this as an obligation is in line with the principle recognised under various international instruments that states have an obligation to 'extradite or prosecute', which in turn requires the concerned state to extend its criminal jurisdiction where it chooses to prosecute (*Arrest Warrant* judgment (supra) para 59).

Universal jurisdiction is based mainly on customary international law, but can also be established under multilateral treaties. The principle does not apply to all crimes; and while it applies to a range of international crimes, its application for war crimes, genocide and crimes against humanity is widely accepted (William A Schabas *An Introduction to the International Criminal Court* 4 ed (2011) 64). Though these crimes are core crimes in the Statute of the International Criminal Court of 1998 ('the Rome Statute'), the Statute itself contains no explicit provision requiring states to exercise universal jurisdiction. Notwithstanding the Rome Statute's silence on universal jurisdiction, in the process of domesticating the Statute (that is, translating the Statute into domestic law), states parties to the Statute have introduced international crimes in their domestic law — thus adopting universal jurisdiction. South Africa is an example of such a state. Following its ratification of the Rome Statute on 27 September 2000, South Africa proceeded to domesticate it through the ICC Act in August 2002. This Act, as I shall explain below, provides one of the legal bases for South Africa's exercise of universal jurisdiction. South Africa has also ratified the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment of 1984 ('the CAT'), under which it can exercise universal jurisdiction over acts of torture (see arts 5, 6 and 7).

The principle of universal jurisdiction does not automatically become 'an operative legal norm': that is, while states may exercise universal jurisdiction over international crimes, this is subject to a number of prerequisites. Xavier Philippe ('The principles of universal jurisdiction and complementarity: How do the two principles intermesh' (2006) 88 *International Review of the Red Cross* 379) outlines three essential steps to the exercise of universal jurisdiction: 'the existence of a specific ground for universal jurisdiction; a sufficiently clear definition of the offence and its constitutive elements; and a national means of enforcement'. States, therefore, have the jurisdiction to define and punish certain offences recognised by the international community of nations as being of universal concern, and to adjudicate universal and non-territorial crimes.

Based on limitations on its exercise, two categories of universal jurisdiction can be distinguished: 'absolute' (also referred to as pure, broad, extensive or true) and conditional (also referred to as narrow or strict) universal jurisdiction. Absolute universal jurisdiction allows for the exercise of jurisdiction in absentia. This implies that states can investigate and prosecute persons accused of serious international crimes even if the accused is not within the territory of the state concerned (Charles C Jalloh 'Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction' *Legal Studies Research Paper Series,*

Working Paper No 2009–38 (2010) 8; see also Philippe op cit at 379–80). There are, however, practical problems with the implementation of this form of jurisdiction, as certain steps such as punishment itself would be difficult to enforce if the accused is not present within the state concerned. In the *Arrest Warrant* case ((supra), commencing at page 200), Bula-Bula J, in a separate opinion, found the exercise of absolute universal jurisdiction to be contrary to international law, stating that '[t]he idea that a State could have the legal power to try offences committed abroad, by foreigners against foreigners, while the suspect himself is on foreign territory, runs counter to the very notion of international law' (para 74 of the opinion).

Conditional universal jurisdiction, on the other hand, subjects its exercise to the presence of an accused within the territory of the state concerned, as the accused has to be available for trial. It places a condition on the use of universal jurisdiction to prosecute a person accused of international crimes. Thus, if a person accused of a serious international crime is present within the territory of a state, that state has the right (as well as an obligation) to prosecute the person (Jalloh op cit at 7; Philippe op cit at 379).

Despite the existence of the abovementioned categories, the practice of many states has been to limit their use of universal jurisdiction, particularly in relation to prosecution, to cases where the accused is present within their territory. Thus, the distinction between absolute and conditional universal jurisdiction, at a conceptual level, is arguably non-existent. In its 2005 resolution, the *Institut de Droit International* attempted to find a middle ground between absolute and conditional universal jurisdiction, stating (in para 3(b) that:

> 'Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender.'

This implies that the exercise of universal jurisdiction by states includes investigative acts in absentia and requests for extradition. In other words, '*investigative acts* and *requests for extradition* are permissible as a form of universal jurisdiction over crimes under international law' (Claus Kreb 'Universal jurisdiction over international crimes and the *Institut de Droit International*' (2006) 4 *Journal of International Criminal Justice* 561 at 576–8). This part of the resolution speaks to the question whether the principle of universal jurisdiction allows for the commencement of an investigation where an accused is not within the territory of the state concerned. This question was at the heart of the *SALC* case, as will be seen below. The case raised the issue of whether domestic proceedings can be initiated, in the form of an investigation, relating to persons accused of an international crime who are not present in South Africa.

SOUTH AFRICA'S PERSPECTIVE ON UNIVERSAL JURISDICTION

Universal jurisdiction in domestic law

The ICC Act

This part of my note does not endeavour to discuss the ICC Act in its entirety. My aim is to highlight provisions that are relevant to the discussion on the exercise of universal jurisdiction by South Africa, particularly in relation to the investigation of international crimes. My discussion of the ICC Act is more detailed than the GCA and Torture Act, as the ICC Act was at the core of the *SALC* case.

The ICC Act is South Africa's first domestic legislation on the implementation of international crimes — particularly crimes against humanity or war crimes. These crimes could not be prosecuted domestically prior to the Act because of the absence of legislation. The aim of the ICC Act is, therefore, to provide a framework for the effective implementation of the Rome Statute in South Africa; to give effect to South Africa's obligation under the Rome Statute; to make provision for crimes against humanity, the crime of genocide and war crimes; to make provision for the prosecution of those accused of committing these crimes within South Africa and beyond; and to ensure South Africa's co-operation with the ICC 'in the investigation and prosecution' of those accused of committing these crimes where South Africa itself does not prosecute the persons (s 3).

It is commonly understood that universal jurisdiction can be better enforced through the principle of complementarity. Accordingly, the ICC Act recognises this principle as it is enshrined in the Rome Statute. The Rome Statute states that the ICC 'shall be complementary to national criminal jurisdictions' (Preamble; art 1). The principle of complementarity is 'a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primary jurisdiction' and seeks to strike a balance 'between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction' (Philippe op cit at 380). In this regard, the principle implies that the primary responsibility for the prosecution of the crimes in the Rome Statute rests with national courts, failing which the ICC can assume jurisdiction. In order for national courts to carry out this primary responsibility, the Rome Statute lays down some guiding norms on drafting national legislation on jurisdiction. For jurisdiction to pass from national courts to the ICC, the crimes must be those contained in the Rome Statute, and the state that has jurisdiction must 'be unwilling or unable genuinely to carry out the investigation or prosecution' (Rome Statute, art 17). So if South Africa has jurisdiction but fails to exercise it and jurisdiction passes to the ICC, South Africa is still under an obligation to assist and co-operate with the ICC, including in relation to requests for assistance with 'arrest and surrender' (ICC Act, ss 8–32; see also the Rome Statute, arts 86 and 87(7)).

The ICC Act clearly defines when South Africa can assume jurisdiction over the listed international crimes — crimes against humanity, crime of genocide and war crimes. Section 4(3) of the ICC Act provides that a person who commits any of the contemplated crimes outside of South Africa 'is deemed to have committed that crime in the territory of the Republic' (a distinctive feature of the Act); and South African courts can exercise jurisdiction over persons accused of committing such crimes, where:

'*(a)* that person is a South African citizen; or
(b) that person is not a South African citizen but is ordinarily resident in the Republic; or
(c) that person, after the commission of the crime, is present in the territory of the Republic; or
(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.'

Section 4 of the ICC Act thus establishes various jurisdictional grounds on the basis of the nationality of the accused or victim, the ordinary residence of the accused or the victim, and the presence of the accused in South Africa. It is evident that these bases go beyond the traditional grounds of nationality, territoriality and passive personality to include universal jurisdiction. As the court stated in the *SALC* case (para 13), the purpose of deeming all crimes under the ICC Act that are committed beyond South Africa to have been committed in the country, is 'to give effect to the principle of universal jurisdiction, and to confer jurisdiction on domestic courts for international crimes'. The ICC Act has thus been identified as granting 'relatively expansive jurisdiction' to courts in South Africa in relation to the listed international crimes (Lee Stone 'Implementation of the Rome Statute in South Africa' in Chacha Murungu & Japhet Biegon (eds) *Prosecuting International Crimes in Africa* (2011) 311). However, it is evident from s 4(3)*(c)* that South Africa adopts 'conditional' universal jurisdiction in relation to the prosecution of persons that have committed crimes under the ICC Act. The exercise of 'enforcement' jurisdiction is conditioned on the presence of the accused in South Africa. The problems with exercising universal jurisdiction in absentia in the prosecution of accused persons will not arise in the South African context if the ICC Act is complied with, since this is explicitly prohibited by the Act.

Furthermore, the ICC Act is in harmony with the Rome Statute in dealing with the question of immunities and privileges of certain individuals. Section 4(2) of the ICC Act diverges from customary international law, but rightly so in this context, by excluding immunity for certain government officials or for their status to be used as a basis for the reduction of their sentence following conviction. These persons are: 'a head of state or government, a member of a government or parliament, an elected representative or a government official'. The subsection also excludes the defence of superior orders for any 'member of a security service or armed force' that is 'under an obligation to obey a manifestly unlawful order of a government or superior'.

Three further points should be noted in relation to the ICC Act. First, in accordance with the Rome Statute and relevant international law principles, s 5(2) of the ICC Act limits the crimes that can be prosecuted to those committed after the Act came into force. Secondly, s 5(1) of the Act places a procedural limitation requiring the 'consent' of the National Director of Public Prosecutions ('NDPP'). The NDPP is 'the head of the prosecuting authority' with 'the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings' (Constitution of the Republic of South Africa, 1996, s 179(1) and (2); National Prosecuting Authority Act 32 of 1998, s 20). In deciding whether or not to institute prosecution, the NDPP must take into consideration South Africa's obligations and the principle of complementarity (ICC Act, s 5(3)).

The procedural limitation stated above is not an absolute bar to prosecution however, as a decision by the NDPP not to prosecute 'does not preclude the prosecution of that person in the Court' (ICC Act, s 5(6)). It is also important to note that the consent requirement is limited to prosecution and not investigation. This distinction is important as it was at issue in the *SALC* case. Thirdly, in domesticating the Rome Statute, the ICC Act incorporates the Statute in whole. Also, art 1 of the Act states that the use of 'rules' therein speaks to 'the Rules of Procedure and Evidence referred to in Article 51 of the [Rome] Statute'. This implies that South African courts, in prosecuting international crimes under the ICC Act would have recourse to the procedural and substantive provisions in the Rome Statute (Anton Katz 'An Act of transformation: The incorporation of the Rome Statute of the ICC into national law in South Africa' (2003) 12(4) *African Security Review* 27).

The Geneva Conventions Act

The purpose of the GCA is to domesticate the Geneva Conventions and the Protocols additional to them, to ensure that South Africa complies with these treaties, and, of particular relevance, to 'ensure prevention of, and punishment for, breaches of the Conventions' (see the Preamble and s 2). The GCA does not deal with various jurisdictional grounds as is the case in the ICC Act but, similarly to s 4(3) of the ICC Act, an offence under the GCA that is committed outside of South Africa is deemed to have been committed within South Africa. The relevant jurisdiction provision in this regard is s 7(1), which gives any court in South Africa jurisdiction to 'try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic'. In choosing an appropriate court to try the person, the Chief Justice and the NDPP have to be consulted (GCA, s 7(2)). Section 6(2) is also of relevance as it not only recognises offences committed 'within' South Africa but also those committed 'outside the borders' of the country. Annexed to the GCA are the relevant Geneva Conventions, which contain

provisions that require the exercise of universal jurisdiction by state parties and speak to the immediate investigation of breaches of the Conventions.

The Torture Act

The Torture Act mirrors the ICC Act in its approach in that it not only allows for universal jurisdiction but also identifies similar jurisdictional grounds. The aims of the Act are, amongst others, to give effect to South Africa's obligations with regards to the crime of torture in terms of the CAT, and to 'provide for the prosecution of persons who commit' acts of torture (s 2(1)). Jurisdiction over such acts can be exercised on the basis of the nationality of the accused or victim, the ordinary residence of the accused or the victim, and the presence of the accused in the territory or territorial waters of South Africa or 'on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered' in South Africa (s 6(1)). The provision also stipulates that an offence committed outside South Africa is deemed to have been committed in the country, 'regardless of whether or not the act constitutes an offence at the place of its commission' (s 6(2)). The consent of the NDPP is required before an accused can be prosecuted; and the NDDP is also responsible for choosing the court where the accused will be prosecuted (s 6(2)).

INVESTIGATING INTERNATIONAL CRIMES: THE *SALC* CASE

As I have indicated above, the case stemmed from a request to the high court to review the decision of the government not to investigate crimes against humanity (torture in particular) that had allegedly occurred in Zimbabwe (para 1(1)). The ICC Act and the Promotion of Administrative Justice Act 3 of 2000 formed the basis of the application to the court (para 1(2)). For present purposes, my focus will be on the ICC Act as well as the Rome Statute. While the question of locus standi and other issues were raised in the case, my focus in this section is on issues that speak to the question of initiating investigations under the principle of universal jurisdiction (for a general analysis of the case, see Christopher Gevers '*South Africa Litigation Centre & another v National Director of Public Prosecutions & others*' (2013) 130 *SALJ* 293).

The case was brought by two non-governmental organisations — the Southern African Litigation Centre and Zimbabwe Exiles Forum — on behalf of the victims. The respondents were the NDPP, the Head of the Priority Crimes Litigation Unit (PCLU), the Director-General of Justice and Constitutional Development and the National Commissioner of the South African Police Service.

The applicants had submitted a 'dossier' (which the court refers to as the 'torture docket' or 'docket') to the PCLU, which is tasked with investigating and prosecuting crimes in the ICC Act, and is part of the National Prosecuting Authority ('NPA'). The dossier detailed (a) evidence of crimes against humanity, specifically torture, committed by Zimbabwean officials

and (b) South Africa's obligations in this regard (para 1(10)). Crimes against humanity refer to acts 'committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack' (Rome Statute, art 7(1)). Torture is listed under both the Rome Statute and the ICC Act as a crime against humanity (Rome Statute, art 7(1)*(f)*; ICC Act, Schedule 1, part 2). The Rome Statute and the ICC Act define torture as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'.

Sections 3 and 4 of the ICC Act read together make crimes against humanity and therefore torture committed outside South Africa similarly crimes under the domestic law of South Africa, as I have indicated above. The issues before the court included, amongst others, the international and domestic obligations of South Africa to investigate and prosecute international crimes enshrined in the Rome Statute and the ICC Act; the obligation of the government in the investigation and the prosecution of the crimes; consistency of the request for investigation with the objects and purpose of the ICC Act; the sufficiency of the information provided by the applicants in justifying the initiation of an investigation; and the relevance of the considerations, including political considerations, relied upon by the respondents (para 1(6)).

The state's obligation to investigate international crimes

The applicants averred that South Africa has an obligation under the ICC Act to investigate the alleged crimes (para 1(9)). The applicants also averred that the National Prosecuting Authority (NPA), in line with its obligations under the ICC Act, should consider the dossier; 'take appropriate action'; and arrest the Zimbabwean officials whenever they visit South Africa (para 1(13)). It should be noted that while the acts complained of were committed in Zimbabwe, s 4(3) of the ICC Act deemed the acts to have been committed in South Africa. Hence, as the court pointed out, the torture victims 'are to be regarded as having been tortured in South Africa' (para 13). Accordingly, the court found that the protections in the South African Constitution extended to these victims; and to find differently, the court held, 'would make a mockery . . . of the universal jurisdiction principle', rendering the provisions of the ICC Act redundant (ibid). Other factors convinced the court. First, Zimbabwe is not a party to the Rome Statute and there was no evidence that Zimbabwe planned to investigate and prosecute the officials. Secondly, Zimbabwe has not ratified the CAT (which would have required it to investigate the alleged acts of torture) (see arts 5, 6 and 7). The primary jurisdiction of Zimbabwe therefore fell away since it had not exercised jurisdiction on the issue. This provided justification for South Africa to exercise jurisdiction in line with the ICC Act.

On the other hand, South Africa's policy on investigations is clear on the need to respect state sovereignty. Also, while investigations could be carried

out 'by way of a formal letter of request' or informally 'through Interpol channels, or whatever other informal methods' (para 1(15)), s 2 of the International Co-operation in Criminal Matters Act 75 of 1996 details only formal requests. This implies, arguably, that it prohibits travelling to another country for the purposes of investigation without that country's knowledge and consent. If South Africa follows formal channels of investigation and seeks assistance, such a request can be refused by Zimbabwe in terms of its Criminal Matters (Mutual Assistance) Act 13 of 1990.

Despite the allegations in the dossier, no investigation was initiated and the movements of the Zimbabwean officials accused of the crimes were not monitored (para 3.1). The respondents raised a number of concerns regarding South Africa's exercise of jurisdiction in the case. It was argued that investigations 'would be impractical and virtually impossible' (para 3). The South African Police Service ('SAPS'), in particular, was of the view that the 'anticipated presence' of the Zimbabwean officials in South Africa was not enough of a legal basis for the institution of an investigation (para 4). It was argued that investigations would be hampered by questions relating to its legality; difficulties in the collection of evidence; inability to secure the cooperation of Zimbabwean authorities and the likelihood of resistance from Zimbabwe; the probability that the evidence would have to be obtained in a 'covert manner' due to the identity of the Zimbabwean officials involved; respect for Zimbabwe's sovereignty; the possibility of the investigations being compromised; the negative impact that an investigation would have on not just diplomatic relations between South Africa and Zimbabwe but also on relations between Southern African Development Community ('SADC') forces; and the impact it would have on future investigations (paras 4, 5 and 10).

It should be noted in relation to possible co-operation by Zimbabwean officials that the existence of jurisdiction in itself does not imply an obligation on 'the territorial or nationality State to assist in any investigation, provide evidence or extradite suspects' (Cryer et al op cit at 60). Their co-operation can either be compelled by treaty, or depends on political will. Since Zimbabwe is not a state party to the Rome Statute and has not ratified the CAT, its co-operation is not required under that statute or the CAT, and South Africa is therefore dependent on political will to bring those accused of the acts of torture to justice. Also, a potential negative consequence in relation to the question of securing evidence at the prosecution stage is worth noting — that is, the failure of universality cases 'to achieve the standard of proof for a criminal conviction' (Cryer et al ibid).

The court was of the view that the concerns raised did not provide justifiable grounds for refusing to initiate an investigation in line with domestic and international law obligations. The court held that the respondents should have born in mind the 'primary obligation' of ensuring that the 'purpose and objects of the ICC Act' are fulfilled in line with South Africa's 'international obligation to investigate and prosecute perpetrators of international crimes in light of the information placed before the Respondents'

(para 27). This would be in line with South Africa's commitment, as a party to the Rome Statute, not only to ending impunity for the 'perpetrators' of international crimes but also to 'contribute to the prevention of such crimes' (Rome Statute, Preamble). This commitment is reiterated in the Preamble to the ICC Act, where South Africa commits to bringing perpetrators of international crimes to justice either in its domestic courts 'in terms of its domestic laws where possible, pursuant to its international obligations' under the Rome Statute, or to do so in the ICC where South Africa declines or is unable to deal with the case in its domestic courts, 'in line with the principle of complementarity'. Having regard to South Africa's obligations under the ICC Act and the Rome Statute, the applicants argued that South Africa ought to have investigated the alleged crimes (para 15). The court found the respondents to have breached both their domestic and international obligations. It held (para 15) that

> 'in failing to initiate an investigation, thereafter attempting to justify their decision on the basis of material errors of fact of law, and through taking into account irrelevant factors and failing to consider relevant ones, [the respondents] have flouted their domestic and international obligations'.

The court held that the respondents failed to discharge their obligations 'to initiate, manage and direct an investigation in a co-operative manner as envisaged by the ICC Act' (para 15). It is evident that further investigations had to be carried out in order to establish, at the very least, whether the alleged acts constituted crimes against humanity (para 9). This would strengthen South Africa's exercise of jurisdiction in the case if it proceeds with prosecution.

The question of investigation in absentia

A crucial issue that was raised in relation to initiating the investigation was whether it is legal for investigations to commence while the accused Zimbabwean officials were not present in South Africa (para 9). While s 4(3) places conditions on the exercise of jurisdiction, s 4(1) does not require the presence of an accused. It merely states that 'any person who commits a crime is guilty of an offence and is liable on conviction to a fine or imprisonment'. Further, s 4(3) clearly links the conditions only to securing the jurisdiction of the courts. Put differently, the exercise of 'enforcement' jurisdiction is subject to the presence of an accused in South Africa, while the exercise of 'prescriptive jurisdiction' is not. This implies that while an investigation could be undertaken when an accused is not present in South Africa, prosecution before a judicial body can only take place when the accused is present. This addresses concerns regarding the exercise of universal jurisdiction in absentia mentioned earlier. In fact, it has been argued that s 4(3) is 'motivated by the South African legislature's concern to avoid trials *in absentia*' (see Christopher Gevers 'The application of universal jurisdiction in South African law' (2012) available at *http://www.ejiltalk.org/universal-jurisdiction-in-south-africa*).

The respondents also argued that there needed to be a legal provision permitting investigations; otherwise, any investigation would be 'null and void' (para 22). In this regard, it should be recalled that s 5(1) of the ICC Act does not require that the authorisation of the NDPP be sought before an investigation could proceed (para 21). This is a requirement only in relation to prosecution.

The threshold required for the initiation of an investigation

During the hearing, concerns were raised regarding the negative impact an investigation would have on foreign relations. The respondents focused largely on whether the information before them was sufficient for a prosecution, instead of focusing on its relevance for an investigation, as it is only after such an investigation that a decision on prosecution can be made. In response, the court considered the 'threshold' required for a decision on whether or not to initiate an investigation. With reference to art 53 of the Rome Statute, the court held that only 'a reasonable basis' should exist (para 28). Article 53 prohibits the initiation of an investigation only where 'there is no reasonable basis to proceed'. The court relied on art 53 of the Rome Statute because there is no provision in the ICC Act or any other domestic legislation on the standard of evidence that is appropriate to trigger the initiation of an investigation. The court was of the view that there was reasonable basis to initiate an investigation based on the information before the respondents, and that it was irrelevant at this stage whether the material was sufficient for prosecution (para 28).

The question of political considerations and immunity

The court further held that 'when an investigation under the ICC Act is requested, and a reasonable basis exists for doing [sic] an investigation, political considerations or diplomatic initiatives, are not relevant at that stage having regard to the purpose of the ICC Act' (para 31). Political or diplomatic considerations, as the court observed, would only become relevant at the stage of deciding whether or not to prosecute (ibid). This also implies that the issue of immunity enjoyed by the accused Zimbabwean officials is not relevant at the investigation stage (para 31). This issue is important as some of the accused Zimbabwean officials could enjoy immunity under customary international law. It must be emphasised here that it is an established principle under international law that certain state officials enjoy immunity from criminal jurisdiction (see the *Arrest Warrant* case (supra), the judgment of the court, para 51). Bantekas (op cit at 127) states that immunity from criminal jurisdiction means that

> 'a court cannot entertain a particular suit, not that the defendant is discharged from criminal liability altogether or that the jurisdiction of the court is extinguished. This means that once the procedural bar of immunity is removed . . . the criminal liability of the accused re-emerges and that person becomes once again susceptible to criminal prosecution.'

Immunity can be enjoyed on the basis of the governmental functions that a person carries out (referred to as functional immunity, or immunity ratione

materiae or, subject matter immunity); or on the basis of the person's status such as heads of states (referred to as personal immunity, or immunity ratione personae, or procedural immunity) (see Ronald Slye 'Immunities and amnesties' in Max du Plessis *African Guide to International Criminal Justice* (2008) 182). The exercise of universal jurisdiction in the context of immunity is complex because immunity is generally not recognised for international crimes. For example, art 27(1) of the Rome Statute excludes immunity for individuals being tried before the International Criminal Court ('ICC'). Article 27(2) explicitly excludes immunity for state officials. Thus, when exercising universal jurisdiction in terms of legislation domesticating the Rome Statute, a sitting state official cannot benefit from immunity, despite ordinarily enjoying immunity under customary international law.

The high court in the *SALC* case cited the trial of Charles Taylor as an example of immunity being denied to state officials for international crimes. The court, however, incorrectly refers to the ICC (para 31), as Taylor was tried by the Special Court of Sierra Leone and not the ICC. The court's view on the question of immunity at the stage of investigation accords with the position of Higgins, Kooijmans and Buergenthal JJ in their joint separate opinion in the *Arrest Warrant* case ((supra), opinion commencing at page 63). They held in that case that, in the exercise of universal jurisdiction, 'commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate' the principle of immunity (ibid para 59). The DRC, in the case, had argued that any investigation against the minister concerned, with the aim of bringing him to court, would constitute a violation of the principle of immunity (ibid para 47). Belgium had argued that, for crimes that violate the 'fundamental interests of the international community', 'territorial presence' was not a condition for the exercise of universal jurisdiction (ibid para 8). Belgium's stance was that an investigation or prosecution initiated against an accused person outside its territory was in line with international law and practice (ibid). In the South African context, the ICC Act is very clear that the presence of an accused person is a condition for the initiation of prosecution under the principle of universal jurisdiction.

The court's order

The court concluded that '[i]f a proper investigation had been made, it would have been the first step that would have enabled the First Respondent [the NDPP] to make a subsequent decision whether or not to prosecute, if the perpetrators were present in the territory of the Republic, as some of them indeed had been' (para 32). It should be noted that an investigation is not only important in informing the decision to prosecute but is also relevant should South Africa decide to refer the case to the ICC. This is in accordance with art 14 of the Rome Statute: 'a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation'. Without a proper investigation, it would be difficult for a state, when referring a case, to provide this necessary supporting documentation.

Accordingly, in its order, the court found the decision not to investigate to have been invalid (para 33). The decision was thus set aside. The court proceeded to set out what is required of the relevant organs of state, since the case stemmed from the government's failure to fulfil its domestic and international obligations under the ICC Act and Rome Statute respectively. The Head of PCLU was required to assist the National Commissioner of the SAPS in evaluating the request for an investigation to be initiated (para 33). The court specified that the investigation of the alleged crimes should be done expeditiously and comprehensively, after which, a decision needed to be made on whether or not a prosecution should be instituted (para 33).

It is worth noting that just over two months after the *SALC* decision, the ICJ issued a decision that also emphasises the importance of initiating (preliminary) investigations once there is reason to suspect a person for acts of torture. This was in the case of *Belgium v Senegal* (ICJ judgment of 20 July 2012 available at *http://www.icj-cij.org/docket/files/144/17064.pdf*), relating to the obligation of Senegal to either prosecute the former President of Chad, Hissène Habré (who was present in Senegal at the time), or to extradite him to Belgium to face criminal proceedings. Though *Belgium v Senegal* was based on the CAT and not the Rome Statute or legislation implementing the Rome Statute, it does deal with universal jurisdiction for torture and is therefore relevant to a discussion on the obligation to investigate torture. The case emphasises the need for states to adopt legislation in line with international obligations to which they have committed, and that these grant them universal jurisdiction to institute investigations over acts of torture.

CONCLUSION

South Africa's perspective on universal jurisdiction, particularly on the initiation of investigations under this principle, is evident not only from the ICC Act but also from the *SALC* case. The case complements the ICC Act in reflecting South Africa's perspective on the principle, particularly the obligation of the state in terms of the ICC Act in the exercise of universal jurisdiction. It is evident that the exercise of universal jurisdiction is not only limited to the prosecution of international crimes, but also includes their investigation, as the latter informs the decision on the former. Accordingly, the *SALC* case accentuates South Africa's obligation under the ICC Act and its international obligation to investigate international crimes, irrespective of where the crimes occur. It also clarifies the instances in which the obligations in the exercise of universal jurisdiction are triggered. While South Africa's exercise of 'enforcement' universal jurisdiction is subject to the presence of the person accused of committing an international crime within the country, the exercise of 'prescriptive' universal jurisdiction is not subject to this condition. Whether the current perspective remains unchanged would depend on how other courts might address the issue, as the government may appeal the decision.

Notwithstanding this, the court's decision is significant for accentuating the commitment of South Africa to protecting rights and ending impunity

for grave offences. Individuals who have committed international crimes in neighbouring countries will therefore not see South Africa as a safe haven. The decision is also significant in that it illustrates the positive impact of the Rome Statute at the domestic level. When the Rome Statute becomes a part of domestic law, it enables states directly to address the problem of impunity for international crimes. Since the *SALC* decision illustrates that South Africa takes its obligations under the Rome Statute seriously, South Africa's compliance with the AU's stance on disregarding arrest warrants from the ICC therefore comes into question, as it would be contrary to its Rome Statute obligations if it complies with the stance.

Furthermore, despite the *SALC* decision being a narrow one, given its focus on the South African implementing legislation vis-à-vis the Rome Statute, the issues raised in the case are issues that other countries may also face should they implement the Rome Statute in a similar fashion. It is evident from the case that there is a chain of political, practical and policy challenges relating to the exercise of universal jurisdiction. Some of the challenges such as those relating to securing evidence are not unique to the exercise of universal jurisdiction, but could also arise in the exercise of jurisdiction under other jurisdictional grounds. In relation to the respect for state sovereignty in the exercise of universal jurisdiction, it is evident from the consideration of complementarity and universal jurisdiction above that, to some extent, the principle of complementarity facilitates the practical application of universal jurisdiction in a way that prevents conflicts in the exercise of jurisdictions, respects the primacy of prosecution for the state that has jurisdiction, and respects state sovereignty.

In addition to the challenges highlighted in the consideration of the *SALC* case, a further practical challenge is whether states that exercise universal jurisdiction would be able to guarantee the necessary 'due process' (fair arrest, detention and trial) standards. This was not at issue in the *SALC* case. A simple response to this would be not to extradite accused persons to states that cannot guarantee acceptable standards of due process. This has in fact been the situation in practice, since '[g]overnments regularly deny extradition to courts that are unable to ensure high standards of due process' (Kenneth Roth 'The case for universal jurisdiction' (2001) 80 *Foreign Affairs* 150 at 153).

Lastly, further legislative developments in terms of the GCA and Torture Act not only reflect the (potential) positive impact of the relevant treaties at the domestic level in enabling states to address impunity for international crimes, but also South Africa's commitment to this goal.

POSTSCRIPT

The government subsequently appealed the High Court's decision; and on 27 November 2013, the Supreme Court of Appeal ('SCA') delivered its judgment on the appeal (see *National Commissioner of the South African Police Service v South African Litigation Centre* [2013] ZASCA 168). The SCA held

that the SAPS is 'empowered to investigate the alleged offences irrespective of whether or not the alleged perpetrators are present in South Africa' and 'required to initiate an investigation under the [ICC Act] into the alleged offences' (para 70). The competence of the SAPS to initiate an investigation is derived from a reading of s 205(3) of the Constitution, relevant provisions in the SAPS Act and the NPA Act, and relevant provisions in the ICC Act (paras 53–5). The SCA observed that '[w]hilst it is true that s 4(3) of the ICC Act does not expressly authorise an investigation prior to the presence of an alleged perpetrator within South African territory, it also does not prohibit such an investigation' (para 55). The fact that South African authorities were being requested to conduct an investigation within South Africa's borders was of importance, as it is in line with relevant principles relating to jurisdiction and state sovereignty; and, as the court stated, if 'the investigation is limited to within South Africa's own borders, the relevant authorities are empowered to investigate the commission of any crimes criminalised by the ICC' (para 56). However, an investigation could extend beyond South Africa's borders if consent or co-operation of Zimbabwe is obtained (paras 56 and 68). Comparative approaches in other jurisdictions considered by the SCA revealed that 'no universal rule or practice' exists 'against the initiation of investigations in the absence of alleged perpetrators' (paras 58–66). Taking this into consideration, the court held that adopting a strict approach to the 'presence requirement' would defeat the object and purpose of South Africa's legislation and would be contrary to the fight against impunity (para 66). What strengthened the need to initiate an investigation — in addition to South Africa's obligations in this regard — was the prospect of the perpetrators being present in South Africa (ibid). It is evident from the judgment that the SCA has also bolstered South Africa's commitment to ending impunity for grave crimes and protecting rights. Accordingly, the SCA judgment has been described as 'a landmark decision for local and international justice' ('Zim torture ruling a landmarks decision — SALC' *The Zimbabwe Mirror*, 28 November 2013).