



**Reflections on the Evolving Jurisprudence Concerning the Presence of the Accused
Focusing on *National Commissioner of the South African Police Service v Southern
African Human Rights Litigation Centre and Another***

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Reflections on the Evolving Jurisprudence Concerning the Presence of the Accused Focusing on *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*

Abstract

On 30 October 2014 South Africa's Constitutional Court unanimously stated that the South African Police Service was obligated to investigate allegations of torture in Zimbabwe. This landmark decision, based on South Africa's international obligations and domestic legislation, is rooted in the Court's interpretation of universal jurisdiction and in particular its application of the presumption of the "anticipated presence" of the accused.

The case, first heard in the North Gauteng High Court in 2012 before being taken on appeal to the Supreme Court of Appeal and Constitutional Court, concerned allegations of torture against ZANU-PF officials and Zimbabwean police during the run-up to elections in 2007. This final judgment imposes a binding obligation on the South African Police Service to investigate the allegations, prior to any decision on further prosecution.

*This dissertation begins by providing a background to South Africa's implementation of the Rome Statute domestically before focusing on the theoretical framework of universal jurisdiction. This is followed by an examination of the South African jurisprudence, in particular the judgment of the Constitutional Court in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*.*

The Constitutional Court's decision to allow for the exercise of universal jurisdiction in absentia (otherwise known as "anticipated presence") must be located within the broader concept of jurisdiction. Anticipated presence is a controversial issue and this paper will explain both the Court's reasoning as well as possible implications of this judgment.

The fight against impunity for perpetrators of international crimes, emphasised by both the Rome Statute and South Africa's own legislation, has been strengthened by this judgment. This paper will also examine the remaining areas of concern which were not addressed by the Constitutional Court.

This Constitutional Court judgment will define the approach of South African courts in forthcoming cases concerning the application of the Rome Statute. Despite the Constitutional Court's failure to take all factors into account in its judgment, this landmark decision has changed the legal landscape considerably and will be a powerful tool to counter the culture of impunity.

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Introduction

With the adoption of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, South Africa fulfilled its obligations, as a signatory to the Rome Statute, by enacting complementary legislation. This legislation empowers the South African authorities to investigate and prosecute international crimes and s 4(3) of the Act provides for four bases on which the state could assume jurisdiction. One of these four is universal jurisdiction. Although universal jurisdiction is triggered with the presence of the accused, the Act did not clarify at which stage during an investigation or prosecution this presence was required.

On 16 March 2008, the Southern Africa Litigation Centre (SALC) delivered a dossier concerning evidence of torture against Zimbabweans. As the perpetrators were also Zimbabwean and the crimes were allegedly committed in the territory of Zimbabwe, the National Prosecuting Authority (NPA) in South Africa declined to investigate this case. SALC took the South African Police Service (SAPS) to the North Gauteng High Court and won their case. The South African Police Service lost an appeal at the Supreme Court of Appeal before taking the case to the Constitutional Court. The Constitutional Court's judgment, delivered on 30 October 2014, unequivocally states that the South African authorities had a duty to investigate these allegations.

*National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*¹ is the first case in South Africa which focuses on South Africa's responsibilities under both domestic legislation and international law to investigate or prosecute international crimes. Although the case is ground-breaking for a number of different legal reasons, this dissertation is primarily concerned with the Constitutional Court's interpretation of universal jurisdiction.

The Court was required to ascertain whether an investigation into allegations of torture by Zimbabweans against other Zimbabweans within that country could be initiated in South Africa. As the alleged perpetrators are not present in South Africa, the Court also

¹ [2014] ZACC 30, hereafter referred to as the *SALC* case.

had to determine whether South African law should follow the liberal tradition of universal jurisdiction, as seen in the *Pinochet* case,² or whether a strict requirement of presence was necessary prior to the initiation of an investigation. The recognition that an investigation may occur prior to the likely arrival of a perpetrator is referred to as “anticipated presence”.

In order to understand the context of the Constitutional Court’s judgment, this paper will first outline the background to South Africa’s relationship with the International Criminal Court³ from the establishment of the ICC through to the adoption of complementary domestic legislation. This will be followed by an explanation of the principle of complementarity in respect of the ICC. After an inquiry into the theoretical aspects of universal jurisdiction, this dissertation will explore the concept of anticipated presence through international case law. Part A of this paper will conclude with a discussion of the limitations imposed on the SAPS, NPA and judiciary when investigating and prosecuting international crimes under South Africa’s legislation.

Part B introduces the relevant factual details of the *SALC* case as well as the decisions taken by the North Gauteng High Court and the Supreme Court of Appeal. This is followed by a detailed examination of the decision taken by the Constitutional Court on the issues of universal jurisdiction and anticipated presence. The implications of the Court’s judgment are potentially far-reaching and this paper includes a discussion on its possible repercussions in the sphere of politics as well as legal precedent. The paper concludes with an analysis of the new precedent set by the Constitutional Court on the legal point of anticipated presence. A variety of concerns are raised with respect to this judgment, including its impact on future cases regarding universal jurisdiction. However, despite some weaknesses in the Constitutional Court judgment, this paper finds on reflection that the judgment follows the most favourable interpretation of international law and domestic legislation in order to fight against impunity. The acceptance of “anticipated precedence” by the Constitutional Court will support South Africa’s commitment to investigating and prosecuting international crimes.

² See Chapter 6(a): The case of Augusto Pinochet.

³ Hereafter referred to as the ICC.

PART A – THEORETICAL FRAMEWORK

CHAPTER ONE: South Africa and the Rome Statute

South Africa's support for an international court to try international crimes can be traced to 1993. Delegations from South Africa and a few other nations of the Southern African Development Community (SADC) participated in the draft statute which the International Law Commission presented to the United Nations General Assembly's Sixth Committee.⁴ Subsequently South Africa was closely involved in meetings concerning the establishment of an international criminal court prior to the Rome Conference. In September 1997, a conference was held in Pretoria that negotiated a series of principles that were adopted by the SADC nations.⁵ This collection of principles also appeared in the Dakar declaration on the ICC and was incorporated into a resolution of the Organisation of African Unity approved by heads of state in Burkina Faso in June 1998.⁶

As a 'fervent supporter of a permanent international criminal court', South Africa was influential in mobilising the other SADC nations.⁷ South Africa coordinated the construction of significant parts of the final draft of the Rome Statute, particularly Part IV: Composition and Administration of the Court.⁸ The support of the SADC bloc was instrumental in the adoption of the Rome Statute on 18 July 1998. Delegates from the SADC nations had been involved in every level at the Rome Conference⁹ thus enabling the delegates to fulfil most of the SADC objectives, as set out in their common statement, which had served as an instruction manual for the bloc.¹⁰ The unity of the

⁴ Sivu Maqungo, 'Establishment of the International Criminal Court: SADC's Participation in the Negotiations' (2000) 9(1) *African Security Review* 42.

⁵ Southern African Development Community (SADC) Principles of Consensus and Negotiations, formulated on 14 September 1997.

⁶ Hassan Jallow and Fatou Bensouda, 'International criminal law in an African context' in Max du Plessis (ed) *African Guide to International Criminal Justice* (2008) Institute for Security Studies, Pretoria 42.

⁷ Lee Stone, 'Implementation of the Rome Statute of the International Criminal Court in South Africa' in Chacha Murungu and Japhet Biegon (eds) *Prosecuting International Crimes in Africa* (2011) Pretoria University Law Press, Pretoria 305.

⁸ *Ibid.*

⁹ The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

¹⁰ Maqungo (note 4) at 43.

African states served to ‘ensure that the principles enshrined in the SADC and Dakar declarations were implemented to the extent possible’ at the conference.¹¹

Although art 13 of the common statement had encouraged ‘all SADC member States to sign the Statute once it [was] adopted, and implement measures for its early ratification’ only six of the fifteen SADC members had signed the Rome Statute within its first year, while currently five SADC nations are still not party to the treaty.¹² Of particular interest to this paper is that Zimbabwe is one of these five,¹³ while South Africa, the primary focus of this paper, has signed, ratified and enacted complementary and cooperative legislation in accordance with the Statute. Although Zimbabwe did initially sign the treaty, the state has ruled out ratification and therefore is not a party to the Rome Statute.¹⁴ Consequently the state is protected from incurring any obligations, unless it chooses to accept the court as an international legal person, under the *pacta tertiis* rule.¹⁵ The only exception to this rule occurs when the United Nations Security Council refers a situation to the International Criminal Court thereby empowering the Court to assume universal jurisdiction in the matter.¹⁶

Although South Africa was one of the original signatories, ratification was delayed due to the need to draft complementary domestic legislation. In July 1999 diplomats and justice department officials from twelve of the fourteen SADC countries met in Pretoria for the SADC Conference on the Rome Statute.¹⁷ On the conclusion of this conference, a set of general principles was adopted entitled the Model-Enabling Act which ‘would guide the SADC approach to ratification’.¹⁸ The Model-Enabling Act deals with issues such as interpretation, definition of crimes, immunities and privileges of Court officials, cooperation with the Court, arrest and surrender of persons to the Court and enforcement

¹¹ Jallow and Bensouda (note 6) at 43.

¹² As of 10 February 2015.

¹³ In accordance with art 125(2) of the Rome Statute, the Statute only enters into force after a State has deposited an instrument of ratification or acceptance with the Secretary-General of the United Nations.

¹⁴ New Zimbabwe, *Zimbabwe rejects calls to ratify ICC treaty* (25 October 2011).

¹⁵ Article 34 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

¹⁶ Article 13(b) of the Rome Statute.

¹⁷ The Democratic Republic of Congo and the Seychelles were not represented at this conference.

¹⁸ Botswana, Report by Augustine Makgonatshotlhe, Secretary of Defence, Justice and Security (14 September 2011) Note No. 118/11 EB 9/3/4 IX (13) B8.

of sentences.¹⁹ The conference's discussions led to these guidelines providing a framework for SADC nations to ratify and implement the Rome Statute and were used by South Africa in its own implementing legislation.²⁰

On the conclusion of the conference, the Deputy Director-General of South Africa's Department of Foreign Affairs,²¹ Abdul Minty, stated that although South Africa supported ratification of the Rome Statute this had been delayed as it was 'a cumbersome document and [it] could take between six months and a year for a law to be passed' in order for it be adopted into national legislation.²² This proved to be an optimistic estimate as ratification of the treaty only occurred with the passing of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002,²³ which came into effect on 16 August 2002.

Commentators have criticised the delay in enacting this international treaty within domestic legislation by states such as South Africa that had initially been particularly vocal in support of the ICC.²⁴ In 1999, Minty observed that since a permanent international court to prosecute perpetrators of international crimes had taken so long to establish, '[t]he SADC countries must not perpetuate this delay.'²⁵

The introduction of the ICC Act ensured that South Africa would have the ability to prosecute war crimes and crimes against humanity, neither of which were the subject of previous domestic legislation. Prior to the ICC Act, the principle of *nullum crimen sine lege*²⁶ would have provided an obstacle to a successful prosecution as, without domestic legislation specifically penalising such acts contrary to peremptory norms of customary international law, it would be unlawful to prosecute an individual for such a crime.²⁷

¹⁹ Botswana, Report by Augustine Makgonatshotlhe, Secretary of Defence, Justice and Security (note 18).

²⁰ Stone (note 7) at 306.

²¹ Now known as the Department of International Relations and Cooperation.

²² Moya, Fikile-Ntsikelelo, 'SADC backing for global criminal court' (11 July 1999) *IOLNews*.

²³ Hereafter referred to as the ICC Act.

²⁴ Maqungo (note 4) at 42.

²⁵ Moya (note 22).

²⁶ Directly translated to 'no crime without law', under this principle an act may not be a crime unless legislated by the state.

²⁷ Stone (note 7) at 307.

Following the enactment of this domestic legislation in South Africa, the focus has now shifted to the practical application of South Africa's complementary Act, in particular the case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*.²⁸ This case questioned South Africa's obligations under the Rome Statute to investigate allegations of crimes against humanity in the neighbouring state of Zimbabwe. This has been a controversial case, particularly due to the political implications involved.²⁹

The case's primary focus is jurisdiction. According to the ICC Act, South Africa has jurisdiction to investigate or prosecute if there is a link between South Africa and the crime. Section 4(3) of the ICC Act, which is discussed in detail below, lists four different scenarios whereupon South Africa may assume jurisdiction over an international crime. In the appeal, the Constitutional Court had to determine the limits of South African jurisdiction in the international sphere as Zimbabwe has not ratified the Rome Statute, both perpetrators and victims of the crime were Zimbabwean, and the crime occurred in Zimbabwean territory. The Court also examined South Africa's commitment to human rights and its duties under international law. As South Africa has enacted legislation to criminalise international crimes, as per the Rome Statute, it is obliged to prosecute offenders according to the aims of both the Statute and the ICC Act which both emphasise the determination to end impunity for crimes of this nature. The jurisdiction of complementary domestic courts is examined below, followed by a discussion on their limitations in South Africa in Chapter Seven of Part A.

CHAPTER TWO: Complementary jurisdiction

The ICC was not established as a court of first instance, but rather a judicial body which may intervene when domestic courts are unable or unwilling to act. The ICC has been described as a "buttress" which supports domestic criminal justice systems.³⁰ This forms the basis of the principle of complementarity which is enshrined within the Rome

²⁸ *SALC* case (note 1).

²⁹ See Part B Chapter 3(b): Political implications below.

³⁰ Max du Plessis, Antoinette Louw and Ottilia Maunganidze 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' ISS Paper 241 (November 2012), 5.

Statute. This principle safeguards state sovereignty, in particular the state's undisputed right 'to exercise criminal jurisdiction over all acts committed in its territory and elsewhere by its citizens'.³¹

The Preamble to the Rome Statute clarifies the Court's position:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking **measures at the national level** and by enhancing international cooperation...

Recalling that it is the **duty of every State** to exercise its criminal jurisdiction over those responsible for such crimes...

Emphasizing that the International Criminal Court established under this Statute shall be **complementary** to national criminal jurisdictions. [*emphasis added*]

To some extent the purposes of the Rome Statute conflict with the principle of complementarity as the latter limits the methods through which the purposes of the Statute may be achieved. However, these limitations should be interpreted as a means to make the Statute more effective.³² As the Rome Statute expresses a preference for prosecutions to occur in domestic courts, rather than at the ICC, the importance of effective and independent national judiciaries is emphasised. This also ensures that a state's sovereignty is protected from undue interference by the ICC, unless the judiciary is dysfunctional and unable, or unwilling, to investigate or prosecute. Therefore this requirement provides an incentive for states to improve and enhance their domestic judiciaries in order to manage international crimes at the domestic level effectively and protect their sovereignty.

The Rome Statute assumes that domestic prosecutions are preferable to those in an international court in order to appease individual state sovereignty and in recognition of the ICC's own limited capacity.³³ The complementarity principle thus provides an

³¹ Stigen, Jo *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008) Martinus Nijhoff Publishers, Leiden 15.

³² *Ibid.*

³³ *Ibid* at 18.

effective balance between a state's sovereignty and the interference of the ICC.³⁴ Despite this, the state is 'still under an obligation to assist and co-operate with the ICC, including in relation to requests for assistance with arrest or surrender.'³⁵

Article 17 of the Rome Statute outlines the rules of admissibility to the Court and explains that cases will be inadmissible if a domestic court is already investigating or prosecuting the issue concerned. The unwillingness or inability of a state to prosecute or investigate is one of the triggers for the ICC's jurisdiction. This article affirms the ICC as a court of last instance with a domestic investigation and prosecution taking precedence unless inability or unwillingness is manifest through: a decision to shield the accused from justice,³⁶ an unjustified delay in proceedings,³⁷ proceedings which are not conducted in an impartial or independent manner thus inconsistent with bringing the accused to justice,³⁸ the inability of the domestic judiciary to function due to a total or partial collapse or the inability of the State to obtain the accused or the necessary evidence.³⁹

The need to take 'measures at the national level',⁴⁰ reiterated throughout the Rome Statute, is problematic in many countries where international crimes have been committed as their legal systems have either collapsed or been seriously weakened.⁴¹ In order for the principle of complementarity to be effectively implemented, national judiciaries require firm foundations in the rule of law and the capacity to carry out effective prosecutions of international crimes. Article 17(3) of the Rome Statute provides for the ICC to assume jurisdiction if 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its

³⁴ Xavier Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (June 2006) 88(862) *International Review of the Red Cross* 380.

³⁵ Lilian Chenwi 'Universal Jurisdiction and South Africa's perspective on the investigation of international crimes' (2014) 131 *SALJ* 34; see also arts 86 and 87(7) of the Rome Statute.

³⁶ Section 17(2)(a) of the ICC Act.

³⁷ Section 17(2)(b) of the ICC Act.

³⁸ Section 17(2)(c) of the ICC Act.

³⁹ Section 17 (3) of the ICC Act.

⁴⁰ Preamble of the Rome Statute.

⁴¹ Open Society Justice Initiative 2010. 'Promoting Complementarity in Practice – Lessons from Three ICC Countries (7 December), 2.

proceedings.⁴² The first priority of the State after ratification, according to art 88 of the Rome Statute, is to ensure that national laws are implemented. This is in order to facilitate Part IX which calls for the cooperation of states parties. The domestic courts require not only a legislative framework but also the necessary tools to facilitate prosecutions such as independent judges, functioning judicial infrastructure and investigative capacity.⁴³

South Africa's ICC Act contains legislation which not only empowers South African officials to engage in the prosecution of ICC crimes, but also provides a comprehensive set of guidelines to assist South Africa in supporting the ICC through various actions. These include cooperating with arrest warrants, extraditing suspects, and enforcing sentences. Section 3 of the Act states that one of its objects is:

[T]he enabling, as far as possible and in accordance with the principle of complementarity, the national prosecuting authority of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.

South Africa has jurisdiction over international crimes if one of four conditions is met: firstly if the accused is a South African citizen,⁴⁴ secondly if the accused is ordinarily a resident in South Africa,⁴⁵ thirdly if the accused after committing the crime is present in South Africa⁴⁶ or, finally, if the crime is committed against a South African citizen or resident.⁴⁷ The third condition enables extra-territorial jurisdiction as the crime is deemed to have been committed in the country notwithstanding its actual location.⁴⁸ Section 4(3) enables South Africa to exercise universal jurisdiction over the core international crimes as described in the Rome Statute.

⁴² Article 17(3) of the Rome Statute.

⁴³ Open Society Justice Initiative 2010 (note 41) at 2-3.

⁴⁴ Section 4(3)(a) of the ICC Act.

⁴⁵ Section 4(3)(b) of the ICC Act.

⁴⁶ Section 4(3)(c) of the ICC Act.

⁴⁷ Section 4(3)(d) of the ICC Act.

⁴⁸ Stone (note 7) at 311.

CHAPTER THREE: Universal jurisdiction

Mary Robinson, former President of Ireland and then United Nations High Commissioner for Human Rights, stated in the foreword to the 2001 Princeton Principles of Universal Jurisdiction that:

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.⁴⁹

Universal jurisdiction was first invoked over the offence of piracy and under customary law all states have the power to punish any act of piracy committed on the high seas.⁵⁰ Unlike other crimes, no nexus, or link, with the prosecuting state was required. Later this concept was extended to include slave trading due to ‘the offence’s heinous nature, [therefore] the parties agreed to establish a common or universal jurisdiction over slave traders on the high seas.’⁵¹ As may be seen, universality is only applicable to serious crimes against international law contravening international norms *erga omnes*. After the Second World War, the universality principle was extended to war crimes and crimes against humanity, based in part on the premise that war crimes are often tried and punished in the courts of one state while occurring outside of that state against foreign nationals.⁵²

Universal jurisdiction exists for all states in respect of these particular crimes and is thus based on the nature of the crime. Universal jurisdiction has been justified by three primary rationales.⁵³ Firstly, universal jurisdiction is seen as necessary in order to deal with international crimes so heinous that they affect all of humanity. Secondly, by allowing all states to have jurisdiction over such crimes, states have a greater capacity to

⁴⁹ Princeton University Program in Law and Public Affairs *The Princeton Principles on Universal Jurisdiction* (2001) at 16.

⁵⁰ Kenneth C. Randall, ‘Universal Jurisdiction Under International Law’ (1988) 66 *Texas Law Review* 791.

⁵¹ *Ibid* at 800.

⁵² *Ibid*.

⁵³ Hannah Woolaver ‘Prosecuting International Crimes in South Africa: Interpreting the Requirement of the Accused’s Presence in South African Territory under the Implementation of the Rome Statute of the ICC Act’ (2014) 131 *SALJ* 257.

fight the impunity of perpetrators. Finally, universal jurisdiction also provides a mechanism to ensure that the victims of international crimes may still obtain justice where the state is unwilling or unable to prosecute, particularly in cases where the perpetrators are influential non-state actors or state officials.⁵⁴

There are three aspects of a state's jurisdiction during the process of a criminal investigation. Jurisdiction may be exercised prescriptively through the creation of laws to prohibit certain conduct, adjudicatively when the state initiates an investigation and starts criminal proceedings against the accused, or through enforcement.⁵⁵ Enforcement jurisdiction, unlike the other two forms of jurisdiction, is 'strictly and solely territorial' as it is exercised by the State when arresting the suspect within its territory and, once a guilty verdict is reached, carrying out the applicable sentence.⁵⁶

The *Lotus*⁵⁷ case laid down the complementary principles of territoriality, declaring that states are allowed to exercise all three forms of jurisdiction within the confines of their territory. This case also determined whether jurisdiction extended beyond territorial boundaries, initially stating that 'the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.'⁵⁸ However, this rule was immediately qualified by the court, declaring that international law did not prohibit a state 'from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad and in which it cannot rely on some permissive rule of international law.'⁵⁹ Thus the Court stated that there is 'a wide measure of discretion' which may only be limited in particular cases by prohibitive rules. The case concluded that unless there was a specific rule that prevented states from

⁵⁴ Woolaver (note 53) at 257.

⁵⁵ Roger O'Keefe 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 3 *Journal of International Criminal Justice* 735.

⁵⁶ Woolaver (note 53) at 256.

⁵⁷ *The SS Lotus case (France v Turkey)* (1927) PCIJ Series A, No 10.

⁵⁸ *The SS Lotus case* supra note 57 at 18.

⁵⁹ *The SS Lotus case* supra note 57 at 19.

doing so, states could exercise this jurisdiction over acts, including those outside of their territory.⁶⁰

O’Keefe finds that the distinction between adjudicative and prescriptive jurisdiction is unnecessary in the criminal context. He determines that adjudicative jurisdiction is merely the ‘exercise or actualization of prescription’ as both forms of jurisdiction are asserting that the conduct concerned is prohibited under the law in question.⁶¹ Customary international law, as determined by state practice, accepts a variety of different bases for prescriptive jurisdiction which provide a sufficient link between the conduct of the accused and the interests of the prescribing state.⁶² Territorial jurisdiction is, of course, available to all states in respect of all offences. O’Keefe states that jurisdiction to enforce is strictly territorial as a state cannot enforce its own laws within the territory of another state without that state’s consent. However, in order to enforce territorial jurisdiction international law does not prevent ‘the prescribing state from requesting the extradition of a suspect, accused or convict from the territory of a state in which he or she is present, or from requesting other police or judicial assistance from another state.’⁶³ This view was followed by the Constitutional Court in the *SALC* case, as will be discussed in Part B.⁶⁴

Concerning extra-territorial offences, the prescribing state has four different bases on which to criminalise conduct. The first is nationality, where nationals of a state may be prosecuted by that state even if the conduct was performed abroad. The second is on the basis of “passive personality” where the victim of the criminal conduct is a national of the prescribing state. The third is the “protective” principle (or *competence réelle*) which, controversially, allows states to ‘assert criminal jurisdiction over extraterritorial offences committed abroad by aliens where the offence is deemed to constitute a threat to some fundamental national interest.’⁶⁵ The fourth source for jurisdiction is

⁶⁰ *The SS Lotus case* supra note 57 at 18-19.

⁶¹ O’Keefe (note 55) at 737.

⁶² *Ibid* at 738.

⁶³ *Ibid* at 741.

⁶⁴ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2014 (2) SA 42 (SCA) at 55.

⁶⁵ O’Keefe (note 55) at 739.

universality pertaining to certain specific offences which do not require a link with the prescribing state.

O'Keefe defines universal jurisdiction as:

[P]rescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.⁶⁶

However, he then states that it is more useful to define universal jurisdiction negatively rather than positively and quotes Ascencio's definition of universal jurisdiction as 'a ground of jurisdiction which does not require any link or nexus with the elected forum'.⁶⁷ Philippe outlined three essential concerns in 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'.⁶⁸

According to the Princeton Principles, serious crimes under international law include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.⁶⁹ The Rome Statute lists four crimes as within the jurisdiction of the International Criminal Court in Article 5: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The other crimes that are listed in the Princeton Principles have become *jus cogens* due to the widespread ratification of several international treaties, for example the Geneva Conventions of 1949 and the United Nations Convention against Torture of 1984. As this obligation to act against heinous crimes, irrespective of the limits of territorial jurisdiction, appears in numerous multilateral treaties it has become a core principle of customary international law. The late twentieth century thus saw the courts move away from the *Lotus* case as fighting impunity was prioritised over respecting sovereignty. These treaties also impose the

⁶⁶ O'Keefe (note 55) at 745.

⁶⁷ Hervé Ascencio 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*' (2003) 1 *Journal of International Criminal Justice* 699.

⁶⁸ Philippe (note 34) at 379.

⁶⁹ Princeton University Program in Law and Public Affairs (note 49).

obligation on states of *aut dedere aut judicare*. This is the obligation to extradite individuals who commit serious international crimes or to prosecute them if no other state has requested their extradition.

Universal jurisdiction has become an increasingly politicised concept as it has been often interpreted as a breach of a state's territorial integrity and sovereignty. In particular, the African Union (AU) has raised concerns that the use of this principle by European states to indict African leaders 'has the effect of destabilising or impeding the political and socioeconomic progress of African States.'⁷⁰ The AU recognises universal jurisdiction as a measure to end impunity⁷¹ and its codified framework stipulates that a member of the AU has the 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'.⁷² However, the AU has declared its intention not to execute warrants of arrest issued on this basis due to the possibility of abuse of this principle.⁷³

According to Brownlie, universal jurisdiction has to comply with international law and follow three principles: firstly, a substantial and *bona fide* connection between the subject matter and the source of the jurisdiction, secondly the principle of non-intervention in the domestic jurisdiction of other states, and thirdly elements of accommodation, mutuality and proportionality should be applied.⁷⁴ While the first and third principles have their origins in customary international law, the principle of non-intervention in the domestic jurisdiction of states is enshrined in art 2(1) of the United Nations Charter.⁷⁵

The exercise of enforcement jurisdiction is confined to the territory of the state invoking it and the principle of non-intervention safeguards the principle of territoriality. However domestic criminal jurisdiction, when based on universality, applies to

⁷⁰ Chenwi (note 35) at 28.

⁷¹ 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) at para 3.

⁷² Article 4(h) of the *Constitutive Act of the African Union*, 1 July 2000.

⁷³ African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction* (note 71) at para 5 (iv).

⁷⁴ Ian Brownlie *Principles of Public International Law* 5ed (1998) Clarendon Press, Oxford at 313.

⁷⁵ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

prescriptive jurisdiction whereby states may make laws which outlaw international crimes, and can also apply to adjudicative jurisdiction, subject to the constraints of territoriality.

According to these limitations, universal jurisdiction may be divided into two categories: absolute and conditional.⁷⁶

CHAPTER FOUR: “Absolute” versus “conditional” universal jurisdiction

The subdivision of universal jurisdiction into “absolute” and “conditional” was first formulated by Antonio Cassese. He viewed “conditional” universal jurisdiction as the ‘most widespread version’ which relied on the classical definition of universal jurisdiction.⁷⁷ This was described by Abi-Saab in relation to the international crime of piracy,⁷⁸ and focuses on the act of capture ‘in the *forum deprehensionis*, that provides the state with the competence under international law to prosecute the offender.’⁷⁹ “Absolute” universal jurisdiction, on the other hand, occurs under a different interpretation of the universality principle whereby ‘a State may prosecute persons accused of international crimes regardless [...] of whether or not the accused is in custody in the forum state.’⁸⁰ According to Jalloh, the distinction is that absolute universal jurisdiction allows a state to exercise jurisdiction *in absentia* and thus the presence of the accused in the territory of the state concerned is not required. Jurisdiction is obtained through the universality of the crime and they ‘do not need any of the usual territoriality, nationality or other jurisdictional nexus to the offence’.⁸¹

Cassese states that universal jurisdiction cannot, in practical terms, be an absolute right of jurisdictional competence where all states are empowered to investigate and prosecute any and every occurrence of an international crime. Instead, although each

⁷⁶ Chenwi (note 35) at 32.

⁷⁷ Antonio Cassese *International Criminal Law* (2001) Oxford University Press, Oxford 261.

⁷⁸ Georges Abi-Saab, ‘The Proper Role of Universal Jurisdiction’ (2003) *Journal of International Criminal Justice* 599-600.

⁷⁹ Max du Plessis, ‘South Africa’s International Criminal Court Act: Countering genocide, war crimes and crimes against humanity’ ISS Paper 172 (November 2008) 5.

⁸⁰ Cassese (note 77) at 261.

⁸¹ Charles Chernor Jalloh ‘Universal jurisdiction, universal prescription? A preliminary assessment of the African Union perspective on universal jurisdiction’ (2010) 21 *Criminal Law Forum* 8.

state has the potential to act as they all are empowered to act against international criminals, ‘universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting state’.⁸² Practical issues such as punishment would be difficult to enforce without the presence of the accused in the state concerned.⁸³ The ICC’s test for admissibility not only questioned whether the accused was present within the state wishing to exercise jurisdiction, but whether the state was able to prosecute. This was evident in the case concerning Saif Gaddafi where the ICC found that Libya was unable to prosecute as the accused was not within the state’s custody. The accused had been detained by Zintan Militia and the state had been unable to negotiate his release into their custody.⁸⁴

“Conditional” universal jurisdiction, on the other hand, relies on the presence of the accused in order that he or she may be available to stand trial. The presence of an individual accused of an international crime within the territory of the state does not only grant the right to prosecute, but may even infer an obligation on the state to do so.⁸⁵ This obligation may arise from the *aut dedere aut judicare* provision which accompanies universal jurisdiction in international criminal conventions. As Judges Higgins, Kooijmans and Buergenthal state in the *Arrest Warrant* case:

There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario* **so as to exclude** a voluntary exercise of universal jurisdiction.⁸⁶

The 2005 *Institut de Droit International* resolution attempted to find some common ground between the two categories of universal jurisdiction with article 3(b):

⁸² Antonio Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’ (2003) *Journal of International Criminal Justice* 592.

⁸³ Chenwi (note 35) at 33.

⁸⁴ ICC, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-OI/II-OI/II-344-Red, 31 May 2013, para 207.

⁸⁵ Jalloh (note 81) at 7.

⁸⁶ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* International Court of Justice, 14 February 2002, at 57 (original emphasis).

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.⁸⁷

Thus the distinction between prescriptive and enforcement jurisdiction appears to allow states to investigate acts and request extradition under universal jurisdiction, but in order to exercise enforcement jurisdiction, ie to prosecute the accused, the accused must be present.⁸⁸ Apart from a few isolated examples, which will be mentioned in Chapter Five, most states have limited their use of universal jurisdiction to cases where the accused is present in their own country.⁸⁹

CHAPTER FIVE: Anticipated presence

The presence of the accused is therefore the pivotal point of distinction between “absolute” and “conditional” universal jurisdiction, while universal jurisdiction *in absentia* has become a highly contested point in international law. O’Keefe argues that ‘there can be no such thing as “universal jurisdiction *in absentia*”’ as universal jurisdiction is one of the bases for prescriptive jurisdiction.⁹⁰ Whether or not universal jurisdiction is lawful or not is a separate situation to whether enforcement of jurisdiction occurs *in personam* or *in absentia*.⁹¹ Judges Higgins, Kooijmans and Buergenthal noted in the *Arrest Warrant* case that:

Some jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognised under international law.⁹²

The separate opinion in the *Arrest Warrant* case is rightly concerned with the consequences that the lack of the presence of the accused will have on a fair trial. The

⁸⁷ *Institut de Droit International* ‘Resolution: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes’ (Cracow, 2005).

⁸⁸ Chenwi (note 35) at 33.

⁸⁹ Ibid.

⁹⁰ O’Keefe (note 55) at 750.

⁹¹ Ibid.

⁹² *Case Concerning the Arrest Warrant of 11 April 2000* supra note 86 at 56.

right to a fair trial, originating in customary international law, is enshrined in art 14(3)(d) of the International Covenant on Civil and Political Rights.⁹³ This article protects the accused's right to be present at their trial and was recognised in art 63(1) of the Rome Statute. The legality of proceedings occurring without the accused's presence has been widely explored internationally, particularly in the *Arrest Warrant* case.

The separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case stated that:

[T]he underlying purpose of designating certain acts as international crimes is to authorise a wide jurisdiction to be asserted over persons committing them, there is no rule of international law....which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.⁹⁴

This clearly differentiates between the investigation phase, which under international law does not require the presence of the accused, and the right of the accused to be present during trial. This infers that jurisdiction may be exercised prior to the presence of the accused. The Princeton Principles claim that a state is not prevented from 'initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition, when the accused is not present.'⁹⁵

If the ICC Act limits universal jurisdiction to the presence of the accused in South African territory, is their presence required prior to the commencement of an investigation? This strict interpretation of presence is not generally enforced by state practice and has proven to be impractical. Presence of the accused during trial is clearly required by the ICC Act, but the point of inquiry at which this is a requirement is less clear. Internationally the presence requirement has been interpreted both strictly and broadly in different jurisdictions.

⁹³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

⁹⁴ *Case Concerning the Arrest Warrant of 11 April 2000 Case Concerning the Arrest Warrant of 11 April 2000* supra note 86 at 58.

⁹⁵ Princeton University Program in Law and Public Affairs (note 49).

CHAPTER SIX: Jurisprudence concerning anticipated presence

a. The case of Augusto Pinochet

The arrest and extradition of Chilean General Pinochet in 1998 was hailed globally as setting a precedent for a new era of universal jurisdiction displaying a broad interpretation of universal jurisdiction requirements. The attempt to hold the former Chilean dictator accountable for committing international crimes while head of state was believed to be a step forward in holding political leaders accountable, ‘piercing the veil of sovereignty’ in order to eradicate the culture of impunity.⁹⁶ Although Chile had established its own National Commission of Truth and Reconciliation, the findings of the commission did not prompt any prosecutions as the Pinochet government had enacted an amnesty for its actions. The amnesty law was used by the Chilean courts to block any investigations into the criminal activities of the former government.⁹⁷ This was challenged by the institution of a criminal investigation in Spain in 1996. This investigation was prompted by criminal complaints against the military leadership in both Argentina and Chile for their role in the disappearances of Spanish citizens.⁹⁸ As the charges against Pinochet grew to include torture, terrorism and genocide, the Spanish Courts confirmed their jurisdiction in this case by referring to the universality of the charges. Judge Garzón also stressed that there had been Spanish victims in the case which leant ‘a legitimate interest’ to the Spanish proceedings.⁹⁹

On 6 November 1998, the Spanish government sent an extradition request to Britain on learning of Pinochet’s presence in that country. Chile’s response to this request was to accuse Spain of ‘an illegitimate invasion of the jurisdiction of the Chilean courts.’¹⁰⁰ However, it could be argued that universal jurisdiction enables the domestic courts of other states to prosecute perpetrators of international crimes when the national court is unable to shake off the shackles of past oppression. Drumbl comments that ‘[t]o be sure,

⁹⁶ Richard A. Falk ‘Assessing the Pinochet Litigation: Whither Universal Jurisdiction?’ in Stephen Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2004) University of Pennsylvania Press, Philadelphia 97.

⁹⁷ Ibid at 103.

⁹⁸ Ibid at 106.

⁹⁹ Ibid.

¹⁰⁰ Ibid at 104.

there are times where proceedings conducted far away can be catalysts in the process of accountability at home, where they may help pry loose information that is deeply buried.’¹⁰¹

Spain had not been the only country to initiate proceedings against Pinochet. In both France and Belgium, criminal proceedings had been brought by French citizens in the former and Chilean exiles in the latter. Unlike France, the Belgian court found that Belgian law conferred universal jurisdiction on the courts ‘allowing it to proceed even when the accused is not present in the country and the victims are not Belgian in the setting of alleged severe violations of international humanitarian law.’¹⁰² The Belgian court also found that even though crimes against humanity were not codified in their domestic criminal law at the time, they were still able to issue an arrest warrant finding that ‘before being codified in a treaty or statute, the prohibition on crimes against humanity was part of customary international law and international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* on our domestic legal order.’¹⁰³ Despite this resolution, the case for trial in Belgium was not presented to the British courts. Falk reflects on what approach should be taken with regard to a multiplicity of requests for extradition and whether time, which was seen as the priority in this affair, should be afforded primary significance.¹⁰⁴ This case relied on the domestic courts of foreign jurisdictions, in this case Britain, accepting the doctrine of universal jurisdiction.

b. The effect of the *Pinochet* case in Spain

Spain had several procedural advantages for those wishing to pursue a case based on universal jurisdiction. For example, Spanish law not only allowed a victim to bring a complaint directly to a magistrate, but allowed people who were not directly connected to the crime to file complaints such as Non-Governmental Organisations (NGOs).¹⁰⁵ The

¹⁰¹ Mark A. Drumbl *Atrocity, Punishment and International Law* (2007) Cambridge University Press, Cambridge 84.

¹⁰² Falk (note 96) at 109.

¹⁰³ Luc Reydamas ‘In re Pinochet. Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), November 8, 1998’ (Jul 1999) 93(3) *The American Journal of International Law* 703.

¹⁰⁴ Falk (note 96) at 107.

¹⁰⁵ Naomi Roht-Arriaza ‘Universal Jurisdiction: Steps Forward, Steps Back’ (2004) 17 *Leiden Journal of International Law* 377.

successful extradition of Pinochet to Spain prompted a number of other cases against heads of state. Although those against currently active heads of state were dismissed on immunity grounds, other cases, in particular those concerning Guatemala, appeared promising.¹⁰⁶ The *Guatemala Genocide* case was dismissed by a lower court on the ground of lack of jurisdiction due to subsidiarity.¹⁰⁷ However, the Spanish Supreme Court overturned part of this judgment before introducing limitations to Spain's universal jurisdiction law. The court held that it was necessary to have 'a clear tie to Spain' such as the nationality of the victim, or the presence of the offender within the country.¹⁰⁸ In this case, the genocide and terrorism charges were thus invalid, but the torture charges would remain as the Convention against Torture¹⁰⁹ allows for jurisdiction based on passive personality.

The case was referred to Spain's Constitutional Tribunal which subsequently overturned much of the Supreme Court's findings. The tight nexus required for universal jurisdiction cases under the Supreme Court was reversed as the Constitutional Tribunal issued 'a ringing endorsement of broad universal jurisdiction.'¹¹⁰ The Tribunal found that it would be contrary to the Spanish Constitution to restrict the constitutional right to effective judicial protection.¹¹¹ The *Guatemala Genocide* case in 2005 established that an investigation on the basis of universal jurisdiction was not required to wait on the presence of the accused,¹¹² although the presence of the defendant was required for trial,¹¹³ as 'universal jurisdiction, whose aim is fighting impunity, does not require any

¹⁰⁶ Roht-Arriaza (note 105) at 377.

¹⁰⁷ *The Guatemala Genocide Case*, Audiencia Nacional, Sala de lo Penal [A.N.] [Criminal Law Division] Judgment No. 115/2000 (2000).

¹⁰⁸ Roht-Arriaza (note 105) at 380.

¹⁰⁹ UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (hereafter referred to as the Convention against Torture).

¹¹⁰ Naomi Roht-Arriaza 'Guatemala Genocide Case' (2006) 100 *American Journal of International Law* 207.

¹¹¹ Hervé Ascencio 'The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals*: Unconditional Universality is Back' (2006) 4 *Journal of International Criminal Justice* 586.

¹¹² *Guatemala Genocide Case, Menchú Tumn (Rigoberta) and ors v Two Guatemalan Government Officials and Six members of the Guatemalan Military*, Constitutional Appeal, Case No 237/2005, ILDC 137 (ES 2005), 26th September 2005, Constitutional Court.

¹¹³ Roht-Arriaza (note 110) at 211.

link other than the universal character of the values protected by the provisions criminalising the most serious violations of international law.’¹¹⁴

c. The case of Fulgence Niyonteze

One of the earliest cases involving universal jurisdiction in recent times concerns the 1999 case of former Rwandan mayor, Fulgence Niyonteze.¹¹⁵ Niyonteze had applied for political asylum in Switzerland and was living in that country with his family. Based on information supplied to the Swiss government by an NGO, Niyonteze was detained. He was later charged under the Swiss Military Penal Code with murder, incitement to commit murder and violations of the laws and customs of war, as well as for war crimes under Common Article 3 of the 1949 Geneva Conventions and art 4(2)(a) of Additional Protocol II.¹¹⁶ Switzerland refused to extradite him to the International Criminal Tribunal for Rwanda, and instead prosecuted him in a Swiss Military Court.¹¹⁷ Switzerland’s investigation took two years and involved flying witnesses to Switzerland and the court to Rwanda. One of the military judges wrote that:

This investigation and everything that had to be done to prepare and organise the trial has demonstrated that it is perfectly possible to make investigations focusing on countries other than our own, to listen to victims and to see that they obtain justice. It is even a duty that we have towards those who have lived through dramatic events. The judicial intervention in such cases is also a warning to war criminals of all kinds, who should not or no longer be able [*sic*] to settle with impunity in the country of their choice.¹¹⁸

¹¹⁴ Ascencio (note 111) at 586.

¹¹⁵ *Public Prosecutor v. Niyonteze*, Tribunal Militaire d’Appel, 26 May 2000 and Tribunal Militaire de Cassation, Switzerland, ILDC 349 (CH 2001), judgment of 27 April 2001.

¹¹⁶ International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

¹¹⁷ Joshua E. Kastenberg ‘Universal Jurisdiction and the Concept of a Fair Trial: Prosecutor v Fulgence Niyonteze: A Swiss Military Tribunal Case’ (2004) 12(1) *University of Miami International and Comparative Law Review* 31.

¹¹⁸ Judge Navanethem Pillay ‘The Contribution of National Courts to International Criminal Justice: Some Comments on the Emerging Notion of Universal Jurisdiction’ in Evelyn A. Ankuham and Edward K. Kwakwa (eds) *African Perspectives on International Criminal Justice* (2005) Africa Legal Aid, Accra 11.

The Court convicted him of murder, attempted murder and breach of international conventions.¹¹⁹ The case went on appeal to the Military Appeals Tribunal which reversed all the lower court's convictions on jurisdictional grounds, except for the convictions for war crimes which had been based on universal jurisdiction.¹²⁰ Swiss military law allows for tribunals to exercise universal jurisdiction over individuals who are accused of war crimes. Although this rule was enacted in 1927, Niyonteze was only the second case.¹²¹ Prior to this case, the accused in *In re G* was charged with war offences in 1997 during the Bosnian conflict; but he was acquitted due to lack of evidence.¹²²

d. Belgium and universality

Belgium's Universal Jurisdiction Act of 1999 was a radical piece of legislation for two reasons. The prosecution could charge individuals who were not physically present on Belgian soil, while no nexus was required between Belgium and the person charged. The Act also disregarded the generally accepted immunity for heads of state that are currently in office.¹²³ The 2001 conviction of four Rwandans on charges of crimes against humanity was only the second time that a third-party State has convicted individuals of war crimes 'which do not directly affect the prosecuting State.'¹²⁴ Although the Rwandans were arrested in Belgium, their crimes had been committed in Rwanda against Rwandans.

The liberalism of the Universal Jurisdiction Act led to a flood of lawsuits filed against international figures. In 2001, a case was brought against Prime Minister Ariel Sharon of Israel on allegations that he played a role in massacres that had occurred in Beirut. This case proved to be politically embarrassing for Belgium, as Sharon refused to visit Brussels in fear of an indictment and arrest.¹²⁵ Belgium was also taken to the

¹¹⁹ Drumbl (note 101) at 83.

¹²⁰ Kastenber (note 117) at 31.

¹²¹ *Ibid* at 37.

¹²² *In re G*, Military Tribunal, Division 1, Lausanne, Switzerland, April 18, 1997, reported in 92 AM. J. INT'L. L. 78 (1998).

¹²³ Pillay (note 118) at 12.

¹²⁴ *Ibid*.

¹²⁵ Roht-Arriaza (note 105) at 385.

International Court of Justice (ICJ) over the arrest warrant that it issued for Abdoulaye Yerodia Ndombasi, acting Minister of Foreign Affairs for the Democratic Republic of Congo, for inciting genocide. The ICJ ruled that, as a former minister, Ndombasi was immune from prosecution for crimes which had been allegedly committed during his time of office.¹²⁶ The Belgian authorities decided that judicial reform was necessary, prompted by the ‘perceived theoretical problems of overlap and potential conflicts with sovereignty’ coloured by political pressure.¹²⁷ Thus due to the combined political pressure and criticism by the ICJ, Belgium withdrew the Universal Jurisdiction Act in 2003.¹²⁸

Despite the withdrawal of the Act, on 29 June 2005 a jury in Belgium convicted two Rwandan businessmen of aiding and abetting war crimes.¹²⁹ This conviction rests on legislation that enables Belgian courts ‘to prosecute certain extraordinary international crimes committed outside Belgium where the accused is a resident of Belgium.’¹³⁰

e. The case of Hissène Habré

In January 2000, torture victims from Chad travelled to Senegal to initiate criminal proceedings against former president and dictator, Hissène Habré. The state prosecutor brought the case to a regional tribunal in Dakar on 3 February 2000. This case, and the arrest of Habré, was the first time that an African country brought human rights charges against another nation’s head of state, as well as the first use of the “Pinochet precedent” outside of Europe.¹³¹

Habré had been living in Dakar since being deposed in December 1990, although he did not apply for asylum but appeared to enjoy the status of guest of the government.¹³² Despite a truth commission in Chad recommending in 1993 that the government ‘begin

¹²⁶ *Case Concerning the Arrest Warrant of 11 April 2000* supra note 86.

¹²⁷ Roht-Arriaza (note 105) at 376.

¹²⁸ Pillay (note 118) at 13.

¹²⁹ Drumbl (note 101) at 84.

¹³⁰ Ibid.

¹³¹ Pillay (note 118) at 11.

¹³² Stephen P. Marks ‘The *Hissène Habré* Case: The Law and Politics of Universal Jurisdiction’ in Stephen Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2004) University of Pennsylvania Press, Philadelphia 135.

without delay judicial process against those responsible for this horrible genocide, guilty of crimes against humanity',¹³³ the Commission of Inquiry was ignored until 1998 when the Chadian government considered requesting Habré's extradition from Senegal.¹³⁴ After the Chadian government elected not to extradite Habré, victims, supported by international NGOs, filed a criminal complaint. Once the victims had given testimony, the judge indicted Habré on charges of being an accomplice to torture.¹³⁵ A criminal investigation was opened with a view to further indictments against other perpetrators.

The Senegalese prosecution claimed that they had jurisdiction due to articles 4-7 of the Convention against Torture, art 79 of the Senegalese constitution and rules of customary international law.¹³⁶ Habré contested this charge and filed a motion to dismiss the case. The Appellate Court found in his favour stating that Senegal had not adopted legislation which would implement the provisions of the Convention against Torture in order that its courts would have jurisdiction over torture committed by a foreigner outside of their territory.¹³⁷ The court found that the legislation had provisions for jurisdiction to prescribe, but not for jurisdiction to adjudicate.¹³⁸ An appeal to the Supreme Court found that 'Senegalese courts do not have jurisdiction over acts of torture committed by a foreigner outside of the territory [of Senegal], whatever the nationality of the victims.'¹³⁹ Although the Convention against Torture established the duty to extradite or punish (*aut dedere aut judicare*),¹⁴⁰ the Court concluded that this was a non-self-

¹³³ Original text: « D'engager sans délai des poursuites judiciaires contre les auteurs de cet horrible génocide, coupables de crimes contre l'humanité. » In *Les crimes et détournements de l'Ex-Président Habré et de ses complices, Rapport de la Commission d'Enquête du Ministère Tchadien de la Justice*, L'Harmattan 1993, 98. Translation from Marks (note 132) at 135.

¹³⁴ Marks (note 132) at 135.

¹³⁵ Ibid at 140.

¹³⁶ Ibid at 141.

¹³⁷ Pillay (note 118) at 11.

¹³⁸ Marks (note 132) at 142.

¹³⁹ Original text: « ...que les juges relèvent qu'aucune modification de l'article 669 du code de procédure pénale n'est intervenue et en déduisent que les juridictions sénégalaises sont incompétentes pour connaître des actes de torture commis par un étranger en dehors du territoire quelle que soit la nationalité des victimes. » La Cour de Cassation, Première chambre statuant en matière pénale, 20 March 2001, *Arrêt n° 14 du 20-3-2001 Pénal, Souleymane Guengueng et autres Contre Hissène Habré*. Translation from Marks (note 132) at 146.

¹⁴⁰ Article 5(2) of the Convention against Torture.

executing duty and found that ‘Hissène Habré’s presence in Senegal cannot by itself justify prosecution against him.’¹⁴¹

Unlike the *SALC* case, anticipated presence was not an issue as the perpetrator was in the country that wished to prosecute the crime. However, the Senegalese interpretation of its obligations under the Convention against Torture stifled this attempt to create a “Pinochet precedent” in Africa.¹⁴² The case undermined global efforts to hold perpetrators accountable for heinous crimes and reinforced the culture of impunity, particularly in Africa.

f. Germany and Donald Rumsfeld

In Germany the Code of Crimes against International Law (*Völkerstrafgesetzbuch*), when read in conjunction with the Code of Criminal Procedure (*Strafprozessordnung*), provides for universal jurisdiction *in absentia*, provided the presence of the suspect could be anticipated. This codification of the principle of anticipated presence ensures that Germany has one of the more liberal universality provisions globally.¹⁴³ The German legislation also included subsidiary universal jurisdiction, in accordance with art 17 of the Rome Statute, allowing the state to relinquish prosecution where another state has a greater claim to do so. This implementation of the complementarity principle within German domestic legislation unfortunately gave horizontal effect to it meaning that if another state was currently investigating or prosecuting a case (or had already done so) Germany would be prevented from doing so. Consequently, when the *Abu Ghraib* situation was referred to court,¹⁴⁴ it led to the incorrect application of art 14 of the Rome Statute by a German judge.¹⁴⁵ The judge stated that the situation had already

¹⁴¹ Original text: « [L]a présence au Sénégal d’Hissène Habré ne saurait à elle seule justifier les poursuites intentées contre lui. » La Cour de Cassation, Première chambre statuant en matière pénale, 20 March 2001, *Arrêt n° 14 du 20-3-2001 Pénal, Souleymane Guengueng et autres Contre Hissène Habré*. Translation from Marks (note 132) at 147.

¹⁴² Marks (note 132) at 147.

¹⁴³ Cedrik Ryngaert ‘Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations’ in Morten Bergsmo (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) Forum for International Criminal and Humanitarian Law, Oslo 180.

¹⁴⁴ Prosecutor General, Federal Supreme Court, Criminal Complaint Against Donald Rumsfeld et al., No. 3 ARP 156/06-2 (Apr. 5, 2007).

¹⁴⁵ Ryngaert (note 143) at 180.

been dealt with in the United States and thus, according to art 17 of the Rome Statute, it was not admissible in Germany.¹⁴⁶

Although, as Ryngaert states, ‘there are powerful arguments against this method’ if a critical number of states believe that the complementarity principle may be applied on a horizontal level ‘it may crystallize as a norm of customary international law irrespective of the normative desirability of such as a norm.’¹⁴⁷

The case was also judged inadmissible, as it did not meet the requirements for anticipated presence. When the Stuttgart Regional Appeals Court dismissed the appeal in 2009, the Court stated that:

Contrary to the view of the complainants, however, the expectation of a suspect’s future sojourn in the country cannot be simply based on the fact that it cannot be ruled out. A sojourn in the country can only be expected if actual circumstances exist that suggest a presence in Germany within the foreseeable future.¹⁴⁸

This judgment provided guidelines for the use of anticipated presence in universality cases. One of the accused was Donald Rumsfeld, former Secretary of Defense, and despite allegations that he was regularly present in Germany for conferences and meetings, this was not deemed sufficient evidence of a link between Germany and the accused. The court concluded that the examples offered either lacked a domestic link or were unsubstantiated.¹⁴⁹ This case’s conclusions on anticipated presence were significant in shaping an approach towards investigating notable individuals.

g. Strict requirement of presence

A number of states require the accused’s presence prior to initiating an investigation. In Denmark, the accused must be present in order for a universal-jurisdiction based

¹⁴⁶ Ryngaert (note 143) at 180.

¹⁴⁷ Ibid at 181.

¹⁴⁸ Stuttgart Higher Regional Court, Oberlandesgericht Stuttgart, 5. Strafsenat, Beschluss vom 21. April 2009, 5 Ws21/09 at 9.

¹⁴⁹ Ibid at 10.

investigation to take place.¹⁵⁰ If the accused departs the country at any stage during the investigation, the investigation will immediately end.¹⁵¹ An example of this occurred in 2005 when Danish authorities received a complaint concerning a Chinese official who was scheduled to visit. Due to the strict presence requirement, an investigation could only begin on the official's arrival, and so there were only five days during the official's stay in which to investigate the complaint and apply for an arrest warrant. On the official's departure the investigation had to be discontinued.¹⁵² This strict interpretation of universal jurisdiction hinders Denmark's ability to deal with allegations of international crimes committed by foreign perpetrators.

h. South Africa and customary international law

The presence requirement is one which must be balanced between the generally recognised right of the accused to be present during their trial¹⁵³ and the necessity, expressed in the Preamble of the Rome Statute, to end impunity for international crimes which is facilitated by universal jurisdiction and the prosecution of perpetrators in domestic courts.¹⁵⁴ Article 3(b) of the 2005 Resolution of the *Institut de Droit International* stated that the accused's presence is required to exercise universal jurisdiction except for acts of investigation and requests for extradition,¹⁵⁵ while the AU's Draft Model National Law on Universal Criminal Jurisdiction only requires the accused's presence during the trial.¹⁵⁶ State practice appears to support the view that the presence of the accused is not required for an initial investigation to be opened as 'only a very small number of states explicitly required the accused's presence to authorise an investigation.'¹⁵⁷ Under s 232 of South Africa's Constitution,¹⁵⁸ customary international law is automatically law in South Africa unless it conflicts with South African

¹⁵⁰ Woolaver (note 53) at 264.

¹⁵¹ *Ibid.*

¹⁵² Du Plessis (note 79) at 5.

¹⁵³ Article 14(3)(d) of the International Covenant on Civil and Political Rights of 1966; Article 63(1) of the Rome Statute.

¹⁵⁴ Woolaver (note 53) at 261.

¹⁵⁵ *Institut de Droit International* (note 87).

¹⁵⁶ Article 4(1) of the African Union (Draft) Model Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI (2012).

¹⁵⁷ Woolaver (note 53) at 264.

¹⁵⁸ Constitution of the Republic of South Africa, 1996, hereafter referred to as the Constitution.

legislation or the Constitution. However, without an international treaty on the nature of universal jurisdiction and only limited examples of state practice so far, ‘there is at this point no clear rule of customary international law’ on the issue.¹⁵⁹

As mentioned above, under South Africa’s ICC Act one of the triggers for jurisdiction is the presence of the accused in South Africa after committing the crime.¹⁶⁰ Du Plessis calls s 4(3)(c) ‘a particularly progressive feature of the ICC Act’¹⁶¹ as this extension of jurisdiction disregards the accused’s nationality or residence and does not require a close or substantial connection with South Africa at the time of the offence. As the ICC Act concerns crimes which fall under the universality principle, s 4(3)(c) relies on universal jurisdiction so no nexus with the prosecuting state is required.

Du Plessis explains that the ICC Act provides South Africa with an “opportunity” to act because of universal jurisdiction, however this is limited by the phrase ‘present in the territory of the Republic’¹⁶² and accordingly the Act adopted a form of conditional universal jurisdiction which is ‘contingent upon the presence of the suspect in the *forum state*’.¹⁶³

Gevers refutes this by claiming that a more accurate interpretation is that s 4(3)(c) ‘merely confirms the territorial limits of South Africa’s *enforcement* jurisdiction and recognises that under South African law our courts cannot hold trials in absentia’.¹⁶⁴ South Africa still retains universal jurisdiction over its prescriptive capabilities and these are not conditional on the presence of the accused on South African territory after the commission of a crime. The ICC Act therefore regulates South Africa’s obligations under universal jurisdiction¹⁶⁵ for the presence of the accused on South African soil is required in order to prosecute. Chenwi agrees with this explanation, also interpreting

¹⁵⁹ Woolaver (note 53) at 264.

¹⁶⁰ Section 4(3)(c) of the ICC Act.

¹⁶¹ Du Plessis (note 79) at 4.

¹⁶² Section 4(3)(c) of the ICC Act.

¹⁶³ Du Plessis (note 79) at 4.

¹⁶⁴ Gevers, ‘South Africa Litigation Centre & Another v National Director of Public Prosecutions & Others’ (2013) 130(2) *South African Law Journal* 295.

¹⁶⁵ Du Plessis (note 79) at 4.

South Africa's s 4(3)(c) to be solely concerned with prosecution and stating that universal jurisdiction *in absentia* is 'explicitly prohibited by the Act.'¹⁶⁶

South Africa's ICC Act also appears to define jurisdiction arising from the presence of the accused in South Africa 'after the commission of the crime'.¹⁶⁷ However s 4(3)(c) is unclear on when the accused is required to be present in South Africa during the process of investigation and prosecution. This ambiguity is of paramount significance in the *SALC* case.

Du Plessis identifies two reasons which appear to support the interpretation that a suspect is not required to be physically present in the *forum deprehensionis* in order for an investigation to be initiated, or for an arrest warrant to be issued in anticipation of arrival.¹⁶⁸ Firstly, it is practical for an initial investigation to ascertain the current location of the accused. Thus it would be illogical to refuse to investigate when the accused's status is uncertain.

Whether or not expressed, the condition of presence must be presumed for the purposes of the "search", during the course of which it will be verified. Otherwise it is a vicious circle: in order to know whether X is in hiding on our territory, it is necessary to search for him; but in order to search for him, it is necessary to have already discovered (by enlightenment or intuition) that he is present.¹⁶⁹

Secondly, as jurisdiction is based on the location of the accused and not the other circumstances of the case, it would be impractical if the state could only 'open an investigation to the point at which it can be proven that a suspect is within the territory of the state exercising universal jurisdiction'.¹⁷⁰ An investigation without the presence of the accused would deter international criminals from travelling to the country or at least alert authorities to the incoming presence of a suspect. Without such measures, South

¹⁶⁶ Chenwi (note 35) at 35.

¹⁶⁷ Section 4(3)(c) of the ICC Act.

¹⁶⁸ Du Plessis (note 79) at 5.

¹⁶⁹ C. Lombois (1995), 'De la compassion territoriale', in *Revue de Science Criminelle et de Droit Pénal Comparé*, p. 401, unofficial translation, cited in FIDH, 'Implementing the Principle of Universal Jurisdiction in France' (March 2006) [online].

¹⁷⁰ Du Plessis (note 79) at 5.

Africa would run the risk of becoming a safe haven for international criminals.¹⁷¹ However, the presence of the accused would still be required before the initiation of more advanced judicial proceedings in order to prevent the duplication of prosecutions for the same offence in multiple jurisdictions.¹⁷² Trials in absentia are prohibited under South Africa's Constitution in order to protect the accused's right to a fair trial.¹⁷³

The legal threshold of anticipated presence as a precondition for opening an investigation appears to avoid the potential legal and practical difficulties identified. This threshold also facilitates the interpretation of the ICC Act in accordance with the Rome Statute without being hindered by the strict presence requirement. Under s 233 of the Constitution, a court will prefer a reasonable interpretation of legislation that is consistent with international law to any alternative that is inconsistent with international law. As the Princeton Principles confirm, there is no international requirement for the presence of a suspect prior to the instigation of an investigation. Therefore the anticipated presence requirement would be acceptable as a means to give effect to the intention of parliament, expressed in the ICC Act, whose aim is 'to ensure that domestic prosecutions of international criminals take place in South Africa.'¹⁷⁴

CHAPTER SEVEN: Infrastructure of the ICC Act

At first glance, South Africa's obligations under the Rome Statute, enforced by the ICC Act, appear to empower the South African authorities to investigate and prosecute all allegations of international crimes. However, this would be unfeasible and place an extraordinary burden on the police, prosecuting authorities and the judiciary.¹⁷⁵ Therefore limitations were placed on the prosecution and investigation of international crimes by the South African authorities. These were instituted by the rules governing criminal procedure in South Africa, the Constitution and South Africa's ICC Act, as well as international instruments.

¹⁷¹ Woolaver (note 53) at 266.

¹⁷² Ibid.

¹⁷³ Section 35(3)(e) of the Constitution.

¹⁷⁴ Du Plessis (note 79) at 5.

¹⁷⁵ Woolaver (note 53) at 267.

Woolaver proposes that the principle of subsidiarity of universal jurisdiction be applied in order to lessen this burden. The principle of subsidiarity states that the national court of first instance should be situated in the state with the closest link to the crime.¹⁷⁶ Therefore South Africa's obligation to investigate and prosecute would only be exercised if there was no other state with a closer link. This principle is recognised as a method of resolving competing jurisdictions.

The temporal scope of the ICC Act limits the prosecution of crimes to those occurring after the act came into force in 2002.¹⁷⁷ The principle of *nullum crimen sine lege* (no crime without law) is internationally accepted and South Africa's own Constitution prohibits the retrospective application of criminal law in s 35(3)(l). The case of *Masiya v Director of Public Prosecutions*¹⁷⁸ confirmed the Constitutional Court's approach to the principle of legality by stating that '[s]ection 35(3)(l) of the Constitution confirms a long-standing principle of the common law that provides that accused persons may not be convicted of offences where the conduct for which they are charged did not constitute an offence at the time it was committed.'¹⁷⁹ However, this is not limited to only national crimes as this section states that the right to a fair trial of the accused includes the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'.¹⁸⁰

International law is included as a source of law within the Constitution by s 232, which declares that customary international law will be respected provided that it is not inconsistent with the Constitution or an Act of Parliament. Section 233 requires the courts to interpret legislation consistently with international law, while s 39 (1)(b) states that the Bill of Rights must be interpreted with due consideration of international law. Thus the extension of the ICC Act 'to crimes under customary international law that took place before the Act came into force would not violate this principle [of *nullum*

¹⁷⁶ Woolaver (note 53) at 267.

¹⁷⁷ Section 40 of the ICC Act.

¹⁷⁸ 2007 (5) SA 30 (CC).

¹⁷⁹ *Masiya v Director of Public Prosecutions and Others* 2007 (5) SA 30 (CC).

¹⁸⁰ Section 35(3)(l) of the Constitution.

crimen sine lege]¹⁸¹ and would be compliant with the above sections of the Constitution.

South Africa is a party to a number of international treaties and conventions which also impose obligations on states parties to adopt national legislation to criminalise specific crimes and to prosecute offenders. Once South Africa has implemented the necessary steps to ratify an international treaty, then the state is bound to comply. These steps are outlined by both the treaty and by S 231 of the Constitution. For example, the 1949 Geneva Conventions and their 1977 Protocols became legally binding when the Implementation of the Geneva Conventions Act 12 of 2002 was adopted.

In order to investigate and prosecute the crimes contemplated in the ICC Act, the Priority Crimes Litigation Unit (PCLU) was established within the National Prosecuting Authority (NPA) in 2003.¹⁸² All requests for investigations and prosecutions in reference to the Act must be made to the PCLU. A special National Director of Public Prosecutions¹⁸³ is appointed to head this unit in accordance with s 13(1)(c) of the NPA Act¹⁸⁴ which states that the president may appoint Directors of Public Prosecutions ‘to exercise certain powers, carry out certain duties and perform certain functions’.¹⁸⁵ The ICC Act states that no prosecution may begin against an accused without the consent of a Director of Public Prosecutions. Therefore the NDPP who heads the PCLU is responsible for consenting, or refusing permission, to all prosecutions of international crimes in South Africa.¹⁸⁶

As the NDPP of the PCLU exercises prosecutorial discretion concerning crimes under the ICC Act, this discretion may be limited by three factors identified by du Plessis.¹⁸⁷ The NDPP should first consider the aims of the ICC Act. The primary aim of the Act is to ensure the prosecution of individuals who are alleged to be guilty of crimes against humanity, war crimes and genocides. South Africa is therefore under an obligation to

¹⁸¹ Gevers (note 164) at 295.

¹⁸² *Government Gazette* No 24876 of 23 May 2003.

¹⁸³ Hereafter referred to as the NDPP.

¹⁸⁴ National Prosecuting Authority Act 32 of 1998.

¹⁸⁵ Section 13(1)(c) of the National Prosecuting Authority Act.

¹⁸⁶ Du Plessis (note 79) at 7.

¹⁸⁷ *Ibid.*

investigate and, if a *prima facie* case is established, to prosecute in order to fight impunity. Under s 3(d), the ICC Act must:

[E]nable, as far as possible and in accordance with the principle of complementarity [...] the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.¹⁸⁸

The second consideration for the NDPP is that if he or she declines to prosecute under the ICC Act, comprehensive reasons for this decision must be provided to the Director-General of Justice and Constitutional Development and these must be forwarded to the Registrar of the International Criminal Court.¹⁸⁹

The final factor for consideration, raised by du Plessis, is compliance with the NPA Act and the NPA Prosecution Policy. According to the Preamble of this Act, South Africa's NPA is required to observe the United Nations Guidelines on the Role of Prosecutors¹⁹⁰ where paragraph 15 is particularly relevant:

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly [...] grave violations of human rights and other crimes recognised by international law and, where authorised by law or consistent with local practice, the investigation of such offences.¹⁹¹

The formation of the PCLU created an organisation to investigate and prosecute these crimes domestically and provides the framework for compliance with the Guidelines. The only limitation which qualifies the powers and practice of the PCLU and NDPP in investigating and prosecuting these crimes is the question of public interest.¹⁹² When considering whether it would be in the public's interest to prosecute, the NPA's prosecution policy states that prosecutors should consider all relevant facts which include:

¹⁸⁸ Section 3(d) of the ICC Act.

¹⁸⁹ Section 5(5) of the ICC Act .

¹⁹⁰ United Nations *Guidelines on the Role of Prosecutors*, The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 (1990).

¹⁹¹ United Nations Guidelines on the Role of Prosecutors (1990), para 15.

¹⁹² NPA Prosecution Policy, paragraph 4(c).

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.¹⁹³

The international crimes listed under the ICC Act are heinous in nature and thus have a cumulative effect on peace and security; therefore it would be logical to presume that there ‘must be compelling reasons of public interest to forestall or prevent such action by the prosecuting arm of government’.¹⁹⁴ The primary concerns of the PCLU should be the gravity of these international crimes, accompanied by their universal condemnation, the international community’s commitment to punish those who act with impunity and South Africa’s interest in not becoming a safe haven to fugitives from justice.¹⁹⁵ The Constitutional Court emphasised that ‘only the most compelling reasons’ would justify the exercise of discretion to refuse to instigate charges:

Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals.¹⁹⁶

The procedural limitation to prosecution, that is the consent or refusal by the NDPP, does not bar prosecution as per s 5(6) of the ICC Act. The consent of the NDPP is also limited to prosecution and is not required for an investigation.¹⁹⁷ The lack of consent by the NDPP for an investigation shall be explored with reference to the *SALC* case in Part B.

As has been stated above, the ICC Act gives effect to the complementarity framework in order to facilitate national prosecutions. Section 5 of the Act sets out the procedure for

¹⁹³ NPA Prosecution Policy, paragraph 4(c).

¹⁹⁴ Du Plessis (note 79) at 8.

¹⁹⁵ Ibid.

¹⁹⁶ *S v Basson* 2005 (12) BCLR 1192 (CC).

¹⁹⁷ Chenwi (note 35) at 36.

the establishment of proceedings in South African courts, in particular s 5(1) states that no prosecution may be initiated without the consent of the NDPP. The Director's decision must be informed with reference to 'South Africa's obligation in the first instance, under the principle of complementarity in the Rome Statute, to exercise jurisdiction over and to prosecute persons accused of having committed an ICC crime'.¹⁹⁸ This limitation, however, is reserved for prosecution as consent is not required for opening an investigation, issuing a warrant, arresting the accused and charging them for an offence.¹⁹⁹

In conclusion, South Africa's ICC Act is ambiguous on the issue of "anticipated presence". The international case law has shown that although a liberal interpretation was initially embraced, stricter guidelines have been introduced in recent years. However, as no consistent approach has been accepted worldwide, the interpretation on this point within customary international law still vague. Part B, concerning South Africa's own jurisprudence on this issue, outlines the facts and judgment of the *SALC* case. The Constitutional Court examined when the presence of the accused was required under South Africa's ICC Act by looking at the legal theories examined in Part A, above, as well as South Africa's obligations under international law.

PART B – SOUTH AFRICAN JURISPRUDENCE

CHAPTER ONE: Factual background to the *SALC* case

On 16 March 2008, the Southern Africa Litigation Centre (SALC) delivered a dossier of evidence relating to allegations of torture that had been committed against members of the political opposition party in Zimbabwe, the Movement for Democratic Change (MDC), during a raid by the ruling party, the Zimbabwe African National Union – Patriotic Front (ZANU-PF), on their headquarters, Harvest House in Harare in March 2007. At this raid, more than 100 people were taken into custody and were detained for several days. During this time they were allegedly tortured by Zimbabwean police. The dossier contained allegations of 'severe beatings, mock executions, waterboarding, and

¹⁹⁸ S 5(3) of the ICC Act, paraphrased in Du Plessis (note 79) at 8.

¹⁹⁹ Du Plessis (note 79) at 8.

electric shocks’ as well as pressure to implicate both themselves and others in carrying out petrol bombings which the ruling party had alleged that the opposition had committed.²⁰⁰ This raid occurred a year before national elections in Zimbabwe and relates to an alleged widespread and systematic attack on opposition members²⁰¹ and supporters in the run-up to the 2008 national elections.²⁰²

The dossier of evidence contained sworn witness statements of which seventeen deponents attested to suffering torture, while the other six were made by lawyers, medical doctors and family members of victims to corroborate the allegations of torture. SALC was concerned about the perception that the rule of law had collapsed in Zimbabwe, that the victims would not remain safe, and that the Zimbabwean courts would be unable to hold the perpetrators accountable.²⁰³ It is for these reasons that SALC delivered the dossier to the PCLU of the NPA in South Africa.

SALC also submitted a comprehensive memorandum containing ‘detailed legal and factual submissions providing guidelines on the prosecution of crimes against humanity such as torture’.²⁰⁴ The memorandum required that the NPA consider the legal details as well as the evidence contained within, in order to ascertain whether to initiate an investigation under South Africa’s ICC Act. SALC also offered its assistance to the NPA for the gathering of further evidence and the provision of advice concerning international law in respect of the acts alleged against the named perpetrators.²⁰⁵ SALC’s submission was made to the NPA as South Africa’s law enforcement agencies are legally obliged under the ICC Act to investigate international crimes and to hold these perpetrators accountable in South African courts. Although not all forms and instances of torture constitute crimes against humanity, ‘it was undisputed that if the

²⁰⁰ Gerhard Werle and Paul Christoph Bornkamm ‘Torture in Zimbabwe under Scrutiny in South Africa’ (2013) 11(3) *Journal of International Criminal Justice* 661.

²⁰¹ Gevers (note 164) at 296

²⁰² SALC case (note 1) at 9.

²⁰³ SALC case (note 1) at 11.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

allegations in this case are proved, the conduct of the Zimbabwean police officers could amount to crimes against humanity and thus an international crime'.²⁰⁶

SALC's submission was not only concerned with the conduct of the Zimbabwean police but also their superiors in the police force and in government according to the doctrine of 'command responsibility'. The memorandum relies on the definition of this doctrine as determined by the International Criminal Tribunal of Yugoslavia:

As long as a supervisor has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.²⁰⁷

SALC did not attempt to bring the torture complaints to the Zimbabwean law-enforcement agencies, however, it was accepted during legal proceedings in South Africa that the case should be 'conducted throughout on the basis that the Zimbabwean authorities have failed to act on the torture allegations'.²⁰⁸ The dossier listed the names of several Zimbabwean officials as suspects. SALC's founding affidavit in the North Gauteng High Court included reports by reputable human rights organisations which not only confirmed the allegations of widespread and systematic torture but also demonstrated that perpetrators were not being prosecuted and were acting without restraint.²⁰⁹ These statements were not denied by the South African Police Service (SAPS) but, rather, were dismissed as inadmissible evidence. The Constitutional Court found that due to the lack of denial by the SAPS there was sufficient evidence 'to form the ineluctable conclusion that the Zimbabwean authorities have failed to act on the torture allegations'.²¹⁰

SALC received a response from the Acting NDPP, Advocate Mpshe SC, more than eight months after the submission of the torture docket. The response stated that the allegations had to be evaluated by the SAPS before the NPA could make a decision

²⁰⁶ SALC case (note 1) at 12.

²⁰⁷ *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landžo (Appeals Chamber)* IT-96-21-A (ICTY) at para 198.

²⁰⁸ SALC case (note 1) at 12.

²⁰⁹ Ibid.

²¹⁰ Ibid.

whether to launch an investigation. The matter was referred to the acting National Commissioner of the SAPS, Tim Williams. SALC made a request to all parties involved that a decision be made by 30 January 2009. On 20 April 2009, SALC sent a further letter to the above parties as well as the Director-General of the Department of Justice and Constitutional Development. The extended deadline of 1 May 2009 was not met, and on 19 June 2009 the NDPP informed SALC that he had been advised by the acting National Commissioner of the SAPS that the SAPS did not intend to investigate the allegations.

The reasons furnished by the SAPS for their refusal to investigate were endorsed by the NDPP. These reasons include lack of an adequate investigation into the matter, and that further investigations would be ‘impractical, legally questionable and virtually impossible’.²¹¹ The letter sent by the acting National Commissioner of the SAPS states that ‘the docket contains nothing more than mere allegations’ and that he did not see that he should ‘[involve] the SAPS in an investigation, the legality of which is questionable and which can have far-reaching implications for the [SAPS] and the country in general.’²¹²

SALC and the Zimbabwe Exiles Forum (ZEF) applied to the North Gauteng High Court for an order reviewing and setting aside the decision by the SAPS and NPA not to investigate. This was the first case in South Africa to question the application of the ICC Act. The case interrogated the limits of the universality principle as well as the obligation to investigate serious human rights violations. After losing the case in the North Gauteng High Court, the SAPS appealed the judgment in the Supreme Court of Appeal and the Constitutional Court.

CHAPTER TWO: Final judgment on the *SALC* case

The *SALC* case is a pivotal case on several points of law and highlights South Africa’s role in supporting both the ICC, through complementarity, and the Rome Statute. The South African courts consistently emphasised South Africa’s obligation to prohibit

²¹¹ *SALC* case (note 1) at 15.

²¹² *Ibid.*

individuals the protection to ‘act with impunity’ in committing serious breaches of international law. The judgment of the North Gauteng High Court focused on three important aspects: first, the question of the applicants’ standing, secondly the reviewability of the decision not to investigate, and thirdly, the duty of South African authorities to investigate allegations of crimes against humanity in Zimbabwe.²¹³ The High Court held that the decision by the NPA and SAPS not to investigate the matter was inconsistent with both the Constitution and South Africa’s international law obligations. Judge Fabricius found that the ICC Act ‘committed South Africa, as a member of the international community, to bringing persons to justice under South African law where possible’ and concluded that:

[A]ll the mentioned provisions place an obligation on South Africa to comply with its obligations to investigate and prosecute, crimes against humanity within the ambit of the provisions of s 4(3) of the ICC Act, and it is in the public interest that the State does so.²¹⁴

The High Court’s judgment also emphasised that s 4(3) of the ICC Act referred to the accused’s presence during a trial. The Supreme Court of Appeal (SCA) agreed with this interpretation of s 4(3), although the SCA failed to specify exactly when the accused’s presence was necessary. The judgment did provide some preliminary guidelines to the use of anticipated presence which were developed further by the Constitutional Court. For example the practicality of an investigation would hinge on the likelihood of the accused’s presence for ‘if there is no prospect of a perpetrator ever being within a country, no purpose would be served by initiating an investigation.’²¹⁵

Nevertheless the SCA granted the SAPS leave to appeal to the Constitutional Court. The constitutional issue raised was the extent to which s 205(3) of the Constitution imposed a duty on the SAPS and the NPA to investigate the allegations in this particular case.²¹⁶ The National Commissioner of the SAPS disagreed with the Supreme Court of Appeal’s

²¹³ Werle and Bornkamm (note 200) at 661.

²¹⁴ *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (10) BCLR 1089 (GNP) at 13.4.

²¹⁵ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* supra note 64 at 66.

²¹⁶ *SALC* case (note 1) at 19.

judgment on three grounds: that the court had adopted ‘an absolutist position on universal jurisdiction’, that the court granted relief to the defendant that had not been sought, and that the court ‘predetermined the manner in which the SAPS is required to exercise its investigatory discretion.’²¹⁷ The legal question that the Constitutional Court had to answer was whether, considering national and international law obligations, the SAPS had a duty to investigate crimes against humanity beyond South Africa’s border, and if so at what point or in what circumstances would this duty be triggered.²¹⁸

a. Universal jurisdiction

The Constitutional Court first determined the position of international law within South Africa’s legal framework by referring to the Constitution, in particular ss 231(4),²¹⁹ 232²²⁰ and 233.²²¹ In the case of *Glenister v President of the Republic of South Africa and others*,²²² Ngcobo CJ stated that the Constitution had made it clear that South Africa’s legislation and Constitution should be ‘interpreted to comply with international law, in particular international human rights law’.²²³ In this case the international law concerned had been domesticated through the adoption of the ICC Act and the Prevention and Combating of Torture of Persons Act 13.²²⁴

The Court then examined South Africa’s ability to exercise jurisdiction. The Court referred to O’Keefe’s interpretation of international law as consisting of three levels: prescriptive, adjudicative and enforcement jurisdiction. According to the *Lotus* case, all

²¹⁷ *SALC* case (note 1) at 20.

²¹⁸ *SALC* case (note 1) at 21.

²¹⁹ Section 231(4) states that:

‘[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation’.

²²⁰ Section 232 states that:

‘[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

²²¹ Section 233 states that:

‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

²²² 2011 (3) SA 347 (CC).

²²³ *Glenister v President of the Republic of South Africa and others* supra note 222 at 97.

²²⁴ of 2013.

three forms of jurisdiction may be exercised within the territory of the state.²²⁵ Domestic criminal jurisdiction recognises four grounds for *rationes jurisdictionis*: nationality, passive personality, the protective principle and universal jurisdiction.²²⁶ The Rome Statute lists the grounds for jurisdiction as territoriality or nationality in art 12(2)²²⁷ but does not have jurisdiction on the basis of universality.

As has been discussed in Part A, universal jurisdiction has been supported by state practice in international law, yet there are certain principles which provide boundaries for this practice, in particular Brownlie's three general principles.²²⁸ Enforcement jurisdiction is only possible within the confines of the territory of the state seeking to prosecute an individual, however both of the other forms of jurisdiction (adjudicative and prescriptive) are only limited by the principle of non-intervention which protects the principle of territoriality.²²⁹

b. Principle of Subsidiarity

Zimbabwe has primary jurisdiction over allegations of torture within its borders by its citizens against other Zimbabweans. But the Constitutional Court stated that as the dossier was brought to the attention of the South African authorities without any attempt to request the Zimbabwean police to investigate should not deter the South African authorities from their investigation. However this statement is controversial as, according to the Rome Statute, the ICC Prosecutor must inform states parties that would normally exercise jurisdiction prior to initiating an investigation.²³⁰ Stigen queries whether this obligation extends to domestic jurisdictions under the principle of subsidiarity.²³¹ In the *Arrest Warrant* case, judges Higgins, Kooijmans and Buergenthal stated in their separate opinion that a 'State contemplating bringing criminal charges

²²⁵ *The SS Lotus case* supra note 57.

²²⁶ Brownlie (note 74) at 303-308.

²²⁷ Of the Rome Statute.

²²⁸ See Part A Chapter Three: Universal jurisdiction above.

²²⁹ *SALC case* (note 1) at 29.

²³⁰ Article 18(1) of the Rome Statute.

²³¹ Jo Stigen *The Relationship between the Principle of Complementarity and Exercise of Universal Jurisdiction for Core International Crimes* in Morten Bergsmo (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) Forum for International Criminal and Humanitarian Law, Oslo 151.

based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.²³² This appears to contradict the judgment of the Constitutional Court directly and has consequences for the principle of subsidiarity. It is notable that some countries have implemented domestic legislation to deal with the issue of subsidiarity. In Spain, for example, the law developed to include the principle of subsidiarity whereby the state where the crime was committed is favoured over a claim by Spain which is based on universal jurisdiction.²³³ The issue of concurrent jurisdictions and competing claims will be examined more closely in Chapter Three.

c. Obligation to investigate or prosecute

On the issue of complementarity, the Court emphasised that the ICC is a court of last resort and that states parties have a primary responsibility to investigate and prosecute. All parties to the Rome Statute are informed that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’ in order that impunity for these perpetrators may end.²³⁴ The Constitutional Court also emphasised that the ICC’s stance against impunity for universal jurisdiction allows the investigation of crimes committed in non-signatory countries.²³⁵

The Court then examined South Africa’s jurisdiction to prosecute these particular allegations. Torture is a statutory crime because it is criminalised in South Africa’s ICC Act.²³⁶ This Act allows for the prosecution of a crime which occurred beyond the borders of South Africa.²³⁷ The international ban on torture is a peremptory norm and South Africa has its own Torture Act, the Prevention and Combating of Torture of Persons Act which domesticated the 1984 United Nations Convention against

²³² *Case Concerning the Arrest Warrant of 11 April 2000* supra note 86 at 59.

²³³ Luciana Boboc and Mihaela Aghenitei ‘Universal Jurisdiction and Concurrent Criminal Jurisdiction’ (2014) 1 *Law Review*, 3.

²³⁴ Preamble of the Rome Statute.

²³⁵ *SALC* case (note 1) at 32.

²³⁶ Section 3(d)-(e) of the ICC Act.

²³⁷ *SALC* case (note 1) at 33.

Torture.²³⁸ The Court also referred to regional law, in particular the African Charter on Human and People's Rights²³⁹ which was signed and ratified by both South Africa and Zimbabwe, as well as legal principles adopted by SADC and non-binding resolutions of the United Nations.

The nature of human rights treaties to impose obligations on states parties differentiates them from other ordinary treaties. These obligations are referred to as *erga omnes* for they are owed to the international community as a whole.²⁴⁰ South Africa's obligations under international law should therefore be of paramount importance as they are owed to all other states parties who have an interest in upholding such treaties.

The Court concluded that due to the Constitution, the international nature of the crime of torture, and the multitude of international and regional treaties on this issue, South Africa 'is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations.'²⁴¹

d. Anticipated presence?

The Court's final focus was the requirement for the presence of the accused. The Court referred to the Constitution where in s 35(3)(e) an accused is required to be present during trial but there is no requirement for the presence of the accused during an investigation. According to the Supreme Court of Appeal, "anticipated presence" in South Africa was sufficient to comply with the principles, as stated by Brownlie, that 'there should be a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction.'²⁴² The SAPS argued that the suspect's presence was

²³⁸ UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85.

²³⁹ Organization of African Unity, *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁴⁰ Hennie Strydom, 'The Vicissitudes of the Rome Statute in the Hands of South Africa's Law Enforcement Agencies' (2012) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 825.

²⁴¹ *SALC* case (note 1) at 40.

²⁴² Brownlie (note 74) at 313.

required before an investigation could be initiated in order to prevent a multiplicity of investigations or prosecutions of any international crime by a range of states.

The Constitutional Court focused on whether presence was required at the point of the investigation. The 2005 Resolution of the *Institut de Droit International* states that an accused's presence was required when exercising universal jurisdiction 'apart from acts of investigation and requests for extradition'.²⁴³ Part V of the Rome Statute, which deals with the investigation and prosecution process, distinguishes between the two when dealing with the issue of the presence of the accused. Numerous mentions are made of the need to request the presence of the accused, *inter alia*, art 54 where the Prosecutor may 'request the presence of and question persons being investigated, victims and witnesses'.²⁴⁴

The Supreme Court of Appeal judged that although the ICC Act did not 'expressly authorise an investigation prior to the presence of the alleged perpetrator within South African territory, it also does not prohibit such an investigation'.²⁴⁵ Therefore, an investigation was not contemplated in the legislation and no necessary measures were indicated. The Court read the ICC Act in conjunction with other legislation and found that 'the SAPS, in the form of the Hawks, has the competence to initiate an investigation into conduct criminalised in terms of the Act which had been committed extra-territorially'.²⁴⁶

The Constitutional Court agreed with the Supreme Court of Appeal's decision that an investigation may occur in the absence of a suspect. The Court made several arguments that, while not in support of anticipated presence, appear to find that any requirement for the presence of the accused prior to, or as a precondition for, an investigation would render the process unworkable. For example, it would be ludicrous for the presence of the accused to be required before an investigation into the location of the accused could

²⁴³ *Institut de Droit International* (note 87).

²⁴⁴ Article 54(3)(3) of the Rome Statute.

²⁴⁵ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* supra note 64 at 55.

²⁴⁶ *Ibid.*

occur. The Court also determined that an anticipatory investigation did not infringe on the constitutional rights of the accused to a fair trial.²⁴⁷

CHAPTER THREE: Conclusions by the Constitutional Court

The Court did however provide a set of guidelines or limitations on the exercise of universal jurisdiction. The first limitation is the principle of subsidiarity, which declares that the other country must be unwilling or unable to investigate or prosecute, that there is a substantial connection between the subject matter and the source of jurisdiction, and the prohibition of intervention in another country.²⁴⁸ The second limitation is practicability as a preliminary investigation must examine whether a successful prosecution would be likely by testing reasonableness, the ease of gathering evidence, and the nature and extent of resources. Geographic proximity should also play a role in determining the practicality of an investigation.²⁴⁹

a. Admissibility

The Constitutional Court's guidelines on the exercise of universal jurisdiction provide a practical framework for the application of anticipated presence with two limitations. These limitations are practicability and the principle of subsidiarity as noted above. Like the International Criminal Court, the principle of subsidiarity allows South Africa to step in when the other country is unwilling or unable to investigate or prosecute. It is unclear what threshold will be used to establish this, although the *Katanga* case established the admissibility test under art 17(1)(a) and (b) of the Rome Statute and could be used as a persuasive source for a definition.²⁵⁰ The principle also states that there must be a substantial connection between the source of jurisdiction and the subject matter, in addition to non-intervention in the domestic affairs of the other country.

²⁴⁷ *SALC* case (note 1) at 48.

²⁴⁸ *SALC* case (note 1) at 61.

²⁴⁹ *SALC* case (note 1) at 63.

²⁵⁰ ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, ICC-01/04-01/07 (2009) paras 86-9.

There are no guidelines within either the Rome Statute or South Africa's ICC Act to provide for a situation where the state with primary jurisdiction, due to a change in capacity, is able to assume jurisdiction in a case where an investigation or prosecution is already underway in another state. Although Zimbabwe has not ratified the Rome Statute or the International Covenant on Civil and Political Rights, it is bound by the African Charter on Human and Peoples' Rights²⁵¹ among other regional documents and non-binding United Nations resolutions. Article 5 of the Charter protects the rights of citizens to dignity and to be free from torture and other degrading treatment. This right imposes the correlating obligation on Zimbabwe to investigate allegations of torture.²⁵²

Should Zimbabwe decide to investigate the allegations would South Africa's ability to investigate be halted? It appears to depend on the requirements of admissibility: unwillingness or inability. The Rome Statute emphasises the principle of *ne bis in idem* in art 20 stating that 'no person who has been tried by another court for conduct' which is also listed within the Statute 'shall be tried by the Court with respect to the same conduct'. The proviso is that the initial prosecution should not have taken place with the purpose of shielding the perpetrator from justice, or if the proceedings 'were not conducted independently or impartially in accordance with the norms of due process recognised by international law' or were 'inconsistent with an intent to bring the person concerned to justice.'²⁵³

If the principle of subsidiarity was followed then Zimbabwe, as the state with the closest link to the crime, would have the strongest claim. The competing claims of two domestic jurisdictions over prosecuting or investigating such a crime have not been examined in any great detail. Article 19 of the Rome Statute refers to a challenge by a state on admissibility or jurisdiction which may be brought by a state which also has jurisdiction. There is no rule in international law which establishes a hierarchy of the

²⁵¹ Organization of African Unity (note 239).

²⁵² *SALC* case (note 1) at note 45.

²⁵³ Article 20(3) of the Rome Statute.

various sources of jurisdiction.²⁵⁴ Rastan summarizes a variety of reasons both for and against prosecution in the country where the crime occurred; however he concludes that '[t]he silence of the Rome Statute on which domestic jurisdiction should be granted priority when there are competing admissibility challenges means that the issue is likely to be treated on a case by case base.'²⁵⁵

The Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) declared in 2005 that there should be no predetermined hierarchy between domestic jurisdictions concerning the transfer of cases under rule 11 *bis* proceedings. The Appeals Chamber observed that attempts to resolve this issue and establish criteria for the most appropriate jurisdiction between 'concurrent jurisdictions on a horizontal level' had hitherto failed and that '[i]nstead, States have agreed on various criteria and opted to give weight to certain criteria over others depending on the circumstances of a particular case.'²⁵⁶ The Chamber concluded that a decision on applicability should be based on pragmatic considerations and an evaluation of which State would have the 'significantly greater nexus'.²⁵⁷

In 2003 Eurojust, the European Union's judicial cooperation body, published a series of guidelines for cross-border cases where there was a distinct possibility of prosecution occurring in two or more jurisdictions.²⁵⁸ These may be of some interest to South Africa and other jurisdictions in reference to horizontal claims. However, the conclusion one may reach on conflicting domestic jurisdictional claims is that the determining factors will be a comparison of the nexus between the crime and the competing states, as well as pragmatic considerations.²⁵⁹

²⁵⁴ Rod Rastan 'Complementarity: Contest or Collaboration?' in Morten Bergsmo (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) Forum for International Criminal and Humanitarian Law, Oslo 99.

²⁵⁵ Ibid at 99-100.

²⁵⁶ *Prosecutor v. Gojko Janković*, Referral Appeals Decision, IT-96-23/2-AR11bis.2, 15 November 2005, para 34.

²⁵⁷ *Prosecutor v. Gojko Janković* supra note 256 at para 37.

²⁵⁸ Eurojust Guidelines, Annual Report 2003, Making the Decision - "Which Jurisdiction Should Prosecute?"

²⁵⁹ Rastan (note 254) at 103.

As the Constitutional Court states, ‘if Zimbabwe were able and willing to investigate and prosecute the alleged crimes of torture, there would be no place for South Africa also to do so.’²⁶⁰ The *SALC* case alleges the involvement of six Cabinet Ministers and Directors General as well as the ZANU-PF; but a future change in the political landscape could lead to a judiciary that may fulfil the requirements for functional independence and impartiality.

The practicability limitation requires a preliminary investigation to answer whether a full investigation would be likely to lead to a successful prosecution. The preliminary stage will check reasonableness, how easily the prosecution may collect evidence, the extent of resources available and the geographic proximity. In the *SALC* case it is clear that geographic proximity is a high priority concern. The case concerns a neighbouring country which has significant links with South Africa. It has been evident that political unrest has had implications on Zimbabwe’s neighbouring states, and in particular, South Africa, as attested by the number of Zimbabwean refugees seeking asylum in South Africa. States would thus be in favour of investigating allegations of international crimes on their borders as not to do so may lead to instability.

b. Political implications

The judgment of the Constitutional Court does not only affect the legalities of interpreting the ICC Act or the decision by the Court that the SAPS was bound to consider investigating the case. Zimbabwe is one of South Africa’s neighbours, as well as a fellow member of SADC, and there are close ties between the two countries. During the case, there was pressure exerted on South Africa by Zimbabwe who was refuting the claims. One of the SAPS’s arguments in the case had focused on the harm to the relationship between the two countries. The Constitutional Court emphatically dismissed this as unavoidable and described torturers as the enemy of all.²⁶¹

This follows the dissenting opinion of Judge ad hoc Van den Wyngaert in the *Arrest Warrant* case stating that ‘[i]t may be *politically* inconvenient to have such a wide

²⁶⁰ *SALC* case (note 1) at 62.

²⁶¹ *SALC* case (note 1) at 36.

jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad.’²⁶² However, Van den Wyngaert concluded that trials based on universal jurisdiction could not be deemed illegal due to political inconvenience.²⁶³

The SAPS’s concerns over interfering with the sovereignty of a foreign state during an investigation were noted by the Constitutional Court. But the SAPS’s reference to the offer of assistance by SALC as a proposal to conduct “espionage” in Zimbabwe on behalf of the SAPS was pronounced to be ‘wholly untenable’.²⁶⁴ The Court found that ‘there is nothing improper or unlawful in a non-governmental entity facilitating foreign nationals travelling to and lawfully entering into this country to aid a lawful investigation’.²⁶⁵ The Constitutional Court was highly critical of the Zimbabwean authorities and judicial system throughout the judgment. Although the Court did not go so far as to state that the reasons offered by SALC for bringing the case to the South African courts, namely that ‘there were several indications of the collapse of the rule of law in Zimbabwe and that the safety of the witnesses in Zimbabwe could not be guaranteed’²⁶⁶ were true, their conclusion that ‘it was very unlikely that the Zimbabwean police would have pursued the investigation with the necessary zeal’²⁶⁷ was not complimentary.

This conclusion has rather interesting political ramifications as Zimbabwe, a fellow member of SADC, has been supported by the South African government throughout the turbulent economic and political situation of recent years. In particular, the South African government has shown support for the ruling party and the leadership of Robert Mugabe, as seen in 2013 when President Jacob Zuma censored the South African envoy, Lindiwe Zulu, and endorsed the ZANU-PF’s landslide victory in the national election

²⁶² *Case Concerning the Arrest Warrant of 11 April 2000* supra note 86 at 56 (original emphasis).

²⁶³ Ibid.

²⁶⁴ SALC case (note 1) at 75.

²⁶⁵ Ibid.

²⁶⁶ SALC case (note 1) at 62.

²⁶⁷ Ibid.

‘despite widespread accounts of electoral irregularities’.²⁶⁸ The South African judiciary, although following the guidance of the ICC Act in fighting impunity on the African continent, is showing support, although indirectly, to opponents of the current Zimbabwean government who would be travelling to South Africa in order to give testimony against the current Zimbabwean regime. Although the judgment stated that an investigation would not offend the principle of non-intervention, the Court does not appear to take into account the affect that an investigation would have on Zimbabwe’s current political situation and the legitimacy of its government.

The Constitutional Court’s support of civil society involvement in facilitating the transport of Zimbabwean victims and witnesses to South Africa appears to be considering the fact that the investigation is ‘one into a crime as grave and heinous in international law as torture.’²⁶⁹ This leads one to suppose that the actions of SALC may be less justifiable if it concerned a different, less serious crime or type of investigation. South Africa’s policy on investigations highlights the need to respect state sovereignty according to the International Co-operation in Criminal Matters Act.²⁷⁰ Under this Act South Africa is required to make a formal request for assistance to Zimbabwe. Zimbabwe is not a party to the Convention against Torture or the Rome Statute so ‘South Africa is therefore dependent on political will to bring those accused of the acts of torture to justice’²⁷¹ so Zimbabwe would have grounds to refuse the request.

South Africa’s ICC Act has now been displayed as an effective tool to combat impunity in the region, and may lead to further claims relating to other African nations in the SADC region or possibly further afield. These claims will however be limited by the Constitutional Court judgment’s emphasis on the practicability of investigating allegations. Van den Wyngaert’s dissenting opinion also referred to practicality,

²⁶⁸ Matthew Graham ‘The ANC and the ‘myth’ of liberation solidarity – ‘othering’ in post-apartheid South(ern) Africa’ (2014) 44(1) *Africa Insight* 185.

²⁶⁹ SALC case (note 1) at 75.

²⁷⁰ 75 of 1996.

²⁷¹ Chenwi (note 35) at 39.

particularly in reference to the difficulty of obtaining evidence in other states and a fear of overburdening the court system.²⁷²

These guidelines on practicality will likely prove invaluable in avoiding the kinds of problematic situations that occurred in Belgium and Spain where the lack of clear limitations from the onset led to a gradual decrease in the applicability of universal jurisdiction. In both of these states political pressure was exerted on the courts. Belgium's prosecutors currently have broad discretion on universal jurisdiction cases but these individuals are not protected from political pressure.²⁷³ South Africa's courts, particularly those involved in the *SALC* case, have shown admirable strength in withstanding political pressure and have complied with their commitment to justice regardless of the wishes and views of other branches of government.

c. Legal conclusions

The conclusion of the Constitutional Court was that the SAPS had misconceived their legal obligations under the ICC Act and that the merits of the case were sufficient to conclude that there was a reasonable possibility that the SAPS could gather evidence to satisfy elements of the crime of torture.²⁷⁴ The case provided a legal framework to guide the application of anticipated presence and set out guidelines on the interpretation of South Africa's ICC Act. The Constitutional Court's decision that an investigation may proceed without the presence of the accused follows considerable international state practice and interprets s 4(3) of the ICC Act in accordance with the aims of both the Act and the Rome Statute. Under universal jurisdiction, South Africa could assert prescriptive and, to a certain extent with respect to territoriality, adjudicative jurisdiction in order to investigate the allegations of torture 'as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request.'²⁷⁵

²⁷² *Case Concerning the Arrest Warrant of 11 April 2000* supra note 86 at 56.

²⁷³ Roht-Arriaza (note 105) at 388.

²⁷⁴ *SALC* case (note 1) at 77.

²⁷⁵ *SALC* case (note 1) at 49.

The Constitutional Court highlighted how this interpretation would benefit the fight against impunity. Du Plessis noted that impunity gaps exist where the ICC lacks jurisdiction or where there is an absence of political will. Political considerations play a role in case selection by the ICC Prosecutor, as well as the decisions on referral by the United Nations Security Council.²⁷⁶ Consequently a ‘horizontal complementary relationship between the ICC and national justice systems’²⁷⁷ would lessen the impunity gap. Through the adoption of universal jurisdiction and, in particular, anticipated presence, national courts have been able to investigate and prosecute cases that otherwise would not have received attention due to politics.

With the addition of anticipated presence in the arsenal of prosecutors and investigators, cases concerning international crimes outside of South Africa’s borders are now more readily accepted under the purview of South African courts – provided they comply with the guidelines suggested in the *SALC* case. Investigations without the presence of the suspect are not new but investigations into the conduct of non-citizens committed against other non-citizens in a foreign country’s territory initially appeared to stretch the limits of South Africa’s legal jurisdiction. However, the Constitutional Court’s emphasis on South Africa’s obligations under international law as well as South Africa’s vision to advance the cause of human rights globally (and particularly on the African continent) favours this extension of universal jurisdiction over perpetrators of international crimes residing in foreign states.

This judgment will not only affect the likelihood of an investigation and prosecution of Zimbabweans for acts of torture committed against their fellow citizens. The support by the Constitutional Court for anticipated presence as an aspect of universal jurisdiction will encourage and facilitate other investigations and prosecutions into international crimes such as genocide, war crimes and crimes against humanity. This precedent should serve to lessen the impunity of perpetrators predominantly in the SADC region but also across Africa.

²⁷⁶ Max du Plessis ‘Universalising international criminal law: The ICC, Africa and the problem of political perceptions’ ISS Paper 249 (December 2013), 2.

²⁷⁷ Du Plessis, Louw and Maunganidze (note 30) at 1.

d. Precedent

Finally, this case provides a precedent on important legal issues which will influence several ongoing investigations and forthcoming cases in the South African courts concerning the ICC Act. The court found that there was a distinction between enforcement and prescriptive jurisdiction with relation to the accused *in absentia*. Therefore the South African judiciary would be unable to exercise jurisdiction without the presence of the accused, but an investigation may be undertaken if there is anticipation of their presence.²⁷⁸

In 2009, the Solidarity Alliance and the Media Review Network submitted a dossier to the NPA and the Priority Crimes Unit alleging that Israeli soldiers who fought in Operation Cast Lead in Gaza were guilty of international crimes.²⁷⁹ The dossier states that South Africans were among the soldiers implicated and that, although Israel is not a party to the Rome Statute, South Africa would have jurisdiction to investigate its own citizen's conduct abroad under the ICC Act. The NPA declined to prosecute, but the case is currently under review in the North Gauteng High Court.²⁸⁰

It is worth noting that the NPA has opened one investigation into international crimes under the ICC Act. It found that sufficient evidence was brought to the attention of the PCLU to warrant opening an investigation into crimes against humanity committed in Madagascar in 2009. When the investigation was begun in August 2012, the basis was the ICC Act and universal jurisdiction. Unlike the *SALC* case, jurisdiction was found under s 4(3)(c) of the ICC Act²⁸¹ as the accused, former President Marc Ravalomanana, was in exile in South Africa. The status of this investigation is unknown as

²⁷⁸ Chenwi (note 35) at 40.

²⁷⁹ Stone (note 7) at 328.

²⁸⁰ Fatima Asmal 'Gaza Conflict: For some, war is where the heart is' (8 August 2014) *Mail & Guardian*.

²⁸¹ *Rakoto and Others v Head: Directorate for Property Crimes and Others* (52268/12) [2012] ZAGPPHC 281 at 6

Ravalomanana managed to evade surveillance to return to Madagascar in 2014²⁸² and is currently under house arrest.²⁸³

Another example of a case that will be affected by the *SALC* case concerns politically motivated rape. In February 2013, AIDS-Free World made legal submissions to the NPA requesting that the SAPS investigate allegations of a widespread campaign of politically motivated rape carried out in Zimbabwe by members of the ZANU-PF against opposition party supporters in 2008. This case shares many similarities to the *SALC* case and the Constitutional Court's pronouncements on universal jurisdiction and anticipated presence should prove invaluable.

The Constitutional Court's clarity on the issue of the applicability of the ICC Act to crimes committed by foreign nationals in a foreign territory against non-South Africans provides a framework which would potentially protect South Africa's courts from 'delictual claims of state responsibility made by other states whose international legal rights are violated by internationally unlawful assertions of jurisdiction.'²⁸⁴ This case will also provide much-needed guidance concerning the interpretation of South Africa's ICC Act.

Conclusion

After viewing South Africa's relationship with the Rome Statute, this paper outlined the legal theories concerning the principle of complementarity and universal jurisdiction. The concept of "anticipated presence" was examined through exploring various cases which presented the argument that the initial liberal interpretation of universal jurisdiction has been, to some extent, undermined in more recent years. The golden years of the "Pinochet precedent" were quickly eroded by political pressures, and the requirements for jurisdiction to investigate or prosecute international crimes became stricter. The concept has not been rejected by international law; however its popularity

²⁸² Peter Fabricius 'Ravalomanana gatecrashes the party' (16 October 2014) *ISS Today*.

²⁸³ Garry Fabrice Ranavoson 'Ravalomanana « exilé » à Faravohitra' (26 December 2014) *L'Express de Madagascar*.

²⁸⁴ Woolaver (note 53) at 255.

has diminished with the introduction of new domestic legislation to govern the application of the principle.

Once South Africa's infrastructure concerning the ICC Act was explained, the facts of the *SALC* case were presented. The NPA's refusal to investigate the matter was initially based on the practicalities involved, as well as a concern that the case would lead to a negative impact on diplomatic relations between South Africa and Zimbabwe. The appeal by the SAPS queried the extent of the duty imposed on it to investigate the allegations.

This paper traced the legal background of the principles espoused in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*, before concentrating on other similar cases internationally. The second half of this paper focused on an analysis of the Constitutional Court's reasoning. The judgment was well-balanced and relied on the works of a variety of academic scholars such as Brownlie and O'Keefe, as well as international cases, for example the *Lotus* case and the *Arrest Warrant* case.

The Constitutional Court judgment in the *SALC* case provided a definitive answer on the use of "anticipated presence" in cases concerning the ICC Act. The *SALC* case has been a test case of both South Africa's ICC Act and its obligations to the Rome Statute and has provided guidelines and limitations on the legal questions of anticipated presence, the principle of complementarity and universal jurisdiction. South African authorities cannot be expected to investigate all allegations of international crimes and so the Constitutional Court provided workable guidelines on how to determine the feasibility and reasonableness of an investigation and prosecution.

The case sets out a definitive framework for the practical application of the ICC Act with regard to an investigation based on universal jurisdiction. The interpretation of South Africa's obligations and rights regarding universal jurisdiction must comply with both the Constitution and customary international law. The Constitutional Court accepted the concept of "anticipated presence" into South Africa's jurisprudence after

discussing at length the theories of universal jurisdiction and *jus cogens*. This sound theoretical base should be beneficial in future prosecutions based on universal jurisdiction, in South Africa and internationally. South Africa's role in safeguarding democracy and human rights was strictly construed in this case, and consequently the SAPS was ordered to investigate the allegations.

Although the Constitutional Court's judgment is a well-reasoned one and interprets a wide range of legal theories regarding jurisdiction, there were gaps in the judgment relating to competing jurisdictions and the absence of any attempt to initiate a case on these allegations in Zimbabwe. Indeed the Court failed to anticipate any possible effects on the political situation within Zimbabwe that may arise should a prosecution occur. The Court chose instead to take the moral high ground, which is admirable but not always pragmatic in the political arena. Any prosecution of Zimbabweans for politically-motivated torture would inevitably have ramifications for the ruling party and, consequently, 'a relatively high political cost for the forum state.'²⁸⁵ However, this paper also acknowledges that South Africa must honour its commitments both internationally and domestically as laid out in legislation and the Constitution.

The Constitutional Court's framework on the application of the ICC Act complied with many of the arguments for limitations on the concept of "anticipated presence" and followed the liberal *opinio juris* concerning the subject. The *SALC* case has created the precedent for universal jurisdiction in South Africa. Further cases will, I am sure, further clarify the issues I have raised; however, the guidelines established by the Constitutional Court in this case will successfully support the initiation of investigations and the prosecution of international crimes in South Africa on the basis of universal jurisdiction.

In conclusion, this landmark judgment has surely paved the way for South Africa to join the fight against impunity on the African continent.

²⁸⁵ Werle and Bornkamm (note 200) at 675.

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