THE AU MODEL LAW ON UNIVERSAL JURISDICTION: AN AFRICAN RESPONSE TO WESTERN PROSECUTIONS BASED ON THE UNIVERSALITY PRINCIPLE

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SUMMARY

The African continent has been consistent in placing its concerns regarding the manner in which international criminal justice is administered on the international platform. For the past decade, the continent has minced no words about its misgivings concerning the use of universal jurisdiction (UJ) by both foreign States and the International Criminal Court (ICC). The African Union (AU) has been very supportive of UJ and its utility in fighting impunity and affording justice to victims of the core crimes of international law, namely, genocide, war crimes and crimes against humanity. Often referred to as core crimes, these are regarded as customary law crimes which are an affront to entire humankind. These crimes were also codified by the *Rome Statute* of the ICC. However, the political and selective use of the principle of universality by foreign States to prosecute perpetrators of these crimes was seen as causing conflicts and undermining peace efforts, reconciliation and regional stability. As a result the African continent voiced its concerns at various public platforms, including under the auspices of the UN and it therefore called for reforms. This prompted the AU to produce its own model law on UJ, which African States could adapt to their own socio-political circumstances and legal context. The debates that ensued around UJ on the African continent offered African States a chance to contribute to the development of international law, especially on the rules concerning UJ. This paper analyses the interaction amongst African states that eventually led to the development of UJ regulations within their individual legal systems, and tries to determine if there is indeed an African signature in those legal rules.

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1 Background

Recent developments in international criminal law, particularly in the area of universal jurisdiction (UJ), have left an indelible mark on the continent. The legal, political and diplomatic wrangling that preceded the prosecution of Hissène Habré by Senegal, the prosecution of Rwandan nationals by Belgium and Switzerland, as well as the indictment of a former Democratic Republic of Congo minister of State by Belgium are pertinent examples. These contentious matters illustrate a characteristic of international law, which is its reliance on State consent for new rules of law to be accepted as such. Acceptance of a rule by States or a sense of obligation (*opinio juris sive necessitatis*)[1] should be accompanied by wide usage over time or what is called settled practice (*usus*),[2] and the confluence of these two gives birth to customary international law.

The universality principle is widely accepted as a competent jurisdictional link under customary international law,[3] and no state in Africa disputes this in principle.[4] The African Union (AU), in its October 2013 Extraordinary session, reaffirmed its previous

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1 This was articulated by the International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* 1986 ICJ Reports 14 (27 June 1986) para 77. Also see Dugard *International Law* 26.

2 *North Sea Continental Shelf Cases* 1969 ICJ Reports 3 (20 February 1969) paras 70-78, in which it was stated that not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.

3 See Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 604. Also see Philippe 2006 *IRRC* 386.

4 Even on the African continent, the staging area for recent misgivings about the principle of universality, the States are not opposed to the principle *per se*, but are concerned with the politicised manner in which it is being applied. See the *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction* Assembly/AU/Dec.199(XI) (2008), adopted at the AU's Ordinary Session of 30 June - 1 July 2008 in Sharm El-Sheik, Egypt, in which the AU decried the abuse of the principle, whilst recognising its centrality to international criminal justice.

decisions on the abuse of the principles of UJ,[5] whilst expressing its strong conviction that the search for justice is imperative in the fight against impunity. It further stressed that UJ-based prosecutions must be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace.[6] Whilst denouncing the manner in which UJ has been used,[7] the AU has remained firm on the importance of the universality principle to international criminal justice.[8]

Even though states agree on the importance of UJ, there is disagreement regarding the international law crimes over which this jurisdictional link should be employed. This has raised concerns over the manner in which the universality principle has sought to be used by both foreign courts and the International Criminal Court (ICC).[9]

It must be pointed out at this early stage, that the *Rome Statute* of the ICC does not include UJ *per se*. When states came together to draft and adopt the *Statute of the ICC*,[10] there were arguments for UJ to be included as a ground of jurisdiction.[11] This

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5 These include its *Decision on the Abuse of the Principle of Universal Jurisdiction* (2008), adopted in Sharm El Sheikh in July 2008, as well as various *Decisions on the Activities of the ICC in Africa* (2009, 2010, 2011, 2012, 2013) adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012, and May 2013.

6 See the *Decision on Africa's Relationship with the International Criminal Court* Ext/Assembly/AU/Dec.1-2(Oct.2013) (2013), adopted at the AU's Extraordinary Session on 12 October 2013 in Addis Ababa, Ethiopia.

7 Also see the *Decision on International Jurisdiction, Justice and the International Criminal Court* Doc.Assembly/AU/12(XXI), Assembly/AU/Dec.482(XXI) (2013), adopted at the 21st Ordinary Session of the AU 26-27 May 2013 in Addis Ababa, Ethiopia, para 4. Note that the Republic of Botswana was the only country to enter a reservation to the entire Decision.

8 *Decision on International Jurisdiction, Justice and the International Criminal Court* Doc.Assembly/AU/12(XXI), Assembly/AU/Dec.482(XXI) (2013) para 3.

9 *Decision on International Jurisdiction, Justice and the International Criminal Court* Doc.Assembly/AU/12(XXI), Assembly/AU/Dec.482(XXI) (2013) para 4. The AU reiterated its concern on the politicisation and misuse of indictments against African leaders by the ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya.

10 The UN convened the Preparatory Committee on the Establishment of an International Criminal Court from 25 March to 12 April and from 12 to 30 August 1996, whose task was to polish the already existing draft statute. This was followed by the diplomatic conference of plenipotentiaries in 1998 whose aim was to finalise and adopt a convention on the establishment of an international criminal court. The Assembly also decided that the Preparatory Committee would meet in 1997 and 1998, in order to complete the drafting of the text for submission to the Conference. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court. This was followed by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment

motion did not receive the necessary support, as states feared it might impact negatively on the ratification process. It was felt that this would politicise the court and make it impossible to get states to append their signatures on the treaty. As a result, UJ is currently not listed as a ground upon which the ICC could exercise jurisdiction.[12] However, when the ICC decides to seize a matter that involves neither a State Party nor a citizen of a State Party, arguments can be made and have been made that the ICC is in that regard exercising a form of UJ. In terms of Articles 12(2) and 13(b), the ICC shall have jurisdiction where:

(a) the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
(b) the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or
(c) the United Nations Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.[13]

The prevailing view is that the ICC does not exercise UJ.[14] However, this position overlooks the fact that the exercise of jurisdiction by the ICC in cases referred by the UNSC constitutes an exception to the territorial and nationality requirement. In other

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of an International Criminal Court, held at Rome in 1998 (see *Resolution on Establishment of an International Criminal Court* GA Res 52/160 (1997)). The Conference had before it the draft statute, which was assigned to the Committee of the Whole for its consideration. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole, and reporting to the Conference or to the Committee of the Whole as appropriate. On 17 July 1998, the Conference adopted the *Rome Statute of the International Criminal Court* (1998), which was opened for signature on 17 July 1998 and remained open until 17 October 1998.

11 Germany, for instance, wanted to have included in the *Rome Statute* a provision granting the court UJ over the core crimes. Germany's arguments were based on the rationale that states individually have a legitimate basis at international law to prosecute the core crimes on account of UJ. The ICC therefore had to have the same capacity as the contracting states. See Williams 2000 *ILS* 544.

12 ICC 2014 http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx.

13 A 13(b) of the *Rome Statute* empowers the Security Council to refer a situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

14 Akande 2003 *JICJ* 623.

words, even though the Rome Statute lists territoriality and nationality as the only two forms of jurisdiction, Article 13(b) allows the UNSC to avoid these two requirements in the interests of international peace and security. The UNSC referral is not a form of jurisdiction; hence, the ICC's connection with matters referred to it in this manner can be explained only on the basis of the universality principle.[15]

Even though most commentators are of the opinion that the ICC does not exercise UJ,[16] there are instances where ICC prosecutions fall squarely within the universality principle.[17] Further, in relation to the domestic legislative enactments aimed at implementing the ICC obligations of states under the *Rome Statute*, Dugard expresses the opinion that such laws do confer upon the courts of a particular State some form of UJ. This is the power of domestic courts to try the international law crimes recognised by the *Rome Statute*, based on the principle of universality.[18]

The interventions of the ICC and those of the domestic courts of foreign states resulted in African and some non-African states uniting to denounce what they perceived as the abuse of the principle, mainly by Western states,[19] which were

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15 Dube *Universal Jurisdiction* 126.

16 Ryngaert *International Criminal Court* 4. Even the ICC perceives itself as not having UJ because of the manner in which A 13 of its Statute is worded. See in this regard ICC 2014 http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx. Also see Bekou and Cryer 2007 *ICLQ* 50.

17 Dugard *International Law* 155. Whilst Dugard aligns with the position that the ICC does exercise limited UJ, he also points out that other commentators hold a contrary view.

18 Dugard *International Law* 155.

19 See *Delegates Cite Abuse of Universal Jurisdiction, Lip Service to Fight against Impunity: Sixth Committee Debate* Sixty-Eighth General Assembly, 14th Meeting, GA/L/3462 (2013). During the debate many state representatives voiced their concerns about the manner in which the principle of universality was being used by what they termed "police states" in violation of international law. Their major concern was that this legal avenue was being politicised, and used in disregard of state sovereignty and the jurisdictional immunities that state officials enjoy under international law. Speaking in the debate were representatives from a number of African states including Mozambique (which stressed that UJ has political consequences and up to now has been used by non-African States to prosecute African leaders unilaterally), Equatorial Guinea (whose representative expressed concern about the political nature and abuse of the principle of universality by what he referred to as "police States"), Kenya (which urged caution when exercising the principle and that it should not be used only as lip service in the fight against impunity, as is currently the case), Lesotho (which raised the concern that UJ is currently being used to serve the caprices of individual [non-African] States), and Uganda (whose representative called for a working group to assist states to reach a consensus on the scope and application of the principle of UJ). Non-African States also raised similar concerns about the misuse of UJ. These include Iran (which raised concerns about the violation of the jurisdictional immunities of

allegedly pursuing a neo-colonial agenda against African States. To ensure that its reservations were placed in the international arena the AU decided to request African State Parties to the *Rome Statute* to inscribe on the agenda of the forthcoming sessions of the Assembly of State Parties the issue of the indictment of African sitting heads of state; and to highlight the consequences of such actions on peace, stability and reconciliation in AU member states.[20]

2 A brief overview of the position of UJ in some Western States and under the AU legal framework

Outside the continent of Africa, states like Canada,[21] Belgium,[22] France,[23] the Netherlands,[24] Spain,[25] and Switzerland[26] are keen adherents to the universality

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heads of state), Azerbaijan (whose concerns included selectivity and politically motivated prosecutions), Cuba (which raised concerns about UJ's being used to undermine the integrity of various legal systems), Italy (which called for a detailed study of the concept, as it is currently a murky area), Israel (which called for additional state reports on the topic in order to deal with the inconsistencies in its application), and Vietnam (whose concerns centred on sovereign equality, political independence and non-interference in the internal affairs of other States).

20 See *Decision on Africa's Relationship with the International Criminal Court* Ext/Assembly/AU/Dec.1-2(Oct.2013) (2013) para 10(vii).

21 Canada became the first country in the world to incorporate the obligations of the Rome Statute into its national laws when it adopted the *Crimes against Humanity and War Crimes Act (2000) (CAHWCA)* on 24 June 2000. Canada was then able to ratify the Rome Statute on 9 July 2000. This move also necessitated that other laws pertinent to criminal law and procedure in Canada be amended accordingly. These include the *Criminal Code*, 1985, the *Extradition Act*, 1999 and the *Mutual Legal Assistance in Criminal Matters Act*, 1985. The CAHWCA incorporates all the traditional forms of jurisdiction and also adds UJ as a permissible jurisdictional ground for the prosecution of the core crimes. This law is consistent with Canada's previous war crimes policy, as illustrated in the case of *R v Finta* 1994 104 ILR 285 which had been brought under the *Criminal Code* RSC 1927, in particular s 7(3.71), and involved the prosecution of a foreigner for crimes committed against non-Canadian citizens outside Canada during the Nazi regime. See Foreign Affairs, Trade and Development 2013 http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx?lang=eng.

22 See Lamaitre 2001 http://www.law.kuleuven.be/jura/art/37n2/lemaitre.htm.

23 The French *Code of Criminal Procedure*, 1957, as amended by the Act of December 1992 (*Code de procédure pénale*), in A 689 which provides for UJ over offences committed outside of France in cases where an international convention gives jurisdiction to French courts to deal with that particular offence. Although French law has incorporated UJ, based on treaty obligations in respect of certain offences, absolute UJ based on customary international law has not been established. As a result, UJ cannot generally be exercised in French courts in respect of certain *jus cogens* crimes, including crimes against humanity and genocide. See Worldwide Movement for Human Rights 2006 http://www.fidh.org/en/europe/france/Implementing-the-principle-of. Also see HRW 2006 France http://www.hrw.org/reports/2006/ij0606/8.htm.

24 The Netherlands conferred UJ on its courts in respect of the core crimes through the *International Crimes Act*, 2003 (ICA). The only proviso is that the perpetrator is present in the Netherlands, and that the crimes were committed after the entry into force of the Act on 1 October 2003. The *Wartime Offences Act*, 1952, the *Genocide Convention Implementation Act,*

principle. For some of these states the initial approach was to adopt the broad notion of UJ, where the presence of the accused was not a prerequisite to the exercise of jurisdiction.[27] However, political and diplomatic pressure forced the likes of Belgium to amend their laws and embrace the narrow version of UJ instead.[28] For instance, Belgium first enacted the *Act on the Punishment of Grave Breaches of International Humanitarian Law* in 1993 to confer UJ on its courts in relation to war crimes. In 1999 the law was amended to include genocide and crimes against humanity. Section 7 of the 1993 Act allowed Belgian courts to prosecute a foreigner for offences committed abroad against another foreigner, even if the accused could not be found in Belgium. In that regard it embraced the broad notion of UJ, allowing for prosecution *in absentia*. The current legislation limits UJ to people who became Belgian citizens or residents after committing a core crime.

As will be discussed below, on the African continent itself there are only a few states that embrace the universality principle in relation to the core crimes. These include South Africa, Kenya, Uganda, Senegal, Mauritius, and Burkina Faso. The majority of African states steer clear of this principle. Although a number of African states have

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1964 and the *Act Implementing the Convention against* Torture, 1988 cover situations where the core crimes were committed prior to this new Act. Dutch law prohibits UJ *in absentia*. See HRW 2006 http://www.hrw.org/reports/2006/ij0606/10.htm.

25 See Assam 2014 http://www.theguardian.com/world/2014/feb/11/spain-end-judges-trials-foreign-human-rights-abuses.

26 In 2011 Switzerland introduced several new aspects to its legislation and judicial organisation aimed at broadening its framework for the prosecution of the core crimes. The *Swiss Criminal Code*, 1937 was revised to introduce a specific heading on crimes against humanity, which had until then been captured under the Swiss law as a common crime like murder, assault, rape or other serious crimes. It also transferred jurisdiction over these crimes from the military to civilian justice. The new law also provides for UJ over crimes committed abroad (A 264m) and the exclusion of relative immunity (A 264n). See Boillat, Arnold and Heinrich 2012 *Politorbis* 41.

27 See Garcia 2009 https://www.middleeastmonitor.com/reports/by-silvia-nicolaou-garcia/54-universal-jurisdiction-against-israeli-officials.

28 See *Decision on the Abuse of the Principle of Universal Jurisdiction* Doc.EX.CL/640(XVIII) (2011) in which the AU noted its concerns on the abuse of the principle of universality by Western States. In the same decision, the AU called upon its members to furnish it with a list of pending UJ cases against African leaders in foreign courts. The AU further called upon its members to apply the principle of reciprocity on countries that have instituted proceedings against African State officials and to extend mutual legal assistance to each other in the process of the investigation and prosecution of such cases. This was Africa's attempt to show the West that African courts could equally be the staging area for the prosecution of State officials from those Western States that were currently pursuing Africans, regardless of where the crime took place. The AU members further called for an international regulatory body with competence to review and/or handle complaints or appeals arising out of the abuse of the principle of UJ by individual States.

ratified the *Rome Statute*, for most of them the legislation aimed at implementing those obligations and introducing UJ for the core crimes is still in draft form.[29]

The AU's position on the universality principle has not been to dismiss UJ absolutely in principle. Instead the AU has consistently noted the utility of UJ in ending impunity, especially in the light of Article 4(h) of the *Constitutive Act of the AU*.[30] What the regional body has, however, continually decried is the manner in which this principle has been used by non-African States against African state officials. In its 2008 session, the AU noted that there was a rise in the abuse of the principle of universality in respect of the core crimes, and that this will have negative consequences in international relations.[31]

3 The AU Model Law on Universal Jurisdiction

The *Model Law on Universal Jurisdiction* (*AU Model Law*) that was adopted by the AU was a result of concerns that Africa had with the use of UJ by both non-African states and the ICC.[32] African states had raised objections in various AU Decisions taken over the years, particularly after 2008, to the manner in which European states had indicted African state officials. The *AU Model Law* represents a common position adopted by African states, and also indicates current legal thinking from the continent *vis-à-vis* UJ. It offers a malleable template for developing UJ legislation, which states can adapt to suit their domestic peculiarities. It also has the potential to ensure that African laws on UJ are harmonised in content, thereby minimising potential clashes similar to those brought about by the UJ laws of Western states.

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29 A total of 11 African States currently have draft legislation for implementing ICC obligations and introducing UJ, whilst eight States have not signed the Rome Statute at all. A total of six States have enacted domestic legislation which introduces the universality principle in respect of the core crimes, namely: Kenya, Mali, Mauritius, Senegal, Uganda and South Africa

30 A 4(h) of the *Constitutive Act of the African Union* (2000) provides that the AU shall function in accordance with the following principles: "the right of the Union 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".

31 See *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction* Doc.Assembly/AU/14 (XI) (2008).

32 *African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes* (2012) (*AU Model Law*), adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7-15 May 2012 in Addis Ababa, Ethiopia.

In its preamble the *AU Model Law* registered the ambitions of the AU to end impunity by ensuring that heinous crimes that affect the international community do not go unpunished.[33] It also alludes to the continent's aversion to grave circumstances, such as those involving the core crimes, and thereby recalls the AU's right to intervene in such circumstances as empowered by Article 4(h) of the *AU Constitutive Act*. The AU links this need to intervene to the need for effective prosecution in order to stem impunity for the core crimes. Accordingly, the AU highlights the fact that interference with a state's internal affairs will be accepted as legitimate by the African bloc only if it is done in line with international law itself, and in furtherance of the goal to fight impunity.

The provision setting out the purpose of the *AU Model Law* clearly demonstrates that the main aim of the AU was to be in control of the development of international criminal law, especially in the case of UJ. Instead of leaving the subject of UJ to a group of Western states the AU decided to influence actively the growth of this branch of law. This resonates with international law norms, in that state practice determines what eventually becomes settled as norms, values and rules in international law.[34] It also resonates with the sovereign equality of states. Hence the draft *AU Model Law* stipulates that its purpose is to provide a framework for individual countries to exercise UJ over certain international crimes. It is worth noting that the model's provision does not necessarily limit itself to the core crimes of genocide, war crimes and crimes against humanity. Instead it extends this jurisdiction to other international law crimes and other crimes of international concern. Hence it uses the wording "international crimes" rather than "international law crimes", "core crimes" or "atrocity crimes". The *AU Model Law* does not define what an international crime is, save to list the categories of crimes over which states

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33 See the preamble to the *AU Model Law*. In the preamble, African States recognise that the heinous nature of some crimes means that they should not go unpunished, and that this resonates with the obligations of African States under A 4(h) of the *AU Constitutive Act*. It further recognises that the primary responsibility to end impunity, and to prosecute offenders rests with states, and that this will enhance international cooperation amongst states.

34 See the case of *S v Petane* 1988 3 SA 51 (C), in which the court clearly stated that customary law is founded on practice, not on preaching.

could employ the universality principle in national legislation as follows: genocide, war crimes, crimes against humanity, piracy, trafficking in narcotics, and terrorism.[35]

The provisions of the *AU Model Law* on jurisdiction differs markedly from the provisions of the Western states that initiated prosecution proceedings against African state officials in the past decade,[36] particularly regarding the requirement of the presence of the accused. In Article 4 of the *AU Model Law* the presence of the accused is stipulated as a requirement only for the commencement of prosecution.[37] The *AU Model Law* is silent on whether presence is a pre-requisite for the initiation of UJ-based investigations.[38] In other words, investigations can commence without the accused being present.

What is notable, though, in the *AU Model Law* is the rider introduced by Article 4(2). It provides that in exercising UJ the courts of the prosecuting state shall accord priority to the courts of the state in whose territory the crime is alleged to have been committed. The territorial state has a stronger connection with the crimes, and as such, even though all States are outraged by the heinous nature of the crimes committed, it is ultimately the territorial State that is most affected by the accused's conduct. It is only logical that it be given the chance to deal with the situation and find closure. However, Article 4(2) was also couched in such a way as to deal with the possibility of impunity, in that it gives preference to the territorial state only to the extent that it is willing and able to prosecute. Hence only cases where the territorial state is unwilling and unable to prosecute can any other state proceed on the basis of UJ. This is in line with the international law principle of

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35 See A 8 of the *AU Model Law*.

36 See the discussion above concerning the *Belgian Act on the Punishment of Grave Breaches of International Humanitarian Law*, 1993 (amended in 1999), which allowed Belgian courts to prosecute a foreigner for offences committed abroad against another foreigner, even if the accused could not be found in Belgium.

37 A 4 of the *AU Model Law* provides as follows: "The Court shall have jurisdiction to try any person ... provided that such a person shall be within the territory of the State at the time of the commencement of the trial".

38 In A 5 the *AU Model Law* empowers the national prosecuting authority of states desiring to use UJ to prosecute offenders who are found in their territory.

complementarity.[39] Xavier Philippe defines this principle as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction.[40] The principle is premised upon a compromise between respect for the sovereignty of states and respect for the universality principle. It thus involves an acceptance by States that the perpetrators of the core crimes may be punished through the creation and recognition of international criminal bodies,[41] and in this case, the recognition of the right of third-party states to prosecute, based on the grave nature of the offences.

Article 17 of the *Rome Statute* regulates the complementarity of the ICC *vis-à-vis* national courts.[42] The drafters of the *Rome Statute* chose the word *"or"* rather than *"and"*, which is the preferred term in the *AU Model Law*.[43] The complementarity envisaged in Article 4(2) of the *AU Model Law* is one between the domestic courts of different countries, all of which are desirous of prosecuting perpetrators of the core crimes. The choice of words is quite interesting, given the meaning of each of the words. Du Plessis states that in determining the meaning of the text of a statute, one must bear in mind that each word in that statute must be given meaning.[44] This should be informed by the understanding that language in a statute is not used unnecessarily.[45] Adams and Kaye assert that *"and"* conveys conjunction, with items linked by and being considered together,[46] whilst the use of *"or"* introduces alternatives.[47]

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39 Even the ICC works on the principle of complementarity in terms of which the State has primacy of jurisdictional competence, unless it is unwilling or unable to prosecute. See the Preamble as well as A 17 of the *Rome Statute*.

40 Philippe 2006 *IRRC* 380.

41 Philippe 2006 *IRRC* 380.

42 It provides that as regards the admissibility of cases, the Court shall determine a case admissible where "it is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution". The use of the word "genuinely" works as a safeguard against states which would attempt to carry out a sham trial, in order to block the ICC or any other competent tribunal from being seized with jurisdiction.

43 A 4(2) of the *AU Model Law* provides that "... the Courts shall accord priority to the court of the State in whose territory the crime is alleged to have been committed, provided that the State is willing and able to prosecute".

44 Du Plessis *Re-interpretation of Statutes* 213.

45 Du Plessis *Re-interpretation of Statutes* 213.

46 Adams and Kaye 2007 *St John's L Rev* 1172.

47 Adams and Kaye 2007 *St John's L Rev* 1181.

As stated above, in both the ICC and AU outlook on complementarity, the concepts of the ability and willingness of the domestic court to prosecute are used. Under the *Rome Statute* it should suffice that a state has failed to meet one of these elements. This means that if a state is willing to prosecute, but is otherwise unable to do so by reason of its having a collapsed judicial system or for some other reason, this should be sufficient ground for the ICC to assume jurisdiction over the matter. In other words, in the ICC context, the two factors need not exist simultaneously. It will be sufficient that one of them is established (ie inability or unwillingness). However, given the use of *"and"* in the *AU Model Law*, the understanding should be that both elements must be satisfied before any other court can exercise UJ over a particular matter. If interpreted in this way, the provision means that a capable state which is unwilling to prosecute and a willing state which is unable to prosecute still retain primacy of jurisdiction, unless it can be proved that the two elements are simultaneously satisfied. The existence of just one of the two elements is not sufficient under the current wording of the *AU Model Law*. This is a consequence of the use of the word "*and*", which denotes that both elements must be satisfied and not just one of them. This is a much more stringent approach to complementarity and may defeat the stated goal to end impunity.

As stated earlier, the *AU Model Law* does not necessarily limit itself to the core crimes, but includes other crimes of international concern. Notably omitted from its list of crimes are the crimes of slave-trading and slavery, which largely affected the continent in the 17th century and continue to plague the continent to this day, although in a subtle way. The draft does, however, list piracy, which under customary international law is in the same category as slave-trading in terms of its heinous nature.[48] Perhaps the drafters were of the opinion that both slave-trading, and the exercise of UJ over this crime are already established under customary

[48] Both slave-trading and piracy have formed the bedrock of the development of UJ since the 17th century, a development which has been gradually gaining momentum since the Nuremburg Trials.

international law.[49] Unfortunately, the same cannot be said of the core crimes. Unlike piracy and slave-trading, even though the core crimes are established as crimes under customary international law,[50] there is no consensus that customary law confers UJ on states for their prosecution.[51]

The *AU Model Law* also takes into account one of the major concerns that the African continent has consistently expressed over time, being that of immunity for sitting heads of states. Article 16 reaffirms the immunity of foreign state officials. It stipulates that foreign state officials who are entitled to jurisdictional immunity shall not be charged or prosecuted under this law. The provision makes an exception where the crimes in question are covered by a treaty to which both the prosecuting state and the state of the nationality of such officials are parties, and which prohibits immunity. This is in line with international law on jurisdictional immunities. The fact that it requires both the prosecuting state and the state of the suspect's nationality to be party to a treaty that excludes immunity for those crimes also resonates with the international law principle that state consent is central to the formation of rules of international law.

The AU was eager to ensure that sovereign immunity was put into effect. Article 16(2) of the *AU Model Law* stipulates that the jurisdiction of the national court set out in Article 4 shall not extend to foreign state officials. The same provision prevents the prosecuting authority of each state from extending its prosecutorial powers to foreign state officials.

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49 Cassese *International Criminal Law* 284. See also Mugambi 2007 *Ga J Int'l & Comp L* 500. Also see Dugard *International Law* 157 who also supports the position that the earliest known customary international crime was that of piracy.

50 See Kontorovich, who asserts that historical evidence does not support the view that slave-trading, like piracy, exemplified a universal offence which entitled all States to prosecute offenders. Instead, he propounds a view that most international treaties on slave-trading created "delegated jurisdiction" whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offence. This effectively made each state an agent of the others. He also argues that piracy as well did not become universally recognisable as a result of its perceived heinousness. See Kontorovich 2004 *Harv Int'l LJ* 186.

51 Mugambi 2007 *Ga J Int'l & Comp L* 498.

The *AU Model Law's* immunity provision stands in stark contrast to the provisions of some international instruments, including the *Rome Statute*,[52] as well as the national legislation of some African states that provide for UJ in respect of the three core crimes.[53]

4 The requirement of presence for the purposes of prosecution

The presence of the accused in the territory of the state intent on undertaking the prosecution against him is central to the determination of whether or not that state can exercise UJ over him. The two schools of thought, that is, the broad and the narrow schools of UJ, turn on this point. The *AU Model Law* adopts the narrow version of UJ by requiring the accused to be present on the territory of the prosecuting state for it to be clothed with jurisdiction under the universality principle. Its counterpart, the broad version of UJ, does not enjoy widespread acceptance, and it does not require the accused person to be present in the territory of the prosecuting state before legal proceedings can be commenced against him. The narrow version of UJ aligns with the customary international law position that only the state where the accused is in custody may prosecute him;[54] that is, the so-called *forum deprehensionis*.[55] The requirement of presence will be further discussed in respect of the national laws below.

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

53 Similarly, the ICC-implementing legislation of South Africa (s 4(2)(a) of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002), as well as South Africa's *Prevention and Combating of Torture of Persons Act* 13 of 2013 (s 4(3)(a)) clearly stipulate that the position or status of the accused and their perceived immunity shall not bar the court from proceeding against them.

54 See Cassese 2002 *EJIL* 857-858.

55 Cassese *International Criminal Law* 285.

4.1 The requirement of presence for the purposes of investigation

International law is silent on the requirement of presence for the purposes of pursuing a UJ-based investigation against a foreigner who committed core crimes against other foreigners abroad. The *AU Model Law* also does not address this point, but limits itself to presence for the purposes of prosecution only. In Article 5 it only empowers the national prosecuting agency of the state in whose territory the accused is found to initiate prosecution proceedings, and is silent about investigation.[56]

As there is generally no court involvement in the investigative phase of the proceedings, the wording of the *AU Model Law* should be understood to deal with cases that have gone beyond the investigative stage, cases which are ripe for adjudication. But as soon as there is court involvement, the accused's presence would be required so as to secure the jurisdiction of the court. This could be for the purposes of putting charges to the suspect.[57] This is a preferable approach, given that there is no customary law rule prohibiting investigations *in absentia*.

In the case of UJ-based investigations, however, there is a need to differentiate between presence and residency. Even though the *AU Model Law* is silent on the accused's presence as a pre-requisite for UJ-based investigations to commence, the state intending to do so must remain alive to the futility of opening investigations against an accused person who is highly unlikely to ever enter its territory. Where there is a likelihood that the accused can be brought within the territory of the prosecuting state, either voluntarily or via extradition, an investigation *in absentia* as a prelude to a UJ-based prosecution therefore makes more sense.[58]

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[56] A 5 of the *AU Model Law* provides that "The Prosecuting Authority shall have the power to prosecute before the court any person in the territory of the State who is alleged to have committed a crime prohibited under this law".

[57] *Amicus* brief, submitted in support of the Respondent in the pending Constitutional Court case of *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* CCT02/14 paras 51-53.

[58] Hence the Supreme Court of Appeal in *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013) para 66 stated that "... if there is no prospect of a perpetrator ever being within a country, no purpose would be served by initiation an investigation [*in absentia*]".

5 Creating Africa's own international criminal court

The efforts of the continent to be proactive and develop an autochthonous African framework to stem the culture of impunity for core crimes can also be seen in the recent adoption of the amendment protocol in July 2014. This new instrument effectively amended the *Statute of the African Court of Justice and Human Rights* to grant this court criminal jurisdiction to try international crimes.[59] The *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (*Draft Protocol*) was adopted by the First Session of the Special Technical Committee (SCT) on Justice and Legal Affairs of the African Union in Addis Ababa on 16 May 2014.[60] The Ministerial Session of the STC on Justice and Legal affairs considered and adopted six other draft legal instruments and recommended them for consideration by the Assembly through the Executive Council at the Summit of the African Union in Malabo, Equatorial Guinea, in June 2014. Unlike the *AU Model Law* which protects sovereign immunity for state officials in domestic courts, the *Draft Protocol* seeks to ensure this immunity for state officials before this international criminal tribunal. This is a sharp departure from the practice of other tribunals, such as the Special Court for Sierra Leone and the Extraordinary African Chambers.[61] The Trial Chamber in *Prosecutor v Radovan Karadzic* concluded that under customary international law an immunity agreement does not operate to remove the jurisdiction of an international court.[62] The accused had sought to rely on a diplomatic agreement made in 1996 that he would not be tried before the Tribunal. The tribunal, convinced that according to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals, rejected Karadzic's claims of immunity. Further, some national legislation for the prosecution of the core crimes also excludes the immunity

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59 The Draft in Article 3 confers international criminal jurisdiction upon the court.

60 See AU 2014 http://legal.au.int/en/content/first-session-special-technical-committee-justice-and-legal-affairs-african-union-concluded.

61 The former Sierra Leone president, Charles Taylor, unsuccessfully tried to rely on immunity *ratione personae*, claiming that he had still been the sitting president of Sierra Leone at the time of indictment.

62 *Prosecutor v Radovan Karadzic: Trial Chamber Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue* ICTY-2008-IT-95-5/18-PT (17 December 2008).

of state officials. For example the Mauritian *International Criminal Court Act* provides that:

> ... it shall not be a defence ... nor a ground for a reduction of sentence for a person ... to plead that he is or was Head of State, a member of a Government or Parliament, an elected representative or a government official of a foreign State.[63]

Section 27 of the Kenyan *International Criminal Courts Act* of 2008 also precludes immunity from becoming a bar to proceedings in which a request for the surrender of a suspect to the ICC is being determined. South Africa adopts the same approach in both section 4(3) of the *Prevention and Combating of Torture of Persons Act* 13 of 2013 and section 4(2) the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.

6 African states that embrace universal jurisdiction in relation to the core crimes

In analysing the countries on the continent that embrace UJ, each country's implementation of the *Rome Statute* will be considered. In essence, the focus will be on those countries which are party to the *Rome Statute* which codified the three core crimes, and will determine how each country's legislation for implementing the *Rome Statute* provides for the application of the principle of UJ in its courts, as well as other Acts for the implementation of the international obligations of various states, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Torture Convention*).

Whether a state embraces the principle of universality or not will to a large extent be influenced by the place of international law in that particular jurisdiction. It is therefore important to determine whether a state follows the monist tradition or the dualist tradition. For monist states, both international law and municipal law form part of a single legal system; hence, international law becomes domestically

[63] S 6(1) of the *Mauritian International Criminal Court Act* 27 of 2011.

applicable without any act of domestication. Dualist states on the other hand require ratification followed by an act of domestication.[64]

6.1 South Africa's legal framework allowing universal jurisdiction

South Africa is a dualist country.[65] International law, save for customary law,[66] does not form part of the law of the Republic unless it has been domesticated by Parliament.[67] Whilst the core crimes which are now contained in the *ICC Statute* are accepted as established in customary international law, the exercise of UJ in respect of these crimes has not yet crystallised into custom. The exercise of UJ over these crimes still emanates from treaty law, and as such the normal rules relating to the application of treaty-based law in the domestic sphere are applicable. Hence South Africa embarked on the legislative process to domesticate two main treaties to enable it to prosecute the three core crimes, and to introduce UJ.

6.1.1 The Implementation of the Rome Statute of the International Criminal Court Act

South Africa signed the *Rome Statute* on 17 June 1998, becoming its 23rd State Party. In 2002 South Africa enacted a law to enable it to meet its obligations under the *Rome Statute*, the *Implementation of the Rome Statute of the International Criminal Court Act* (*ICC Act*).[68] The *ICC Act* empowers South Africa to investigate and prosecute the core crimes if such persons after the commission of the crime are present in the territory of the Republic. Due to the controversy surrounding UJ and the fact that customary international law has not yet crystallised to form solid rules on the requirement of presence, there is still on-going debate both locally and internationally.

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64 Dugard *International Law* 42.

65 Dugard *International Law* 46.

66 See s 232 of the *Constitution of the Republic of South Africa*, 1996, which stipulates that "... customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

67 See s 231(2) of the South African *Constitution*, which provides that "[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub-section (3)".

68 The Implementation of the *Rome Statute of the International Criminal Court Act* 27 of 2002.

The case discussed below, involving Zimbabwean victims of torture who sought to enforce South Africa's UJ obligations under the *ICC Act*, clearly illustrates this contention.[69] What is clear, though, is that presence must be distinguished from residency. In other words, it must be established whether the perpetrator is merely briefly passing through the Republic or is sufficiently established in the Republic to allow its justice machinery to engage with him.[70] The debate on residency or presence is critical in determining if and when a state can commence UJ proceedings against a foreign perpetrator of the core crimes.[71] This is because there are two schools of thought on this subject.[72] The one side believes investigation *in absentia* is permissible under international law and that the presence of the accused is required only once the actual trial starts.[73] In other words, the suspect does not necessarily have to be in the territory of the forum state for it to commence UJ-based investigation against him. The other school of thought adheres to the thinking that the processes of investigation and initiation of prosecution should not be separated; that they are as much a part of the state's pre-trial enforcement jurisdiction as is arrest. They should therefore all be subject to the requirement that the accused must be present.[74] These issues are discussed in detail below.

6.1.2 The presence requirement in the initiation of the investigation

The exercise of jurisdiction over crimes which occurred externally often relates to both the investigation of and the actual prosecution of those crimes. The requirement of the accused's presence in international law has largely been focussed

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69 *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013).

70 See, for example, the Spanish UJ legislation that was amended in 2014 to require that the perpetrator should either have become a citizen or a permanent resident after the commission of the offence.

71 Werle and Bornkamm 2013 *JICJ* 666.

72 In *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013) para 66 the court expressed the opinion that there is no universal rule or practice against the initiation of investigations in the absence of the alleged perpetrators.

73 Kress 2006 *JICJ* 576. Also see Rabinovitch 2005 *Fordham Int'l LJ* 528.

74 For instance, both Denmark and Germany required the defendant to be present in order for an investigation to be undertaken. See Thorp 2010 http//researchbriefings.files.parliament.uk/documents/SN05422/SN05422.pdf 8.

on the prosecution of the offences alleged, rather than the investigation of those offences.

The South African case involving Zimbabwean torture victims that will be reviewed below turned on the refusal of the State prosecuting authority and the police service to initiate a UJ-based investigation of suspects who were not on South African soil. One of the key considerations that could have influenced the refusal is that investigations do not always lead to prosecution, and as such these two processes must be viewed separately as different stages of development of criminal proceedings.

6.1.3 The presence requirement in the initiation of prosecution

The *ICC Act* includes personal jurisdictional restrictions on the exercise of the universality principle. It specifies that South African courts can exercise universal adjudicative jurisdiction over the core crimes only if the accused comes to South Africa at some point after committing the crime.[75] The *ICC Act* is ambiguous about whether presence is required for an investigation. All it does is to state that the presence of the accused person is necessary in order to secure the jurisdiction of a South African court.

The case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*[76] illustrates the on-going debates regarding the presence requirement. In this case the Supreme Court of Appeal (SCA) was confronted with a claim that the national prosecution authority (NPA) was empowered to investigate serious allegations of torture committed outside South

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[75] S 4(3)(c) of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 provides that: "(3) In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if .. (c) that person, after the commission of the crime, is present in the territory of the Republic."

[76] *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013). The case was taken on appeal and is currently pending before the Constitutional Court of South Africa.

African territory.[77] The NPA had earlier refused to assist the Zimbabwean exiles when it was approached to investigate the allegations of torture raised. The Centre was assisting Zimbabwean nationals who were now residing in South Africa in an attempt to obtain justice for the torture they had been subjected to in Zimbabwe by Zimbabwean government officials. The applicants relied on the provisions of the *ICC Act*, which recognises the crimes defined in the *Rome Statute* as crimes under South African law.

Both the High Court[78] and the SCA[79] held that the alleged conduct complained of is a crime in terms of South African law, notwithstanding that it was committed extra-territorially. The SCA noted that the legislation is silent on whether the alleged perpetrator is required to be present within South Africa at the time the investigation is initiated.[80] The court was, however, alive to the futility of adopting a strict presence requirement, as this would defeat the purpose of the legislation and

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77 In this case, Zimbabwean state security forces had raided the opposition party, the Movement for Democratic Change (MDC)'s headquarters and detained and tortured suspected as well as actual MDC supporters. All the elements of the crime took place in Zimbabwe, the perpetrators were Zimbabweans, and so were the victims. Two organisations (the Southern Africa Litigation Centre (SALC) and the Zimbabwe Exiles Forum (ZEF)) later assisted the victims, who now resided in South Africa, to seek justice. They delivered a dossier to the NPA and the South African Police Service containing comprehensive evidence of the involvement of Zimbabwean officials in the perpetration of widespread and systematic torture, constituting a crime against humanity. To establish a link, the organisations stated that the perpetrators were frequent travellers to South Africa and as such could easily be subjected to the ICC Act. They therefore requested the NPA and SAPS to initiate an investigation in terms of their legal obligations stipulated in the ICC Act. The SAPS refused to oblige, citing the extra-territorial nature of the acts allegedly committed. The matter is still pending at the Constitutional Court, where it was heard on 15 May 2014. It is worth noting that the case was initially brought to court prior to the coming into force of the *Prevention and Combating of Torture of Persons Act* 13 of 2013 discussed below.

78 *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 3 All SA 198 (GNP) 50.

79 *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013) paras 55, 67.

80 *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013) para 51. The court found arguments that the allegations complained of are deemed to have taken place the moment the accused entered South African soil to be fallacious. It stated that the provision criminalises such conduct at the time of its commission, regardless of where and by whom it was committed. Further, that whilst the ICC Act does not expressly authorise an investigation prior to the presence of an alleged perpetrator within South African territory, it also does not prohibit such an investigation (para 55). The court found that there was nothing wrong with an investigation *in absentia*, provided that it happens on the State's own territory, or on the foreign State's territory only with its consent (para 56).

encourage impunity.[81] It is commonplace that the investigation of an alleged crime might or might not lead to prosecution. Whilst alive to the issues raised by the court, and also alive to the *lacuna* in international customary law on this point, it should be noted that where the third State can initiate investigations without infringing on the sovereignty of another State, then it should be permitted to do so. Hence the Constitutional Court also held on appeal from the SCA that UJ investigations can be initiated without offending the South African *Constitution* or international law.[82]

6.1.4 The Torture Act of 2013

South Africa is party to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Torture Convention*).[83] This UN Convention was domesticated by the *Prevention and Combating of Torture of Persons Act* (*Torture Act*).[84] Torture is codified by both the *Rome Statute* and the *Torture Convention.* Under the *Rome Statute*, it forms part of crimes against humanity, provided they are committed in a systematic or a widespread manner and are targeted at a civilian population. Under the *Torture Act* individual acts of torture as well as attempting, inciting, instigating, or commanding torture are all criminalised. The *Torture Convention* enjoins State Parties to ensure that all acts of torture are offences under their criminal law.[85] In Article VI the *Torture Convention* empowers

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81 *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013) para 66. The SCA further indicated that there is no universal rule or practice against the initiation of investigations in the absence of alleged perpetrators. Further that it would be a waste of time and resources to invest in an investigation when the prospects of the alleged perpetrator ever setting foot in the Republic are slim. However, adopting a strict presence requirement would also do violence to the fight against impunity.

82 *National Commissioner, SAPS v Southern African Human Rights Litigation Centre* 2013 ZASCA 168 (27 November 2013) para 47.

83 South Africa ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) in 1998.

84 *Prevention and Combating of Torture of Persons Act* 13 of 2013.

85 A IV of the *Torture Convention*. The same applies to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. The *Torture Convention* already envisaged an element of universality, for it provides in A IV(2) that each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature. However, A IV does not introduce UJ; it merely underscores the grave nature of the crime of torture. UJ in respect of this crime comes through only in A VI.

each State Party to exercise jurisdiction on the basis of the universality principle in cases where the accused is present on its territory.[86]

In keeping with its obligations under the *Torture Convention*, South Africa enacted Section 6 of the *Torture Act*,[87] which provides for South African courts to exercise extra-territorial jurisdiction over acts of torture committed abroad.[88] The *Torture Act* is silent on the need for the presence of the accused in UJ-based torture investigations; it expressly requires the presence of the accused for prosecution purposes only.[89] The Act is worded in such a way that it grants a South African court jurisdiction over extra-territorial acts of torture provided the accused is present in the territory of the Republic after the commission of the offence. Since South African courts are largely not involved in the investigation stages of the proceedings, it stands to reason that the jurisdiction referred to here is judicial jurisdiction.

6.2 Kenya

Kenya is also a party to the *Rome Statute*, having ratified it in 2005.[90] Kenya enacted the *International Criminal Courts Act* of 2008,[91] which entered into force on

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86 A VI provides that: "Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in Article IV is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted." Article VI has a rider, which places an obligation on the prosecuting state to make an immediate preliminary enquiry into the facts. In other words, the *Torture Convention* envisages a situation where the state must apprehend the suspect for purposes of investigation. A VI is further buttressed by Aa XII and XIII which impose procedural fairness considerations.

87 *Prevention and Combating of Torture of Persons Act* 13 of 2013.

88 S 6(1) of the South African *Prevention and Combating of Torture of Persons Act* 13 of 2013, titled Extra-territorial jurisdiction, provides that: "A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence ... had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the accused person – ... (c) is after the commission of the offence, present in the territory of the Republic or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention."

89 See s 6(1) of the *Prevention and Combating of Torture of Persons Act* 13 of 2013.

90 Kenya signed the *Rome Statute* on 11 August 1999 and ratified it on 15 March 2005, becoming the 98th State Party.

91 S 18 of *International Criminal Court Act*, 2008 introduces UJ for Kenyan courts in respect of the core crimes.

1 January 2009.[92] The Kenyan Act makes a distinction between two types of jurisdiction that Kenyan courts can exercise. The first, which incorporates UJ in addition to the traditional forms of jurisdiction,[93] is contained in Section 8 of the Kenya *ICC Act*.[94] It governs the jurisdiction of the courts in respect of the core crimes listed in Section 6.[95] The second relates to offences that take place as a result of proceedings emanating from the prosecution of the core crimes under Section 8. It covers instances where an offender commits any of the offences listed in Sections 9 to 17, which include attempts to bribe officials, the intimidation of witnesses, the fabrication of evidence, the obstruction of officials etc. In doing this, Kenya was alive to the catalytic nature of such acts to impunity; hence it clothed its courts with jurisdiction to try such offences wherever and by whomever they are committed, provided the accused is present on Kenyan soil.[96] Presence is therefore a strict requirement for the commencement of prosecution proceedings for offences committed by a foreigner abroad, and this is supported by state practice.[97] Without exception the defendants in various UJ-based prosecutions had taken up permanent residence in the forum state – as refugees, exiles, fugitives, or immigrants – and

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92 The Kenyan *International Criminal Court Act*'s short title states that this is an Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the *Rome Statute* in the performance of its functions

93 S 8 of the *International Criminal Court Act*, 2008 provides that a person who is alleged to have committed any of the core crimes may be tried and punished in Kenya on the basis of territoriality (s 8(a) - offence is alleged to have been committed in Kenya), or nationality (s 8(b)(i) - at the time of commission the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity), or passive personality (s 8(b)(iii) - the victim of the alleged offence was a Kenyan citizen). Kenya also introduced a novel form of passive personality, under which its courts assume jurisdiction if the victim was a citizen of a State that was allied with Kenya in an armed conflict (s 8(b)(iv)). Kenya also interestingly provides for its courts to have jurisdiction over an offender who, at the time of the commission of the offence, was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state.

94 S 8(c) of the *International Criminal Court Act*, 2008 grants courts jurisdiction under the universality principle where the accused is present on Kenyan soil after committing the offence.

95 S 6 of the Kenyan *International Criminal Court Act*, 2008 stipulates that the core crimes under the Act shall assume the same meaning as that given in the *Rome Statute*.

96 S 18(c) of the Kenyan *International Criminal Court Act*, 2008 provides that a person who is alleged to have committed an offence under any of ss 9 to 17 may be tried and punished in Kenya for that offence if "the person is, after commission of the offence, present in Kenya".

97 See generally Reydams *Rise and Fall of Universal Jurisdiction*. See for example, the instances of UJ-based prosecutions in the courts of Austria, Canada, Germany, Denmark, Belgium, the United Kingdom, the Netherlands, Finland, France, Spain, and Switzerland for "war crimes" committed abroad.

resisted being 'sent back to the countries in which their abominable deeds were done'.[98] The states of nationality of the accused in most instances acquiesced in or even supported prosecution. The fact that this rise in the use of UJ happened in relation to matters involving the territories of Rwanda and the former Yugoslavia also had an influence on the premium placed on the presence requirement. The prosecutor of the *ad hoc* international criminal tribunals for these countries and the UN Security Council had encouraged all states to search for and try the suspects on their territory.[99] Further, extradition often was impossible, if not legally, then practically.[100]

6.3 Uganda

Uganda's courts also enjoy UJ in respect of the core international crimes. The main enabling legislation is the *International Criminal Court Act* 6 of 2010,[101] which Uganda enacted pursuant to its obligations under the *Rome Statute*.[102] Uganda makes four connecting factors prerequisite to the exercise of jurisdiction by its courts over a suspect who commits these crimes outside Uganda.[103] The perpetrator must be a citizen of or permanently resident in Uganda (nationality),[104] or the person must be employed by Uganda in a civilian or military capacity.[105] Also where the victim of the alleged crimes is a citizen or permanent resident of Uganda (passive personality) its courts will be clothed with jurisdiction.[106] The Act also provides that the courts will have jurisdiction where the person after committing the offence is

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98 Reydams *Rise and Fall of Universal Jurisdiction*.

99 See *Security Council Resolution 955 on the Establishment of the International Criminal Tribunal for Rwanda* (1994).

100 *Security Council Resolution 955 on the Establishment of the International Criminal Tribunal for Rwanda* (1994).

101 The *Uganda International Criminal Court Act* 6 of 2010. S 18 makes provision for jurisdiction of Ugandan courts over the core crimes, thus combining both the traditional forms of jurisdiction and UJ.

102 Uganda signed on 17 March 1999, and ratified on 14 June 2002, becoming the 68th State Party.

103 In ss 7, 8 and 9 the Ugandan *Uganda International Criminal Court Act* 6 of 2010 states that the definitions of the core crimes as contained in the *Rome Statute*, and the *Geneva Conventions* (1949) in the case of war crimes, shall apply in Uganda.

104 S 18(a) of the *Uganda International Criminal Court Act* 6 of 2010.

105 S 18(b) of the Ugandan *International Criminal Court Act* 6 of 2010.

106 S 18(c) of the Ugandan *International Criminal Court Act* 6 of 2010.

present in Uganda.[107] It is not clear whether this relates to mere presence or the more established requirement of residency. The Ugandan Act is silent on the need for presence for investigative purposes. The Act expressly stipulates that presence shall be required 'for the purposes of jurisdiction' only.[108] However, it is not clear whether this relates to judicial jurisdiction as exercised by the courts, or prosecutorial jurisdiction exercised by the national prosecuting authority for the purposes of putting charges to the accused, or enforcement jurisdiction through police investigative powers. Since there is no rule of custom prohibiting the commencement of investigations in the accused's absence, I submit that for investigative purposes under the Ugandan Act, the suspect need not be present.

6.4 Mauritius

Mauritius enacted the *International Criminal Court Act* 27 of 2011 in order to give effect to its obligations under the *Rome Statute*.[109] The Mauritian *ICC Act* sets out the three core crimes and provides for Mauritian courts to have jurisdiction over perpetrators of these crimes.[110] Section 4 introduces the universality principle over and above the traditional forms of jurisdiction,[111] namely: nationality[112] and passive

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107 S 18 of the Ugandan *International Criminal Court Act* 6 of 2010 introduces the universality principle in addition to the traditional forms of jurisdiction.

108 S 18(d) of the *International Criminal Court Act* 6 of 2010 provides that proceedings may be brought against a person for crimes committed outside the territory of Uganda if that person is, after the commission of the offence, present in Uganda. Also see ss 18(a) and (c), which establish jurisdiction where the offender is a citizen or permanent resident of Uganda, or is employed by the Ugandan Government in a civilian or military capacity, or where the victim of the offence is a citizen or permanent resident of Uganda.

109 Mauritius signed on 11 November 1998 and ratified on 5 March 2002, becoming the 53rd State Party. The *International Criminal Court Act* 27 of 2011 was proclaimed by Proc 1 of 2012 and came into force on 15 January 2012. See the Republic of Mauritius 2012 http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP11-POA-2012-MAU-ENG.pdf.

110 S 5 of the Mauritian *International Criminal Court Act* 27 of 2011 provides that any person found guilty of the three core crimes shall be sentenced to penal servitude for a term not exceeding 45 years.

111 S 4(3) of the Mauritian *International Criminal Court Act* 27 of 2011 provides that: "(3) Where a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he – ... (c) is present in Mauritius after the commission of the crime."

112 S 4(3)(a) of the *International Criminal Court Act* 27 of 2011 clothes Mauritian courts with jurisdiction if the person committing the offence outside Mauritius (a) is a citizen of Mauritius, or (b) if he is not a citizen of Mauritius, he is ordinarily resident in Mauritius.

personality.[113] The aim of Section 4 is to provide Mauritian courts with a link to the crime or the accused for acts committed abroad. The wording of the Section 4 does not necessarily indicate whether the presence is required for investigation or actual prosecution. It simply states that where the crime has been committed outside Mauritius, it shall be deemed to have been committed in Mauritius if the accused is afterwards present in Mauritius. It does not state whether this requirement relates to the courts or the police and other investigative institutions. It is submitted that the Mauritian provision is an open-ended one, subject to interpretation. The majority of UJ provisions in both domestic laws[114] and in some treaties[115] are clear in their indications that presence of the accused is a requirement for prosecution. The absence of a customary law rule on the initiation of UJ-based investigations *in absentia* favours the argument that presence is not a requirement for investigation but only for prosecuting. This argument, however, does not carry much weight in the Mauritian case, since the Act itself does not stipulate what the presence is required for. It is submitted that in this case presence should be required for both investigations and the initiation of prosecution.

7 Concluding remarks

Whilst the four *Geneva Conventions* of 1949 enjoined states either to try or to extradite offenders and perpetrators of grave breaches,[116] the real impetus in the development of international criminal law is to be located outside the law of war.[117]

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113 S 4(3)(d) of the Mauritian *International Criminal Court Act* 27 of 2011 empowers the court to exercise jurisdiction where the crime has been committed against a citizen of Mauritius or against a person who is ordinarily resident in Mauritius.

114 For example, as discussed above, the South African, Kenyan and Mauritian ICC Acts require the presence of the accused for courts to be seized with jurisdiction over a UJ-based prosecution. They are silent on the requirement of presence for the purposes of initiating investigations.

115 See the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), for example.

116 For the core crimes of genocide, war crimes and crimes against humanity, there is a treaty-based obligation *aut dedere aut judicare* only for grave breaches of the *Geneva Conventions* (1949) and Additional Protocol I. See Chatham House 2013 http://www.chathamhouse.org/publications/papers/view/192991#sthash.LF58B8oA.dpuf.

117 The *Geneva Conventions* and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war). See ICRC 2010 https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm.

Perhaps this can be attributed to the fact that apart from war crimes, the other two core crimes could be committed in peace time, and as such required a well-suited legal system and a tribunal structure to punish offenders. It was the jurisprudence of the various *ad hoc* international criminal tribunals,[118] the various treaties and global political and diplomatic lobbying that brought about general consent to the need to punish not only perpetrators of war crimes but also genocide and crimes against humanity.[119]

The *Rome Statute* and the obligations of states contained therein provided a springboard for the development of new legal frameworks, both on the African continent and abroad, aimed at giving effect to the obligations of states under international law. These new legal frameworks also developed within a milieu of widespread global impunity for these grave breaches.[120]

The interactions that have taken place under the umbrella of the UN and the AU also demonstrate the hunger on the part of African states to meaningfully participate in the development of international law on the basis of sovereign equality with other states. Hence Africa as a collective has been very vocal on issues that it perceives as a corruption or abuse of established international customary law, such as the immunity of state officials in the courts of a foreign state. It also presents international law with challenges for the assertion that UJ over these core crimes is an established principle of customary law, since this assertion is not necessarily supported by state practice. Whilst a few states, such as Belgium, Spain, France and Switzerland have attempted to prosecute and at times succeeded in prosecuting foreigners on the basis of UJ, there is no evidence that this is indicative of widespread acceptance of the practice amongst states. In fact their recent recapitulation also does not bode well for such an assertion. The various

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118 For example, the International Criminal Tribunal for the Former Yugoslavia and The International Criminal Tribunal for Rwanda.

119 The occurrences in the former Yugoslavia and in Rwanda galvanised the revulsion of all of humanity and ultimately provoked the international community to respond to this situation. It spurred a determination to return to the legacy of Nuremberg in order to end the culture of impunity that had prevailed since. See generally Griffin 2000 *IRRC*.

120 The ICC, for example, was set up in response to this growing trend in impunity over the core crimes of genocide, war crimes and crimes against humanity.

amendments of UJ legislations, for example the 2014 Spanish amendment which now confers jurisdiction only if the perpetrator later becomes a citizen of or a permanent resident of Spain indicates that no such state practice exists. The persistent objections raised by African states, as well as other concerned states such as China, Israel, the US and others, militates against the view that UJ in relation to the prosecution of these offences is settled customary law.

The AU's resolve to come up with a sound legal framework on this issue which has divided the world can be seen in its attempts to strengthen not only the domestic laws of its members but also in its attempts to create a continental tribunal akin to the ICC.[121]

[121] The *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (2014) was adopted by the AU Assembly at its 23rd Ordinary Session in Malabo, Equatorial Guinea in June 2014, and has not yet come into force.

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LIST OF ABBREVIATIONS

AU	African Union
DRC	Democratic Republic of Congo
EJIL	European Journal of International Law

Fordham Int'l LJ	Fordham International Law Journal
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
Harv Int'l LJ	Harvard International Law Journal
HRW	Human Rights Watch
ICA	International Crimes Act
ICC	International Criminal Court
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILS	International Law Studies
IRRC	International Review of the Red Cross
JICJ	Journal of International Criminal Justice
MDC	Movement for Democratic Change
NPA	National Prosecuting Authority
SALC	Southern Africa Litigation Centre
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SCT	Specialised Technical Committee
St John's L Rev	St John's Law Review
UJ	Universal Jurisdiction
UN	United Nations
UNSC	United Nations Security Council
ZEF	Zimbabwe Exiles Forum