



# The Exercise of Universal Jurisdiction for Specific Crimes and the Complementarity Principle of the Rome Statute under South Africa's Legal System

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## ABSTRACT

Universal Jurisdiction (UJ) is one of the most effective judicial mechanisms used by the courts to combat and prevent the proliferation of some international crimes that have shocked humankind. One common means of exercise UJ, is through international treaties signed by civilised nations of the world. Accordingly, the Rome Statute is a treaty providing devices for the prosecution of crimes under Article 5 by both member states and non-member states through UJ. Consequently, all ratifying states the Statute, besides obligations to cooperate with the Court, are also expected to exercise UJ in their domestic legal system as required by the Statute. This article, therefore, sought to determine whether individuals indicted for the crime of genocide, war crimes, and crimes against humanity may be prosecuted in South Africa (SA) and, if so, can the courts in SA also exercise UJ for those individuals whose states are not members of the Rome Statute? This article examined the exercise of UJ under the Rome Statute and domestically in South Africa through the Implementation Act using a qualitative research method. It argues that through the principle of complementarity and under the Implementation Act, the SA legal system has been authorised to exercise UJ for those crimes under the Statute as implemented by courts in SA in the Al Bashir case.

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## INTRODUCTION

Universal Jurisdiction (UJ) is one of the most effective judicial and juridical devices utilised by courts to prevent impunity for crimes affecting humanity. However, UJ is restricted to severe crimes affecting mankind.<sup>1</sup> Accordingly, UJ *per se* is not an independent jurisdiction as it relies on national jurisdiction and national judicial decisions. The Court does not recognise immunities prior to its jurisdiction, which is a major concern in implementing its authority.<sup>2</sup> Therefore, the application of UJ mandates states to act against these serious crimes for mankind even when the offences were not committed in that state. Similarly, the state may equally have no direct connection or link to the crime. In other words, the state

<sup>1</sup> See Article 5 of the Rome Statute creating the International Criminal Court (the ICC), Rome Statute of the International Criminal Court circulated as document A/CONF.183/9 of 17 July 1998 and came into force on 1 July 2002 (Rome Statute), available at: <https://www.icc-int/resource-library/> ( accessed 20 March 2025).

<sup>2</sup> See Article 27 of the Rome Statute.

exercising UJ is similar to the principle of *actio popularis*.<sup>3</sup> The rationale behind this action of the state is the safeguarding of the world order as a member of that society. Moreover, as indicated earlier, it may be exercised by a state without any jurisdictional connection or link between the place of commission of the crimes, the perpetrator's nationality, on the one hand, and the victim's nationality, on the other hand. Finally, UJ provides the authorities to prescribe, adjudicate and enforce. UJ also includes how the application of jurisdiction is obtained over a person, and this power to exercise jurisdiction is reserved to the state. Member states to the Rome Statute are expected by the Statute to domesticate crimes prosecuted by the Court, and consequently, SA through the Implementation Act 27 of 2002. Accordingly, this domestication of the Rome Statute allows crimes under its jurisdiction to be prosecuted domestically, thereby acting as a UJ for these crimes. After the introduction in Part I, this article will examine the concepts and theories justification for applying UJ in Part II. Part III will analyse the exercise of UJ under the Statute, the principle of complementarity and UJ for specific crimes. Part IV examines the exercise of UJ under SA's jurisdiction through the Implementation Act, and Part V concludes the article.

## METHODOLOGY

This study used qualitative research methodology. Qualitative research is a kind of research that aims to gather or collect and analyse data to gain an understanding of the concepts. In this regard, the key methodological approach for this paper is the desktop research approach. Data from secondary sources such as articles, literature surveys, the internet and other electronic sources dealing with mineworkers' environment and its associated legal and constitutional ramifications are analysed.

## DISCUSSION

### Concepts of Universal Jurisdiction

Universal Jurisdiction (UJ) is a legal principle that allows a country's courts or legal system to prosecute individuals for certain serious crimes, regardless of where the crimes are committed and the nationality of the perpetrators or victims. The idea behind UJ is to hold individuals accountable for serious offences committed against mankind, even if they occur outside the prosecuting country's borders. UJ is controversial, which has led to debates about its scope and application. While some argue that UJ act as a device to combat impunity for serious offences, others raise concerns about potential abuse and political motivations.<sup>4</sup>

International treaties and conventions provide mechanisms for both member states and non-member states to exercise UJ. Nevertheless, the actual implementation and enforcement of UJ may vary from one country to another. Several reasons appear to justify the application of UJ.

### Theories and Justifications of Universal Jurisdictions

The principles that govern the applicability of UJ are the nationality principle, the passive personality principle, the territoriality principle and the protective principle. The territoriality principle allows states to prosecute individuals for offences carried out outside their territory. Under this principle, states have the primary authority to exercise jurisdiction over offences perpetrated in their respective territories.<sup>5</sup> Accordingly, this principle is a fundamental principle of sovereignty under UJ as it allows states to enforce their laws within their borders and prosecute individuals for crimes committed outside their territory. In other words, it extends its jurisdiction beyond its borders for specific offences, such as crimes against humanity.<sup>6</sup> The nationality principle allows a country to establish jurisdiction over individuals accused of international crimes regardless of where the crime occurred. Here, a country can exercise jurisdiction over

<sup>3</sup> *Actio popularis* simply means action of the people and it refers to the right of any member of the public to initiate legal action to protect a public interest, often used in international law and sometimes in domestic legal system. It also means right resident in any member of the community to take legal action in vindication of a public interest as seen in South-West Africa Cases (*Ethiopia v. South Africa; Liberia v. South Africa*); Second Phase, International Court of Justice (ICJ), 18 July 1966, 47, para 88, <https://www.refworld.org/jurisprudence/caselaw/icj/1966/en/90239> (accessed 01 April 2025).

<sup>4</sup> Carsten Stahn, "The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine-A Reply to Michael Newton," *Vand. J. Transnat'l L.* 49 (2016): 443.

<sup>5</sup> Angelo Dube, *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* (Galda Verlag, 2016).

<sup>6</sup> Stahn, "The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine-A Reply to Michael Newton."

individuals who are its nationals or citizens when they have committed specific international crimes.<sup>7</sup> The passive personality principle, on its part, allows a country to exercise jurisdiction over individuals charged with certain international crimes based on the nationality of the victim, even if the crimes were committed outside its territory. Here, the country may assert jurisdiction over individuals guilty of a specific international crime once the injured party is a citizen of that country. Finally, the protective principle allows a country to assert authority over individuals accused of international crimes once the interest or security of that country is directly affected, even if the crime had occurred outside its territory.<sup>8</sup>

### ***Justification for the application of Universal Jurisdiction***

There are several theories and justifications for UJ concepts in international law. Some of the primary justifications include: (i) preventing impunity, with the primary reasons to deter perpetrators of heinous crimes such as genocide, war crimes and crimes against humanity cannot escape justice by seeking refuge in another country. In other words, UJ is aimed at preventing impunity and ensuring accountability regardless of where the crimes were committed; (ii) protecting fundamental human rights irrespective of the nationality,<sup>9</sup> UJ is aimed at ensuring that fundamental rights are not violated; (iii) international law contends that the application of UJ has become customary international law over time; (iv) filling legal vacuums, where there is no other avenue for pursuing justice UJ will fill the vacuum; (v) humanity's interest; not taking into consideration the nationality of the individuals is accused of grave international crimes; (vi) deterrence and prevention, by allowing states to prosecute individuals for offences despite their nationality, UJ aims to deter the commission of such crimes and prevent future atrocities.<sup>10</sup>

### **Exercise of Universal Jurisdiction under the Rome Statute**

The ICC have jurisdiction over four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>11</sup> The Court applies the principles of cooperation and complementarity to facilitate the exercise of UJ.<sup>12</sup>

### **Principles of Cooperation and Complimentarily**

Cooperation with the Court with respect to crimes under its jurisdiction is a fundamental principle that facilitates the exercise of UJ. Accordingly, member states to the Statute are obligated to work together with the Court as far as investigations and prosecution of crimes within the jurisdiction of the Court.<sup>13</sup> The Court may invite any state not party to this Statute to help regarding cooperation through an *ad hoc* arrangement, an agreement with such state or any other appropriate basis. Should a state not party to this Statute, which has entered into an *ad hoc* arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may inform the Assembly of States Parties (ASP) or, where the Security Council (SC) referred the matter to the Court, to the SC.<sup>14</sup> In addition, the Court may ask member states to participate in this process, and such requests could be made through diplomatic channels or other means designated by the state party upon ratification.<sup>15</sup> Article 87(7) of the Rome Statute also proclaims that a state party that fails to comply with any requests to cooperate and thereby prevent the Court from executing its functions and powers can be sent to the ASP or the UNSC if the matter was brought to the Court by the Security Council.<sup>16</sup> In addition, the Court could also apply Article 89 of the Rome Statute to communicate a request for the arrest and surrender of an accused

<sup>7</sup> Roger O'keefe, "Universal Jurisdiction: Clarifying the Basic Concept," *Journal of International Criminal Justice* 2, no. 3 (2004): 735–60, 736.

<sup>8</sup> Dube, *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa*, 10-15.

<sup>9</sup> Stahn, "The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine-A Reply to Michael Newton."

<sup>10</sup> O'keefe, "Universal Jurisdiction: Clarifying the Basic Concept," 736.

<sup>11</sup> See Article 5 of the Rome Statute.

<sup>12</sup> See greater details on the application of the principle of complementarity available at: <https://opiniojuris.org/2024/05/24/an-overview-of-the-principle-of-complementarity/> (accessed 01 April 2025).

<sup>13</sup> See Article 86 of the Rome Statute.

<sup>14</sup> See Article 87(5) of the Rome Statute.

<sup>15</sup> See Article 87(1)(a) of the Rome Statute.

<sup>16</sup> See general Article 87 and in particular Article 87(7) of the Rome Statute.

person or state officials<sup>17</sup> to any state or territory where such a person is in accordance with the Statute.<sup>18</sup> State parties are also compelled to obey a request to cooperate regarding any accused.<sup>19</sup> The Pre-Trial Chamber usually issues arrest warrants after application by the Prosecutor in accordance with Article 58 of the Rome Statute and after finding reasonable ground to believe that such a person or state officials have committed crimes within the jurisdiction of the Court.<sup>20</sup> The warrant of arrest will include, among others, the name of the person and the specific crime committed. Indeed, without cooperation, the exercise of UJ by the Court for crimes under and within its jurisdiction may not be accomplished.

Another principle used by the Court for the exercise of UJ is the rule of correspondence.<sup>21</sup> According to this principle, when the national jurisdiction or legal system of a state party is incapable of prosecuting an individual for the crimes under its jurisdiction, the ICC may step in and exercise the power of UJ. In other words, the Court will only intervene if a state is unwilling or unable to investigate and prosecute the alleged perpetrators genuinely.<sup>22</sup> Another principle under the ICC is the state party's referral to its jurisdiction.<sup>23</sup> In such cases, the Court may exercise its jurisdiction if the crimes were committed on the territory of a state party or involve a national of a state party. Moreover, non-state parties may also submit a matter to the Court's jurisdiction or consent to its jurisdiction. Further, the UNSC may also refer a matter involving international crimes to the Court, even if the crime was committed in states that are not parties to the Rome Statute.

Finally, the Court also has prosecutorial discretion to commence an investigation into situations that fall within its jurisdiction.<sup>24</sup> The Court may also issue international arrest warrants for persons accused of crimes within its jurisdiction.

### **Universal Jurisdiction for Specific Crimes Under the Rome Statute**

As indicated earlier, the Court may exercise UJ for specific Crimes within its jurisdiction. For example, some of these crimes include<sup>25</sup> war crimes,<sup>26</sup> the crime of genocide,<sup>27</sup> and the crimes of aggression.<sup>28</sup> Crimes against humanity are authorised under Article 7 of the Rome Statute.<sup>29</sup> Accordingly, crimes against humanity appear to be popular, and these are serious international crimes that involve systematic attacks against civilian populations.

These attacks include killing, extermination, enslavement, torture, and other inhumane acts when committed as part of a systematic attack against any civilian population, as in the case of this study.<sup>30</sup>

<sup>17</sup> As the case with President Al Bashir to various states as indicated above.

<sup>18</sup> See generally, Article 91 of the Rome Statute describing the content of the request to arrest and surrender the name of the person, convicted judgment and a copy of the arrest warrant.

<sup>19</sup> See Article 89(1) of the Rome Statute.

<sup>20</sup> See Article 58(1)(a) of the Rome Statute.

<sup>21</sup> See paragraph 10 of the Preamble of the Rome Statute.

<sup>22</sup> See generally Article 17 of the Rome Statute.

<sup>23</sup> See Article 13 of the Rome Statute.

<sup>24</sup> See Article 15 of the Rome Statute.

<sup>25</sup> By virtue of Article 7 of the Rome Statute, Crimes against appears to dominate the other crimes beside war crimes regarding their effects on modern society. It consists of murder, extermination enslavement, deportation or forcibly transfer of population, imprisonment and severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation, sexual violences, persecution, disappearance of person, apartheid, and other inhumane acts.

<sup>26</sup> By virtue of Article 8, war crimes means serious breaches of the Geneva Convention of 12 August 1949 and consists of the following acts against persons or protected property; wilful killing, torture, inhuman treatment, biological experiments, wilfully causing great suffering, destruction and appropriation of property, compelling service in hostile forces, denying a fair trial, unlawful deportation and transfer, unlawful confinement, taking hostages, attacking civilians and civilian objects, attacking personnel or objects involved in humanitarian assistance or peacekeeping mission, excessive incidental death, injury, or damage, attacking undefended places, killing or wounding a person hors de combat, improper use of a flag of truce, improper use of a flag, insignia or uniform of the hostile party, improper use of a flag, insignia or uniform of the UN, improper use of the distinctive emblems of the Geneva Conventions.

<sup>27</sup> In terms of Article 6 of the Rome Statute genocide mean any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

<sup>28</sup> By virtue of Article 8 *bis*, the crime of aggression is the only crime not committed by a private individual without the help of a state entity and it means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the UN.

<sup>29</sup> See Article 7 of the Rome Statute.

<sup>30</sup> See Articles 5 and 7 of Rome Statute.

Consequently, the ICC has the authority to prosecute individuals for crimes against humanity regardless of where the crimes were committed and the nationality of the accused or victims. In this regard, the ICC is exercising UJ for serious crimes on a global scale.<sup>31</sup>

### Universal Jurisdiction through the Implementation Act

Here, the exercise of UJ is authorised by the Implementation Act by courts in SA. This was exemplified by the Supreme Court of Appeal in SA when the former President of Sudan, Al Bashir, visited in 2015 for a meeting organised by the African Union (AU).

### The Implementation Act

South Africa ratified the Rome Statute and became a state party to the Statute on 17 July 1998.<sup>32</sup> Accordingly, SA has enacted the Implementation Act 27 of 2002, thereby incorporating the Rome Statute into its national laws.<sup>33</sup> The Implementation Act of 2002 was warmly welcomed in SA. This was because besides giving effects to the complementary principle in the Statute,<sup>34</sup> and the facilitation of cooperation with the Court, the Implementation Act has also empowered SA domestic courts for the first time to have authority over crimes adjudicated by the Rome Statute,<sup>35</sup> and as of 17 July 2018 there was a case of crime of aggression pending ratification by SA.<sup>36</sup> However, in 2016, the government of SA informed the ICC of its intention to withdraw from the Court, even though it was one of the initial countries on the African continent to implement the Rome Statute.<sup>37</sup> The reason to withdraw came after the court decision held that SA failed to comply with its obligation after a request to cooperate in the arrest and surrender of Al Bashir when he attended the 25<sup>th</sup> AU summit that took place in the country.<sup>38</sup> The decision to withdraw from the court was challenged and taken to court by the main opposition party on 24 October 2016.<sup>39</sup> Finally, in that judgment, the high court held that the decision to withdraw was unconstitutional and invalid.<sup>40</sup>

Currently, SA is still a member state of the Rome Statute, and the Implementation Act of 2002 is still effective. This section will analyse the jurisdiction under the Implementation Act of 2002, the institution of proceedings and cooperation regarding the requests to arrest and surrender state officials to the Court. According to this jurisdiction, if a person is accused of any of the crimes mentioned earlier, they are responsible, resulting in incarceration for life with or without a fine or both imprisonment and a fine.<sup>41</sup> The fact that a person is a head of state or government, a member of a government or parliament, and even a state official or elected representative is no bar or defence to crimes committed under this jurisdiction.<sup>42</sup> In other words, individuals or state officials, whether high-ranking or subordinate officials and whether former or sitting state officials, may not rely either on personal immunity or immunity *ratione*

<sup>31</sup> See generally Article 7 of the Rome Statute for crimes against humanity and Article 13 for the exercise of jurisdiction.

<sup>32</sup> *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [1].

<sup>33</sup> See the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 and entered into force on 16 August 2002 (the Implementation Act of 2002).

<sup>34</sup> By virtue of Section 3 of the Implementation Act of 2002 some of the objectives of the Implementation Act are: to ensure that the Rome Statute is effectively implemented in South Africa; facilitate complementarity principle in accordance with Article 1 of the ICC; to provide mechanism for the arrest and surrender to the Court of persons or state officials accused of crimes under the jurisdiction of the ICC.

<sup>35</sup> Max Du Plessis, "South Africa's Implementation of the ICC Statute: An African Example," *Journal of International Criminal Justice* 5, no. 2 (2007): 460–79; Dire Tladi, "The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law," *Journal of International Criminal Justice* 13, no. 5 (2015): 1027–47; *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [2].

<sup>36</sup> Rebecca Schwartz, "South Africa Litigation Centre v. Minister of Justice & Constitutional Development: Balancing Conflicting Obligations-Prosecuting Al-Bashir in South Africa," *Tul. J. Int'l & Comp. L.* 24 (2015): 422.

<sup>37</sup> Schwartz, "South Africa Litigation Centre v. Minister of Justice & Constitutional Development: Balancing Conflicting Obligations-Prosecuting Al-Bashir in South Africa."

<sup>38</sup> Aghem Hanson Ekor, "The ICC's Appeals Chamber Judgments in the Jordan Case Regarding Al Bashir and Ntaganda Case: Victories for the Fights against Impunity and Immunity for Serious Crimes," *Polit Journal Scientific Journal of Politics* 1, no. 4 (2021): 150–56.

<sup>39</sup> Ekor, "The ICC's Appeals Chamber Judgments in the Jordan Case Regarding Al Bashir and Ntaganda Case: Victories for the Fights against Impunity and Immunity for Serious Crimes."

<sup>40</sup> *Democratic Alliance v. Minister of International Relation and Co-operation and others (Council for the Advancement of South African Constitution as Intervening Party)* [2017] 2 All SA 123 (GP) [77].

<sup>41</sup> See Section 4(1) of the Implementation Act of 2002.

<sup>42</sup> Section 4(2) of the Implementation Act of 2002.

*materiae* before its jurisdiction for crimes committed under the Implementation Act of 2002.<sup>43</sup> Similarly, members of the security services and armed forces are also accountable for offences committed under this jurisdiction.<sup>44</sup> Accordingly, the status or office of a person, whether state officials or members of the armed forces, is neither a defence to a crime nor a mitigation of sentence under this jurisdiction.<sup>45</sup> The provision of Section 4 of the Implementation of 2002 is consistent with Article 27 of the Statute, but a fine could be part of the sentence under the Implementation Act of 2002.<sup>46</sup>

In exercising jurisdiction under the Implementation Act of 2002, the court must consider the Constitution of the Republic and the law,<sup>47</sup> international convention, particularly the Statute, customary international law and comparative foreign law.<sup>48</sup> Likewise, the exercise of jurisdiction under this court is secured by virtue of Section 4(3) of the Implementation Act of 2002 through holding a person or state officials liable for any of the crimes under Section 1 of the Act, which include crimes against humanity, war crimes, and the crime of genocide.<sup>49</sup> When the crimes under this jurisdiction are committed outside the Republic, it is considered to have been committed in the territory of SA provided as follows: (i) that person or state official is a South African citizen; (ii) that person is an ordinary resident of SA; (iii) that person or state officials after commission of the crime is within the territory of SA;<sup>50</sup> (iv) that person or state officials have committed the said crime either against a South African citizen or ordinary resident in the Republic of SA<sup>51</sup> Once any of the above conditions are met the proceedings will be initiated.

Accordingly, the office of the public prosecutor, through the National Director of Public Prosecution (NDPP), initiated all proceedings before this jurisdiction.<sup>52</sup> The duty of the NDPP is like that of the Prosecutor of the ICC. By virtue of Section 5(2) of the Implementation Act of 2002, the crimes under this jurisdiction are not retrospective.<sup>53</sup> Moreover, when instituting proceedings, the NDPP also considers the principle of complementarity and the obligation of SA as a member state to the Rome Statute.<sup>54</sup> Finally, the NDPP, working in consultation with the Chief Justice of SA and the member of the Ministry of Justice or Central Authority in accordance with Section 5 of the Implementation Act of 2002, decides the appropriate high court of the Republic that will entertain any person or official charged for crimes under the jurisdiction of the Implementation Act of 2002.<sup>55</sup> The Implementation Act of 2002 also enables collaboration with the Court regarding the arrest and surrender of persons or state officials accused under its jurisdiction.<sup>56</sup>

### Cooperation and Complimentarity under the Implementation Act

Arrest warrants under the Implementation Act of 2002 are executed using two methods.<sup>57</sup> The first situation deals with warrants from the ICC and the second deals with provisional arrest warrants order by

<sup>43</sup> Schwartz (2016) *Tulane Journal of International and Comparative Law* 422-423, where the South African Supreme Court of Appeals affirmed the decision of the High Court that the government failed in its obligation under the Rome Statute to arrest President Al Bashir when he was in South Africa for AU summit in 2015; *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [113].

<sup>44</sup> *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [92].

<sup>45</sup> Section 4(2)(i)(ii) of the Implementation Act of 2002.

<sup>46</sup> E. Kayitana, "Universal Jurisdiction of South Africa Criminal Court and Immunities of Foreign State Officials," *Potchefstroom Electronic Law Journal* 18, no. 7 (2015): 2560-2603.

<sup>47</sup> The Constitution referred here is the 1996 Constitution of South Africa.

<sup>48</sup> See Section 2 of the Implementation Act of 2002.

<sup>49</sup> Section 1 of the Implementation Act of 2002.

<sup>50</sup> A good example here is President Al Bashir when he was present in the Republic of South Africa in 2015 for the 25<sup>th</sup> AU summit and was charged by the ICC for war crimes, crimes against humanity and genocide.

<sup>51</sup> See generally Section 4(3) of the Implementation Act of 2002.

<sup>52</sup> Section 5(1) of the Implementation Act of 2002.

<sup>53</sup> Section 5(2) of the Implementation Act of 2002 indicates that no prosecution may be instituted against a person for crimes committed before 1<sup>st</sup> July 2002 and this section is consistent with Article 24 of the ICC.

<sup>54</sup> Section 5(3) of the Implementation Act of 2002; *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [9].

<sup>55</sup> See Section 5(4) of the Implementation Act of 2002.

<sup>56</sup> Sections 8-32 of the Implementation Act of 2002.

<sup>57</sup> See Du Plessis (2007) *JICJ* 466, *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [96].

the authorities from the court in SA.<sup>58</sup> In the first situation, once a request to arrest is received by the court from the ICC to arrest and surrender a person to whom the Court has already issued an arrest warrant, the request is forwarded to a magistrate together with all the necessary documents and the magistrate will endorse the warrant which could be executed in any part of the country.<sup>59</sup>

In the second situation, dealing with provisional arrest warrants, the Central Authority receives a request from the court about a suspected person or a state official charged with any of the offences under the Rome Statute and sends it to the NDPP.<sup>60</sup> The office of the NDPP must affirm with reasonable grounds to believe as follows: (i) the request was made with the determination or urgency by the court on the basis that the suspects is convicted of any of the crimes under the Rome Statute; (ii) a warrant of arrest or judgment against that person or state official is in place; (iii) formal request for the surrender of that person will be made later; (iv) the accused or state official is in the territory or on his or her way to SA;<sup>61</sup> (v) the aim of the arrest is to bring the accused person before the court or for imprisonment under a sentence of the court.<sup>62</sup>

Once a person is arrested or detained for such crimes under the Rome Statute, he or she must be brought before a magistrate within 48 hours.<sup>63</sup> The magistrate will make enquiries to establish the following: (i) the warrant applies to the exact person; (ii) the accused person has been arrested in accordance with the procedures laid down in the domestic laws; (iii) and finally that the rights of the accused person were respected.<sup>64</sup>

With regard to cooperation, the Implementation Act of 2002 allows competent authorities in SA to collaborate with the ICC and render assistance during investigations and prosecutions in many areas.<sup>65</sup> Collaboration may include but not exhausted to the following: (i) the identification of the accused person and his or her location and items; (ii) evidence collections, testimony under oath and expert opinions; (iii) examining of the accused person under investigation and prosecution; (iv) the service of notice and judicial document to the accused; (v) the presence of the accused and his or her transfer, examination of sites, search and seizures; and (vi) protection of victims and witnesses and preservation of all evidence.<sup>66</sup> These procedures are consistent with the rules laid down in the Rome Statute, especially Articles 51 and 53 of the Statute. Finally, the jurisdiction of the Implementation Act of 2002 is also against immunities and impunity.

### **Prosecution of Al Bashir through the Implementation Act**

Al Bashir travelled to SA in June 2015 for an AU conference, and SA was expected to arrest him as a member state to the Rome Statute.<sup>67</sup> Prior to the court order,<sup>68</sup> which was that Al Bashir should be arrested

<sup>58</sup> Section 8 of the Implementation Act of 2002; *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [97].

<sup>59</sup> See Section 8(2) of the Implementation Act of 2002.

<sup>60</sup> Section 9(1) of the Implementation Act of 2002.

<sup>61</sup> *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [5], where for instance, the South African High Court ordered that President Al Bashir should be prevented to leave South Africa.

<sup>62</sup> Section 9(2) of the Implementation Act of 2002.

<sup>63</sup> See Section 10(1) of the Implementation Act of 2002; *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [98].

<sup>64</sup> For proceedings regarding preparatory examination as well as order of committal see Section 10(3) to 10(9) of the Implementation Act of 2002. For removal of surrendered person see Section 11 of the Implementation Act of 2002 as well. Accused person entry and passing through South Africa are deemed to be in custody in the Republic and may be detained in any police cell in accordance with Section 12 of the Implementation Act of 2002. Finally, accused person could also be discharge by the magistrate when she or she is no longer to be surrendered and eventually release by virtue of Section 13 of the of the Implementation Act of 2002.

<sup>65</sup> Section 14 of the Implementation Act of 2002; *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [2].

<sup>66</sup> See generally Section 14 of the Implementation Act of 2002 regarding all areas of cooperation with the ICC.

<sup>67</sup> See *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [4].

<sup>68</sup> See *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5) SA 1 (GP) [4].

and not allowed to leave the country,<sup>69</sup> was executed, the President had left the country, and this order was appealed by the government of SA.<sup>70</sup>

The final decision in line with the immunity of incumbent President Al Bashir of Sudan, a non-state party to the Rome Statute, was decided by the Supreme Court of Appeal of SA in 2016,<sup>71</sup> as per Judge Wallis JA, who held that Al Bashir as President Sudan enjoyed immunity from and that SA was not obliged to arrest him because of his status as incumbent President of Sudan as required by international law.<sup>72</sup> However, the position of SA as a member state to the Rome Statute and its obligation to cooperate with the Court were inconsistent with its mandate under the Statute and the Implementation Act 27 of 2002.<sup>73</sup> In other words, SA was supposed to arrest the Sudanese when he visited the country in 2015 for the AU summit based on the implementation of the Rome Statute and its obligation under the Rome Statute.<sup>74</sup>

Professor Gaeta also expressed a different view with regard to the decision of Judge Wallis mentioned earlier.<sup>75</sup> She argued that while the ICC arrest warrant against President Al Bashir might be lawful, the request to state parties like SA and many others to arrest and surrender Al Bashir to the ICC is not binding upon them.<sup>76</sup> Moreover, like the situation in Kenya, the AU once more calls on African states to disregard any request to arrest and surrender President Bashir pursuant to Article 98 of the Statute because he enjoys personal immunities as the sitting President.<sup>77</sup>

Despite the warrants issued by the Court indicting Al Bashir for serious international crimes, he continued to travel to many countries with impunity.<sup>78</sup> With great support from the AU and the Sudanese government, his arrest and surrender to the Court have been futile. While he was the incumbent President, President Bashir still enjoyed his immunity in office.<sup>79</sup> However, there have been some cases where sitting presidents were charged for similar crimes while in office before establishing the Rome Statute.<sup>80</sup> This study adheres to and further argues the view that African senior state officials who are not parties to the Rome Statute enjoy immunities from prosecution for international crimes committed while in office.

## CONCLUSION

The principle of territoriality enables states to exercise UJ for heinous crimes committed outside their territory. The principle of nationality allows a country to claim jurisdiction over individuals who are its nationals or citizens for specific international crimes committed outside its territory. UJ allows a state to assert jurisdiction for international crimes even if the victims of the crimes are nationals or citizens of that country. The state may also be allowed to exercise protective UJ for serious international crimes

<sup>69</sup> See the Order of the Supreme Court of Appeal in *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), (holding that the failure to arrest and detain, for surrender to the ICC, of President Al Bashir is inconsistent with South Africa's obligation to the Rome Statute and Section 10 of the Implementation Act 27 of 2002, which implemented the Rome Statute in South Africa).

<sup>70</sup> See the Order of the Supreme of Appeal in South Africa in *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), (holding that the application for leave appeal is granted).

<sup>71</sup> See generally *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

<sup>72</sup> See *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [84].

<sup>73</sup> See *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [113].

<sup>74</sup> See *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016) [103].

<sup>75</sup> See Gaeta P. "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) *Journal of International Criminal Justice (JICJ)* 7,315-332 at 315.

<sup>76</sup> See Gaeta (2009) *Journal of International Criminal Justice* 332.

<sup>77</sup> Patricia Hobbs, "Contemporary Challenges in Relation to the Prosecution of Senior State Officials before the International Criminal Court," *International Criminal Law Review* 15, no. 1 (2015): 76-100, 81.

<sup>78</sup> Arab News, "Jordan Loses ICC Appeal over Failure to Arrest Bashir," 2025, www.arabnews.com.

<sup>79</sup> See *Democratic Republic of Congo v. Belgium, I.C.J* 14 February 2002 (NO.121), [58].

<sup>80</sup> For example, the ICTY indicted President Milosevic for war crimes, crimes against humanity and genocide while he was in office in the *Prosecutor v. Milosevic*, Case No.IT-99-37 (24 May 1999). He was indicted twice, with the first indictment in June 2001 and the second on 16 October 2001. However, at the time of his arrest he was no longer head of state because he was voted out in September 2000. See generally Patricia Hobbs (2015) *International Criminal Law Review* 15, 76-100 at 86 in this regard. Another example here is Charles Taylor was indicted for aiding and abetting war crimes and crimes against humanity, in the *Prosecutor v Charles Ghankay Taylor* Case No. SCSL-2003-01-1 was sentenced on 30 May 2012 to 50 years in prison. See also Dube A in *Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa* (Galda Verlag Publishers 2016) 128.

committed outside its territory if the security of that state is directly affected by the crime. The Rome Statute may also exercise UJ for all the four core crimes committed under its jurisdiction through the principles of complementarity and through referral by consent and accepting the authority of the Court on the one hand, and using its discretion for crimes committed under its jurisdiction and by the UNSC referral to the Rome Statute. SA prosecuted Al Bashir as the Sudanese President for crimes committed under the Rome Statute and through the Implementation Act. In doing so, SA was using the principles of complementarity of the Rome Statute and cooperation with the Court through the exercise of UJ for specific crimes under the Court and Implementation Act. Consequently, UJ is needed to prosecute serious international crimes affecting humankind.

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