Chapter 10
European Efforts in Transitional Justice While Implementing Universal Jurisdiction: ICJ Belgium v. Senegal Case

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10.1 Introduction

On 20th July 2012 the International Court of Justice ruled that Senegal must submit the case of Chad's former leader Mr. Hissène Habré to its competent authorities for the purpose of prosecution if it does not extradite him to Belgium. The international consensus that the perpetrators of international crimes should not go unpunished is being advanced by established international criminal tribunals, treaty obligations and a growing number of countries that recognise universal jurisdiction for their national courts, which may have an important role to play in balancing justice and peace, accountability and stability in transitional societies as in Mr. Habré's case. Despite the fact that universal jurisdiction (International Law Association 2000, p. 2)[1] is being accepted by States while trying to comply with their international obligations, difficulties arise when it comes to the implementation of universal jurisdiction because of its concurrency with existing judicial mechanisms. The authors of this article argue that internationally recognised values and reparatory justice for victims of the conflict must be placed on a State's power to choose which cases involving core international crimes are the objects of the exercising of its criminal jurisdiction, including universal jurisdiction and universal jurisdiction *in absentia*, after taking the principle of subsidiarity into account.

[1] 'Under the principle of universal jurisdiction, a State is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator of the victim.'

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10.2 Universal Jurisdiction as a Comprehensible Remedy

Universal jurisdiction, being accepted widely as a tool to fight international impunity, is still one of international law's more controversial topics (O'Keefe 2004, p. 736). Despite the positive effect of filling the impunity gap, the risk of possible negative consequences should be kept in mind when exercising universal jurisdiction. Unbridled universal jurisdiction can challenge the world order and deprive individuals of their rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, resulting in: unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory (Bassiouni 2008, p. 153). Consequently, it is of the utmost importance firstly, to understand the essence of the doctrine of universal jurisdiction and, secondly, to implement universal jurisdiction with clear awareness of its risks.

The assertion of universal jurisdiction originated in 1927 when the Permanent Court of International Justice in *The Case of S.S. 'Lotus' (France v. Turkey)*, (the Lotus case) Stated that 'in all systems of law the principle of the territorial character of criminal law is fundamental', although it also added that '[t]he territoriality of criminal law (. . .) is not an absolute principle of international law and by no means coincides with territorial sovereignty' (Lotus case, p. 20). It further added:

> (. . .) jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law (. . .) Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable (Lotus case, pp. 18–19).

An argument to prove the utility of the universal jurisdiction concept as a comprehensive and widely accepted framework requires it to be situated within recognised international treaties, international customary law and national law.

There are a number of international treaties that impose an obligation to prosecute and punish criminal perpetrators.[2] Starting with the UN Convention on the

[2] See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 4 Sept. 1956, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov. 1973, 1015 UNTS 244; Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 Dec. 1970, 10 ILM 133; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 Sept. 1971, 10 ILM 1151; International Convention against the Taking of Hostages, adopted 12 Dec. 1979, G.A. Res. 34/146, UN GAOR, 34th Sess., Supp. No. 99, UN Doc. A/34/819, 18 ILM 1456 (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, S. Treaty Doc. N. 100-20, 1465 UNTS 85.

Prevention and Punishment of the Crime of Genocide (further referred to as the Genocide Convention) where States parties were obliged to take national actions in order to prevent and punish the crime of genocide as a 'crime under international law' (Genocide Convention, Art. I). Notwithstanding the fact that the Genocide Convention has provided only territorial jurisdiction, the customary law evolved towards the application of universal jurisdiction covering the crime of genocide, as Stated by the International Court of Justice (ICJ) in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (further referred to as the Genocide case):

> (...) the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.

Furthermore, universal jurisdiction was first explicitly embodied in the Geneva Conventions together with the obligation of the States Parties 'to enact any legislation necessary to provide effective penal sanctions'.[3]

Customary international law, while providing a basic right for universal jurisdiction, does not elaborate a mechanism of implementation and does not provide obligations to be taken at the national level (Henckaerts 2005, pp. 604 and 568–621).[4] To illustrate this, the Hague Court of Appeal in its judgements against two Afghan military officials refused to apply customary international law on the ground that Article 94 of the Dutch Constitution prohibits Dutch judges from reviewing statutes in light of unwritten international law. Even though this decision of the court could be criticised, national initiatives to include universal jurisdiction among other national legal provisions largely dependent on certain international treaties. As a consequence this can create an asymmetrical obligation for some States (Philippe 2008, p. 387).

The application of the normative legal framework of international law as it relates to universal jurisdiction is not elaborated in such a manner as to impose sufficiently clear obligations on States to exercise universal jurisdiction and to have explicit mechanism to do this. If international law were to make progress in

[3] Common articles GC I, Art 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the *grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also*, if it prefers, and in accordance with the provisions of its own legislation, *hand such persons over for trial to another High Contracting Party concerned*, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article (...) (emphasis added).

[4] 'Rule 157: States have the right to vest universal jurisdiction in their national courts over war crimes'.

formulating a concrete definition of those obligations, the discretionary power consubstantial with State sovereignty would still leave when it comes to the final implementation of the provision (Philippe 2008, p. 387).

Despite the acknowledgement of its existence, there is no consensus concerning the definition of the concept of universal jurisdiction. This problem was evident in the ICJ *Arrest Warrant case* between Congo and Belgium (hereinafter referred to as the Yerodia case) in which none of the judges made an effort to provide a definition of or clarify the concept of universal jurisdiction despite its importance for the case.[5]

Nevertheless, doctrinal agreement on certain well established features allows a definition of universal jurisdiction to exist. Universal jurisdiction according to O'Keefe amounts to the assertion of jurisdiction in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct (O'Keefe 2004, p. 745). Bassiouni elaborates further, that as an *actio popularis* universal jurisdiction may be exercised by a State without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, the victim's nationality, and the enforcing State. The basis is, therefore, exclusively the nature of the crime and the purpose is exclusively to enhance world order by ensuring accountability for the perpetration of certain crimes (Bassiouni 2008, p. 153).

The rationale for validating the existence of universal jurisdiction is that international crimes affect the international legal order as a whole. This means that after being affected by disruptive international crimes, territorially or nationally, States are not always able or willing to react effectively and therefore States that do not have any jurisdictional connection or link to the international crimes that have been committed are granted a right to prosecute. The main controversy this raises is whether in such cases States can or should do so. Indeed, there is no real evidence that States are obliged to implement universal jurisdiction outside of treaty obligations (Cryer et al. 2010, p. 44; Yerodia case, p. 51).

The discussion on the right to exercise universal jurisdiction by a State leads to 'absolute' or 'pure' universal jurisdiction, more often referred to as 'universal jurisdiction *in absentia*'. Absolute universal jurisdiction comprises of actions when a State implements its jurisdiction over an international crime when the suspect is not present in the territory of the investigating State. Such exercise of universal jurisdiction could be argued as being convenient in cases where the impunity gap occurs because of the unavailability of the suspect due to the lack of political will to cooperate or the suspect has absconded. In comparison, the 'conditional' universal jurisdiction or otherwise referred to as universal jurisdiction with presence' is exercised when the suspect is already in the State asserting universal jurisdiction.

[5] ICJ *Yerodia* case, Dissenting opinion of Judge ad hoc Van den Wyngaert, paras. 44–45: 'There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways. [. . .] Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning and its legal status under international law'.

While such a distinction made is approved for the academic purposes, in the conceptual level it seems to be non-existent (O'Keefe 2004; Kreß 2006). The controversy lies in the legality of trials *in absentia*, especially under human rights law. Therefore, many States still do not exercise universal jurisdiction when the person is present on their territory. One of the latest examples that could be considered as one of the setbacks in the fight against impunity through universal jurisdiction is the decision by the Paris Prosecutor to dismiss a complaint by an association of victims in Morocco against President Bashar Al-Assad of Syria in 2012 because the suspect was not present in France (as cited in Amnesty International Report 2012, p. 50).

The rationale for limited action in this area can be partly explained by the Statement made in the *Yerodia* case, that the adoption of pure universal jurisdiction 'may show a lack of international courtesy' (Yerodia case, 2002, Separate Opinion of Judge ad hoc Van den Wyngaert, para. 3). One might argue that the distinction of universal jurisdiction *in absentia* as a separate issue as it necessitates proof of legality to a separate head of jurisdiction. However, according to Cassese, it should be treated as a 'different version' (Cassese 2001, p. 261). Considering universal jurisdiction as a jurisdiction to prescribe, it can be extra-territorial. However, jurisdiction to enforce is strictly territorial, since a State may not enforce its criminal law in the territory of another State without that State's consent ('Lotus' case, 1927, pp. 18–19; O'Keefe 2004, pp. 740 and 750).[6] While prescription is logically independent of enforcement, one has limited influence over the legality of another. However, if universal jurisdiction is permissible then its exercise *in absentia* is also permissible. (O'Keefe 2004, p. 750)

The comprehensiveness of the universal jurisdiction concept is limited. Despite existing specific legal grounds for assertion of universal jurisdiction, there are no clear obligations established by legal instruments to identify the duties of States, particularly concerning implementation.

10.3 Universal Jurisdiction as an Obstacle Race

The recognition of universal jurisdiction by the State as a principle is not sufficient to make it an operative legal norm. There are three necessary steps to operationalise the principle of universal jurisdiction: the existence of specific grounds for universal jurisdiction; a sufficiently clear definition of the offence and its constitutive elements; and national means of enforcement allowing the national judiciary to exercise their jurisdiction over international crimes (Philippe 2008, p. 379). While

[6] Where it is Stated (cit. 18), that general international law admits of only rare exceptions to the territoriality of criminal jurisdiction to enforce, all of them pertaining to armed conflict (etc.). Also as further (cit. 19) O'Keefe elaborates, consent to the extraterritorial exercise of police powers and (cit. 20) the consent to the extraterritorial sitting of a criminal court can be possible.

the first two have been outlined in the previous part of this article, the enforcement obstacles will be introduced below.

Implementation of universal jurisdiction is directly related to the practical aspects of a national judicial process including evidence gathering, questioning of witnesses, interpreting and applying the *ne bis in idem* principle, overcoming immunities and finally, more or less ensuring international cooperation. Ensuring the availability of witnesses as well as the collecting of evidence, can be complicated and cannot be presumed. A number of cases based on universal jurisdiction have failed to achieve the standard of proof for a criminal conviction (Cryer et al. 2010, p. 60).[7]

One of the major problems when undertaking prosecutions on the basis of universal jurisdiction is that the existence of jurisdiction *per se* does not give rise to any obligations on behalf of the territorial or nationality State to assist in any investigation, provide evidence or extradite suspects (see Broomhall 2003, pp. 119–123). This problem was evident in the trial of two Rwandan nuns in Belgium. The jury's ability to sort truth from fiction was particularly important because much of the most damning evidence against the nuns, in particular against Sister Kizito, came in the form of witness testimony and no forensic or ballistic evidence was available (Rettig 2012, p. 390). In 2007, the District Court of The Hague acquitted Afghan military official Abdullah F. due to lack of proof, because 'the question of whether the defendant had effective control over his subordinates' acts of violence and torture against the victims could not be answered affirmatively with a sufficient degree of certainty'.

For these reasons, national implementation of universal jurisdiction cannot be executed disregarding more affected countries and coexistence of the concurrent jurisdictions—either national or international. Therefore it is obvious that international law, by providing States with the competence to exercise universal jurisdiction, not only allows for an overlap of jurisdictions but even aims at such overlapping (Jessberger 2009, p. 557).

In order to resolve such an overlap of jurisdictions, the question that has to be answered is which court national or international, based on links with territory, person or without any link—can claim primacy. The exercise of universal jurisdiction should be understood as a fall back mechanism activated only if no primary jurisdiction is willing and able to genuinely prosecute the crime (Jessberger 2009, p. 557). In this context, noticeable similarities can be found between The International Criminal Court (ICC) complementarity system and the concept of universal jurisdiction. One might think that the complementarity regime could be accepted by the States while implementing universal jurisdiction for the purpose of strengthening national prosecutions and introducing more coordination among national legal processes. This could be seen as a possible solution for dealing with coexisting jurisdictions and the means by which the principle of subsidiary universality may be brought into practice.

[7] E.g. Dusko Cvetković prosecution in Austria and *In re Gabrez* in Switzerland.

10.4 Subsidiary Universality?

States have largely failed to establish any comprehensive regime for allocating cases between States with competing jurisdictions. In addition, it should be noted that the right of States to exercise universal jurisdiction still remains controversial (Stigen 2010, p. 134). To date the international community has agreed on several jurisdictional principles for solving coexistence of jurisdictions: The principle of exclusive jurisdiction regulated the work of the Nuremberg and Tokyo Military Tribunals; primary concurrent jurisdiction is embodied in the Statutes of the International Criminal Tribunal for the Former Yugoslavia (Statute of ICTY, art. 9) and Rwanda (Statute of ICTR, art. 8), concurrent complementary jurisdiction governs relationships of national jurisdictions and jurisdiction of International Criminal Court (Rome Statute, art. 1). The complementarity regime established in the Rome Statute has conceptual similarities with universal jurisdiction and might contribute to the implementation of universal jurisdiction. Both mechanisms have an influence on the reduction of impunity for core international crimes by letting an alternative judicial mechanism to be activated when States having primary duty to prosecute are inefficient.

The central tenet of the complementarity principle is that the primary responsibility to prosecute for international crimes (genocide, war crimes and crimes against humanity) is within the State, but if it fails to exercise its national judicial accountability measures, the ICC exercising its jurisdiction shall intervene to hold perpetrators of massive human rights violations accountable. The horizontal dimension of complementarity allows for complementary prosecutorial role to be played by 'bystander' States that do not have a strong nexus with international crime situation and are exercising universal jurisdiction *vis-à-vis* States that are directly concerned with such a situation (territorial/national State) (Ryngaert 2010, p. 165).

Concerning the horizontal dimension of complementarity, similarities with subsidiary universal jurisdiction can be found: the jurisdictional priority for the territorial State and the suspect's home State is conditioned on the existence of genuine criminal proceedings. One important difference between the complementarity principle and a subsidiarity criterion for universal jurisdiction, as usually understood, is that while the former gives priority to any State with jurisdiction [Rome Statute art. 17(1) and 19(2)(b)], the latter only gives priority to the States affected by the crime, typically the territorial State and the suspect's home State (Ryngaert 2010, p. 148).

Nevertheless, currently there is insufficient State practice to conclude that international law attaches a subsidiarity principle to universal jurisdiction (Stigen 2010, p. 141). The ICJ has not pronounced on the existence of a subsidiarity criterion, but in the *Yerodia* case it was Stated:

> a State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned (Yerodia case, 2002, p. 80, para. 59).

However, it is obvious that a subsidiarity principle attached to universal jurisdiction could give a sufficiently well established criterion aimed at the effective

implementation of universal jurisdiction. Moreover, considering the lack of existing regulation and State practice, it is wiser to rely on the ICC's principle of complementarity in order to ensure the best balance among impunity and sovereignty of the State directly affected. Complementarity and universal jurisdiction could even act as catalysts, especially through positive complementarity and the investigations in early universal jurisdiction proceedings. A subsidiarity criterion would limit the interference into a State's sovereignty and the main rationale behind universal jurisdiction would be better reflected. It would give the forum State a subsidiary right to prosecute when necessary to prevent impunity, but not an unconditional right to prosecute on the grounds of the seriousness of the crime (Stigen 2010, p. 134).

Considering all the drawbacks of universal jurisdiction and its implementation, as Rastan argues, the expectation that national authorities would be able to engage significant resources routinely into costly trials for crimes committed abroad, and which may have little connection to the forum State, appears misplaced (Rastan 2010, p. 125). Nevertheless, Belgium, in the case discussed later on in this article, chose the costly trial for the vital benefit of retributive justice that exercise of its universal jurisdiction could have ensured for victims of massive and systematic fundamental human rights violations. If victims seek justice in national courts of residence, and in so doing depend on the State to exercise its universal jurisdiction *ab absentia*, this State has an important role to play in strengthening the responsible sovereignty of the country in transition.

10.5 Importance of Subsidiary Universality in the Transitional Justice

Transitional justice is made up of processes of trials, purges, and reparations that take place after the transition from one political regime to another (Elster 2004, p. 1; Teitel 2000, p. 22). Transitional justice is by its nature a heavily politicised process (McEvoy and McGregor 2008, p. 6). Therefore it is not surprising that transnational trials associated with transitional justice can sometimes raise doubts about the political agenda behind them (Rettig 2012). However, even though there are other transitional justice mechanisms that could be used to fight against impunity for international crimes,[8] in cases where victims of the conflict are not provided with retributive justice, universal jurisdiction can be the only effective and essential tool for international justice.

It is the duty of every State to exercise its jurisdiction over crimes under international law such as war crimes, crimes against humanity, genocide and other international crimes. The UN Security Council has emphasised this responsibility of States to prosecute persons responsible for committing international crimes

[8] International Criminal Court, international criminal tribunals and etc.

in a number of UN Security Council resolutions.[9] For example, at least 97 States have vested their national courts with universal jurisdiction to a certain degree over serious violations of international humanitarian law (Report of UN Secretary General 2011, para. 134).

However, a transitional-justice approach to past atrocities is faced, quite inevitably, with a number of conflicting priorities (Dukić 2007, p. 693). It is for this reason that impunity is chosen, frequently in the name of reconciliation (Human Rights Watch 2005) and amnesties,[10] as the pivotal legal means by which to 'close the book' on the past (McGregor 2008, p. 57). Yet impunity does not automatically lead to national reconciliation (Dieng 2002, p. 2) and empirical support for the claim that amnesties are accompanied by peace is tenuous and context specific (Aloyo 2010, p. 11). We live in an age of accountability in which there is an ever-growing emphasis on the responsibility of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes and other egregious crimes (UN Secretary General Ban Ki-moon's Remarks to the Security Council's Debate 2012).

Despite this rhetoric, universal jurisdiction is broadly understood to represent a reserve tool in the fight against gross violations of human rights. Courts that preside for example within the territorial State and which are able and willing to prosecute individuals for international crimes should have priority in exercising jurisdiction. Firstly, this means that a State is required either to exercise jurisdiction which would necessarily include exercising universal jurisdiction and only then to extradite the person to a State able and willing to do so, or to surrender the person to an international court (such as the International Criminal Court) with jurisdiction over the suspect and the crime.

This multi-dimensional State obligation related to the commitment to universal jurisdiction reflects the idea of responsible sovereignty which conditions State sovereignty and governmental legitimacy on compliance with fundamental human rights (International Commission of Intervention and State Sovereignty 2001, para. 1.35). Even though there are international law theorists who assert that universal jurisdiction gives powerful nations a means of politically influencing less powerful ones (White 2000, p. 224) or appears inconsistent with the notion of sovereign equality among States (Bottini 2004, p. 555), the most important thing is that it gives real sense to the idea of responsible sovereignty. Different countries and cultures adhere to different ideas about justice (Rettig 2012, p. 402). However, the evolution of the human rights regime and the emergence of international conventions impose an obligation to prosecute and punish those who have committed international crimes.[11] This obligation reflects the commitment of the

[9] 1325 (para. 11); 1960 (2010), 1889 (2009).

[10] Amnesties excuse individuals for crimes that would otherwise be punishable by law.

[11] For example, UN Convention on the Prevention and Punishment of the Crime of Genocide, Geneva Conventions, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

international community that the enjoyment of State sovereignty includes obligations in the field of human rights and international justice.[12]

Territorial jurisdiction is a fundamental feature of sovereignty (Dixon 2007, p. 143). However, the exercising of jurisdiction does not entail that any State can employ it without any respect for international law, which in cases of international crimes obliges the State to regulate exercise of universal jurisdiction in its national laws and exercise it in cases of international crimes. 'Purposefully sidestepping national courts' (Rettig 2012, p. 404) is not and should not be the idea of universal jurisdiction, because the main idea is to fight against impunity for international crimes and to protect internationally recognised values in cases of States' inability or unwillingness to do so themselves. Criminal impunity for international crimes cannot be reconciled with democratic principles and for this reason, in a period of transition, international law and, more specifically, universal jurisdiction, should be invoked as a way to bridge shifting understandings of legality (Teitel 2000, p. 20).

Bridging understandings of legality has a significant role in providing retributive justice for victims of the conflict. Reparatory approaches should be an important feature of transitional justice, because in the longer-term, putting victims and victims' rights firmly on the post-conflict agenda is essential to building trust in the State (Winterbotham 2010, p. 30).

When national courts do not provide justice for victims, the primary problem of international law is that mechanisms designed to enforce justice can be considered weak when compared with the domestic sphere. The initial establishment of the ICC was intended to promote international justice (Broomhall 2003). However, it had a negative influence on the enthusiasm of the international community to support mechanisms which have become emblematic of transitional justice, such as the *ad hoc* international criminal tribunals (McGregor 2008, p. 57). The ICC mechanism and politics of the complementarity principle in practice keep raising doubts about the 'warped priorities and institutional self-interest' (Clarke 2012, p. 65) of the ICC, the perceived selectivity of cases (deGuzman 2012, pp. 265–320) and the whole idea of international justice. Furthermore, the jurisdiction of the ICC is non-retroactive.[13] For these reasons, even though the exercising of universal jurisdiction could be interpreted as a political means of achieving the purposes of international justice by giving powerful nations the capacity to influence less powerful ones, universal jurisdiction may be not merely the only tool left to fight impunity, but, more importantly, the only tool to meet the demand of justice for victims.

[12] UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of the year 1970 States that in their interpretation and application international law principles are interrelated and each principle should be construed in the context of the other principles.

[13] The Rome Statute entered into force on the 1st of July 2002 and, as such, the Court cannot exercise its jurisdiction over crimes alleged to have been committed before that date. When a State joins the statute after that date, the Court may only exercise its jurisdiction over crimes committed after the date the statute entered into force for that State, but there is the possibility for a State to plug the gap in time if it so chooses.

In negotiations to end conflicts as well as in post-conflict agendas, victims' needs are often low on the priority list (Winterbotham 2010, p. 30). Universal jurisdiction aims to strengthen international human rights law by enabling politically independent domestic courts to protect international values against impunity for international crimes and could be the most effective road to justice for victims who have nowhere else to go. Furthermore, there is no compelling evidence that national authorities conducting prosecutions based on universal jurisdiction have 'abused' such jurisdiction (Amnesty International Report 2012, p. 9). That means that national authorities exercising universal jurisdiction rely on the principle of achieving justice, and do not intend to promote the destabilisation of an already fragile State of internal affairs in the period of transition. As the case at the ICJ concerning *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)* (further referred as Belgium v. Senegal case) suggests, domestic courts do apply the principle of subsidiarity while exercising universal jurisdiction.

10.6 Subsidiary Universality in the ICJ Belgium v. Senegal Case

On the 20th July, 2012, the International Court of Justice issued its judgment in the *Belgium v. Senegal* case and held that Senegal, being a party to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (further—Convention against Torture), had violated its obligation under the treaty to submit the case of Hissène Habré, the former President of Chad, who had been given refuge in Senegal for more than two decades, to its authorities for the purpose of prosecution (Belgium v. Senegal case, para. 102). The Court unanimously found that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him to Belgium (Belgium v. Senegal case, para. 6).

This decision of the International Court of Justice is considered to be an important victory for Habré victims (FIDH 2012). Prior to this in 2000, complaints made by Chadian nationals residing in Chad were dismissed in the Chamber of the Court of Appeal in Senegal on the grounds that the investigating judge lacked jurisdiction because crimes were committed outside the territory of Senegal by a foreign national against foreign nationals and that they would involve the exercise of universal jurisdiction that national laws did not provide at that time. In the same year Belgian nationals of Chadian origin and Chadians living in Belgium filed complaints against Mr. Habré for serious violations of international humanitarian law, crimes of torture and the crime of genocide and in 2009 the Belgian investigating judge issued an international warrant *in absentia* for the arrest of Mr. Habré. Belgium transmitted the international arrest warrant to Senegal and requested the extradition of Mr. Habré.

The Dakar Court of Appeal ruled on Belgium's first extradition request, holding that Mr. Habré should be given jurisdictional immunity which is intended to survive the cessation of his duties as President of the Republic. Senegal explained that this judgment put an end to the judicial stage of proceedings and that it had taken the decision to refer the case to the African Union. By means of issuing a number of notes to Senegal, Belgium made it clear that the decision to refer Mr. Habré's case to the African Union could not relieve Senegal of its obligation to either prosecute or extradite the person accused of international crimes. Belgium transmitted three more extradition requests to Senegalese authorities in the years 2011 and 2012. Two of them were found inadmissible because, according to the Dakar Court of Appeal, it was not accompanied by the necessary documents and the copy of the international arrest warrant placed on the file was not authentic (Belgium v. Senegal case, paras. 37–40).

Senegal asserted that the only impediment to opening the Mr. Habré trial in Senegal was a financial one (Belgium v. Senegal case, para. 33). The ICJ Stated that financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré (Belgium v. Senegal case, para. 112). Furthermore, the Court concluded that extradition is an option offered by the Convention against Torture, whereas prosecution is an international obligation under this international treaty, the violation of which is a wrongful act that engages the responsibility of the State (Belgium v. Senegal case, paras. 94–95).

According to this conclusion of the International Court of Justice, it can be argued that the State has the duty to extradite the person accused only if for one reason or another it does not prosecute him or her. It could be interpreted that if the State concerned is unable or unwilling to carry out its proceedings, the Forum State should not be required to defer, regardless of the reason for the domestic inability. As Stigen argues, the somewhat exaggerated sovereignty concerns which dictated the high threshold in the Rome Statute at this point should not be the standard to follow (Stigen 2010, pp. 145–146). The decision delivered by the ICJ seemingly did not take that standard of inability and unwillingness to follow. It did not deal with the legality of Belgium's exercise of universal jurisdiction in the context of the principle of subsidiarity.

Sometimes it is argued that subsidiarity should also cover the victim's home State (Stigen 2010, p. 148) and in this case Belgium as well could be considered as one of the States affected by international crime together with the territorial State and the suspect's home State. This notwithstanding, Belgium inquired several times about Senegal's intention to prosecute Mr. Habré and the timeframe that would be needed in order to ensure respect for the principle of subsidiarity.

Belgium's reliance on universal jurisdiction and Senegal's agreement to create a special court within its domestic criminal justice system[14] has set an important precedent for the exercise of universal jurisdiction and the achievement of

[14] Following the judgement of the ICJ, Senegal agreed to an African Union plan to try Mr. Habré before a special court in the Senegalese justice system, the Extraordinary African Chambers.

international justice for victims. The impunity issue and the reparations issue are undoubtedly interrelated, certainly from the perspective of transitional justice in societies emerging from dark episodes of violence, persecution and repression (Van Boven 2010, p. 1). Reparations can take many forms to compensate for harm and to rehabilitate the mind, body and status—property restitutions, monetary payments, education vouchers, memorials, legislation rehabilitation, apologies, or even the return of a loved one's body for burial (Teitel 2000, p. 137). Besides that, as the ICJ decision in the *Belgium v. Senegal* case suggests, the exercise of universal jurisdiction by the Bystander State on the basis of victims' complaints can be an important step in upholding a reparatory approach to transitional justice and ensuring a place for victims to be heard.

10.7 Conclusions

Defence attorney Vanderbeck in the trial of sisters Gertrude and Kizito convicted for their role in genocide in Rwanda argued that 'it is hard to export justice' (as cited in Rettig 2012, p. 413), but impunity for international crimes has political, judicial and moral implications for the future of transitional society and responsible sovereignty of the country confronting transition.

Despite the fact that national courts of many countries are enabled to apply universal jurisdiction in compliance with international obligations, few States have engaged the universal jurisdiction concept. It appears that States tend to look to international legal mechanisms to punish perpetrators of serious crimes, many of whom seek refuge in so-called friendly States. States are either unaware or they care to reject or ignore the concept of universal jurisdiction. However, the *Belgium v. Senegal* case reflects the inevitability of the alternative measures for seeking justice in transitional societies, especially bearing in mind the priority of the fight against impunity and ensuring retributive justice for victims.

Belgium had to step in as victims of human rights violations related to crimes committed by Mr. Habré were left without justice and reparations because of Senegal's lack of effort to prosecute Mr. Habré for 20 years. Belgium asked Senegal several times about its intention to prosecute the accused person and even offered judicial cooperation. That means that the country exercising universal jurisdiction, in this case Belgium, made an effort to establish good communication with the affected States so that any subsidiarity issue could be resolved at the earliest stage and reparative justice could be provided for victims in the bystander State if the territorial State does not exercise jurisdiction even after being urged to do so and comply with international obligations.

Exercising universal jurisdiction with regard to the principle of subsidiarity enables members of the international community, which have acknowledged the significance of transitional justice in other countries, to enforce internationally protected human rights values, end impunity and provide reparations to victims of the conflict that probably do not have any other arena in which to raise their

complaints. As the principle of subsidiarity ensures and practice of the ICJ in the case of *Belgium v. Senegal* suggests, if transitional societies confront their past effectively, there should be no need for the international community and individual States to step in on the basis of universal jurisdiction aimed at the protection of internationally recognised values and reparative justice for victims.

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