

LAW AND POLITICS OF UNIVERSAL JURISDICTION

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Introduction

Universal jurisdiction is a black sheep in the criminal jurisdiction family. Unlike other jurisdictional bases, all characterised by some sort of link between the crime and the prosecuting state, universal jurisdiction is defined by the very absence of it. The rationale for this legal concept is closely intertwined with the idea that certain crimes are in their very nature so extreme and horrendous that they are perceived to be crimes against humankind. It is therefore assumed that the prosecution of these crimes is in the interest of the whole international community and a state that takes such an initiative acts on behalf of humanity and not out of its own national interest.¹

Universal jurisdiction is therefore a controversial concept. Criminal jurisdiction is, after all, a crucial manifestation of a state's sovereignty. The exercise of universal jurisdiction raises important questions about the relevance of principles such as sovereign equality of states, non-intrusion into domestic affairs and even the principle of separation of powers within democratic states, as rulings of domestic courts become a factor in inter-state relations. When put together, all these implications clearly suggest that universal jurisdiction is where international law and international politics walk a fine line between their respective worlds.

Much has been written about the legal aspects of universal jurisdiction. Its political implications however remain largely under-researched. One swift look at the practise of universal jurisdiction in the past decade makes it clear that it has been everything but consistent and to deduce some pattern from it is close to impossible. Yet, on a closer look one notices two cases where the interplay between law and politics has led to strikingly opposite results.

In this article I explore the two cases - I refer to them as the *Pinochet effect* and the *Rumsfeld effect* respectively - comparing their legal and political implications. I translate my findings into two sets of questions – a sort of checklists – that shall simplify the testing of the presence of the *Pinochet* and *Rumsfeld effect* in other cases based on universal jurisdiction. I then apply my conclusions on the case of the former Chadian dictator Hissène Habré.

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¹Supranational Criminology, 'The Criminology of International Crimes and Other Gross Human Rights Violations', at <http://www.supranationalcriminology.org> (20 May 2010).

I. The Pinochet Effect

I.1 The Case

The arrest proceeding against Augusto Pinochet in 1998 is considered to be one of the most important events in international criminal law since the Nuremberg trials. Pinochet was a symbol of military dictatorships that tormented Latin American countries in the 1970s and 1980s. On 11 September 1973 he led a *coup d'état* against the democratically elected president Salvador Allende, allegedly saving Chile from the threat of Communism. The four-man military junta that took power in the coup played according to a predictable scenario: congress was dissolved, the constitution suspended, a secret police created and control became centralised in the hands of General Pinochet, the then chief of the army and a year later a self-appointed president.²

17 years of military rule resulted in 3,197 deaths or forced disappearances³ of (real or perceived) opponents to the regime and in about 28,000 cases of torture.⁴ Thousands were exiled or fled the country in fear for their lives. Chile reverted back to civilian rule in 1990. Pinochet remained chief of the armed forces until 1997 and then assumed a non-elected lifetime seat in the Chilean Senate.⁵ As a senator he acquired parliamentary immunity from prosecution, supplementing a general self-amnesty declared by the military junta in 1978 for crimes committed in the aftermath of the *coup d'état*. Yet another layer of immunity was granted to Pinochet as to the 'Former President of the Republic' by the Chilean Congress in 2000.⁶

In July 1996 on the initiative of Spanish lawyer Joan Garcés, once political advisor of Salvador Allende, the Union of Progressive Prosecutors filed a complaint based on universal jurisdiction against Pinochet and the military and civilian command during his dictatorship.⁷ Two years later, this complaint served as a basis for a warrant of arrest against Pinochet issued by the Spanish Judge Baltasar Garzón, in which the general was charged with genocide,

² N. Roht-Arriaza, *The Pinochet Effect – Transnational Justice in the Age of Human Rights*, Philadelphia: University of Pennsylvania Press 2005, p. vii.

³ Findings of the Truth and Reconciliation Commission ('Rettig Commission') and Reparation and Reconciliation Corporation. Quoted in Amnesty International, *Chile – An Inescapable Obligation: Bringing to Justice Those Responsible for Crimes Against Humanity Committed under Military Rule*, 1998, p. 2.

⁴ Findings of the National Commission on Political Imprisonment and Torture. In: United States Institute of Peace, 'Commission of Inquiry: Chile 03', at <http://www.usip.org/resources/commission-inquiry-chile-03> (10 May 2010). Some sources however talk about higher numbers, see P. De Greiff, 'Comment: Universal Jurisdiction and Transition to Democracy' in: S. Macedo (ed.) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press 2004, p. 129.

⁵ Roht-Arriaza 2005, *supra* note 3, p. viii. S. Jonas, 'The Ripple Effect of the Pinochet Case', at: <http://www.globalpolicy.org/component/content/article/168/29411.html> (5 May 2010).

⁶ *Ibid.*

⁷ Roht-Arriaza 2005, *supra* note 3, pp. 4-5.

terrorism, and torture.⁸ On 16 October 1998 Augusto Pinochet was arrested at a clinic in London where he was recovering from back surgery. He would spend the following 16 months fighting his extradition to Spain.

But before the formal extradition process was able to start, British courts had to determine whether a former head of state had immunity from extradition. The appeal eventually reached the House of Lords. Here, two different panels of judges agreed that Pinochet had been charged with extraditable crimes and that his immunity did not extend to those crimes.⁹ In September 1999, the extradition hearing began and a decision favouring Pinochet's extradition was delivered.¹⁰ Two months later Pinochet's ability to stand trial was questioned after medical tests were carried out by a panel of British doctors. On 2 March 2000 Home Secretary Jack Straw issued a final decision not to proceed with the extradition. The following day Augusto Pinochet left London for Chile as a free man.

1.2 Between Law & Politics

The twists and turns of the Pinochet affair and its dramatic finale exposed in broad daylight the limits of universal jurisdiction. Although the question whether Pinochet could be extradited to Spain under UK law was purely a legal one, the same cannot be said about the considerations of the actors involved.

The UK found itself in a precarious situation. Each course of action implied enormous political costs. On one hand, the Labour government of Tony Blair took power in 1997 after 18 years of Conservative rule and promised "ethical foreign policy".¹¹ Unlike British Conservatives such as Margaret Thatcher who praised Pinochet as a saviour of the Chilean economy, many of the leading figures of the Labour Party, including Home Secretary Jack Straw, had protested against the *coup d'état* in Chile 25 years before.¹² There too was considerable pressure from abroad. Switzerland, France and Belgium followed the Spanish example and filed their own requests for Pinochet's extradition.¹³ Australia, Denmark, Germany, Italy, Luxembourg, Norway, the Netherlands and Sweden, although not aiming to prosecute the Chilean dictator themselves praised Spain for its willingness to do so.¹⁴ Moreover, the European Parliament, the United Nations Committee on Torture and even UN Secretary General Kofi Annan, all

⁸ *Idem*, p. xi. D. Pion-Berlin, 'The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?', *Journal of Latin American Studies*, 2004-36/3, p. 481. Jonas, *supra* note 6.

⁹ The decisions were announced on 25 November 1998 and 24 March 1999. Roht-Arriaza 2005, *supra* note 3, pp. 51, 56.

¹⁰ *Idem*, p. 60.

¹¹ *Idem*, p. 36.

¹² *Ibid.* M. Davis, 'The Politics of the Pinochet Case in the United Kingdom', in: M. Davis (ed.) *The Pinochet Case: Origins, Progress and Implications*. London: Institute of Latin American Studies 2003, pp. 130-131.

¹³ *Idem*, p. 134.

¹⁴ Roht-Arriaza 2005, *supra* note 3, p. 36.

urged the UK government to follow its obligation under the 1984 Convention Against Torture and either prosecute or extradite Pinochet.¹⁵

On the other hand, there were other considerations, equally constraining. Britain had a reason to be grateful to Chile for its support against the Argentinian invasion of the Falkland Islands in 1982. Moreover, Britain was a major supplier of arms to the Chilean military. Then there was a special ally of the UK – the United States – whose support for the 1973 coup and possible complicity in the human rights abuses that followed would inevitably be brought back from the oblivion of the CIA archives to the headlines and possibly even to the courtrooms if Pinochet were to face a trial. Thus, it is hardly surprising that the US put substantial pressure on the UK government to allow Pinochet to return to Chile.¹⁶

Furthermore, the key actors – the governments of Chile and Spain – did not seem to be particularly enthusiastic about prosecuting Pinochet in Madrid. The arrest of the former dictator put the Chilean government in an unenviable situation. Several of its members had been exiled or persecuted by the Pinochet regime¹⁷, thus sympathy for the dictator was certainly not what shaped their official position. Rather, what shaped it was a fear of the possible effects that this case might have for the process of democratic transition in Chile, particularly for the armed forces. The Chilean Minister of Foreign Affairs José Miguel Insulza warned that attempts to try Pinochet outside of Chile may “contribute to the polarisation of the society”¹⁸. Founded on this belief, the government of Chile firmly opposed Garzón's extradition request, arguing first Pinochet's diplomatic immunity, then Chile's sovereignty and invalidity of the detention; when these failed, it shifted the focus to the general's delicate state of health.¹⁹

1.3 The Effects

Although Pinochet's final release was a harsh blow to the struggle against impunity for human rights violations, a decade of hindsight it is clear that those 503 days he spent in London struggling over his extradition to Spain had a profound impact not only on Chile but on the whole world; an impact that is commonly referred to as the *Pinochet effect* or alternatively as the *Garzón effect*.

It is important to note that the search for justice in Chile did not start with Pinochet's arrest. The first criminal complaints concerning killings,

¹⁵ *Idem*, pp. 36-37.

¹⁶ Davis 2003, *supra* note 13, pp. 133-134.

¹⁷ *Idem*, p. 133.

¹⁸ *Ibid.*

¹⁹ Roht-Arriaza 2005, *supra* note 3, p. 59. C. Huneeus, 'The consequences of the Pinochet case for Chilean politics', in: M. Davis (ed.) *The Pinochet Case: Origins, Progress and Implications*. London: Institute of Latin American Studies 2003, p. 173.

disappearances and torture were filed only days after the coup d'état.²⁰ However, the courts, in theory the only democratic institution not dissolved after the change of regime, were largely servile to the military junta, whether due to the political views of the judges or because of the omnipresent climate of fear and intimidation.²¹ Consequently, most of the cases were closed without the facts even having been looked at: between 1973 and 1989 there were 8,908 writs of *habeas corpus* filed. Of those, only 30 were acted upon and only 3 before 1985.²² To the disappointment of all those who hoped that Chile's transition to democracy would bring change, in 1990 the Supreme Court ruled that the controversial 1978 self-amnesty decree adopted by the military junta was constitutional.²³ Until the late 1990s the majority of the courts interpreted the amnesty simply as the absence of a crime, rather than the absence of guilt. In other words, once there was no crime, there was nothing to investigate and cases involving human rights violations committed during the 1973-78 period were closed right from the beginning.²⁴ The political context of a country in a process of transition where democracy was still fragile and army still powerful certainly played a role in the rather cautious approach of the political figures to the question of justice.

However, the country that Pinochet so triumphantly returned to on 3 March 2000, was not the Chile he had left. It was a country that suddenly came to realise that the world around it had changed, that the argument of state sovereignty did not have the same strength it used to have, that the idea of universal jurisdiction for human rights violations is a mainstream legal view and not a mere whim of an overambitious Spanish judge.²⁵ As David Pion-Berlin argues, it was this awakening and the resulting international embarrassment that changed the attitude of the Chilean government.²⁶ With Pinochet's return the world's scrutiny focused on Chile, watching closely whether the government would stand up to its promise that justice could be found there. Consequently, the executive put subtle pressure on the courts in Chile, leaving them little doubt as to what was expected from them. This shift, accompanied by important developments in the Chilean judiciary made before Pinochet's arrest²⁷ led to a number of breakthrough rulings which eventually paved the way for Pinochet's prosecution. On 5 June 2000 Pinochet was stripped of his parliamentary immunity by the Santiago Appeals Court; the decision was later upheld by Chile's Supreme Court.²⁸ On 1 December 2000 Pinochet was indicted

²⁰ Roht-Arriaza 2005, *supra* note 3, p. 69.

²¹ *Idem*, p. 70. Pion-Berlin 2004, *supra* note 9, p. 493.

²² Pion-Berlin 2004, *supra* note 9, p. 493.

²³ *Idem*, p. 494.

²⁴ Roht-Arriaza 2005, *supra* note 3, pp. 71-72.

²⁵ *Idem*, p. 86. Pion-Berlin 2004, *supra* note 9, p. 486.

²⁶ Pion-Berlin 2004, *supra* note 9, pp. 486, 503.

²⁷ The developments refer mainly to the partly natural and partly induced shift in the generation of judges at the Chilean courts, traditionally occupied by supporters of the military. Roht-Arriaza 2005, *supra* note 3, pp. 72-73.

²⁸ Roht-Arriaza 2005, *supra* note 3, pp. 81-82.

for direct participation in 18 kidnappings and aggravated homicides.²⁹ Proceeding against Pinochet continued until his death on 10 December 2006, with an alternation of indictments for specific crimes and claims of dementia which made the defendant unfit to stand a trial.

While the exact nature of the impact that Pinochet's arrest had on his prosecution in Chile remains disputed, there are relatively few who doubt it. Most of the authors seem to agree that while Chilean courts had clearly been moving towards justice even before Garzón's arrest warrant, this change was arguably slow and if Europe had not taken a lead, it is unlikely that any measure of justice would have been served in Chile in the immediate future. In other words, the initiative of Spanish court based on the concept of universal jurisdiction served as a catalyst of Pinochet's prosecution in Chile.³⁰

Additionally, three sub-effects are generally attributed to the Pinochet case. Firstly, the trial against the general opened the way for prosecution of other high-ranking military officials in Chile. With only a few successful cases prior to 1998, by July 2003 over 300 military officers had been indicted and dozens had been convicted, many for disappearances that occurred in the early dictatorship years.

Secondly, with Pinochet's arrest in London international law suddenly assumed a 'flesh-and-blood' character; the norms of human rights treaties that had long languished in "splendid isolation"³¹ became not only real, but able to put the most powerful person in the country behind bars. Consequently, British and Chilean judges were forced to familiarise themselves with international law and as Naomi Roht-Arriaza points out, this (albeit forced) process of internalization and domestication is likely to lead to a wider and better application of human rights law and international criminal law generally.³²

Finally, the Pinochet's arrest kindled new hopes among human rights advocates around the world leading to what Alexandra de Brito calls a 'snowball effect'³³. Cases based on the concept of universal jurisdiction that are considered to be "a natural extension of the Pinochet precedent" include the one concerning Chadian dictator Hissène Habré, Congolese Minister of Foreign Affairs Yerodia Ndombasi and Israeli Prime Minister Ariel Sharon.³⁴

²⁹ *Idem*, p. 83.

³⁰ Pion-Berlin 2004, *supra* note 9, pp. 480, 498-505.

³¹ A.R. Brotóns, 'International law after the Pinochet case', in: M. Davis (ed.) *The Pinochet Case: Origins, Progress and Implications*. London: Institute of Latin American Studies 2003, p. 250.

³² Roht-Arriaza 2005, *supra* note 3, p. 207.

³³ A.B. de Brito, 'The Pinochet case and the changing boundaries of democracy', in: M. Davis (ed.) *The Pinochet Case: Origins, Progress and Implications*. London: Institute of Latin American Studies, 2003 p. 225.

³⁴ *Ibid.* Roht-Arriaza 2005, *supra* note 3, p. 170.

I.4 The Checklist

In order to confirm the presence of the *Pinochet effect* in other cases based on universal jurisdiction, most of the following questions should be answered affirmatively:

- 1) Has the country's unfinished transition to democracy been the major obstacle to the prosecution of the perpetrator?
- 2) Has the use of universal jurisdiction by a third state created international pressure on the defendant's home country to bring him/her to justice?
- 3) Has the defendant's home country changed its attitude towards his/her prosecution (partly) as a result of the international pressure?
- 4) Has the pressure eventually led to the perpetrator's prosecution in his/her home country?
- 5) Has the prosecution of the main perpetrator additionally opened the way for the prosecution of his/her accomplices?
- 6) Has the use of universal jurisdiction triggered a process of internalization and/or domestication of international law in the perpetrator's home country?

II. The Rumsfeld Effect

II.1 The Case

Unlike the effect attributed to the arrest and extradition proceeding against the former Chilean dictator Augusto Pinochet, the *Rumsfeld effect* is not about one defendant. In fact, it is not even about Donald Rumsfeld being a defendant. It is rather a story of multiple characters, each adding their piece to the puzzle of law and politics of universal jurisdiction. I name the changes triggered by the use of this controversial legal concept after the Secretary of Defence of the United States, as in my view he personifies the role that international politics played in this particular case.

II.1.1 Belgian law

The story of the *Rumsfeld effect* takes place in Belgium. In June 1993 both chambers of the Belgian parliament unanimously adopted an *Act Concerning Grave Breaches of the 1949 Geneva Conventions and their Additional Protocols I and II*³⁵ ('1993 Act'). As the name of the act suggests, the law does not follow

³⁵ 'Loi du 16 juin relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions', at http://www.ulb.ac.be/droit/cdi/Site/Legislation_files/Loi%20du%2016%20juin%201993%20texte%20de%20loi.pdf (2 June 2010). L. Reydam, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law', *Journal of International Criminal Justice* 2003-1, p. 679 (Reydams 2003a).

the traditional distinction between international and non-international armed conflicts for the purpose of defining grave breaches. The progressive language of Articles 1 and 7(1) provides Belgian courts with jurisdiction over grave breaches irrespective of the place or context in which they were committed. In February 1999, Belgium amended the law to include genocide and crimes against humanity. It was however asserted that those crimes were subject to Belgian jurisdiction even before the amendment as crimes punishable under customary international law.³⁶ Furthermore, a new controversial paragraph was included in the law, stating that “the immunity attributed to the official capacity of a person does not prevent application of the present act”.³⁷ What is extraordinary about the 1993/1999 Belgian law is that it allowed for universal jurisdiction *in absentia*. In other words, presence of the suspect was required neither for the investigation, nor for the trial.³⁸ Absence of this requirement further reinforced a victim-friendly *partie civile* procedure provided for in Belgium's Code of Criminal Procedure, which allowed private individuals to lodge a complaint directly before an investigative judge (*juge d'instruction*).³⁹ After determining the admissibility of the complaint, the judge would be able to initiate inquiries and fact-finding and even issue an arrest warrant, without having to wait for a request from the public prosecutor.⁴⁰ The particularities of its legal system made Belgium a popular destination for both victims and human rights organisations, who made extensive use of the possibility to trigger universal jurisdiction as a *partie civile*.

2.1.2 The Case against Ariel Sharon

The complaint against the Israeli Prime Minister filed in June 2001 and claiming his responsibility, as the former Minister of Defence, for the massacres in the Palestinian refugee camps of Sabra and Shatila during the Israeli invasion of Lebanon in 1982 may not have been the first case based on the 1993 Act. It was nevertheless the first one that caused a diplomatic headache⁴¹ among the

³⁶ M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia. p. 93.

³⁷ 'Loi relative à la répression des violations graves de droit international humanitaire, 10 février 1999', at <http://www.preventgenocide.org/fr/droit/codes/belgique.htm> (2 June 2010), Article 5(3).

³⁸ *Ibid.*

³⁹ D.R. Hurwitz, 'Universal Jurisdiction and the Dilemmas of International Criminal Justice: The Sabra and Shatila Case in Belgium', in: D.R. Hurwitz, M.L. Satterthwaite & D. Ford (eds.) *Human Rights Advocacy Stories*. New York: Foundation Press 2009, p. 274. T. Ongena & I. Van Daele, 'Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium', *Leiden Journal of International Law*, 2002-15, p. 692. W. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', *Michigan Journal of International Law*, 2009-30, p. 932.

⁴⁰ Hurwitz 2009, *supra* note 38, p. 275.

⁴¹ Although the arrest warrant issued by Belgian courts in 2000 against the Congolese Minister of Foreign Affairs Yerodia Abdoulaye Ndombasi did give rise to diplomatic tension, it is interesting to observe that Congo opted for a purely legal approach to the problem and referred the matter to the International Court of Justice (it became known as the 'Arrest Warrant Case'). Consequently, the arrest warrant has not damaged the relationship between the two countries, nor has it provoked an anti-Belgian movement in Congo; there was no negative press campaign, no threats against Belgians living in Congo. L. Walley, 'The Sabra and

members of the Belgian government. Two legal considerations shaped the proceeding against Ariel Sharon.

First, there was the question of immunity. As previously mentioned the 1999 law explicitly rejected the idea that immunity could be an obstacle to a criminal prosecution. However, the International Court of Justice (ICJ) ruling in the *Arrest Warrant Case*, delivered on 14 February 2002 provided Belgium with a reality check. The Court concluded that ministers of foreign affairs, throughout the duration of their office, enjoy full immunity from criminal prosecution in other states.⁴² It went without saying that heads of governments cannot be protected in less than equal manner.

The second consideration was the applicability of Article 12 of the 1878 Belgian Code of Criminal Procedure requiring the presence of the suspect on Belgian soil for a criminal prosecution to take place. Conflicting opinions on this issue led on one hand to the dismissal of the case by the Brussels Court of Appeals on June 26, 2002⁴³, and on the other to the rejection of the presence requirement by the Belgian Supreme Court on February 12, 2003. The latter however also noted that within the spirit of the ICJ ruling in the *Arrest Warrant Case*, prosecution against Ariel Sharon was inadmissible as long as he held the post of Prime Minister of Israel.⁴⁴

2.1.3 The Case against George H.W. Bush & others

On 18 March 2003, on the eve of the United States invasion in Iraq, seven Iraqi families filed a complaint against former US President George H.W. Bush, Vice-President Richard B. Cheney, Secretary of State Colin L. Powell and General H. Norman Schwarzkopf. The US officials were claimed to be responsible for war crimes stemming from the deaths of at least 200 Iraqi civilians incinerated when a US missile penetrated a Baghdad bomb shelter during the 1991 Gulf War.⁴⁵

On 14 May 2003, only four days before the Belgian national elections, yet another complaint naming high-ranking US official was filed in Belgium. This time the defendant was Tommy Franks, Commander in Chief of the US-British Coalition Forces in Iraq. 17 Iraqi and two Jordanian citizens accused him of ordering or failing to prevent or to punish crimes against humanity in the form of attacks directed against civilians, attacks on medical personnel and medical

Shatila Massacre and Belgian Universal Jurisdiction', in: J. Borneman (ed.) *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*. Princeton: Princeton Institute for International and Regional Studies 2004, p. 60.

⁴² International Court of Justice 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, para. 54.

⁴³ Hurwitz 2009, *supra* note 38, pp. 301-302.

⁴⁴ Cour de cassation de Belgique February 12, 2003, *Arrêt de la Cour de Cassation*, N° P.02.1139.F.

⁴⁵ L. King-Irani, 'Advocacy, Accountability, and Academia: Is Human Rights Activism with the Jurisdiction of Anthropology?', in: J. Borneman (ed.) *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*. Princeton: Princeton Institute for International and Regional Studies, 2004, p. 93; Walley 2004, *supra* note 40, p. 65.

infrastructure, looting of cultural property and use of cluster bombs during the 2003 War in Iraq.⁴⁶

On 21 May 2003, the Belgian Minister of Justice used the option opened to him by the April amendment of the 1993 law and formally transferred the complaint against Tommy Franks to the judiciary of the United States.⁴⁷ The other case concerning United States officials, together with the *Sabra and Shatila case*, were dismissed by the Belgian Supreme Court on 24 September 2003 based on a new law adopted by Belgian legislators in August 2003.⁴⁸

II.2 Between Law & Politics

II.2.1 Israel

Once the complaint against the “first ruler of a country of the North”⁴⁹ reached the desk of the Belgian public prosecutor, the words of prof. Paul W. Kahn warning that “aspirations for equal justice under the law can be political disaster”⁵⁰ turned from wise to prophetic. Although having invoked the principle of universal jurisdiction itself when seeking prosecution of those responsible for the crimes of Holocaust, Israel has become overnight one of the principle's most furious opponents.

The complaint and the following decision of the Belgian Supreme Court provoked an immediate and unprecedented reaction from Israel. Yehudi Kinar, Israeli ambassador in Belgium, was recalled⁵¹; Israeli press launched a campaign against Belgium denouncing it as an anti-Semitic country⁵²; appeals for the boycotting of Belgian products were common⁵³, and the Israeli government even incited the Jewish community living in Belgium to emigrate to Israel⁵⁴. Benjamin Netanyahu, then Minister of Foreign Affairs of Israel, was particularly vocal about his view of the Supreme Court ruling:

⁴⁶ Hurwitz 2009, *supra* note 38, p. 306.

⁴⁷ Although he seemingly forgot to consult this decision with the federal Cabinet of Ministers, as prescribed by the law. Reydam's 2003, *supra* note 35, pp. 683-684.

⁴⁸ Walley'n 2004, *supra* note 40, p. 67.

⁴⁹ *Idem*, p. 61.

⁵⁰ P.W. Kahn, 'Universal Jurisdiction or the Rule of Law?', in: J. Borneman, J. (ed.) *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, Princeton: Princeton Institute for International and Regional Studies 2004, p. 133.

⁵¹ 'Israel recalls envoy following Belgian court ruling on Sharon.' *Haaretz*, 13 February 2003.

⁵² Walley'n 2004, *supra* note 40, p. 64. C. Mallat, 'Accountability in the Middle East', in: J. Borneman (ed.) *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, Princeton: Princeton Institute for International and Regional Studies 2004, p. 37. See for example I. Kohn, 'Belgium: Waiting for the Guillotine', *Arutz Sheva – Israel National News*, 19 February 2003, calling the Belgian Supreme Court decision “unpretentious, hypocritical slagheap of bigotry surrounded by a thick halo of transparent anti-Semitism”; L.R. Beres, 'On Belgium, Prime Minister Sharon and International Justice', *Arutz Sheva – Israel National News*, 18 February 2003.

⁵³ See for example 'Israeli envoy to Miami urges Belgian boycott', *Haaretz* 19 February 2003.

⁵⁴ Walley'n 2004, *supra* note 40, p. 64.

[The Belgian court made] a scandalous decision, which legitimises terror and harms those who fight it. This turns the tables - when those who fight terror turn into the accused and the terrorists are victorious. Belgium is helping to harm not only Israel, but also the entire free world, and Israel will respond with severity to this.⁵⁵

Netanyahu expressly warned that this event might have negative influence on Israel-Belgium relations.⁵⁶ Immediately after the complaint Ariel Sharon cancelled his trip to Brussels and Belgium's Minister of Foreign Affairs Louis Michel had to travel to Berlin to meet him. Michel, embarrassed by what he called "the perverse effect of the Belgian law"⁵⁷ allegedly promised Sharon that his country would reconsider the law that had made this complaint possible.⁵⁸ There are however some who argue that it was not embarrassment over the Sharon case, but rather a confrontation with the United States that urged Belgium to change its law on universal jurisdiction.

II.2.2 The United States

As Paul W. Kahn points out, the pretence that law could be separated from politics was dropped the moment the plaintiffs attempted to extend the reach of Belgium's universal jurisdiction to political agents of the United States.⁵⁹ The context that determined the role that the United States played in the story of the rise and fall of Belgian universal jurisdiction was shaped by a number of factors.

Firstly, it was the rather hostile attitude of the government of President George W. Bush to the very idea of international criminal prosecution, or at least to a type of criminal prosecution, that would encompass citizens of the United States. This attitude was demonstrated on 6 May 2002 when the President formally withdrew from the Rome Statute of the International Criminal Court (ICC), a treaty signed in 2000 by his predecessor Bill Clinton.⁶⁰ This unprecedented manoeuvre was followed by *bilateral non-surrender agreements*⁶¹ negotiated with the State Parties to the Rome Statute and by the controversial *American Service-Members' Protection Act*⁶². A deep distrust

⁵⁵ Haaretz 13 February 2003, *supra* note 50.

⁵⁶ *Ibid.*

⁵⁷ Brotóns 2003, *supra* note 32, p. 247.

⁵⁸ Walley 2004, *supra* note 40, p. 61.

⁵⁹ Kahn 2004, *supra* note 49, p. 132.

⁶⁰ 'US renounces world court treaty', *BBC* 6 May 2002.

⁶¹ *Bilateral Non-surrender Agreements*, more commonly known as *Bilateral Immunity Agreements*, are agreements that the United States negotiated with a number of other states, requiring the latter not to surrender American citizens to the ICC. As of 11 December 2006, 102 states have signed such agreement with the United States, 46 of them being State Parties to the Rome Statute. Coalition for the International Criminal Court, 'Status of US Bilateral Immunity Agreements', 2006, at http://www.iccnw.org/documents/CICCFs_BIAstatus_current.pdf (5 June 2010).

⁶² *American Service-Members' Protection Act* was signed into law on 3 August 2002. The Act prohibits cooperation with the ICC, restricts US participation in the United Nations

towards an international court that would have the power to initiate what US officials feared to be “politicized prosecutions against US men and women in uniform”⁶³, was only magnified when the same right was suddenly usurped by an individual state – Belgium.

It was the above described attitude that led the Democratic Congressman Gary Ackerman to propose the *Universal Jurisdiction Rejection Act* as a direct reaction to the complaints filed in Belgium in May 2003. The bill notably resembles the *American Service-Members' Protection Act*: just the words “International Criminal Court” were changed to “any foreign government claiming universal jurisdiction”. Ackerman's proposal however never made it through the legislative process.⁶⁴

The second factor determining the relations between the United States and Belgium was the war in Iraq launched in March 2003. Belgium pursued a policy of strong anti-war diplomacy and formally opposed the invasion. Together with France and Germany, it maintained a firm veto on NATO's plans to defend Turkey in case it was attacked by Iraq⁶⁵, a move that led to one of the worst crises in the Alliance's history. The US Secretary of Defence Donald Rumsfeld denounced the blocking manoeuvre as a “disgrace” and warned that the countries responsible “will be judged by the other members of the alliance.”⁶⁶ One week later, the first complaint accusing high-ranking US officials of war crimes was filed in Belgium. The timing could have hardly been more unfortunate.

Thirdly, it was its position as the seat of NATO that made Belgium particularly vulnerable to pressure from the United States. On 12 June 2003 Donald Rumsfeld travelled to Brussels to “teach Belgium a lesson”⁶⁷ in his own words. But the lesson was not a legal one, “I will leave it to the lawyers to debate the legalities, I am not a lawyer,”⁶⁸ admitted Rumsfeld. The lesson that US Secretary of Defence came to teach was that law follows politics, and not viceversa.⁶⁹ His

peacekeeping operations unless members of the US Armed Forces obtain immunity from prosecution, provides for the withdrawal of the US military assistance from the countries ratifying the Rome Statute and authorises the US President to use all means necessary to liberate any US citizen or citizen of a US-allied country being held by the Court. The last provision has been dubbed as a *Hague invasion clause*. Human Rights Watch, 'Hague Invasion Act Becomes Law', at <http://www.hrw.org/background/africa/habre1207/> (10 May 2010).

⁶³ United States Department of Defense, 'Secretary Rumsfeld Statement on the ICC Treaty, News Release', 6 May 2002, at <http://www.defense.gov/releases/release.aspx?releaseid=3337> (6 June 2010).

⁶⁴ GovTrack.us, 'Universal Jurisdiction Rejection Act of 2003', at <http://www.govtrack.us/congress/billtext.xpd?bill=h108-2050> (2 June 2010).

⁶⁵ 'NATO crisis over veto on plans to defend Turkey', *The Guardian* 11 February 2003.

⁶⁶ *Ibid.*

⁶⁷ King-Irani 2004, *supra* note 44, p. 94.

⁶⁸ United States Department of Defense, 'Secretary of Defense Rumsfeld at NATO Headquarters, News Transcript', 12 June 2003, at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2742> (6 June 2010).

⁶⁹ Kahn 2004, *supra* note 49, p. 132.

message was a straightforward one:

Belgium needs to realize that there are consequences to its actions. This law calls into serious question whether NATO can continue to hold meetings in Belgium and whether U.S. Officials (...) will be able to continue to visit international organizations in Belgium (...) without fear of harassment by Belgian courts (...) It calls into question Belgium's attitude about its responsibilities as a host nation for NATO and Allied forces. (...) Certainly until this matter is resolved we will have to oppose any further spending for construction for a new NATO headquarters here in Brussels until we know with certainty that Belgium intends to be a hospitable place for NATO to conduct its business.⁷⁰

Some sources⁷¹ reveal that when Rumsfeld claimed "It's perfectly possible to meet elsewhere,"⁷² he had Warsaw, Poland in mind. For Belgium, such a move would mean the loss of annual revenue to the tune of more than 120 million Euros.⁷³ The threat of losing the good will of the United States suddenly gained an economic dimension, constituting the fourth factor in the relations between the two countries. American business organisations abroad, in particular the Brussels office of the American Chamber of Commerce, convinced the Federation of Belgian Enterprises that universal jurisdiction might be harmful to its interests, which in turn motivated the Federation to join the campaign against the broad jurisdiction of the Belgian courts.⁷⁴ Rumours started to circle in Belgian newspapers about possible economic sanctions against Belgium: US companies cancelling their investments and boycotting the port of Antwerp.⁷⁵ No wonder that the universal jurisdiction was soon perceived as a major threat to the Belgian economy.

II.3 The Effects

In April 2003 the Belgian parliament approved an amendment to the 1993 law that significantly limited the jurisdiction of the Belgian courts over international crimes. Firstly, in recognizing immunities established under international law the amendment reflected the recent ICJ judgement in the *Arrest Warrant Case*. Secondly, a dual system for dealing with complaints was created.⁷⁶ While cases with a link to Belgium could still be initiated by a civil party or local prosecutor, the prosecution of cases without such a link became a prerogative of the federal prosecutor. Thirdly, an exception *forum non conveniens* was included in the statute, giving the federal prosecutor the option not to proceed if "it appears

⁷⁰ US Department of Defense 2003, *supra* note 67.

⁷¹ King-Irani 2004, *supra* note 44, p. 94; M. Verhaeghe, 'The Political Funeral Procession for the Belgian Universal Jurisdiction Statute', in: W. Kaleck, M. Ratner, T. Singelstein & P. Weiss (eds.) *International Prosecution of Human Rights Crimes*. Heidelberg: Springer 2007, p. 142.

⁷² US Department of Defense 2003, *supra* note 67.

⁷³ Verhaeghe 2007, *supra* note 70, p. 142.

⁷⁴ *Idem*, p. 140; Walley 2004, *supra* note 40, p. 63.

⁷⁵ Hurwitz 2009, *supra* note 38, pp. 304, 307; Verhaeghe 2007, *supra* note 70, p. 143.

⁷⁶ Reydam 2003a, *supra* note 36, p. 681.

that, in the interest of the proper administration of justice and in compliance with Belgium's international obligations" the case in question should be put either before international courts or before a national court of a country with a relevant link to the case.⁷⁷ Fourthly, the amendment provided a central role for the Minister of Justice in prosecuting cases having no obvious link to Belgium. Articles 7(2) and 7(3) authorise him/her, after consultation with the Council of Ministers, to refer the case either to the ICC, to the territorial state, to the state of nationality of the offender, or to the state where the offender is present.⁷⁸

Most of the controversy however surrounded article 7(4) which was brokered by Belgian Minister of Foreign Affairs Louis Michel. According to this article the Minister of Justice is entitled to, in consultation with the Council of Ministers, bring the crimes not committed in Belgium or against Belgium nationals to the attention of the state of the nationality of the alleged offender.⁷⁹ Consequently, on the request of the federal prosecutor, the Belgian Supreme Court would declare the Belgian courts divested of jurisdiction, irrespective of the attitude of the foreign authorities to the prosecution of the offender. In other words, unlike articles 7(2) and 7(3), article 7(4) deprives Belgian courts of their jurisdiction even if the state of nationality of the offender decides not to exercise its own jurisdiction over the case. The mechanism has been quickly dubbed the *Bush clause*,⁸⁰ as it seemed to be designed specifically to deal with the case against the US officials filed in March 2003.

What was clear from the very beginning was that the amendment was merely a short-term solution, agreed on by politicians seeking the appearance of a solution with the upcoming elections on mind.⁸¹ The reactions of the addressees were also rather mixed. While Israel immediately returned its ambassador to Belgium⁸², the United States seemed to be far less impressed, claiming that case-by-case resolutions are not sufficient and insisting that the law be rescinded altogether.⁸³ In an interview for the *New York Times*, Donald Rumsfeld asserted that he had no faith in the Bush clause and had given the

⁷⁷ 'Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire, 23 avril 2003. Moniteur Belge', at <http://staatsbladclip.zita.be/moniteur/lois/2003/05/07/loi-2003009412.html> (9 June 2010), Article 7(1).

⁷⁸ Conseil d'État, 'Sénat Belgique, Session 2002-2003, Projet de loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire, Avis du Conseil d'État', at: <http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=33579045> (9 June 2010), pp. 2-3.

⁷⁹ *Idem*, p. 3.

⁸⁰ Verhaeghe 2007, *supra* note 70, p. 142.

⁸¹ *Idem*, p. 145.

⁸² S. Ratner, 'Belgium's War Crime Statute: A Postmortem', *The American Journal of International Law*, 2003-97, p. 891.

⁸³ 'Belgium Resists Pressure From U.S. To Repeal War Crimes Law', *The New York Times* 14 June 2003.

Belgian government six months to effectively solve the problem.⁸⁴

Within the 'Rumsfeld deadline' Belgium produced results. On 22 June 2003 Prime Minister Guy Verhofstadt announced that a consensus had been reached on the future of the Belgian universal jurisdiction.⁸⁵ The consensus materialised on 1 August 2003 when the Belgian Senate passed the law repealing the 1993 Act and simultaneously introducing most of the Act's substantive provisions into the Belgian criminal code.⁸⁶

Although the Prime Minister did go to great lengths to persuade the world that the revision had nothing to do with pressure from abroad, some Belgian media sarcastically pointed out that the article concerning immunities in particular seems to have been drafted right at the US State Department⁸⁷. While the original wording of the 1993 Act might have disregarded immunities established under international law, the new article goes much further than just amending this shortcoming:

No coercive action in the context of a criminal investigation can be taken during their journey against any person who officially has been invited to stay on Belgian territory by the Belgian authorities or by an international organisation established in Belgium and with which Belgium has concluded a headquarters agreement.⁸⁸

The hasty and improvised manner in which the law was adopted is reflected in the overall lack of clarity and patchwork-like character of the Act's wording. It limits the jurisdiction of Belgian courts to the traditional grounds of extraterritorial jurisdiction – active and passive personality – and the exercise of universal jurisdiction on the basis of the principle *aut dedere aut judicare* stemming from Belgium's treaty obligations.⁸⁹

The use of universal jurisdiction in Belgium is to be blamed for yet another change, apart from the legal one: the radical shift in the perception of universal jurisdiction by the Belgian society. When in 1998 Belgium joined Spain in requesting extradition of Augusto Pinochet, the move was welcomed by public opinion at large.⁹⁰ What caused a complete opinion shift in a space of less than two years was what Michael Verhaeghe calls “a campaign of ridicule”.⁹¹ The main tool of this campaign was Belgian media featuring articles and cartoons

⁸⁴ Verhaeghe 2007, *supra* note 70, p. 143. 'Belgium Plans to Amend Law on War Crimes', *The New York Times* 22 June 2003.

⁸⁵ 'Belgium Plans to Amend Law on War Crimes', *The New York Times* 22 June 2003.

⁸⁶ 'Belgium amends war crimes law'; *BBC News* 1 August 2003. Reydams 2003a, *supra* note 35, p. 679.

⁸⁷ Reydams 2003, *supra* note 35, p. 685.

⁸⁸ *Loi du 5 août 2003 relative à la répression des infractions graves au droit international humanitaire*, enacted on 5 August 2003, Article 13.

⁸⁹ D. Vandermeersch, 'Prosecuting International Crimes in Belgium', *Journal of International Criminal Justice*. 2005-3, p. 402.

⁹⁰ Walley 2004, *supra* note 40, p. 58.

⁹¹ Verhaeghe 2007, *supra* note 70, p. 146.

depicting the law as absurd, suggesting that Belgium should turn universal jurisdiction into an export, alongside its beer and chocolate.⁹² What facilitated the 'campaign of ridicule' was the apparent lack of understanding of the Belgian legal process by those criticising it and lack of will of those in power to explain that 'a complaint' does not equal 'an indictment', that the complaint retains its private character as the expression of the plaintiff's position, until the judge formally issues an arrest warrant.⁹³ As Michael Verhaeghe sadly observed: "Ridicule contaminated the very phrase 'universal jurisdiction' to such an extent that a calm discussion of its principles became next to impossible."⁹⁴

II.4 The Checklist

In order to confirm presence of the *Rumsfeld effect* in other cases based on universal jurisdiction, most of the following questions should be answered affirmatively:

- 1) Has the use of universal jurisdiction led to a substantial deterioration of the bilateral relations between the countries involved?
- 2) Has the defendant's home country put a diplomatic and/or economic pressure on the country invoking universal jurisdiction aiming to secure dismissal of the complaint and/or to prevent similar complaints in the future?
- 3) Has there been an attempt of the executive power of the country invoking universal jurisdiction to interfere with the judiciary to secure dismissal of the diplomatically sensitive cases?
- 4) Has the country invoking universal jurisdiction changed its attitude toward this legal concept (partly) as a result of the diplomatic and/or economic pressure from abroad?
- 5) Has the government of the country invoking universal jurisdiction announced its intention to change its law on universal jurisdiction in a way that limits the country's jurisdiction over international crimes (e.g. by introducing requirement of a link with the crime, by limiting means for *parties civiles* to initiate proceedings etc.)? / Has the law on universal jurisdiction been changed in such a way?
- 6) Has diplomatic pressure been accompanied by a 'campaign of ridicule' in the country invoking universal jurisdiction that eventually led to a change in the perception of this legal concept by the society in this respective country?

⁹² *Idem*, p. 144. King-Irani 2004, *supra* note 44, p. 95.

⁹³ Verhaeghe 2007, *supra* note 70, p. 145. Hurwitz 2009, *supra* note 38, p. 310.

⁹⁴ Verhaeghe 2007, *supra* note 70, p. 146.

III. The Case against Hissène Habré

III.1. The Case

Hissène Habré ruled Chad from 1982 until he was deposed by current president Idriss Déby in 1990 and fled to Senegal.⁹⁵ The eight years of his bloody dictatorship were marked by widespread and systematic torture, political killings, forced disappearances and arbitrary detention, carried out for the most part by Habré's dreaded political police *Documentation and Security Directorate* (DDS) in a fierce attempt to destroy all forms of opposition to the regime.⁹⁶ The Commission of Inquiry established in 1990 estimated the total number of those killed by the regime at more than 40.000⁹⁷, accusing Habré of committing a "veritable genocide against the Chadian people".⁹⁸ The Commission called for an immediate prosecution of those responsible, but the new government's enthusiasm for justice turned out to be short-lived and up to this day almost none of the Commission's major recommendations have been implemented.

Seven years later, in 1999, Pinochet's arrest in London filled Habré's victims with new hope. They decided to contact Human Rights Watch (HRW) with a request for help in bringing their tormentor to justice in Senegal, where he lived comfortably off the money stolen from Chad's national treasury⁹⁹. On 26 January 2000, Chadian victims, supported by a coalition of Chadian, Senegalese and international non-governmental organisations filed a criminal complaint at the Dakar Regional Court in Senegal, accusing Habré of torture, acts of barbarity and crimes against humanity.¹⁰⁰ On 3 February 2000, Demba Kandji, the investigative judge assigned to the case, indicted Habré of complicity in torture and imposed restrictions on his movement and actions.¹⁰¹

The first blow to the victims' quest for justice was delivered five months later.

⁹⁵ Human Rights Watch, 'The Trial of Hissène Habré, The Trial of Hissène Habré – Time is Running Out for the Victims', 2007, at: <http://www.hrw.org/backgrounder/africa/habre0107/> (10 May 2010), p. 4.

⁹⁶ R. Brody, 'The prosecution of Hissène Habré: International accountability, national impunity', in: N. Roht-Arriaza & J.M. Currena (eds.) *Transitional Justice in the 21st century – Beyond Truth versus Justice*, Cambridge: Cambridge University Press 2006, p. 279.

⁹⁷ Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories, 'Report', at: <http://www.usip.org/files/file/resources/collections/commissions/Chad-Report.pdf> (19 June 2010), p. 41.

⁹⁸ *Idem*, p. 29.

⁹⁹ Before fleeing to Senegal, Habré managed to retrieve more than 3 million CFA francs from the National Treasury and another 115 million from several provincial accounts. S.P. Marks, 'The Hissène Habré Case: The Law and Politics of Universal Jurisdiction', in: S. Macedo (ed.) *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*. Philadelphia: University of Pennsylvania Press 2004, p. 134.

¹⁰⁰ Brody 2006, *supra* note 103, p. 286.

¹⁰¹ R. Brody & H. Duffy 'Prosecuting Torture Universally: Hissène Habré, Africa's Pinochet?', in: H. Fischer, C. Kress & S.R. Lüder, (eds.) *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin: Berlin Verlag 2001, p. 823. Marks 2004, *supra* note 97, p. 140.

On 4 July 2000 the Indicting Chamber of Dakar's Court of Appeals ruled in Habré's favour and dismissed the case for lack of jurisdiction. The Court argued that although Senegal did ratify the United Nations Convention against Torture as early as 1986, it was not followed by an implementing legislation until 1996.¹⁰² In other words, the Court found that torture was not a crime under Senegalese law until 1996, notwithstanding the constitutional rule that treaty obligations prevail over statute. Furthermore, according to said judgement even the 1996 legislation did not expand the courts' jurisdiction over torture committed abroad since universal penalisation (*l'incrimination universelle*) provided for by the Convention is distinct from universal jurisdiction (*la compétence universelle*). This view was later shared by the *Cour de Cassation*, Senegal's court of final appeals, which upheld the Court of Appeals' judgement on 20 March 2001.¹⁰³

By the time the *Cour de Cassation* rendered its judgement, a new actor had joined the cast of the Hissène Habré case. The victims, anticipating unfavourable ruling of the Senegalese judiciary, filed a case against Habré in a country that was at that time still considered to be the Mecca of universal jurisdiction – Belgium. In February 2002 Belgian Investigative Judge Daniel Franssen, accompanied by the Brussels prosecutor and police officers, travelled to Chad. They took testimonies from the victims and even from a number of DDS agents and visited former detention centres and massacre sites.¹⁰⁴ Three years later, in September 2005, Judge Franssen issued an international arrest warrant against Habré and asked for his extradition from Senegal. The Senegalese authorities arrested Habré on 15 November 2005.¹⁰⁵ The Dakar Court of Appeals however refused to rule on this matter claiming lack of jurisdiction and left the decision to President Abdoulaye Wade. He in turn brought the matter to the African Union Summit, which in January 2006 created a *Committee of Eminent African Jurists* entrusted with the task of considering the appropriate venue for the Habré trial.¹⁰⁶ On 2 July 2006, on the recommendation of the Committee, the African Union called on Senegal to prosecute Habré “on behalf of Africa”¹⁰⁷. Although the four years that followed did witness some major changes in the Senegalese legal system, the prosecution against Hissène Habré seems to be currently at a standstill, so much so that in February 2009 Belgium turned to the International Court of Justice, claiming Senegal's failure to comply with its obligations *aut dedere aut judicare* stemming from Article 7(1) of the Convention against Torture.¹⁰⁸

¹⁰² Brody & Duffy 2001, *supra* note 99, p. 830.

¹⁰³ La Cour de Cassation, Première chambre statuant en matière pénale 20 March 2001, *Arrêt n° 14 du 20-3-2001 Pénal, Souleymane Guengueng et autres Contre Hissène Habré*.

¹⁰⁴ Brody 2006, *supra* note 103, p. 289.

¹⁰⁵ Human Rights Watch 2007, *supra* note 94, p. 7.

¹⁰⁶ Committee of Eminent African Jurists, 'Report of the Committee on the Case of Hissène Habré., 2006', at: www.hrw.org/justice/habre/CEJA_Report0506.pdf (17 June 2010).

¹⁰⁷ Assembly of the African Union 1-2 July 2006, *Decision on the Hissène Habré and the African Union*, doc. ASSEMBLY/AU/3 (VII).

¹⁰⁸ International Court of Justice, 16 February 2009, *Application Instituting Proceedings Belgium v. Senegal*, para. 11.

III.2 Between Law & Politics

What makes the case against Hissène Habré distinct is that the argument of state sovereignty, so typically used against the concept of universal jurisdiction, was not invoked by any of the parties. The fact that Habré had been military defeated by Chad's current Head of State, his crimes thoroughly documented and him living relatively isolated in Dakar since 1990 took away much of the political controversy surrounding similar cases. Yet, the politics of universal jurisdiction is far from absent in the Habré case. Its roots are to be found in the two countries most closely involved in the case – Chad and Senegal. Both countries have shown a rather ambivalent attitude towards the prosecution of Hissène Habré, albeit from different reasons.

The indecisive approach of the Chadian government to the idea of bringing the country's former dictator to the dock is apparent from the incoherent policy applied to the case. On the one hand, the Chadian government has never sought Habré's extradition from Senegal, which is somewhat ironic when one considers the successful lawsuit that the government instituted in Senegal to recover the airplane in which Habré fled.¹⁰⁹ The more off-guard must have the government been caught once the breaking news of Habré's indictment in Dakar reached Chad's capital. After a few days of silence the government announced that Habré's prosecution was a logical continuation of the work that had begun with the Commission of Inquiry established by President Idriss Déby in 1990.¹¹⁰

To comprehend the schizophrenia of Chad's authorities, one must grasp the conflicting forces that were active in Chad in the 1990s. On the one hand, the change of the regime gave a lot of reasons for optimism: the DDS was disbanded, those political prisoners still alive were released, a multi-party system was created, trade unions were permitted and human rights organizations began to work openly.¹¹¹ The current President Idriss Déby was personally responsible for Habré's military defeat and his government has partly built its own legitimacy on the demonisation of the former dictator.¹¹²

However, Déby himself was not entirely without guilt. Before plotting against Habré, Déby used to be his defence and security advisor and commanded Chad's armed forces during the bloody *Black September* in 1984.¹¹³ And Déby

¹⁰⁹ Brody 2006, *supra* note 103, pp. 285, 291.

¹¹⁰ *Ibid.*

¹¹¹ Amnesty International, 'Chad: The Habré Legacy', 2001, at: <http://www.amnesty.org/en/library/asset/AFR20/004/2001/en/224c23b0-d902-11dd-ad8c-f3d4445c118e/afr200042001en.pdf> (15 June 2010), p. 32.

¹¹² Brody 2006, *supra* note 103, p. 291.

¹¹³ *Black September* refers to a particularly murderous wave of a repression launched by Habré in September 1984. Human Rights Watch, 'Chad: The Victims of Hissène Habré Still Awaiting Justice', 2005, at: <http://www.hrw.org/en/reports/2005/07/11/chad-victims-hiss-ne-habr-still->

was not alone. The 1992 report of Chad's Commission of Inquiry warned that "some [DDS agents] have returned to their former functions in the army, the *gendarmerie* and the police; others have been rehabilitated by the new government, which has recruited them into its own intelligence services."¹¹⁴ Little changed over the years that followed. In 2005, HRW published a list of 41 people, who, though previously holding positions of power within the DDS and other security forces under Habré's rule, still occupied posts within country's administration.¹¹⁵ Consequently, it hardly comes as a surprise to learn that the practices, which made Habré's regime so infamous, soon reappeared under Idriss Déby. As Amnesty International reports:

Since 1990, Chad's security forces have been involved in hundreds of extra-judicial executions and other human rights abuses such as 'disappearances', and acts of torture including rape; [yet] no member of the security forces has been brought to justice for these crimes.¹¹⁶

In light of their own sins, the Déby's government could hardly have been expected to actively seek Habré's prosecution and thus risk making justice for past crimes a dangerous precedent.

A second factor that added a political dimension to the case against Hissène Habré was an equally ambiguous attitude of the government of Senegal. Its thinly veiled attempt to influence the legal proceedings against the former Chadian dictator earned Senegal harsh criticism from the United Nations Special Rapporteur on the Independence of Judges and Lawyers and the Special Rapporteur on Torture. One month after succeeding Abdou Diouf as President of Senegal, Abdoulaye Wade appointed Madické Niang, Habré's chief defence counsel, as his adviser on judicial matters.¹¹⁷ On 30 June 2000, the Superior Council of the Magistracy presided by President Wade and his Minister of Justice, decided to transfer Judge Demba Kandji from his post as Chief Investigative Judge of the Dakar Regional Court to the office of the public prosecutor.¹¹⁸ In what seems to be a reprisal for his proactive approach in the case against Hissène Habré, Judge Kandji was thus removed from the investigation and placed under the authority of the Minister of Justice. In the same meeting, the President of the Indicting Chamber of the Dakar Court of Appeals, Cheikh Tidiane Diakhate, before whom the motion to dismiss the

awaiting-justice (24 June 2010). pp. 11-12 (Human Rights Watch 2005a). Brody 2006, *supra* note 103, pp. 281 and 291.

¹¹⁴ Commission of Inquiry 1992, p. 41.

¹¹⁵ Human Rights Watch 2005a, *supra* note 111, p. 24, Annex.

¹¹⁶ Amnesty International 2001, *supra* note 109, p. 33.

¹¹⁷ Marks 2004, *supra* note 97, p. 144. It is interesting to note that in April 2008 Madické Niang was appointed Minister of Justice of Senegal, a key position for the organisation of the Habré trial. Human Rights Watch, 'The Case against Hissène Habré, an "African Pinochet"', 2009, at: <http://www.hrw.org/en/news/2009/02/11/case-against-hiss-ne-habr-african-pinochet> (29 April 2010).

¹¹⁸ Marks 2004, *supra* note 97, p. 145. Brody & Duffy 2001, *supra* note 99, p. 824.

indictment against Habré was pending, was promoted to the State Council.¹¹⁹ When one takes into consideration that these shifts occurred only days before the court was to announce its decision in the Habré case, it does not take much imagination to suspect the government's effort to manipulate the judiciary to obtain the desired result.

What however does require imagination is understanding why the Senegalese government would risk its country's international reputation to shield a former dictator of another African country. It will be recalled that before fleeing to Senegal, Habré had plundered much of Chad's national treasury. This enabled him not only to settle comfortably in Dakar, but also to invest in business¹²⁰ and – even more importantly – to offer generous financial support to the Muslim Brotherhoods¹²¹ in Senegal. This secured him the protection of at least one of the Brotherhoods, most probably the Tijaniya Brotherhood, as Habré is adherent to the Tijaniya sect of Islam.¹²²

To grasp the full implications of such protection, one has to understand the role that Muslim Brotherhoods play in Senegalese society. According to a survey conducted in 1999, more than 85 percent of the Senegalese population has confidence in Religious Brotherhoods,¹²³ making them one of the most influential civil society organisations in the country. As Vengroff and Magala explain, the *marabouts* – religious leaders of the Brotherhoods – “have traditionally played a very significant role in politics, providing a critical alliance with and support for the ruling party and the government.”¹²⁴ Some suggest that there is a direct link between this influence and a continuous failure to bring Hissène Habré to justice in Senegal. Such link might have taken a form of a *quid pro quo* offer: in exchange for the political support of the Brotherhoods in the 2006 presidential election, Abdoulaye Wade – when re-elected – would not extradite Habré.¹²⁵ A few even suggest that Habré himself had contributed financially to the presidential campaign in 2000,¹²⁶ which brought Wade to the presidential seat for the first time.

¹¹⁹ Brody & Duffy 2001, *supra* note 99, p. 824.

¹²⁰ Marks 2004, *supra* note 97, p. 135.

¹²¹ There are three Brotherhoods in Senegal: Tijaniya (37% of Senegalese are members), Mouridiya (16% of Senegalese are members) and Qadiriya (3% of Senegalese are members). C.J. Stevens, 'The Effectiveness of Transnational Networks: The Puzzle of the Hissène Habré Case', 2009, at: http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=caleb_stevens (27 June 2010), p. 41.

¹²² *Idem*, p. 42.

¹²³ R. Vengroff & M. Magala, 'Democratic reform, transition, and consolidation: evidence from Senegal's 2000 presidential election', *The Journal of Modern African Studies*, 2001-39, p. 148.

¹²⁴ *Idem*, p. 149.

¹²⁵ Stevens 2009, *supra* note 119, p. 43.

¹²⁶ D.L. Gbaya, 'AVIS - Alioune Tine, patron de la Raddho, sur le retard du procès de l'ex-dictateur tchadien: Le dossier Habré est bloqué par Wade' at http://www.lequotidien.sn/index.php?option=com_content&task=view&id=6739&Itemid=9 (27 June 2010).

III.3 The Effects

The case against Hissène Habré is unique in the sense that universal jurisdiction was invoked not once, but twice and in two different countries: Senegal and Belgium. The effects of Habré's indictment in Senegal were rather limited due to the swift dismissal of the case by the country's courts. The encouraging beginning has nevertheless moved Habré's victims to seize the historical momentum and seek justice in their home country as well. On 26 October 2000 Chadian courts received a number of criminal complaints accusing former members of the DDS of torture, murder and forced disappearances. After first having been dismissed by the investigative judge for lack of jurisdiction, the proceedings were given green light by Chad's Constitutional Court.¹²⁷ The investigation had begun anew in May 2001, but soon came to a standstill, as the judge had been given neither the means nor the security to allow him to proceed.¹²⁸

Notwithstanding these partial changes, what ultimately turned the tables in the case against Hissène Habré was the involvement of a third country – Belgium. Belgium's involvement in the case amplified the voices of Habré's victims and brought the world's attention to Chad's unfinished transition. It was the pressure thus created that forced the governments of Chad and Senegal to reconsider their ambivalent attitude to Habré's prosecution. Although it took months to persuade the Chadian government to give permission for the Belgian visit, once it did Judge Franssen and his team were provided with full cooperation and support. The victims were granted unlimited access to DDS archives and in October 2002 the Chadian authorities lifted Habré's immunity from prosecution.¹²⁹

For Senegal, Belgium's involvement meant a veritable resuscitation of the case that would otherwise have been forgotten in the archives of the Senegalese courts. Belgium's universal jurisdiction and the extradition request filed on its basis triggered a chain of events that eventually led to the change of Senegalese law and its constitution. In February 2007, President Abdoulaye Wade signed an amendment permitting Senegal to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when they are committed outside of Senegal.¹³⁰ In July 2008, both chambers of Senegal's parliament approved a constitutional amendment that guaranteed that the principle of the non-retroactivity of criminal law does not bar the prosecution of acts "which, when they were committed, were criminal according to the rules of international law

¹²⁷ Brody 2006, *supra* note 103, p. 294.

¹²⁸ *Ibid.* Human Rights Watch, 'Chad - Habré Henchmen Ousted', 2005, at: <http://www.hrw.org/en/news/2005/08/12/chad-habr-henchmen-ousted> (29 June 2010).

¹²⁹ Brody 2006, *supra* note 103, pp. 291-292.

¹³⁰ Human Rights Watch, 'Hissène Habré and the Senegalese Courts – A Memo for International Donors', 2007, at: <http://www.hrw.org/backgrounder/africa/habre1207/> (10 May 2010), p. 4.

relating to genocide, crimes against humanity and war crimes.”¹³¹

Conclusion

This article explored two cases in which the same legal concept, once brought to life, produced strikingly different results. Going beyond *the legal*, I have uncovered a whole new layer of the *political* with notable depth and complexity. And it is indeed the *political*, not *the legal* that makes the stories of the *Pinochet* and *Rumsfeld effects* so different. The question remains: do other cases based on universal jurisdiction follow a similar pattern of the interplay between law and politics? The given scope of an academic article has limited my ability to provide a satisfactory answer to one additional case only.

Hissène Habré has been dubbed an 'African Pinochet' by human rights activists. A swift look at the checklists I have developed to simplify the testing of the presence of the *Pinochet* and *Rumsfeld effect* in other cases based on universal jurisdiction leads me to conclude that indeed all six criteria for the *Pinochet effect* are met. Firstly, as in the Pinochet case, Chad's unfinished transition to democracy determined the limits of the transitional justice (condition 1).¹³² And, like in Chile, after the bitter realisation that regime change does not necessarily imply accountability for the crimes of the previous one, the victims turn their hopes abroad. And, as with Augusto Pinochet, their efforts triggered a 'boomerang effect', making the prosecution of the Hissène Habré possible (conditions 3 and 4).

Yet, the Habré case is a more complex one. As already noted, universal jurisdiction has been invoked twice and in two different countries. As a result, the *Pinochet effect* appeared in two phases. In the first phase, the use of universal jurisdiction in Senegal led to empowerment of Habré's victims and opened the way for prosecution of his henchmen in Chad (condition 5). The overall reach of the *Pinochet effect* was however limited, due to the political interference of the Senegalese government.

The second phase of the *Pinochet effect* was triggered by the involvement of a third country – Belgium. The extradition request based on the Belgian universal jurisdiction legislation brought Habré's crimes and the dubious dismissal of his indictment in Dakar to the headlines of the world's newspapers. Like Chile half a decade earlier, Senegal suddenly found itself under the scrutiny of virtually everyone: from the United Nations Committee Against Torture, the African Union and European Union, to the International Court of Justice (condition 2). The international pressure thus created served as a counterbalance to the political constraints that circumvented Habré's prosecution in the first phase.

¹³¹ Human Rights Watch, 'Senegal: Government Amends Constitution to Pave Way for Hissène Habré Trial', 2008, at: <http://www.hrw.org/en/news/2008/07/22/senegal-government-amends-constitution-pave-way-hiss-ne-habr-trial> (30 June 2010).

¹³² Brody 2006, *supra* note 103, p. 295.

It is interesting to observe that in the case against Hissène Habré, Senegal literally plays a double role. In the first phase of the *Pinochet effect*, it constituted a stage for the proceedings against Habré, the effects of which were felt exclusively in Chad. In the second phase Senegal played the role of Chile – a country being shamed into compliance through the exercise of universal jurisdiction by a third state (condition 3); the effects of the second phase were felt in Chad and Senegal alike. The latter is also where signs of internalization and domestication of international law (condition 6) are to be observed: a specialised legal training of Senegalese police and judiciary in the areas of international criminal and international humanitarian law is crucial for the successful prosecution of Hissène Habré.

While the presence of the *Pinochet effect* may seem to logically imply absence of the *Rumsfeld effect*, for the consistency of my argument I will look for the evidence of the latter as well. Clearly, neither Chad, nor Senegal or Belgium have been shamed into restricting their laws through the exercise of universal jurisdiction by their own courts. Consequently, five out of six conditions for the *Rumsfeld effect* are not met. Nonetheless, the *Rumsfeld effect* is also about an attempt of the executive to interfere with the independence of the judiciary (condition 3). This sounds rather familiar from the Habré case. Indeed, the Senegalese government's fervent effort to manipulate the judiciary to secure the dismissal of Habré's indictment manifestly bears symptoms of the *Rumsfeld effect*.

Admittedly, one swallow does not a summer make and my conclusion is hardly proof of a pattern. It goes without saying that further cases based on universal jurisdiction have to be analysed before anything close to a pattern can be identified. The two model cases and the respective checklists described in the present article may nonetheless serve as useful tools for future analysis of the twists and turns of law and politics of universal jurisdiction.