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SYMPOSIUM: UNIVERSAL JURISDICTION: MYTHS, REALITIES, AND PROSPECTS: The Prosecution of Hissene Habre An "African Pinochet"

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## SUMMARY:

... In February 2000, a Senegalese court indicted Chad's exiled former dictator, Hissene Habre, on torture charges and placed him under virtual house arrest. ... On February 18, Habre's lawyers filed a motion to dismiss the case before the Indicting Chamber (Chambre d'Accusation) of Dakar's Court of Appeals, asserting that Senegalese courts had no competence over crimes committed in Chad, that crimes committed before Senegal's 1986 ratification of the Torture Convention could not be taken into account and that the prosecution was barred by the statute of limitations. ... At the same time, Habre reportedly began spending large sums of money to build his support in Senegal. ... Habre's lawyers, supported by the prosecutor, argued that under the Senegalese penal code, Senegalese courts had no competence to try crimes committed by Chadians in Chad, and that 1984 United Nations Convention against Torture, which Senegal ratified in 1986, was not followed by implementing legislation until 1996, and even the 1996 legislation did not expand the courts' competence to torture committed abroad. ... After the arrest of Hissene Habre in Senegal, we realized that we can demand that justice be done here, in our own country. ... The Habre case in Senegal is now before the Cour de Cassation. ...

## TEXT-1:

[\*321]

In February 2000, a Senegalese court indicted Chad's exiled former dictator, Hissene Habre, on torture charges and placed him under virtual house arrest. It was the first time that an African had been charged with atrocities by the court of another African country. An appeals court quashed the indictment in July 2000. That decision, which has been heavily criticized nationally and internationally, is now on appeal before Senegal's highest court. In the meantime, the case has opened new possibilities for justice in Chad itself.

## I. Background

Hissene Habre, the "Desert Fox," took power in the former French colony of Chad in 1982, overthrowing the government of Goukouni Wedeye. The United States and France supported Habre's military advance on the capital N'Djamena and backed him throughout most of his rule, seeing him as a bulwark against Libya's Moemmar Khadafi. Indeed, under President Ronald Reagan, the United States gave covert CIA paramilitary support to help install Habre in order, according to Secretary of State Alexander Haig, to "bloody Khadafi's nose." n1 The United States later provided

Habre with tens of millions of dollars per year as well as with military intelligence information. n2 [\*322]

Habre's one-party regime was marked by widespread abuse, even for a country with Chad's unfortunate history. In a country with a tradition of north-south rivalry, Habre periodically targeted various ethnic groups from both regions such as the Sara (1984), Hadjerai (1987) and the Zaghawa (1989), killing and arresting group members en masse when he perceived that their leaders were posing a threat to his regime. Just before Habre was deposed in December 1990 by current president Idriss Deby, a fellow northerner who earlier had been his Minister of Defense and military chief-of-staff, Habre's Presidential Guard allegedly killed more than 300 political prisoners who had been secretly detained at the President's headquarters in the capital, N'Djamena. n3

The exact number of Habre's victims is not known. A Truth Commission established by the Deby government, and operating under very difficult conditions, n4 accused Habre's regime of tens of thousands of political murders n5 and systematic torture. Most predations were carried out by his dreaded political police, the Direction de la Documentation et de la Securite (National Security Service). At its height, the DDS, whose four directors all came from Habre's Gorane ethnic group, counted twenty-three branches. The most notorious was the Brigade Speciale d'Intervention Rapide (Special Rapid Action Brigade) whose 584 "highly armed soldiers," according to the Truth Commission, carried out "all the dirty deeds such as arrest, torture, assassinations and large-scale massacres." n6 The [\*323] Truth Commission also accused Habre of stealing some 3.32 billion CFA francs (4.26 million dollars at today's rates) from the national treasury in the days before his flight to Senegal. n7 The Truth Commission called for the "immediate prosecution of those responsible for this horrible genocide, guilty of crimes against humanity." n8 With many ranking officials of the Deby government, including Deby himself, involved in Habre's crimes, however, the new government did not indict Habre or pursue his extradition from Senegal. n9 Indeed, even the files of the Truth Commission have been locked away since 1992, unavailable to researchers.

Since Habre's fall, Chadian victims had nurtured the hope of bringing him to justice. The Chadian Association of Victims of Political Repression and Crime [hereinafter AVPRC], a multiethnic group created after Habre's fall, compiled detailed information on each of 792 victims of Habre's brutality, hoping to use the cases in a prosecution. But without funding or government support, the effort lapsed.

## II. Filing the Case

In early 1999, with the "Pinochet precedent" n10 in mind, Delphine Djiraibe, President of the Chadian Association for the Promotion and Defense of Human Rights, requested Human Rights Watch's assistance in bringing Habre to justice in Senegal. Senegal's democratic tradition, its relatively independent judiciary, and its leadership role on international rights issues n11 made a successful prosecution conceivable. [\*324]

International researchers visited Chad twice, n12 where they met the remaining faithful of the moribund Association of Victims who provided them with the thousands of pages of documentation they had prepared in 1991, and had kept in hiding when the government changed its mind on digging up the past. Working in secret, because of fears that someone, including Chadian officials, might tip off Habre who could then flee Senegal for a more protective shelter, the researchers were introduced to victims and potential witnesses and sought documentation of Habre's crimes. Meanwhile, Human Rights Watch quietly organized a coalition of Chadian, Senegalese and international non-governmental organizations [hereinafter NGO's] to support the complaint, n13 as well as a group of Senegalese lawyers to represent the victims. The coalition decided to bring the case as a private prosecution (plainte avec constitution de partie civile) rather than presenting the evidence to Senegalese authorities and requesting a state prosecution. n14

In the complaint filed on January 26 in Dakar Regional Court, n15 the plaintiffs, seven individual Chadians, several of whom came to Senegal for the event, as well as the AVPRC, n16 officially accused Habre of torture, barbarous acts and crimes against humanity. The barbarity charges were [\*325] based on a Senegalese statute, as were the torture charges, which were also founded on the 1984 United Nations Convention against Torture, n17 which Senegal ratified in 1986. The groups also cited Senegal's obligations under customary international law to prosecute those accused of crimes against humanity.

In the court papers presented to Juge d'Instruction (Investigating Judge) Demba Kandji, the groups provided details from the AVPRC files of 97 political killings, 142 cases of torture, 100 "disappearances," and 736 arbitrary arrests, most carried out by the DDS, as well as a 1992 report by a French medical team on torture under Habre, and the Chadian Truth Commission report. The groups also furnished documents describing how Habre placed the DDS under his direct supervision, staffed it with his close friends, and required that it report regularly to him.

On the eve of the filing, which until then had remarkably remained secret, the NGO's, the plaintiffs and their lawyers met with the Senegalese Minister of Justice, Serigne Diop, who assured them that there would be no political interference in the work of the judiciary. Senegal's tightly contested presidential election campaign was also about to begin, and the ruling party presumably would not want to be seen protecting a brutal dictator.

The case moved ahead with stunning speed. Judge Kandji first forwarded the file to the state prosecutor for his non-binding advice. The prosecutor, pressed by the plaintiffs to act quickly so that Habre did not flee the country<sup>n18</sup> and so that the victims could be heard before returning to Chad, gave his favorable advice (*requisitoire pour information*) within two days. The following day the victims gave their closed-door testimony before Judge Kandji.

Over two days, Kandji heard the testimony of six of Habre's victims. "My heart is filled with joy," said Suleymane Guengueng upon leaving the courthouse. "I have waited nine years to tell a court of law about the horrors which were inflicted on me and my fellow prisoners," said Guengueng, [\*326] <sup>n19</sup> who almost died of dengue fever during two years of mistreatment in Chadian prisons and was the AVPRC leader who had hidden away the victims' files. Two other victims described being subjected to a widespread torture method, the "Arbatachar," in which a prisoner's four limbs were tied together behind his back, leading to loss of circulation and paralysis. Another former prisoner was ordered by the DDS to dig mass graves to bury Habre's opponents. One described how his brother, a regional lieutenant governor, was arrested and "disappeared" in Habre's campaign against the Hadjerai.

Judge Kandji then summoned Habre himself on February 3, 2000 and indicted him on charges of *complicite d'actes de torture* (accomplice to torture) and restricted his movements.<sup>n20</sup> He also opened an investigation against persons to be named for crimes against humanity, disappearances and barbarous acts (*une information judiciaire contre X . . . pour disparitions, crimes contre l'humanite et actes de barbarie*) meaning that he could later indict Habre or others on these charges.

The indictment was leading news across the continent. Radio France Internationale, a station listened to throughout francophone Africa, had been carrying stories on the case almost daily. *Jeune Afrique*, the most important weekly magazine for the region, featured a picture on its cover of Habre leaving the courthouse, as well as interviews with the plaintiffs, an editorial and a profile of Judge Kandji.<sup>n21</sup> The Senegalese press gave prominent, and almost always positive, coverage to the case during the initial stages.

### III. The Investigation Continues

While the plaintiffs carried out further research, now without the need for secrecy, Judge Kandji continued his investigation into the case. He heard the testimony of several more witnesses who came to Dakar in May, including the president of the Chadian Truth Commission and the head of the French medical team,<sup>n22</sup> and sent letters rogatory to Chad and France.<sup>n23</sup> [\*327] He was also hoping to go to Chad to gather further evidence, though it was unclear whether he would get the resources from the Senegalese government to do so.<sup>n24</sup>

On February 18, Habre's lawyers filed a motion to dismiss the case before the Indicting Chamber (*Chambre d'Accusation*) of Dakar's Court of Appeals, asserting that Senegalese courts had no competence over crimes committed in Chad,<sup>n25</sup> that crimes committed before Senegal's 1986 ratification of the Torture Convention could not be taken into account and that the prosecution was barred by the statute of limitations.

At the same time, Habre reportedly began spending large sums of money to build his support in Senegal. Newspaper articles appeared attacking the Senegalese groups which brought the case, asserting that Habre was no worse than other Chadian rulers and alleging that he was the victim of a French-American imperialist plot.<sup>n26</sup> Habre's friends in the powerful Islamic brotherhoods (*confreries*) also began to agitate in his favor.

### IV. Political Winds

In March 2000, Abdoulaye Wade, a veteran opposition figure, was elected president of Senegal, ending unbroken decades of rule since independence by the socialist party of Leopold Senghor and Abdou Diouf. [\*328] While the vote marked the re-vitalization of Senegal's democracy, it would have immediate negative effects on the Habre prosecution, for Habre's attorney, Madicke Niang, was one of Wade's closest advisors. Indeed, Wade appointed Niang as his special advisor on judicial matters, while allowing Niang to continue his legal practice, including his defense of Habre.<sup>n27</sup>

The first sign of a change in the government's attitude came in May, when the prosecutor's office gave its advice on the motion to dismiss.<sup>n28</sup> On January 28, under the previous government of President Abdou Diouf, assistant state prosecutor

Abdulaye Gaye had given his formal approval to the prosecution of Habre. Now, however, assistant state prosecutor Francois Diouf joined Habre's motion for dismissal.

On May 16, lawyers for Habre and for the victims, as well as the state prosecutor, presented arguments for over six hours behind closed doors to Dakar's three-judge Indicting Chamber on Habre's request to dismiss the case. Habre's lawyers, supported by the prosecutor, argued that under the Senegalese penal code, Senegalese courts had no competence to try crimes committed by Chadians in Chad, n29 and that 1984 United Nations Convention against Torture, which Senegal ratified in 1986, was not followed by implementing legislation until 1996, and even the 1996 legislation did not expand the courts' competence to torture committed abroad. The victims' lawyers asserted that the "no safe haven" provisions in articles 5-7 of the Convention against Torture expressly obliged states to either prosecute or extradite alleged torturers who enter its territory. n30 They argued that under the express terms of article 79 of the Senegalese Constitution, international [\*329] treaties, once ratified, override Senegal's legal code. n31

Habre's lawyers also asserted that the prosecution was barred by a three-year statute of limitations for minor offences. The victims' lawyers argued that a 10-year statute of limitations for serious crimes applied and that, according to Senegalese law, the time period only began when prosecution became possible after Habre fell from power on December 1, 1990. n32 The case was initiated in Dakar in January 2000, less than 10 years later.

Habre also argued that as Senegal only ratified the Torture Convention in 1986 and only enacted incorporating legislation in 1996, the provisions of these two instruments could not be applied retroactively. n33

The judgment of the Indicting Chamber, originally scheduled to be delivered on June 15, was postponed until June 20, and then postponed again until July 4. Wade's influence would come to a head days before the decision was finally rendered.

At a hastily convened meeting on June 30, 2000, the Superior Council of the Magistracy (Conseil superieur de la Magistrature), presided by President Wade and his Minister of Justice, transferred Judge Demba Kandji from his post as chief investigating judge of the Dakar Regional Court to become assistant state prosecutor at the Dakar Court of Appeals. Judge Kandji was thus removed from the Habre investigation. There can be no doubt that his transfer was a reprisal for his handling of the Habre case. In previous days, some newspapers had floated accusations, which have proven to be unsubstantiated, that Judge Kandji had received a bribe to allow an accused Dutch pedophile to leave the country. Just as Habre was regarded as an "African Pinochet," Judge Kandji, who was unusually familiar with human rights law and had participated in several international seminars on law and rights, was becoming Senegal's equivalent of Spanish Judge Baltasar Garzon, n34 and his abrupt transfer was seen as a way for the government to block Kandji's continuing probe.

In the same meeting of the Superior Council of the Magistracy, the [\*330] president of the Indicting Chamber, Cheikh Tidiane Diakhate, before whom the Habre dismissal motion was sub judice, was elevated to the State Council (Conseil d'Etat). The re-appointment of this judge, only days before he was to rule on the case, similarly appeared to be an effort to manipulate the judiciary.

#### V. The Case is Dismissed

These last-minute shenanigans foreshadowed the Indicting Chamber's decision. On July 4, 2000, the three-member Chamber dismissed the charges against Hissene Habre, ruling that, despite the Convention against Torture, Senegalese courts had no competence to pursue the charges because the crimes were not committed in Senegal. n35

The court held that under Senegal law, its courts had competence only over certain extraterritorial crimes committed by foreigners. n36 Looking at the Torture Convention, the court asserted that, unlike the Charter of the International Military Tribunal, it "did not allocate competence to any jurisdiction," while under criminal law such rules must be set forth with precision. The court focused on the Convention's article 5, which calls on states to adopt legislation establishing competence over extraterritorial torture, rather than on article 7 which sets forth more clearly the requirement of *aut dedere aut judicare*. n37 It distinguished a previous Cour de [\*331] Cassation case involving administrative law, n38 which subordinated national law to an international treaty, on the ground that criminal law operates under more strict rules. The court pointed out that Belgium and France had, unlike Senegal, adopted implementing legislation specifically granting competence to their courts over extraterritorial torture. The court thus found that "Senegalese courts do not have competence over acts of torture committed by a foreigner outside of Senegalese territory regardless of the nationality of the victims." n39

In addition, the court mistakenly assumed that Habre had been indicted for crimes against humanity. The court also

rejected those charges, asserting that Senegalese positive law contained no such crime and the principle of legality barred consideration of this charge.

The victims have appealed the decision to the Cour de Cassation, which will probably hear the case in early 2001. In the meantime, however, restrictions on Habre's movements have been dropped and he is free to leave the country.

#### VI. Reaction to the Decision

Habre's lawyers called the decision a victory for the law. n40 Most others disagreed, emphasizing the interference with the judiciary. "This is the most important human rights case in Senegal's history and we are behaving like a banana republic," said Alioune Tine of RADDHO. n41 Sidiki Kaba, one of the victims' lawyers lamented, "When politics enters the courthouse door, law goes out the window." n42 The Union of Senegalese Judges deplored "repeated violations" of the Constitution and national law.

International reaction to the decision and the surrounding judicial manipulations was uniformly harsh. The United Nations Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur on Torture, made a rare joint and public expression of their concern to the [\*332] government of Senegal over the dismissal and the surrounding circumstances. n43 The New York Times called the decision "particularly disappointing" and blasted what "looks suspiciously like interference from the country's new president." n44 The Chadian plaintiffs sent an open letter to President Wade, which they also published in five of Senegal's leading newspapers. n45

#### VII. The Impact of the Case in Chad

Just as General Augusto Pinochet's arrest in Britain broke the spell of Pinochet's impunity in Chile and opened the way to the General's possible prosecution in Chile, the Habre indictment had an immediate impact back in Chad.

The Chadian government was clearly caught off-guard by the filing of the case. The government had built its legitimacy partly on the demonization of the former leader, but they probably feared the effects of a full airing of its failure to seek Habre's extradition. After a few days of embarrassed silence, the government announced that the prosecution in Senegal was a logical continuation of the work it had begun with the Truth Commission. When the case was dismissed in July 2000, the Chadian government officially declared its disappointment. n46 It even suggested it was ready to seek other means of bringing Habre to justice. n47

The Association of Victims and the human rights organizations which had initiated the case gained a new stature in Chadian society, having returned [\*333] from Dakar with Habre's scalp, something no one, not even most of the victims, had thought remotely possible. As one victim told Human Rights Watch, "since when has justice come all the way to Chad?" n48 The human rights groups, through the International Committee for the Trial of Hissene Habre, got funding to pursue investigations into Habre's crimes for use in the Dakar prosecution and announced their intention to file criminal charges in Chadian courts against their direct torturers.

On September 27, 2000, President Idriss Deby, in a startling reversal of his pre-Dakar positions, met with the Association of Victims' leadership to tell them that "the time for justice has come" n49 and that he would support their cases. He told them that he had complained to President Wade about the July 2000 decision. Deby also promised to clean up his administration of all former DDS agents and to grant full access to the files of the Truth Commission to the International Committee.

On October 26, 2000, seventeen victims lodged criminal complaints for torture, murder, and "disappearance" against named members of the DDS. According to Ismael Hachim, President of the AVPRC, "We never accepted - and will never accept - the idea that our torturers are escaping justice. After the arrest of Hissene Habre in Senegal, we realized that we can demand that justice be done here, in our own country. Now, it's time for Chad's judicial system to do its duty." n50 Given Chad's feeble judiciary and the continuing power wielded by Habre accomplices, this will be a difficult task, but the fact that it is even thinkable marks a significant step forward. n51

#### VII. Conclusion

The Habre arrest marked the first time an African country brought human [\*334] rights charges against another nation's head of state, and it signaled the first use of the "Pinochet precedent" outside Europe.

Like the Pinochet case in the United Kingdom, the Habre litigation is now being fought over the single crime of torture, to the exclusion of other acts such as political killings, "disappearances," and crimes against humanity. Looking ahead

to future prosecutions under universal jurisdiction, this limitation and the decision of the Indicting Chamber highlights the need for states – even those like Senegal in the "monist" tradition of international law – to adopt specific legislation incorporating all treaty crimes in domestic legislation. In addition to legislation implementing the Torture Convention, states could use the process of ratification of the Statute of the International Criminal Court to incorporate into national law all the crimes over which the ICC has jurisdiction, particularly crimes against humanity.

The manipulations surrounding the Indicting Chamber's ruling also underscores that the political will of the prosecuting (or extraditing) state will be a critical factor in the possibility of a prosecution. In the Pinochet case, British police immediately executed the arrest warrant sent by Spain, and Britain's Home Secretary Jack Straw then twice made the diplomatically difficult decision to allow Spain's extradition bid to proceed. Other countries would probably have made a decision more weighted to the political costs of a break with the international status quo. In March 2000, for instance, Ricardo Anderson Kohatsu, a Peruvian intelligence officer accused of vicious torture, was sent by the Peruvian government to testify to the Inter-American Commission on Human Rights in Washington, D.C. When NGO's denounced his presence and presented credible evidence, United States law enforcement officials detained him as he was about to leave the country. However, the State Department intervened to free Kohatsu on the questionable pretext that he was entitled to immunity under the headquarters agreement between the United States and the Organization of American States.<sup>n52</sup> Senegal, which prides itself on being the first [\*335] country in the world to ratify the treaty establishing the International Criminal Court and has taken a high profile on international rights issues, allowed the Habre prosecution to begin, but an intervening election changed the balance, at least for now.

The Habre case in Senegal is now before the Cour de Cassation. Whatever the result, the indictment has already energized human rights activists across the continent, given new hope to victims of abuse and has had an important liberating impact in Chad.

#### FOOTNOTES:

n1 Bob Woodward, *Veil: The Secret Wars of the CIA 1981–1987* 97 (1987).

n2 On United States support for Habre's push for power and defense against a Libyan-backed offensive, see Rene Lemarchand, *The Crisis in Chad*, in *African Crisis Areas and U.S. Foreign Policy* 239–56 (Gerald J. Bender et al. eds., 1985). According to a Chadian Truth Commission, counselors of the American embassy visited the Direction de la Documentation et de la Securite (National Security Service) [hereinafter DDS] offices on a regular basis and helped train intelligence agents. The Commission quotes one DDS Director as saying that a United States national named John was an adviser to the DDS and was particularly interested in the Libyan problem. See Commission D'Enquete Nationale du Ministere Tchadien de la Justice, *Les Crimes et Detournements de L'Ex-President Habre et De Ses Complices* (Truth Commission) 29 (1993).

n3 See Amnesty International, *Amnesty International Report 1991*, at 59–60 (1991).

n4 The Truth Commission report itself laments the lack of time and resources to carry out its work and notes that some of its members dropped out because they found it too dangerous. The Commission nevertheless heard 1,726 witnesses and conducted three exhumations. See Commission D'Enquete Nationale du Ministere Tchadien de la Justice, *Les Crimes et Detournements de L'Ex-President Habre et De Ses Complices* (Truth Commission) 10–11 (1993). Under the circumstances, it produced a creditable report.

n5 The Truth Commission unscientifically arrived at the number 40,000 by estimating that the 3,780 identified victims were only 10% of the killings. See *id.* at 69, 97.

n6 *Id.* at 23–25. There was also a Terrorist Mission Branch (Service Mission Terroriste) in charge of the "physical liquidation of Chadian opposition figures living abroad," which carried out "dozens of assassinations and kidnappings." *Id.*

n7 Habre fled first to neighboring Cameroon, whose president Paul Biya reportedly asked Senegalese President Abdou Diouf to help him find a more distant place. Diouf, the story goes, was unsuccessful in persuading anyone else to take Habre and took him in himself.

n8 Commission D'Enquete Nationale du Ministere Tchadien de la Justice, *Les Crimes et Detournements de L'ExPresident Habre et De Ses Complices* (Truth Commission) 98 (1993) ("D'engager sans delai des poursuites judiciaires contre les auteurs de cet horrible genocide, coupables de crimes contre l'humanite") (translated by author).

n9 Chad did institute a successful lawsuit in Senegal to recover the airplane in which Habre fled. In 1998, Chad's then Justice Minister Limane Mahamat said that Chad would seek Habre's extradition from Senegal, but no formal request was made.

n10 See, e.g., Human Rights Watch, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, (last modified Sept. 2000) <<http://www.hrw.org/campaigns/chile-98/brochfln.htm>>; Barbara Crossette, *Dictators Face The Pinochet Syndrome*, N.Y. Times, Aug. 22, 1999, § 4, at 3.

n11 Senegal was the first country in the world to ratify the treaty establishing the International Criminal Court, and has ratified the United Nations Torture Convention and most other major human rights treaties. See *infra* note 17 and accompanying text.

n12 The first visit, in July–August 1999, was carried out by Genoveva Hernandez and Nicolas Seutin, lawyers from Spain and Belgium, respectively. The trip was sponsored by the Human Rights Program of Harvard Law School through its Program Director, Peter Rosenblum, who had extensive contacts in Chad. The second, in November–December, was conducted by a Congolese lawyer Pascal Kambale, who would be instrumental throughout the case, and by Alioune Tine, Director of the Dakar-based African Assembly for the Defense of Human Rights [hereinafter RADDHO]. See David Bosco, *Dictators in the Dock New Attempts to Bring Despots to Justice*, 18 *The American Prospect* (2000), available at <http://www.americanprospect.com/archives/V11-18/bosco-d.html>.

n13 The groups supporting the case are RADDHO, the Chadian Association for the Promotion and Defense of Human Rights, the Chadian League for Human Rights [hereinafter LTDH], the AVPRC, the National Organization for Human Rights (Senegal), the London-based Interights, the International Federation of Human Rights Leagues [hereinafter FIDH], and the French organization Agir Ensemble pour les Droits de l'Homme. Upon filing the complaint, representatives of these groups formed the International Committee for the Trial of Hissene Habre.

n14 This decision, reached after considerable internal debate, was based on a few factors. First, as the attitude of the Senegalese government was not known, there was no guarantee the state would bring a prosecution, whereas a private prosecution would at least get a hearing before a relatively independent judiciary. Second, any time delay, such as while the prosecutor was considering whether to go forward, would give Habre a chance to flee the country.

n15 "Tribunal regional hors-classe de Dakar" (translated by author).

n16 In May, another fifty-three Chadian victims joined the original plaintiffs, as well as a Frenchwoman whose Chadian husband had been murdered in 1984.

n17 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39 Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 *I.L.M.* 1027 (1984).

n18 The plaintiffs cited article 6 § 1 of the Torture Convention, which states:

Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence.

Id.

n19 Human Rights Watch, *Senegal Opens Investigation Against Ex-Chad Dictator* (visited Feb. 9, 2001) <<http://www.hrw.org/hrw/pr>>

n20 The judge's order limited Habre's movements to the two Dakar zones where he has houses; barred him from making public declarations, required that he report once a week to a police post, and ordered him to turn in all his firearms and his passport.

n21 See Francois Soudan, *Un Dictateur face a la Justice*, *Jeune Afrique L'Intelligent*, Feb. 15–21, 2000, at 18.

n22 Witnesses were brought forward to show that Habre was not a distant ruler who knew nothing about the crimes. They included a female political prisoner who spent 15 months in a jail which Habre twice visited, and a male who said he was tortured in Habre's presence.

n23 On March 20, Judge Kandji sent letters rogatory to Chad asking that his Chadian counterpart interview a number of witnesses including the 4 DDS Directors. Letters rogatory to France asked for a full deposition of Helene Jaffe, which she gave in September 2000.

n24 See Stephen Smith, *L'impossible enquete sur Hissene Habre au Tchad: Le juge senegalais a l'origine des poursuites contre l'ancien dictateur manque de moyens d'investigation a N'Djamena*, *Liberation*, Mar. 31, 2000, at 7. The bulk of the private plaintiffs' litigation costs before filing were covered by Human Rights Watch. Thereafter, they were met by the International Committee for the Trial of Hissene Habre from grants secured by Human Rights Watch. These costs included the research in Chad, transportation of witnesses (a roundtrip fare from Chad to Senegal averaged \$950) court costs, and modest lawyers' fees.

n25 In this article, the term "jurisdiction" is used only to define the power of a state to decide a controversy. This is a question to be resolved by reference to international law. The term "competence" is used here to denote whether a state has allocated to its courts the judicial power to adjudicate a particular controversy. This is determined by reference to the law of the state. See Hans Smit, *The Terms Jurisdiction and Competence in Comparative Law*, *10 Am. J. Comp. L.* 164, 164-69 (1961).

n26 The plaintiffs' lawyers are aware of instances in which Habre's agents sought unsuccessfully to pay editors to run articles. The articles subsequently appeared in other papers, which had surely taken the bait. It has been widely rumored that Habre has also put money into the judicial system.

n27 On 25 May the Senegalese Bar Association (Conseil de l'ordre des avocats du Senegal) ruled that Niang could not continue to appear before the courts while serving with Wade. President Wade promptly reappointed Niang as a paid judicial consultant to the government, a subterfuge purporting to allow Niang to both work with Wade and to represent Habre and other clients.

n28 When a case is brought as a private prosecution, all motions are forwarded for the state prosecutor's advice.

n29 Article 669 of the Senegal Criminal Procedure Code reads:

Tout etranger qui, hors du territoire de la Republique, s'est rendu coupable soit comme auteur, soit comme complice, d'un crime ou d'un delit attentatoire a la surete de l'Etat ou de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours, peut etre poursuivi et juge d'apres les dispositions des lois senegalaises ou applicables au Sengal, s'il est arrete au Senegal ou si le gouvernement obtient son extradition.

Code De Procedure Penale art. 669 (Senegal). Habre's lawyers argued that Senegal's extraterritorial competence over foreigners was limited to these cases of crimes against state security and counterfeiting of the national seal or official currency.

n30 See *infra* note 37 and accompanying text.

n31 Article 79 of the Senegalese Constitution reads "les traites ou accords regulierement ratifies ou approuves ont, des leur publication, une autorite superieure a celle des lois, sous reserve, pour chaque accord ou traite, de son application par l'autre partie." *Constitutum Du Senegal Commentee art. 79 (Senegal)*.

n32 Article 7 of the Senegal Criminal Procedure Code provides that "la prescription est suspendue par tout obstacle de droit ou de fait empechant la exercice de la action publique." *Code De Procedure Penale art. 7, P 3 (Senegal)*.

n33 Senegal signed the Convention on February 4, 1985 and ratified it on August 21, 1986. However, the Convention did not enter into force until June 26, 1987. Most of the crimes alleged in the complaint were committed after 1987 in any event.

n34 See *Un juge au-dessus de tout soupçon*, *Jeune Afrique L'Intelligent*, February 15-21, 2000, at 22.

n35 See *Republique Du Senegal, Cour d'Appel de Dakar, Chambre d'Accusation, Arret n' 135 du 04-07-2000* (copy on file with author). The court did not reach the defendant's other points.

n36 See *supra* note 29 and accompanying text.

n37 Article 5 section 2 of the Torture Convention, which imposes a legislative duty, states: "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over [acts of torture] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him . . ." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39 Sess., Supp. No. 51, art. 5, § 2, U.N. Doc. A/39/51 (1984), reprinted in *23 I.L.M. 1027 (1984)*. Article 7 section 1, which establishes the obligation to extradite or prosecute, states: "The State Party in the territory under whose jurisdiction a person alleged to have committed [acts of torture] is found shall . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution." *Id.* at art. 7, § 1; see Henzelin, *Le Principe de L'Universalite En Droit Penal International* 349 (Helbing et al. eds., 2000). Henzelin states:

La Convention se caracterise ainsi principalement en matiere juridictionnelle par le fait qu'elle n'impose pas une obligation purement legislative et territoriale, qui caracterisait precedemment les autres conventions de droits de l'homme, pour reproduire les modeles de securite collective de Tokyo et de La Haye, domines par les principes de la liberte juridictionnelle, aut dedere aut prosequi, ainsi que par l'obligation de poursuivre.

*Id.*

n38 See Abdoulaye Barry *c/ Biscuiterie de Medina* (Cour Supreme du Senegal 23 avril 1980), in *Revue EDJA* N.40, janvier-fevrier-mars 1999, at 69.

n39 "Les juridictions senegalaises ne peuvent connaitre des faits de torture commis par un etranger en dehors du territoire senegalais quelque soit les nationalites des victims" (translated by author).

n40 "C'est une victoire du droit" said Madicke Niang. Brigitte Breuillac, *La justice senegalaise annule l'inculpation d'Hissene Habre pour complicité d'actes de torture*, *Le Monde*, July 6, 2000 (copy on file with author).

n41 Human Rights Watch, *Senegal Actions on ExChad Dictator Deplored* (visited Feb. 9, 2001) <<http://www.hrw.org/press/2000/07/h>>

n42 Papa Gueye, *La justice senegalaise se declare incompetente*, *Le Soleil*, July 5, 2000, at 3 ("Quand la politique entre au pretoire, le droit en sort par la fenetre") (translated by author).

n43 See United Nations Rights Experts Express Concern Over Dismissal Of Charges Against Hissene Habre, United Nations Press Release, Aug. 2, 2000 (copy on file with author).

n44 Editorial, *Justice Denied in Senegal*, *N.Y. Times*, July 21, 2000, at A18. The *Times* editorial, also carried in the *International Herald Tribune*, was translated into French and circulated by the International Committee and was extensively reported in the Senegalese press. See, e.g., Boubacar Seck, *Affaire Hissene Habre: Le New York Times denonce un deni de justice*, *Le Matin*, July 26, 2000, at 3.

n45 See Souleymane Guengueng et al., *Affaire Hissene Habre: Des victimes s'adressent au President Wade*, *Sud*, Oct. 14, 2000, at 5 (copy on file with author). The letter was originally sent on Aug. 9, 2000. See *id.*

n46 See *Communication du Garde des Sceaux, Ministre de la Justice au Conseil des Ministres sur l'Affaire Hissene Habre*, July 6, 2000 (copy on file with author) (stating "Malgre la deception que cause cette decision nous pensons que les pourvois en cassation engages pourraient permettre aux victims d'esperer").

n47 See *id.* (stating "En cas de decision definitive similaire a celle qui vient d'etre prise, le Gouvernement exploitera d'autres procedures de poursuites"). Extradition back to Chad, while procedurally quite appropriate, would of course pose questions of whether Habre could receive a fair trial and whether his physical integrity would be in jeopardy.

n48 Dustin Sharp, *Hunting the Desert Fox: Chadian Justice and the Trial of Hissene Habre* (unpublished paper, Harvard Law School Human Rights Program) (on file with author).

n49 Press Release, de l'AVPRC, des ADH et du Comite International pour le Jugement d'Hissene Habre, Oct. 6, 2000 (copy on file with author).

n50 Ismael Hachim, *Chad: Hissene Habre's Victims Demand Justice* (visited Nov. 22, 2000) <[http://www.hrw.org/hrw/press/2000/10/habre1026.htm](http://www.hrw.org/hrw/press/2000/10/hrw.org/hrw/press/2000/10/habre1026.htm)>.

n51 See, e.g., Olivier Bercault, *Les enjeux de l'affaire Habre*, N'Djamena Hebdo, Nov. 2000, at 6. Bercault states:

Quoiqu'il arrivera a Dakar, le fait que des victimes aient ' ose' porter plainte contre Hissene Habre a debloque une situation gelee depuis dix ans. Tout d'un coup, au Tchad, tout devient finalement possible. On a enfin ose parler de la terreur des annees Habre, on a ose s'adresser a un tribunal, meme s'il se trouve a l'etranger. Les victimes qui ont ete arbitrairement arretees, humiliees, torturees et les familles des victimes qui ont vu des proches se faire assassiner ou disparaitre corps et ame, relevent la tete et demandent justice. On ne craint plus rien. La peur a change de camp.

n52 See Karen DeYoung & Lorraine Adams, *U.S. Frees Accused Torturer; Human Rights Groups Decry Ruling on Peruvian*, Wash. Post, Mar. 11, 2000, at A1. Similarly, in August 1999, when Izzat Ibrahim al-Duri, a top aide to Iraqi President Saddam Hussein, visited Vienna to receive medical treatment, a local city councilman filed a criminal complaint against him, citing his active role in Iraq's genocide against the Kurds. Less than forty-eight hours later, the Austrian government let him leave the country, placing its relations with Iraq above its international treaty obligations. See, e.g., Hannah Cleaver, *Saddam Deputy Escapes Arrest in Austria for Torture Crimes*, The Independent, Aug. 19, 1999, at 5. In November 1998, the former tyrant of Ethiopia, Mengistu Haile Mariam, wanted by the Ethiopian authorities on charges of genocide and crimes against humanity, visited South Africa to receive medical treatment. Despite calls from local and international groups for his arrest, and despite South Africa's strong human rights record, he was not apprehended and he returned to exile in Zimbabwe, where the government has sheltered him since his fall. See, e.g., Dean Murphy, *Nation's Accommodation of Ethiopian Despot Stirs Furor*, L.A. Times, Dec. 10, 1999, at A5. When Abu Daoud, accused in the massacre of Israeli athletes in the 1972 Munich Olympics, was apprehended in France in 1976, Paris gave short shrift to extradition requests from West Germany and Israel and freed him four days after his capture.

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