Bringing a Dictator to Justice
The Case of Hissène Habré
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Abstract
In May 2015, the former Chadian dictator Hissène Habré is scheduled to face trial for brutality against his own people before a special chamber in the Senegalese courts established in 2013. Habré’s trial will mark the first time in history that the courts of one country try the former leader of another country for human rights crimes. The advent of the trial, 25 years after Habré’s fall, is entirely due to the perseverance of Habré’s victims and their non-governmental organization (NGO) allies. The launch of proceedings before the Extraordinary African Chambers has also spurred justice efforts back in Chad, where former agents of Habré’s political police now stand trial for torture and murder and the president has finally promised compensation to Habré’s victims. The Habré case shows that it is possible for a victim/NGO coalition, with tenacity and imagination, to create the political conditions for a successful universal jurisdiction prosecution, even against a former head of state. It also highlights many of the practical problems of litigating crimes far away from the territorial state without the complete cooperation of that state’s government.

1. The Campaign to Bring Hissène Habré to Justice
Hissène Habré ruled Chad from 1982 until he was deposed in 1990 by the current president, Idriss Déby Itno, and fled to Senegal. His one-party regime, backed by the United States (US)1 and France as a bulwark against Libya’s Muammar Gaddafi, was marked by widespread atrocities, including waves of ethnic cleansing. A national truth commission, created in 1991, accused his government of responsibility for 40,000 deaths and the systematic torture

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of detainees. In 2001, Human Rights Watch uncovered files of Habré's political police, the Direction de la Documentation et de la Sécurité (DDS), which reveal, in those files alone, the names of 1,208 people who were killed or died in detention and 12,321 victims of human rights violations. The truth commission also accused Habré of empyting out the national treasury in the days before his flight to Senegal.

In 1999, in the wake of Pinochet's arrest in London, Human Rights Watch, Amnesty International, the Fédération Internationale des Ligue des Droits de l'Homme (FIDH) and other NGOs were looking at ways to build on the Pinochet precedent. Discussions at Human Rights Watch examined criteria for choosing the 'next Pinochet case' including: a request from national NGOs; the availability of evidence; the absence of legal barriers such as immunity; the independence of the judiciary and respect for human rights in the forum country; and the likelihood of success. When the Chadian Association for the Promotion and Defence of Human Rights (ATPDDH) asked Human Rights Watch to help Habré's victims bring him to justice in his Senegalese exile, all these criteria seemed to be fulfilled. In addition, the case was appealing because it presented the possibility that a country in the global south would exercise universal jurisdiction, overcoming what many complained was a paradigm of European courts prosecuting third-world defendants.

The International Committee for the Fair Trial of Hissène Habré (the 'Coalition') was assembled — including the victims and the leading human rights groups in Chad and Senegal, Human Rights Watch and the FIDH. With support from this Coalition, the victims went to Dakar to file a criminal complaint in January 2000. To everyone's surprise, a Senegalese judge indicted Habré in February 2000 on charges of torture, crimes against humanity and other barbaric acts. The indictment was leading news across Africa and it seemed that justice would be swift. However, Habré's supporters reportedly began spending large sums of money to block the case and, after alleged political interference by newly-elected President Abdoulaye Wade, Senegalese appellate courts dismissed the case on the ground that despite its ratification of the United Nations (UN) Convention against Torture, Senegalese courts lacked jurisdiction to try crimes committed abroad because the Convention had not been implemented into national law.

4 In particular, Senegal's democratic tradition and its leadership role on international rights issues made a successful prosecution conceivable. Senegal was the first country in the world to ratify the treaty establishing the International Criminal Court, and has ratified the UN Torture Convention and most other major human rights treaties.
5 This despite the fact that the Senegalese Constitution provides that international treaties, once ratified, override Senegal's legal code. For a fuller description of the case's early days, see R.
The case would have ended there, but the Coalition helped other victims, including three Belgian citizens of Chadian origin, file a case against Habré in Belgium in November 2000. At the same time, the Chadian victim/plaintiffs lodged a communication against Senegal with the UN Committee against Torture (CAT). In April 2001, President Wade declared that he had given Habré one month to leave Senegal, raising the possibility that Habré would find refuge in a country out of the reach of a possible extradition request from Belgium. In a preliminary ruling issued in April 2001, however, CAT called on Senegal to take all necessary measures to prevent Mr. Hissène Habré from leaving the territory of Senegal except pursuant to an extradition demand. After an appeal by UN Secretary-General Kofi Annan, President Wade agreed to heed the committee’s call.

In 2001, the International Court of Justice (ICJ) handed Belgium and its universal jurisdiction law a stinging defeat in the Arrest Warrant case, and even suggested that former rulers such as Habré enjoyed immunity for all acts committed during their period of office but private acts. The Chadian NGOs were able, however, to convince their government formally to waive Habré’s immunity. When the ambitious Belgian law on universal jurisdiction was being repealed under political attack in 2003, the Coalition brought Chadian victims to Belgium to plead their case. Personal meetings with several ministers and key leaders from the major political parties paid off as the Belgian Parliament inserted a ‘grandfather’ clause saving the case despite new restrictions in the law. The Belgian judiciary investigated the case for four years, including an international rogatory mission to Chad, before indicting Habré on charges of crimes against humanity, war crimes, and torture. Belgium sought his extradition in 2005. A Senegalese court, again after political interference by the Wade government, ruled that it lacked jurisdiction to decide on the extradition request.


9 Ibid., § 61. The decision by its terms applied to a Minister for Foreign Affairs but the court on several occasions suggested that the same reasoning would apply to heads of state and heads of government; see e.g. §§ 51, 53.

10 The clause applied to cases in which there were plaintiffs who were Belgian at the time of the criminal complaint and in which the judges had already conducted investigatory acts. The law was drafted in a result-oriented way to save a handful of cases relating to Rwanda, Guatemala and Chad. None of these cases presented the political complications of the cases against US and Israeli officials which had triggered the new restrictions.
Senegal then 'referred' the case to the African Union (AU), a move with no legal grounding but which threatened to put the case in the hands of many rulers who themselves could be worried about human rights prosecutions. Wisely, the AU appointed a Committee of Eminent African Jurists, in January 2006 to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial.11 In the meantime, in May 2006, in response to the case filed in 2001 by the victims, the UN Committee against Torture concluded that Senegal had violated the UN Convention against Torture by failing to prosecute or extradite Habré. The Committee called on Senegal 'to submit the present case to its competent authorities for the purpose of prosecution or to extradite him'.12 The CAT also noted Senegal's obligation to 'adopt the necessary measures, including legislative measures, to establish its jurisdiction' over Hissène Habré's alleged crimes.13

Meeting only days after CAT's ruling, the Committee of Eminent African Jurists recommended Habré's prosecution be carried out in Senegal, and the AU heads of state called on Senegal to prosecute Habré 'on behalf of Africa'.14 President Wade accepted the AU mandate and had Senegalese law amended to give the country's courts extraterritorial jurisdiction over international crimes. However, he argued that Senegal needed full up-front funding of US$ 36.5 million from the International community before beginning any prosecution. Three years of halting negotiations over the trial budget ensued until — with the engagement of the Coalition — Senegal and donor countries finally agreed in November 2010 to a budget of US$ 11.4 million for Habré's trial.

Just days before the budget agreement, the Court of Justice of the Economic Community of West African States (ECOWAS) issued a 'bizarre'15 ruling that

13 Ibid.
Habré could only be tried before a 'special ad hoc procedure of an international character'. In January 2011, the AU responded by proposing a plan for 'extraordinary chambers' within the Senegalese justice system with some judges appointed by the AU. Senegal rejected the plan, however, and in May 2011, withdrew altogether from negotiations with the AU over creation of the court. In the face of Senegal's stalling, Belgium, where the victims' 2002 visit had created strong political backing, in 2009 brought an unprecedented case against Senegal at the ICJ. In July 2011, President Wade threatened to expel Habré to Chad but, days later, retracted his decision in the face of an international outcry. No progress took place until Macky Sall defeated Wade in Senegal's presidential elections in March 2012. The Coalition — including a Senegalese survivor of Habré's jails — had visited Sall in 2009, when he was in the opposition, and he said then that he was embarrassed by Senegal's handling of the case. After his election, Sall quickly announced that he planned to prosecute Habré in Senegal.

On 20 July 2012, the ICJ ruled that 'Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.' The Senegalese authorities responded by reaffirming their commitment to prosecute Habré in Senegal. Senegal and the AU then revived the plan to create 'Extraordinary African Chambers' inside the existing Senegalese court structure. According to an agreement signed on 22 August 2012, the Chambers has sections to handle investigations, trials and appeals. The trial chamber and the appeals chamber will each consist of two Senegalese judges and a president from another African country. The Chambers' mandate will be to prosecute the 'person or persons most responsible' for international crimes committed in Chad between 1982 and 1990, including genocide, crimes against humanity, war crimes and torture. In keeping with the French-based Senegalese legal system, the Chambers' statute provides that victims are permitted to participate in proceedings as civil parties, represented by legal counsel, and to seek reparations.

On 2 July 2013, the Chambers indicted Habré for war crimes, crimes against humanity and torture, and he is currently being held in pre-trial detention in Senegal. On 15 July, 1015 victims registered as civil parties with the


16 Court of Justice of the Economic Community of West African States, Affaire Hissène Habré v. République du Sénégal, 18 November 2010, § 61. See Hessbruegge, ibid: "The Court essentially concludes that international custom requires that internationalized (red) tribunals try international crimes, whereas national courts can have jurisdiction only if such crimes had already been incorporated into national law when they were committed.'

17 Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 20 July 2012, ICJ Reports (2013) 42, § 122(6).

18 Art. 3(1) Statute of the Extraordinary African Chambers (unofficial translation in English available at www.bcw.org/news/2013/09/02/statute-extraordinaryafrican-chambers, (visited 23 January 2015)).
Chambers, represented by a team of lawyers led by Chadian attorney Jacqueline Moundala, coordinator of the Coalition and president of the ATPDH. The investigative phase of the trial is currently underway during which the investigating judges and court police conducted four missions to Chad. They interviewed about 2500 witnesses and victims, analysed thousands of documents of Habré’s political police, assigned experts to dissect Habré’s command structure and uncovered mass graves. A trial is expected later this year. The Chambers’ Chief Prosecutor had requested the indictment of five further officials from Habré’s administration suspected of being responsible for international crimes. None of them are before the court, however. Three of the suspects are at large, while the other two are standing trial in a Chadian court on similar charges, and Chad has refused their transfer to Dakar.

2. The Ripple Effect in Chad

As important as a foreign tribunal’s trial of Habré would be, it would not guarantee full justice to the victims of Habré’s rule nor would it permit Chadian society to confront its past. For over two decades, the victims have also struggled for justice back home — daring to file numerous criminal complaints and demanding reparations from the Chadian government.

In 1992, a national truth commission recommended the prosecution in Chad of those who participated in crimes during Habré’s rule. It also called for DDS officers to be relieved of their state security duties and for measures to be taken to honour the memory of the victims. Yet in 2005, Human Rights Watch found that the truth commission’s recommendations remained largely ignored. The report identified 41 former mid-level and high-level DDS agents still holding key leadership or security positions in Chad. Then in 2013 in the wake of the launch of the Extraordinary African Chambers, the Chadian government, not wanting to appear laggard, took a series of positive actions. Chadian President Idriss Déby Itno publicly expressed his support for the Habré trial and the domestic prosecution of former DDS agents, as well as his intent to provide reparations to the victims. The Chadian authorities arrested 22 former DDS agents — whose cases had been pending since 2000. In 2014, however, when the Extraordinary African Chambers began to look past Habré to others ’most responsible’, the Chadian government seemed to get cold feet. President Déby, who had once been Habré’s military chief, was said to fear he would be implicated. He refused to transfer two key DDS suspects to the Extraordinary Chambers and, perhaps to justify that refusal, rushed them to trial in Chad without a proper pre-trial investigation. At the time of this writing, 21 former DDS agents were standing trial in Chad. While the trial is perhaps the most important transitional justice measure taken since the

establishment of the 1991 truth commission, the lack of preparation has somewhat undermined its value.

The NGOs and victims' groups, who achieved what no one thought possible with the trial of Habré and his accomplices, gained new political space, but at the same time have been subject to constant pressure. Jacqueline Moudelina, the Chadian lawyer who has guided the victims since 2000 narrowly survived an assassination attempt in 2001 by one of the former Habré aides on trial in Chad. Other victims have been harassed and one of their leaders, Souleymane Guengueng, was forced into exile. No witness protection programme has been established around the trial.

The victims are also mobilising around outreach for the Habré trial in Dakar. One of the major challenges to maximizing the impact of Habré trial will be to ensure accessibility of the proceedings to the Chadian people, who are the most interested and affected. The Habré trial poses particular challenges. Firstly, court proceedings will be far away from the Chadian people. The trial is taking place in a national court and not an international tribunal.20 And, while the government of Chad is generally supportive of the trial, the conditions for a full and open discussion of transitional justice issues do not exist. The Chambers budget provided €1 million for a robust outreach programme to be carried out by third parties, but the ambit of the programme has been steadily reduced to make room for other costs, and is scheduled to end before the actual trial begins. The Chadian government committed itself in a cooperation agreement with Senegal to televising the trial back in Chad but as of this writing appears to be having second thoughts.

3. Lessons Learned — A Preliminary Look

Habré is not yet on trial, and the fallout in Chad is not yet clear, so it is far too early to claim, as Le Monde did in 2012, that the Habré case marks 'a turning point for justice in Africa'.21 Yet the CAT and ICIJ decisions, the activism of the AU, the creation of the Chambers and the arrest of Habré's henchmen are all important victories. In 2010, a petition signed by Bishop Desmond Tutu and 117 African human rights groups from 25 countries, complained that Habré's victims had 'been working tirelessly for 20 years to bring him to justice', yet had 'been treated to an interminable political and legal soap opera'.22 Three years later, Habré was in jail and his accomplices on trial in Chad.

Certainly one of the lessons therefore is persistence — and imagination. The New York Times wrote that '[n]umerous brutal leaders have taken power and

mass killings have unfolded on the African continent since Mr. Habré's ouster. But his case has proved unusual for the tenacity of his victims, and of Human Rights Watch, in seeking to bring him to justice. The \textit{Toronto Globe and Mail} praised the efforts to bring him to trial as 'one of the world's most patient and tenacious campaigns for justice.' Indeed, in a case which looked dead so many times, the victims and their supporters made it clear that they were just never going away. When the case was thrown out in Senegal, they went to Belgium. When Wade threatened to expel Habré, they used CAT to keep him in Senegal. When the Belgian law was repealed, they obtained a 'grandfather clause.' When Senegal went to the African Union, they improbably turned the AU into an ally which then helped them overcome the ECOWAS ruling. When Senegal stalled, they pressed Belgium to take the case to the ICJ.

Another lesson then is the creation of allies to develop the political conditions for justice to take its course. The AU, engaged in a tug of war with the International Criminal Court, saw the benefit of being able to prosecute African crimes in Africa. It pressed Senegal for a solution and provided the legitimacy and political cover for Senegal when Macky Sall was ready to act. The US, although it had supported Habré's rule, became a key supporter of the case and President Obama congratulated Macky Sall on his leadership. The government of Chad (until late 2013 when it began to worry that Déby might be implicated in the case), took a number of steps — the lifting of Habré's immunity, invitations to Belgian and Senegalese judges — without which the case would have been impossible. And quirky little Belgium did what no other country had ever done — initiate a case at the ICJ not over territory or revenue but over the right of some victims to justice.

One cautionary lesson is that when a prosecution takes place abroad, NGOs are not in a position to protect participants and witnesses in the territorial country, meaning that the territorial state must be enlisted to take protective measure — and its willingness to do so may depend upon its view of the case. The territorial state can have a preponderant role in determining the success of any outreach programme. Finally, and most importantly, the territorial state controls access to the evidence and witnesses. While Chad has generally cooperated with the Chambers, it refused to hand over two suspects and could terminate its cooperation at any time.

Another lesson is that long campaigns for justice cost money. The budget of the Extraordinary African Chambers, a paltry US$ 11.4 million, pales in comparison to the hundreds of millions for the Special Court for Sierra Leone and the billions for the ICC, and ad hoc tribunals for Rwanda and the former Yugoslavia. But sustaining the political and legal work to get there has required 15 years of funding. The airfare alone from Chad to Senegal is some

US$ 1500. In 15 years, Human Rights Watch has accessed more than US$ 2 million, with the vast majority going to the Chadian and Senegalese groups involved in the campaign.

Indeed, perhaps the greatest lesson for a universal jurisdiction case has been the importance of working as a team across borders, with the victims in the forefront. This has meant developing a partnership between Chadians and Senegalese, whose realities are very different. It has meant accessing rehabilitative victims’ services. It has meant giving equal weight to victims’ interest in achieving justice at home while involving them as protagonists in the campaign abroad. It was the victims’ personal pleas that created a reservoir of support in Belgium. The Coalition brought the Chadian victims and NGOs to Senegal time and again to plead their case with the public, the press and political leaders. It was perhaps this part of the campaign that created the political conditions for the newly-elected President Macky Sall to opt for justice.