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**PROSECUTING HISSÈNE HABRÉ:  
AN AFRICAN DILEMMA**

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# INTRODUCTION

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## *I. An African Dilemma*

Africa is a continent wrought with many problems. The issue of conflict in Africa is by no means a recent development in international affairs. Quite the opposite in fact, the majority of the world's conflicts in recent decades have taken place in Africa, no doubt contributing to its status as the "most conflict affected and conflict prone region in the world".<sup>1</sup> In a 1998 report the United Nations (UN) Secretary-General at the time, Kofi Annan, noted that since 1970, more than 30 wars have been fought in Africa. In 1996 alone African conflicts were the cause of more than half of all war-related deaths worldwide.<sup>2</sup> This sad "reality of Africa's recent past"<sup>3</sup> has posed a major challenge not only to African peace, prosperity, stability and human rights but to global efforts to attain these goals as well.<sup>4</sup>

Unfortunately, the Secretary-General's report – now almost 13 years on – seems still to reflect the current African situation. In early 2011, several new conflicts arose in North Africa as a result of years of political unrest. Revolutions in Tunisia and Egypt forced the ouster of the long time presidents of both countries, Zine El Abidine Ben Ali and Hosni Mubarak respectively. This subsequently sparked an ongoing revolution in neighbouring Libya, which seeks to depose Muammar Qaddafi, de facto leader of Libya since 1969.<sup>5</sup> Perhaps then it is no surprise that all the situations currently being investigated by the International Criminal Court (ICC) are African, with Libya being a recent addition to this list.<sup>6</sup>

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<sup>1</sup> Charles Chernor Jalloh "Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction" (2010) 21(1) *Crim.L.F.* 1 at 19.

<sup>2</sup> *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa* at [4], UN Doc A/52/87-S/1998/318 (1998) [UN Africa Report].

<sup>3</sup> *Ibid.*, at [5].

<sup>4</sup> *Ibid.*, at [3].

<sup>5</sup> Masaya Uchino "Prosecuting Heads of State: Evolving Questions of Venue - Where, How, and Why?" (2011) 34(2) *Hastings Int'l & Comp.L.Rev.* 341 at 341-342.

<sup>6</sup> These situations are the Democratic Republic of the Congo, the Central African Republic, Darfur – Sudan, the Republic of Kenya, Uganda and the Republic of Côte d'Ivoire.

Regrettably in conflict-affected states, the end of the fighting is not the end of the problem. These states are generally left in ruins, financially and institutionally, and lack the infrastructure to rebuild themselves. One particular issue facing post-conflict states is what to do about holding accountable or punishing those responsible for the atrocities committed during the conflict. In many of these cases, ultimate responsibility will be seen as resting with a dictator-type figure. However, prosecuting such people is much easier said than done. It may create more problems rather than provide answers and may not necessarily lead to justice being done.

In this dissertation, I propose to investigate this problem, specifically focussing on Africa and its former dictators who seem to be in a sort of limbo and out of reach of any of the mechanisms currently in place. I will use as an example the case of Hissène Habré, former President of Chad, to examine the various options available and the proper forum for a successful prosecution of former African leaders in similar scenarios so that this dissertation may have some applicability in analogous situations that may arise in the future.

## ***II. A General International Trend towards Individual Criminal Accountability***

Following the horrors of the Second World War, there was a great desire to hold the perpetrators of atrocities accountable for their actions. This desire manifested itself in the form of the International Military Tribunals of Nuremberg and the Far East, based in Tokyo. These tribunals, and especially the Nuremberg Trials, established various important legal precedents but, most importantly, they marked the beginning of a worldwide trend to create and proscribe ‘international crimes’ and punish individuals who violate these prohibitions. While progress towards individual accountability was somewhat stilted during the Cold War, advances were still made. For example, conventions defining and prohibiting the crimes of genocide in 1948 and torture in 1984 were adopted by the UN General Assembly.<sup>7</sup>

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<sup>7</sup> Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) [Genocide Convention], Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) [Torture Convention].

Following the end of the Cold War in 1991 came what William Schabas refers to as “post-Cold War euphoria”.<sup>8</sup> This contributed to a sense of unanimity in the UN Security Council and meant that international justice took a front seat during this period. The International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994) were established by the Security Council in response to horrifying conflicts. More recently in 2000, the Special Court for Sierra Leone was established by an agreement between the UN and Sierra Leone itself. Several other tribunals have also been established with the help and support of the UN in Cambodia, Lebanon, Kosovo and East Timor. Thus a very action-packed decade or so indicated a much-increased willingness in the international community to act where violations of international crimes had occurred. Of course the most important development in this sphere of international law was the advent of the International Criminal Court (ICC), which came into being in 2002.

It is hoped that the ICC will result in the perpetrators of the worst international crimes being punished where states are either unwilling or unable to do so themselves, thus providing a means to end impunity. However, the ICC will not provide a solution to every violation of the crimes contained in the Rome Statute. This is because the jurisdiction of the Court is subject to various temporal, geographical and personal restrictions. These restrictions were necessary so that a consensus could be reached among state parties drafting the Rome Statute. Thus the Court has only prospective jurisdiction over crimes committed after 1 July 2002 and that are alleged to have been committed on the territory of, or by a national of, a state party.<sup>9</sup> There are a few exceptions but otherwise the jurisdiction of the ICC is limited.<sup>10</sup>

### ***III. A Gap in Accountability***

These necessary jurisdictional restrictions inevitably mean that the ICC cannot remedy the impunity enjoyed by a handful of ex-dictators and their accomplices, who

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<sup>8</sup> William Schabas *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*. (Cambridge University Press, Cambridge, UK, 2006) at 32.

<sup>9</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), arts 11 and 12 [Rome Statute].

<sup>10</sup> For example, a non-state party may accept the Court’s jurisdiction over a specified situation under art 12(3) of the Rome Statute. Also, under art 13 the Court may exercise jurisdiction over situations referred to it by the Security Council or the Prosecutor of the International Criminal Court (ICC) using his *proprio motu* power.

committed their alleged crimes before 2002. There is thus a gap in international law allowing the perpetrators of some of the most abhorrent international crimes to go unpunished, and in several cases, to live out the rest of their days in relative comfort. A vivid illustration of this impunity gap can be found in the case of Hissène Habré.

The line of inquiry taken in this dissertation inevitably raises many other controversial issues. Political considerations are inextricably linked to prosecutions of former high-ranking officials. Another controversy surrounding this topic is whether in fact prosecutions such as these should even be pursued in post-conflict states and whether they are the most efficient and effective method of delivering justice in these situations. However, for the purposes of this dissertation I must approach the issue from a mainly legal perspective and proceed on the basis that such prosecutions are a worthwhile endeavour. A discussion on the social implications of using criminal justice to hold these people to account is another issue in itself and is not the focus of my dissertation. Rather, my focus is what is the most appropriate legal solution and how this could be achieved.

In chapter one I will briefly trace the history of Habré's regime and provide a chronology of subsequent attempts to hold him to account. In the following chapters I will evaluate what I consider to be the three most feasible options for a successful prosecution of Habré: an African solution, a Belgian prosecution and, lastly, an ad hoc tribunal with a more international dimension.

## CHAPTER ONE

### HISSÈNE HABRÉ

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#### *I. Habré's Reign in Chad*

Chad gained independence from France on 11 August 1960 “and has since known few periods of real peace. A long-running civil war, several invasions by Libya, and rebel movements in different regions ripped apart the country for decades.”<sup>11</sup> Hissène Habré was initially a rebel leader from the north. In 1978, he joined forces with the government and was named Prime Minister.<sup>12</sup> However, he soon turned against the President and an armed conflict between their respective supporters ensued. After another murderous civil war, Habré seized power on 7 June 1982 and the President fled to Cameroon.<sup>13</sup> Habré’s reign as President was to last almost nine long years until he was defeated by one of his generals, Idriss Deby, who remains President of Chad to this day.<sup>14</sup>

After Habré was ousted, the new government ordered a Truth Commission to investigate and document crimes committed during Habré’s reign.<sup>15</sup> Habré is characterised in the Truth Commission’s report as a “man without scruples”<sup>16</sup> who would side with whomever was of most use to him. This of course made him very dangerous and unpredictable. Habré and his Armed Forces of the North Group, or FAN, were originally supported by the United States (US) as he provided a welcome nuisance to Qaddafi in neighbouring Libya.<sup>17</sup> Habré’s rule was largely centred on consolidating his own personal and absolute power in blood and terror.<sup>18</sup> He exploited

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<sup>11</sup> Human Rights Watch “Chad: The Victims of Hissène Habré Still Awaiting Justice” (2005) at 3 <[www.hrw.org](http://www.hrw.org)> [HRW “Victims”].

<sup>12</sup> National Commission of Inquiry “Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories” (1992) at 52, available online at <[www.usip.org](http://www.usip.org)> [“Truth Commission Report”].

<sup>13</sup> *Ibid.*, at 53.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, at 58.

<sup>17</sup> HRW “Victims”, above n 11, at 3-4.

<sup>18</sup> “Truth Commission Report”, above n 12, at 59.

the already problematic ethnic, religious and regional divides and turned people against each other.<sup>19</sup> His own ethnic group, the Goranes, was favoured. Within a few months of becoming President, all top governmental positions were exclusively occupied by Goranes. Gorane customs even took precedence over the laws of Chad.<sup>20</sup> The Truth Commission's report states that the Goranes became "dizzy with power and arrogant with the impunity afforded them by their regime, the Goranes regarded fellow citizens with disdain and treated them as slaves."<sup>21</sup>

During his period in power, Habré and his feared political police, the Documentation and Security Directorate, attempted to eradicate all political opposition by targeting different ethnic groups whose leaders he perceived as threatening to his regime.<sup>22</sup> Suspects were tortured and subjected to inhumane conditions, resulting mostly in confessions of guilt for non-existent crimes.

The Truth Commission estimated that more than 40,000 Chadians either died in detention or were executed under the Habré regime.<sup>23</sup> The report accused Habré's government of these murders and systematic torture and called for the immediate prosecution of those responsible for atrocities.<sup>24</sup> Apart from these 40,000 victims, the effects of Habré's regime were much more far-reaching and Chad today is still struggling to rebuild itself.<sup>25</sup>

Despite the recommendation to prosecute Habré, two decades have now passed with no progress having been made. When Habré fled Chad, he took the entire treasury of Chad and initially took refuge in Cameroon and then Senegal,<sup>26</sup> where he has been living a peaceful life in exile among the upper class ever since.<sup>27</sup>

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<sup>19</sup> Ibid, at 58.

<sup>20</sup> Ibid, at 60.

<sup>21</sup> Ibid, at 61.

<sup>22</sup> HRW "Victims", above n 11, at 4.

<sup>23</sup> "Truth Commission Report", above n 12, at 91.

<sup>24</sup> Ibid, at 93.

<sup>25</sup> The Truth Commission Report estimated that there were more than 80,000 orphans, 30,000 widows and 200,000 people left with no moral or material support as a result of Habré's regime. "Truth Commission Report", above n 12, at 91-92.

<sup>26</sup> Ibid, at 53.

<sup>27</sup> Dustin Sharp "Prosecutions, Development, and Justice: The Trial of Hissein Habré" (2003) 16 Harv.Hum.Rts.J. 147 at 166.

## *II. Attempts to Hold Habré Accountable*

### *a. Chad*

As Habré's home state and also the state where the alleged atrocities took place, Chad has the primary responsibility for holding him accountable.<sup>28</sup> However, Chad was (and probably still is today) in no position to undertake such a prosecution. This is generally the case in post-conflict states "whose national institutions [are] often left in ruin after years of political strife. In particular, the judicial systems in such countries usually [lack] physical infrastructure, competent personnel, and public confidence in the legitimacy of the system."<sup>29</sup>

Several reasons for Chad's particular inability to try Habré were identified in a Human Rights Watch report.<sup>30</sup> As a former dictator, there is a serious risk Habré would be mistreated or killed as he still has many political enemies in Chad. A fair and efficient trial cannot be guaranteed due to the feeble judiciary and justice system. Additionally, Habré's presence in Chad could cause political destabilisation. Chad's current state of affairs is rather unstable due to the activities of several rebel groups and spill-over violence from neighbouring Sudan. This was one of the reasons that the trial of Charles Taylor was shifted to The Hague instead of being conducted in Freetown, the seat of the Special Court of Sierra Leone.<sup>31</sup> Finally, in 2008 a Chadian court sentenced Habré to death in absentia for supporting rebels.

Thus, there is little prospect of a successful prosecution in Chad. Fortunately, the Chadian government has proved to be in favour of prosecuting Habré elsewhere, and especially his extradition to Belgium.<sup>32</sup> This support from the home state has been most useful in removing a potential hurdle, that of former head of state immunity. On 7 October 2002 the Chadian Minister of Justice waived any claim to immunity that

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<sup>28</sup> Committee of Eminent African Jurists "Report of the Committee of Eminent African Jurists on the Case of Hissène Habré" (2006) Human Rights Watch at 4 <[www.hrw.org](http://www.hrw.org)> [CEAJ Report].

<sup>29</sup> Tanaz Moghadam "Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré" (2007-2008) 39 Colum.Hum.Rts.L.Rev. 471 at 521.

<sup>30</sup> Human Rights Watch "Submission to the Committee of Eminent African Jurists: Options for Hissène Habré to Face Justice" (2006) at 17-18 <[www.hrw.org](http://www.hrw.org)> [HRW "Submission to CEAJ"].

<sup>31</sup> Owen Fiss "Within Reach of the State: Prosecuting Atrocities in Africa" (2009) 31 Hum.Rts.Q. 59 at 63.

<sup>32</sup> HRW "Submission to CEAJ", above n 30, at 18.

Habré may have had as a former head of state, to an investigating Belgian judge.<sup>33</sup> In the *Democratic Republic of the Congo v Belgium Case (Congo v Belgium)*, the International Court of Justice (ICJ) enumerated four circumstances where immunity will not prevent prosecution, one of which is where the national state waives immunity.<sup>34</sup> This argument has therefore been removed from Habré's arsenal.

### ***b. Senegal***

On 26 January 2000, a group of victims, with the help of Human Rights Watch, filed a criminal complaint in Senegal as it was seen as offering several advantages over a prosecution in Chad.<sup>35</sup> Senegal had a reputation for a relatively independent judiciary, a progressive government respectful of international law<sup>36</sup> and its "proximity to Chad and its francophone culture would enable the victims to be involved in the proceedings."<sup>37</sup> Furthermore, Senegal could claim a strong basis for exercising jurisdiction over Habré under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), which it had ratified in 1986 and implemented by domestic legislation in 1996.<sup>38</sup>

Subsequently, Habré was charged in Senegal with torture, barbarous acts and crimes against humanity. At first, the case moved along at considerable speed.<sup>39</sup> Habré was indicted for complicity in acts of torture and placed under house arrest.<sup>40</sup> This was the first time an African state had "brought human rights charges against another nation's head of state, and it signalled the first use of the 'Pinochet precedent' outside Europe."<sup>41</sup> However, this positive progress was not to continue unhindered. While the case was proceeding, an election took place and a new government was voted into power, which unfortunately had a dramatic effect on the outcome of the prosecution.

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<sup>33</sup> Human Rights Watch "Chronology of the Habré Case" (2009) <[www.hrw.org](http://www.hrw.org)> [HRW "Chronology"].

<sup>34</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3 at 25 [*Democratic Republic of the Congo v Belgium*].

<sup>35</sup> Moghadam, above n 29, at 497.

<sup>36</sup> For example Senegal was the first country in the world to ratify the Rome Statute establishing the ICC on 2 February 1999. See Reed Brody "The Prosecution of Hissène Habré - An "African Pinochet"" (2000-2001) 35(2) *New Eng.L.Rev.* 321 at 323.

<sup>37</sup> Moghadam, above n 29, at 497-498.

<sup>38</sup> *Ibid*, at 498.

<sup>39</sup> Brody, above n 36, at 325.

<sup>40</sup> Stephen P. Marks "The *Hissène Habré* Case: The Law and Politics of Universal Jurisdiction" in Stephen Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia, 2004) 131 at 140.

<sup>41</sup> Brody, above n 36, at 333-334. The Pinochet Case was the first time a former head of state was held amenable to criminal proceedings before a court of another state.

Several suspicious events occurred, prompting speculation of foul play.<sup>42</sup> Immediately prior to the much-anticipated judgment, the investigating judge, responsible for the progress of the case thus far, was removed from the investigation and essentially demoted while the President of the Indicting Chamber was elevated to the State Council. Critics suspect that the investigating judge's removal was a reprisal for his handling of the case as well as a way for the government to block his continuing probe.<sup>43</sup> This series of events received much negative global attention and was criticised as an effort to manipulate the judiciary.<sup>44</sup> It also demonstrated how much the political will of the prosecuting state is a critical factor in the likelihood of a prosecution.<sup>45</sup>

Of course, one cannot forget the significant influence of Habré himself. It is suspected that, in addition to using his political connections in Senegal to prompt President Wade to intervene, Habré also used the vast wealth stolen from Chad's treasury to pressure Senegal into delaying the trial and to bribe the Senegalese press to allege that he was the "victim of a French-American plot."<sup>46</sup>

Ultimately and unsurprisingly perhaps, the Indicting Chamber quashed Habré's indictment.<sup>47</sup> This decision was subsequently affirmed by Senegal's highest court, the Cour de Cassation.<sup>48</sup>

### *c. Belgium*

Despite the setback in the Senegalese courts, Habré's victims demonstrated their persistence at holding him accountable. With the obvious states capable of prosecuting Habré either unwilling or unable to do so, the victims were forced to look

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<sup>42</sup> For example, the newly elected president, Abdoulaye Wade, appointed Habré's attorney as his special adviser on judicial matters, yet allowed him to continue his legal practice and his defence of Habré. See Brody, above n 36, at 328.

<sup>43</sup> Ibid, at 329.

<sup>44</sup> Ibid, at 330. See also Bruce Baker "Twilight of impunity for Africa's presidential criminals" (2004) 25(8) Third World Quarterly 1487 at 1492.

<sup>45</sup> Moghadam, above n 29, at 487.

<sup>46</sup> Sharp, above n 27, at 169 and Moghadam, above n 29, at 503.

<sup>47</sup> *Ministère Public et François Diouf Contre Hissène Habré* (arrêt no. 135), 4 July 2000, Chambre d'accusation de la Cour d'appel de Dakar (Criminal Chamber of the Dakar Appeals Court), Senegal, available online at <www.hrw.org>.

<sup>48</sup> *Souleymane Guengueng et Autres Contre Hissène Habré* (arrêt no. 14), 20 March 2001, Cour de Cassation (Court of Cassation), Senegal, available online at <www.hrw.org>.

further afield. On 30 November 2000, three victims living in Belgium filed criminal charges against Habré under Belgium's universal jurisdiction law,<sup>49</sup> the most extensive of its kind in the world at the time.

Universal jurisdiction will be discussed in more depth in chapter three. However, for present purposes, a simple definition will suffice. Universal jurisdiction is based solely on the nature of the crimes to which it relates, which are seen as of such exceptional gravity that they affect the fundamental interests of the international community. Consequently, any state can prosecute the perpetrators of these crimes as agents or trustees of the international community without the need for a more direct link with the alleged crime.<sup>50</sup>

After the charges were filed, a four-year investigation ensued. During these four years Belgium came under intense international pressure, mostly from the US, to change its laws. This was due to the fact that complaints had been filed under the Belgian law against prominent international leaders including a former President and a former Secretary of Defence of the US.<sup>51</sup> Belgium amended its law in response to this pressure in 2003 and it is now subject to various limitations.<sup>52</sup> Fortunately, the Habré proceedings were allowed to continue as these new conditions were met.<sup>53</sup>

Ultimately, the investigation led to the issuing of an international arrest warrant on 19 September 2005. Habré was charged with genocide, crimes against humanity, war crimes, torture and serious violations of international humanitarian law. On the same day, Belgium made an extradition request to Senegal.<sup>54</sup> This was supported by the UN Secretary-General, the President of the African Union (AU) Commission, the government of Chad and the special rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman, or degrading treatment or punishment.<sup>55</sup> Even President Wade of Senegal had specifically said he would look favourably upon

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<sup>49</sup> HRW "Chronology", above n 33.

<sup>50</sup> Julia Geneuss "Fostering a Better Understanding of Universal Jurisdiction" (2009) 7 JICJ 945 at 952.

<sup>51</sup> Former President George HW Bush and former Secretary of Defence Dick Cheney.

<sup>52</sup> Moghadam, above n 29, at 487-488.

<sup>53</sup> The plaintiffs had Belgian nationality, neither Senegal nor Chad was in a position to take the case and the investigation had been initiated before amendments were made. See HRW "Chronology", above n 33 and HRW "Submission to CEAJ", above n 30, at 7.

<sup>54</sup> HRW "Chronology", above n 33.

<sup>55</sup> HRW "Submission to CEAJ", above n 30, at 8.

an extradition request from Belgium.<sup>56</sup> Habré was arrested in Senegal pursuant to the arrest warrant. Once again, everything looked promising for a successful prosecution.

Just over a week after Habré had been arrested and placed in custody, the Senegalese State Prosecutor recommended to the Court of Appeals in Dakar that it declare itself without jurisdiction to rule on the extradition request.<sup>57</sup> Almost immediately, the Court upheld the jurisdictional objection.

Thus, Belgium's attempt to prosecute Habré under its universal jurisdiction law has been temporarily, or maybe even permanently, thwarted. Until Belgium has Habré in its custody, this prosecution is in limbo. In 2009, Belgium filed an application with the ICJ alleging that Senegal violated its obligations under the Torture Convention and other obligations at customary international law, by failing to prosecute or extradite Habré.<sup>58</sup> This development, and also the Senegalese court's reasoning for its lack of jurisdiction regarding the extradition request, will be discussed further in chapter three.

#### *d. Regional Involvement*

Following the decision that Senegal lacked jurisdiction to rule on the extradition request, the Interior Minister of Senegal placed Habré at the disposition of the President of the AU and effectively asked the AU what to do about the situation. In response, the AU formed a Committee of Eminent African Jurists (CEAJ) to consider the options available for prosecuting Habré. After receiving the CEAJ's report, on 2 July 2006, the AU called on Senegal to prosecute Habré "on behalf of Africa, by a competent Senegalese court with guarantees for a fair trial".<sup>59</sup>

President Wade concurred with this request and Senegal has since adopted new laws and amended its Constitution so that a trial is now legally possible in Senegal. A lack of resources has been blamed for the delayed commencement of a trial. President Wade stated that the trial would not begin until Senegal received full international

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<sup>56</sup> Ibid, at 6.

<sup>57</sup> Ibid, at 9.

<sup>58</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*.

<sup>59</sup> *Decision on the Hissène Habré Trial and the African Union Doc Assembly/AU/3 (VII) (2006)*.

funding and would not bear any of the cost itself. This obstacle was overcome on 24 November 2010, when international donors met and pledged all the necessary funds, about US \$12 million.<sup>60</sup>

Despite Senegal's prolonged stalling tactics, a trial finally appeared to be a question of when and not if. Habré himself must have been troubled by these developments as in 2008 he brought a complaint before the Court of Justice of the Economic Community of West African States (ECOWAS), a regional tribunal.<sup>61</sup> This court plays a similar role to the European Union's (EU) European Court of Justice and since 2005 has had jurisdiction to take cases from individuals.<sup>62</sup>

The ECOWAS court delivered its judgment on 18 November 2010 which, unfortunately, has had the effect of adding yet another complication to the Habré saga. The court held that Habré can only be tried by an "ad hoc tribunal of an international character" which, it states, has become an international custom in situations like this. It seemed to suggest that prosecution in any other forum would violate the principle of legality, including a Senegalese trial under its amended legislation.

Despite the dubious reasoning of the ECOWAS court, the AU went back to the drawing board and accommodated this ruling into Senegal's mandate. Recently, it was decided that an ad hoc tribunal of an international character would be set up in Senegal,<sup>63</sup> which Senegal agreed to. Even more recently, on 30 May 2011, the Senegalese delegation walked out of negotiations regarding the proposed character of this tribunal. No reason was given for this backwards step, perhaps demonstrating that despite all Senegal's statements and actions to the contrary, the possibility of a trial in Senegal is still very much an illusion and Senegal's lack of political will still very much an obstacle.

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<sup>60</sup> *Progress Report of the Commission on the Hissène Habré Case – African Union Doc Assembly/AU/8 (XVII) (2011) [Progress Report – AU].*

<sup>61</sup> Habré also brought a case before the African Court on Human and Peoples' Rights however this was dismissed as Senegal had not accepted this court's competence to hear individual complaints. See Jan Arno Hessbruegge "ECOWAS Court Judgment in Habré v. Senegal Complicates Prosecution in the Name of Africa" (2010) [sic] 15 ASIL Insight 4 <www.asil.org>.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Decision on the Hissène Habré Case Doc Assembly/AU/9 (XVI) (2011).*

### ***III. The Next Step***

This concludes the Habré saga thus far. The remaining questions are what are the options still available for prosecuting Habré and which will prove to be the most viable.

## CHAPTER TWO

### AN AFRICAN SOLUTION

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There are various reasons to favour an African trial in bringing Habré to justice. One reason is that Habré's prosecution should be carried out as close to Chad as possible to ensure involvement of, and ease of communication with, victims, their families and the general Chadian population. This would "permit Chadian society to confront its past before finally moving on."<sup>64</sup> Secondly, an African trial will help to develop regional capacity and expertise through the judicial experience of trying international crimes which, in turn, will help in dealing with similar situations in future. Finally, Senegal's, and in fact the entire AU's, "credibility in the fight against impunity is on the line in the Habré case."<sup>65</sup> An African solution would prove that the AU is in fact serious about rejecting the impunity of its abusive leaders and also that it can 'pull its weight', so to speak, in punishing them.

#### *I. A Senegalese National Prosecution*

The problems involved in continuing with a Senegalese prosecution before its domestic courts are numerous. First it is necessary to understand the reasoning of the Indicting Chamber in 2000, affirmed by the Cour de Cassation in 2001, which effectively put an end to a national prosecution unless or until legislative changes were made.

##### *a. Analysis of reasoning*

Despite the fact that Habré had only been indicted for complicity in acts of torture, the Indicting Chamber also erroneously dealt with the other two charges originally brought by the complainants; crimes against humanity and barbarous acts.<sup>66</sup> The

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<sup>64</sup> HRW "Victims", above n 11, at 2.

<sup>65</sup> Human Rights Watch "African Union: New Plan for Mixed Court to Try Hissène Habré" (2011) <[www.hrw.org](http://www.hrw.org)> [HRW "Mixed Court"].

<sup>66</sup> Marks, above n 40, at 142.

crimes against humanity charges were dismissed on the grounds that they were not included in Senegal's domestic legislation and "Article 4 of the Criminal Code prevents Senegalese courts from judging crimes not punishable under the law."<sup>67</sup> The barbarous acts charges were not directly addressed.<sup>68</sup>

However, the torture charges posed more of a challenge to the Chamber. The relevant provisions of the Torture Convention oblige state parties to criminalise acts of torture under their criminal law and to take measures to ensure jurisdiction is established over these offences.<sup>69</sup> Although Senegal had incorporated the crime of torture into its national legislation, it was held that the Code of Criminal Procedure did not provide for extra-territorial or universal jurisdiction over offences of torture committed outside Senegal by a foreigner.<sup>70</sup> Thus, despite the Torture Convention, the national courts of Senegal had no competence to pursue the charges of torture, as the alleged crimes were not committed in Senegal. The Cour de Cassation stated that "the presence in Senegal of Hissène Habré cannot in itself justify the proceedings brought against him."<sup>71</sup>

Senegal is a monist country, meaning domestic and international law exist within one single order.<sup>72</sup> Consequently, international treaties are automatically incorporated into domestic law and are thus directly applicable before Senegalese courts with treaty obligations regarded as superior to domestic law. This principle is enshrined in Article 79 of the Senegalese Constitution. However, the Cour de Cassation held that this article "does not apply when the execution of the convention establishes a prior obligation on Senegal to take legislative measures",<sup>73</sup> ie where the treaty is not self-executing. Nonetheless, "[t]he difficulty with the non-self executing argument is that

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Torture Convention, arts 4 and 5.

<sup>70</sup> *Souleymane Guengueng et Autres Contre Hissène Habré*, above n 48. See also Valentina Spiga "Non-retroactivity of Criminal Law A New Chapter in the Hissène Habré Saga" (2011) 9 JICJ 5 at 18.

<sup>71</sup> See *Decisions of the Committee Against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at [3.3], CAT/C/36/D/181/2001 [*Decision of CAT*]. In a subsequent complaint made to the Committee Against Torture (CAT), it was argued that it was exactly this presence under art 5(2) of the Torture Convention which constituted the basis for jurisdiction.

<sup>72</sup> Marks, above n 40, at 159.

<sup>73</sup> Ibid, at 146.

the doctrine is not part of the Senegalese legal system...”<sup>74</sup> Although this issue – failure of a state party to the Torture Convention to provide for universal jurisdiction in domestic law – is not clear in international law, it has been argued that “the appellate court could have used Article 5 or 7 of the Convention to allow the exercise of universal jurisdiction but chose not to for reasons that may be extralegal.”<sup>75</sup>

Another hurdle for the Court to overcome was a previous Cour de Cassation case in which a treaty had been given priority over an inconsistent domestic law. This was distinguished as the previous case concerned administrative law and it was held that criminal law must operate under stricter rules to encourage more certainty in this area.<sup>76</sup>

The decision to nullify the indictment against Habré was questionable, not only in terms of Senegal’s own domestic law and Constitution, but also in regards to international law. Article 27 of the Vienna Convention on the Law of Treaties states that a defect of municipal law cannot be invoked to excuse the failure to implement an obligation under international law. However, “[t]he consequences of a violation of international law resulting from a defect of municipal law are in the realm of international responsibility”,<sup>77</sup> leaving no recourse available for the victims in the Senegalese legal system itself.

Predictably, the decision dismissing the case against Habré was subjected to much criticism from the UN,<sup>78</sup> Senegal’s association of judges, and human rights activists around the world. This disappointing result proved the Senegalese courts’ unwillingness to uphold international law and Senegal’s inability to live up to its obligations.<sup>79</sup> A complaint concerning the outcome in the Senegalese proceedings was brought before the Committee against Torture (CAT), the body responsible for overseeing compliance with the Torture Convention. In 2006 the CAT issued its

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<sup>74</sup> Ibid, at 157.

<sup>75</sup> Ibid, at 159.

<sup>76</sup> Brody, above n 36, at 330-331.

<sup>77</sup> Marks, above n 40, at 157.

<sup>78</sup> The Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture issued a joint communication expressing concern. See Marks, above n 40 at 144-145.

<sup>79</sup> Mandiaye Niang "The Senegalese Legal Framework for the Prosecution of International Crimes" (2009) 7 JICJ 1047 at 1048.

decision that Senegal had not fulfilled its obligations under articles 5(2) and 7 of the convention.<sup>80</sup> It called on Senegal to adopt measures to establish the necessary jurisdiction over acts of torture and also to either prosecute or extradite Habré.<sup>81</sup> Five years on, Senegal has amended its national legislation but Habré has not been prosecuted or extradited.

### ***b. Amendments to legislation and Constitution***

Following the 2005 decision concerning Belgium's extradition request, the Senegalese Government announced that the Habré case was closed.<sup>82</sup> However, the issue was reopened by the subsequent AU resolution mandating Senegal to prosecute Habré. To comply with the mandate, it was necessary for Senegal to amend its Penal Code and Constitution to overcome the jurisdictional obstacles identified above. Although Senegal maintained that these changes were intended to harmonise its national legislation with its ICC obligations, the amendments were effected after the AU mandate and not after Senegal ratified the Rome Statute in 1999.<sup>83</sup>

The Penal Code was substantively amended to incorporate in Senegalese domestic legislation the crimes contained in the Rome Statute: genocide, crimes against humanity and war crimes. In regards to torture, the Code of Criminal Procedure was amended to provide for jurisdiction over international crimes committed extra-territorially. Of the three situations in which this jurisdiction is engaged, one is where the perpetrator is under the "jurisdiction" of Senegal.<sup>84</sup> Assuming that presence in Senegal is within the "jurisdiction" of Senegal, Habré would therefore come within the amendments.<sup>85</sup>

Further, an exception to the ten-year limit for prosecution under the Statute of Limitations was introduced for the ICC crimes. Significantly, the same exception was not made for the crime of torture. This could be a conclusive obstacle to a Senegalese national prosecution, as the ten-year limit for serious crimes would apply to any fresh

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<sup>80</sup> *Decision of CAT*, above n 71, at [9.12].

<sup>81</sup> *Ibid*, at [10].

<sup>82</sup> HRW "Submission to CEAJ", above n 30, at 9.

<sup>83</sup> Spiga, above n 70, at 7.

<sup>84</sup> Senegalese Code of Criminal Procedure, art 669.

<sup>85</sup> Niang, above n 79, at 1057.

torture charges laid against Habré. While crimes against humanity charges would not be barred, so far the Habré litigation has been fought mainly in relation to torture.<sup>86</sup> Perhaps this was simply an oversight by the Senegalese government or perhaps it strengthens the claim that these amendments were indeed intended to align Senegalese law with its ICC obligations.

To give effect to these substantive amendments, they had to be applied retroactively given that Habré's crimes occurred two decades ago. As an exception to the general prohibition against retroactivity, a provision was introduced into the Penal Code providing that "despite the legality principle affirmed in article 4 of the Penal Code, acts considered as criminal, under the general principles of law, recognized by all nations, are punishable, even if no specific provision existed to that effect in the municipal law at the time of their commission."<sup>87</sup> Yet this new provision could still not override the Constitution, which also enshrines the non-retroactivity principle. Thus a new paragraph was added to the Constitution with the effect of incorporating article 15(2) of the International Covenant on Civil and Political Rights (ICCPR).<sup>88</sup> It was hoped that this provision would remove "at least a potential hurdle to the holding of the *Habré* trial".<sup>89</sup>

Article 15 of the ICCPR provides as follows:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was

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<sup>86</sup> Brody, above n 36, at 334.

<sup>87</sup> Senegalese Penal Code, art 431-6. See Niang, above n 79, 1053-1054.

<sup>88</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) [ICCPR].

<sup>89</sup> Niang, above n 79, at 1054.

criminal according to the general principles of law recognized by the community of nations.

*c. Analysis of ECOWAS court reasoning*

As a result of the ECOWAS court judgment, the new provision in the Constitution of Senegal may now have put a complete end to a national Senegalese prosecution. Habré alleged that the new legislative changes following the AU mandate were clearly intended to target him and, if Senegal were to use them against him, it would violate the principle of non-retroactivity set forth in article 15 of the ICCPR. The ECOWAS court agreed with this argument and reasoned that although torture was regarded as an international crime at the time of commission, the AU mandate must be “implemented in accordance with international custom” that “international(ized) tribunals try international crimes, whereas national courts can have jurisdiction only if such crimes had already been incorporated into national law when committed.”<sup>90</sup> On that basis, Senegal would breach article 15 of the ICCPR if it prosecuted Habré under its amended legislation. This conclusion is difficult to comprehend considering the wording and purpose of article 15.

The reference to international law in article 15(1) and the inclusion of article 15(2) makes redundant the argument that a perpetrator of an international crime, under either treaty law or customary international law, can escape punishment because the crime was not part of the national legal framework of the state in question.<sup>91</sup> Article 15 introduces an exception to the general prohibition on retroactivity meaning that violations of international law “may be punished by states parties to the covenant by means of retroactive domestic criminal laws”<sup>92</sup> because otherwise the purpose of this provision would be defeated. The Senegalese amendments simply had a jurisdictional function in allowing national courts to apply the relevant international rules.<sup>93</sup> They did not create new substantive crimes but merely contributed to the “establishment of national mechanisms to prosecute and punish acts that were already prohibited.”<sup>94</sup>

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<sup>90</sup> Hessbruegge, above n 61.

<sup>91</sup> Manfred Nowak *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition ed, N. P. Engel, Arlington, Va., USA, 2005) at 360.

<sup>92</sup> *Ibid*, at 368.

<sup>93</sup> Spiga, above n 70, at 14.

<sup>94</sup> Human Rights Watch “The Trial of Hissène Habré – Time is Running Out for the Victims” (2007) at 18 <[www.hrw.org](http://www.hrw.org)> [HRW “Trial”].

The prohibition against torture was already recognised under customary international law in 1980<sup>95</sup> and thus the principle against non-retroactivity would not be infringed in applying the amended laws to Habré.

The effect of the ECOWAS court judgment appears to be that domestic laws incorporating already proscribed international crimes would violate the principle of non-retroactivity while statutes establishing international ad hoc tribunals would not, even though they have the same function.<sup>96</sup>

This judgment is questionable, to say the least, and left more questions than answers. It is possible the ECOWAS court's reasoning was guided by "political considerations, such as the will of the [AU] not to put the burden of the trial of a former African leader on another African country, or the wish to deliver a collective message against impunity in the continent."<sup>97</sup> A further problem posed by this development is that the ruling is binding on Senegal, as a member state of ECOWAS. Senegal is therefore effectively barred from pursuing a purely domestic prosecution of Habré. In all likelihood, Senegal is content with this outcome as it provides a further justification to avoid prosecuting Habré. This substantiates the claim that even though Senegal may appear to be the "country best suited to try Hissène Habré",<sup>98</sup> it has "evinced a distinct aversion" to doing so.<sup>99</sup> One must ask whether a national prosecution of Habré in the Senegalese courts is, after all this time, merely an illusion.

It will be interesting to see how the ICJ deals with this judgment in the case Belgium has brought against Senegal. In the event of conflict between the two courts the ECOWAS ruling may be overruled in the ICJ proceedings. This will be discussed in depth in the following chapter.

#### ***d. Senegal's legal obligation***

It is important to keep in mind that Senegal is under a legal obligation, contained in the Torture Convention, to prosecute or extradite Habré and it cannot evade this by

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<sup>95</sup> A customary prohibition also existed for genocide, crimes against humanity and war crimes. See Spiga, above n 70, at 17-19.

<sup>96</sup> Ibid, at 22.

<sup>97</sup> Ibid, at 23.

<sup>98</sup> *Progress Report – AU*, above n 60.

<sup>99</sup> Chandra Lekha Sriram "Trying Habré in Senegal: An African Solution to an African Problem?" (2006) *Jurist – Legal News and Research* <[www.jurist.org](http://www.jurist.org)> ["African Solution"].

passing the issue over to the AU. However, the AU sees its role as “assisting the Government of Senegal to achieve its legal obligations”<sup>100</sup> and as such, not taking the responsibility away from Senegal.

## *II. African Ad Hoc Tribunal*

Another potential African solution is that of an ad hoc tribunal which, until very recently, was being pursued with some promise. This option was incorporated into the AU mandate following the ECOWAS court ruling. The suggestion by the ECOWAS court of a custom to create ad hoc tribunals in these situations has also been harshly criticised as “unprecedented, potentially unfair, [and] erroneous.”<sup>101</sup> Adding to the already numerous deficiencies in the judgment, the court did not examine any evidence demonstrating the alleged custom or suggest a possible form for such a tribunal.

It is true that the majority of prosecutions of former heads of state and high-ranking officials for international crimes have been brought before international ad hoc tribunals. However, the reason for this is because, in most of these cases, such tribunals were seen as the only feasible solution due to the states involved being either unwilling or unable to act. Furthermore, there are many examples where similar cases have been tried before national jurisdictions applying retroactive domestic laws,<sup>102</sup> which as already discussed, do not violate the principle of non-retroactivity as the crimes were proscribed by international law at the time of their commission. The fact that the jurisdiction of the ICC defers to the primacy of national courts provides evidence that the state parties to the Rome Statute wanted a permanent international criminal court to be a fallback and secondary solution. This would surely further negate the existence of the claimed customary rule.

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<sup>100</sup> *Progress Report – AU*, above n 60.

<sup>101</sup> Spiga, above n 70, at 21.

<sup>102</sup> William Schabas “Bizarre Ruling on Non-Retroactivity from the ECOWAS court” (2010) PhD Studies in Human Rights <[www.humanrightsdoctorate.blogspot.com](http://www.humanrightsdoctorate.blogspot.com)>. “We have many examples of international crimes being prosecuted ‘retroactively’ by ordinary national jurisdictions...Eichmann, to start with. In Canada, Finta and Munyaneza. And other universal jurisdiction trials in such places as Belgium, the Netherlands, France and, recently, the United States.”

Nevertheless, an African ad hoc tribunal is still an option for dealing with Habré and was suggested as a possibility in the CEAJ Report to the AU. The disadvantages inherent in an ad hoc solution were identified as delay and cost but the CEAJ was of the opinion that “where there is a will, there is a way”,<sup>103</sup> meaning these problems could be overcome if necessary.

The CEAJ indicated that the AU’s power to establish this tribunal is based in various articles of the Constitutive Act of the AU. These articles relate to the AU’s objectives to promote and protect human rights and to reject impunity, and the power of the AU Assembly to establish any organ of the Union.<sup>104</sup> Significantly, article 4(h) gives the AU the right to intervene in a Member State in respect of grave circumstances (namely war crimes, genocide and crimes against humanity). These articles could be collectively relied upon to justify the AU creating a tribunal with the objective of prosecuting Habré. A potential counter-argument could be that the proposed tribunal would not be an ‘organ of the Union’ as it would be a part of the Senegalese legal framework.

A possible issue associated with such a tribunal is whether the AU, as a regional authority, has the requisite authority to establish it without UN authorisation. In the event that the AU invoked its powers under article 4(h) – the right to intervene – this could be regarded as enforcement action by a regional agency under article 53(1) of the UN Charter, therefore requiring Security Council authorisation. However, in my view the AU would be free to pursue this without any such authorisation. The tribunal could be classified under article 52(2) of the Charter as an “effort to achieve pacific settlement” of a local dispute through a regional agency which can be done before referring a matter to the Security Council. Article 33(1) of the Charter, which concerns pacific settlement of disputes, mentions judicial settlement and resort to regional agencies or arrangements as means to achieve this. Accordingly, an ad hoc tribunal in this particular situation would qualify as an effort at pacific settlement and not enforcement action under article 53(1). Perhaps if Senegal did not agree with the

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<sup>103</sup> CEAJ Report, above n 28, at 4.

<sup>104</sup> Constitutive Act of the African Union (signed 11 July 2000), arts 3(h), 4(h), 4(o), 5(1)(d) and 9(1)(d).

establishment of a tribunal in its territory, authorisation would be needed to impose the tribunal on Senegal, which would constitute a more coercive action.

Presumably, this tribunal would be established by an agreement between the AU and Senegal. This would include a statute for the tribunal, which would subsequently have to be incorporated into Senegalese domestic law. Its structure would be similar to the Extraordinary Chambers in the Courts of Cambodia but with regional rather than international involvement. The AU has proposed a mixed court, consisting of “Extraordinary African Chambers...within the Senegalese justice system with the presidents of the trial court and the appeals court appointed by the African Union. The court would prosecute the person or persons "who bear the greatest responsibility" for genocide, crimes against humanity, war crimes and torture committed in Chad from June 1982 to December 1990.”<sup>105</sup>

Following Senegal’s recent and unexplained withdrawal from negotiations with the AU, victims and human rights groups alike stated that this was the last straw. Even an AU Progress Report recognised that following this latest development and given Senegal’s “marginal progress made in the organization of the Hissène Habré trial since 2006”,<sup>106</sup> it may now be necessary to examine other avenues for an African solution. One alternative avenue identified is the establishment of this tribunal in Chad instead of Senegal. However, in view of the factors discussed in chapter one concerning Chad’s unsuitability to try Habré, the Commission concluded that “Chad would need to void the application of the conviction in absentia and the death sentence already imposed upon [Habré].”<sup>107</sup> No further action has been taken on this matter.

### ***III. An African Criminal Court?***

While, in my opinion, this option will not provide a solution in relation to Habré, it may have some application for any analogous situations that arise in future. The AU itself has contemplated empowering its judicial organ – the African Court of Justice

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<sup>105</sup> HRW “Mixed Court”, above n 65. Interestingly, this is similar to the mandate of the Special Court for Sierra Leone.

<sup>106</sup> *Progress Report – AU*, above n 60.

<sup>107</sup> *Ibid.*

and Human Rights<sup>108</sup> – to try international crimes.<sup>109</sup> Currently, this court has no competence over crimes committed by individuals and lacks the infrastructure needed to act as a criminal court. Also, Africa does not possess the necessary regional expertise in trying these crimes and to be effective the court would need ongoing financial and political support. Perhaps the biggest obstacle would be the difficulty of obtaining agreement of all AU Member States. It is most unlikely that African heads of state, many of whom are accused of crimes of a similar nature to Habré,<sup>110</sup> would be willing to “bring into force a mechanism that can try crimes of the past”,<sup>111</sup> as this might amount effectively to signing their own arrest warrants.

#### ***IV. Summary***

Despite the preference from almost all interested parties for an African solution, it has yet to be seen whether this can be achieved. The AU propounds a total rejection of impunity but has not shown itself to be effective in policing grave violations of international crimes and human rights breaches in its member states. Senegal’s ongoing stalling tactics have spanned over a decade now, proving that a Senegalese trial is very much dependent on political will which is still apparently lacking.

In my view, the proposed Extraordinary African Chambers would provide the most satisfactory outcome but whether this will eventuate is quite another matter and, unfortunately, in light of Senegal’s track record, progress in the near future does not look promising.

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<sup>108</sup> Previously, the African Union (AU) had two judicial organs, the African Court of Justice and the African Court of Human and People’s Rights. They were merged in 2008 to create the African Court of Justice and Human Rights.

<sup>109</sup> *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction* at [9], Doc Assembly/AU/Dec. 213 (XII) (2009).

<sup>110</sup> Moghadam, above n 29, at 505.

<sup>111</sup> HRW “Submission to CEAJ”, above n 30, at 23.

## CHAPTER THREE

### BELGIUM

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Another option, which still carries some potential to hold Habré to account, is a prosecution before the national courts of Belgium. As discussed in chapter one, this would be carried out under Belgium's universal jurisdiction laws. This option is currently in legal limbo due to the Senegalese Court of Appeals' ruling that it has no jurisdiction over the extradition request made by Belgium in 2005.

#### *I. Ruling on Extradition Request*

The Senegalese Court of Appeals' decision was based on the fact that, as a former head of state, Habré enjoyed immunity from jurisdiction pursuant to the ICJ judgment in the *Congo v Belgium* case.<sup>112</sup> However, as previously discussed, that same ICJ decision also stated that no immunity can be claimed by a former head of state if it has been waived by the home state, which is the case with Chad and Habré. Thus, this would appear to be a misinterpretation of the ICJ ruling.

Once again, the Senegalese Court of Appeals' reasoning is difficult to follow. The Court suggested that the immunity attaching to the President of Senegal under the Senegalese Constitution could also be accorded to a foreign head of state with the effect of shielding Habré from prosecution. This notion of 'radiating' head of state immunity is unprecedented. It is settled law that immunity derives from the national state and, once waived, cannot be granted by another state, ie the state of residency. Former Senegalese Judge Mandiaye Niang has remarked that this is a very far-reaching holding. It signifies that Habré cannot be tried before any ordinary court in Senegal and, as of today, the decision remains undisturbed. It is unknown whether this ruling will bar fresh prosecutions of Habré or whether it will be confined to the specific issue of extradition.<sup>113</sup> In any event, it is difficult to see how the same

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<sup>112</sup> Ibid, at 9.

<sup>113</sup> Niang, above n 79, at 1056.

Appeals Court, even differently constituted, will now validate a fresh indictment against Habré.<sup>114</sup>

It also seems strange that former head of state immunity was not raised as an argument in the initial Senegalese proceedings, prior to Chad waiving any such immunity attaching to Habré. Presumably, this was because of the *Pinochet* precedent that, as a former head of state, Habré could not rely on immunity for acts of torture<sup>115</sup> - a now widely accepted holding.<sup>116</sup>

Interestingly, the Senegalese legislative amendments in 2007 did not include a provision setting aside immunity attaching to government officials or heads of state, as provided in the Rome Statute. Despite this omission, it is unlikely that immunity will bar any future proceedings in Senegal in regard to Habré due to the CEAJ recommendation that “Habré cannot shield behind the immunity of a former Head of State to defeat the principle of total rejection of impunity” of the AU Assembly.<sup>117</sup>

It may well be that Senegal does in fact lack this jurisdiction, but not for the reason it stated. Rather, because Senegal declared itself incompetent to prosecute Habré in the 2000 proceedings, logically this would mean that Senegal also lacks the jurisdiction to extradite him.

## ***II. Advantages of a Belgian Prosecution***

Most academics, critics and human rights groups agree that priority should be given to an African mechanism.<sup>118</sup> Unfortunately, the probability of such a mechanism being efficient and effective is minimal, leaving “Belgium’s expansive, if controversial, jurisdiction laws...their best hope for justice.”<sup>119</sup> Even the AU itself has recently admitted that the option of a Belgian trial may have to be revisited given “the

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<sup>114</sup> Ibid.

<sup>115</sup> See Marks, above n 40, at 148 “[t]he House of Lords decided that former head of state immunity did not extend to universally condemned international crimes like torture committed or presided over by the accused when he was head of state.”

<sup>116</sup> Ibid, at 149.

<sup>117</sup> CEAJ Report, above n 28, at 3.

<sup>118</sup> See Sriram “African Solution”, above n 99. See also, Sharp, above n 27, at 171.

<sup>119</sup> Sharp, above n 27, at 171.

difficulty to finding an African solution...”<sup>120</sup> Put in more conclusive terms, “the dilemma of Habré [is] not...that of African trial vs. European trial, but of trial elsewhere vs. no trial at all.”<sup>121</sup>

A Belgian prosecution has been identified as the most concrete, realistic and timely option. An investigation has already been carried out resulting in an arrest warrant. So if Senegal were to comply with Belgium’s extradition request, there would be an immediate possibility of a trial. Furthermore, Belgian courts have experience in dealing with international crimes and have held two successful and fair prosecutions relating to Rwanda. In so far as independence and impartiality are concerned, the Human Rights Watch submission to the CEAJ mentioned that Belgium is “politically neutral” as it has no colonial history with Chad.<sup>122</sup> Higher salaries of judges in Europe have also been recognised as encouraging their “relatively independent nature”.<sup>123</sup> The costs of such a trial would be borne by Belgium and there would be no additional cost of establishing a new court.<sup>124</sup>

Significantly, moving Habré’s trial to Belgium finds support from most interested parties. The cooperation of the government of Chad has already proved useful in waiving any immunity that Habré might have claimed. This also bolsters the argument that using universal jurisdiction in these circumstances is considered politically safe given the support of the home state. The victims and the UN alike have endorsed a Belgian solution, namely for the advantages listed above.<sup>125</sup> For a time, even Senegal seemed optimistic with President Wade stating that he could see no obstacle to Belgium organising a fair trial for Habré.<sup>126</sup>

Nevertheless, there are also problems with a Belgian prosecution, most relating to the exercise of universal jurisdiction.

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<sup>120</sup> *Progress Report – AU*, above n 60.

<sup>121</sup> Sriram “African Solution”, above n 99.

<sup>122</sup> HRW “Submission to CEAJ”, above n 30, at 25.

<sup>123</sup> Sharp, above n 27, at 172.

<sup>124</sup> HRW “Submission to CEAJ”, above n 30, at 16.

<sup>125</sup> *Ibid*, at 8. See also Sharp, above n 27, at 171-172.

<sup>126</sup> HRW “Submission to CEAJ”, above n 30, at 7-8.

### ***III. Definition of Universal Jurisdiction***

“[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”<sup>127</sup>

In other words, where all the traditional jurisdictional links are absent, a court may still exercise jurisdiction “under international law over crimes of such exceptional gravity that they affect the fundamental interests of the international community as a whole.”<sup>128</sup> Universal jurisdiction thus functions as a fallback or catch-all option. The doctrine was originally developed to combat piracy but now covers all breaches of peremptory norms – namely, genocide, war crimes, crimes against humanity and torture.<sup>129</sup> The rationale behind universal jurisdiction is that these crimes are so abhorrent and harmful to humankind that they should never go unpunished.<sup>130</sup>

Many academics accept that universal jurisdiction has the potential to be a “potent weapon” in the international fight against impunity. The doctrine “holds the promise of a system of global accountability – justice without borders – administered by the competent courts of all nations on behalf of humankind.”<sup>131</sup>

Despite its promise, the doctrine is currently a very contentious issue in international law. Arguably, it is more debated than actually implemented and where there is practice it is by no means consistent.<sup>132</sup> The ICJ had an opportunity to assess the doctrine in the *Congo v Belgium* case. However, because Congo abandoned its initial objection on this ground, unfortunately the international community was not provided with the benefit of an authoritative pronouncement by the ICJ on universal jurisdiction.

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<sup>127</sup> *The Princeton Principles on Universal Jurisdiction* (Princeton, N.J.: Program in Law and Public Affairs, Princeton University, 2001), Principle 1(1) at 28, available online at <lapa.princeton.edu>.

<sup>128</sup> *Ibid.*, at 23.

<sup>129</sup> Moghadam, above n 29, at 477.

<sup>130</sup> *Ibid.*, at 476.

<sup>131</sup> Stephen Macedo *Universal jurisdiction: national courts and the prosecution of serious crimes under international law* (University of Pennsylvania Press, Philadelphia, 2004) at 4.

<sup>132</sup> Sharp, above n 27, at 149.

### *a. AU attitude towards universal jurisdiction*

Over the last several years, the AU has displayed increasing opposition to the exercise of universal jurisdiction over Africans. The AU's attitude is crucial in relation to the trial of Habré as it has suggested and encouraged an African solution and has proved unwilling to comply with Belgium's extradition request. Moreover, the AU's attitude is significant on a broader level regarding the development of customary international law in this area. It has been observed that the significance of African opposition "should not be underestimated because assessments of the emergence, or existence, of custom may place a higher premium on the views of those states whose interests are specially affected by the evolution of the relevant rule, in this case, regarding universal jurisdiction."<sup>133</sup> Africa can be seen as 'specially affected' because its leaders and war criminals have often found themselves subject to universal jurisdiction investigations. Such were the AU's concerns that it passed several resolutions regarding the perceived abuse of universal jurisdiction and raised the matter at the 11<sup>th</sup> AU-EU Ministerial Troika meeting held on 20-21 November 2008 in Addis Ababa. It was subsequently decided to set up a technical ad hoc expert group to clarify the respective understanding on the African and EU sides of the principle.<sup>134</sup> Thus the criticisms made by the AU and also by critics of the doctrine are worth investigating.

### *b. Criticisms of Universal jurisdiction*

#### *i. Vulnerable to political abuse*

The first major concern regarding universal jurisdiction is the potential for it to be exercised for political reasons. It is feared that it may be employed with the objective of bullying or pestering foreign opponents to settle political scores. Indeed, the AU believes that this has already taken place with European judges targeting African leaders.<sup>135</sup> This is seen as an intrusion into the sovereign authority and territorial

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<sup>133</sup> Jalloh, above n 1, at 4.

<sup>134</sup> Council of the European Union "AU-EU Expert Report on the Principle of Universal Jurisdiction", Doc. 8672/1/09 REV 1 (2009) available online at <[www.universaljurisdiction.org](http://www.universaljurisdiction.org)> ["AU-EU Expert Report"].

<sup>135</sup> Jalloh, above n 1, at 2.

integrity of states<sup>136</sup> and unwelcome meddling in “the sphere of legitimate self-governance”<sup>137</sup>.

Also, unfortunately, there is an element of selectivity with these types of prosecutions due to limited resources and government interests. This works both ways, with governments either choosing to target certain perpetrators or choosing not to continue with a specific prosecution as it would hurt their international relations and reputation. National courts are generally hesitant to act without strong, unambiguous provisions granting them permission to exercise universal jurisdiction and will usually defer to the political will of the state even if jurisdiction is available.<sup>138</sup>

## *ii. Neo-colonialism*

A second criticism is the allegation that universal jurisdiction is being used to undertake a “neo-colonial judicial coup d’état”<sup>139</sup> in an attempt to recolonize Africa. This seems to be at the core of AU opposition. The AU considers that its leaders are being unfairly targeted by former colonial powers.<sup>140</sup> If one were to list the countries allowing for universal jurisdiction in their domestic laws, it could be observed that these correspond with a list of previous colonialist countries.<sup>141</sup> Further, “the legitimacy of nations exercising universal jurisdiction could be undermined by their colonial pasts because prosecutions may be ‘criticized as being motivated by a desire to improve [the country’s] own [post-colonial] national legacy’.”<sup>142</sup> In fact, Belgium’s “regrettable colonial past” was considered in the Human Rights Watch submission to the CEAJ in assessing the viability of a Belgian trial.<sup>143</sup>

Even if one disagrees with this allegation, it cannot be overlooked that universal jurisdiction proceedings have been initiated almost exclusively by countries from the ‘global north’ against leaders and officials from the ‘global south’.<sup>144</sup> This could be

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<sup>136</sup> Geneuss, above n 50, at 946.

<sup>137</sup> Macedo, above n 131, at 3.

<sup>138</sup> Moghadam, above n 29, at 487.

<sup>139</sup> Geneuss, above n 50, at 946.

<sup>140</sup> Although some argue that this claim is exaggerated. See Jalloh, above n 1, at 15-16. See also, “AU-EU Expert Report”, above n 134, at [40].

<sup>141</sup> Moghadam, above n 29, at 484-485.

<sup>142</sup> Ibid, at 486.

<sup>143</sup> HRW “Submission to CEAJ”, above n 30, at 25.

<sup>144</sup> Moghadam, above n 29, at 484.

construed as first world lawyers trying to utilise third world dictators as test cases to experiment with the parameters of this vague doctrine.<sup>145</sup> A Belgian prosecution of Habré would further strengthen this criticism.

### *iii. Practical difficulties*

Thirdly, the practical difficulties involved in implementing universal jurisdiction cannot be ignored. Most of these arise because such prosecutions are generally carried out in locations geographically removed from where the atrocities took place. Difficulties in collecting evidence and accessing victims and witnesses are inevitable. On top of these challenges, national courts are dealing with “criminal offenses with which domestic prosecutors have little experience, but also the prospect of extraterritorial investigations, language barriers, the need to understand the historical and political context in which the alleged crimes occurred...”<sup>146</sup> Henry Kissinger, a vehement opponent of universal jurisdiction, identifies a further problem in that the alleged perpetrator is subjected to an unfamiliar legal system, raising questions of due process safeguards and rights of the accused.<sup>147</sup>

These problems are prominent in the option of a Belgian trial for Habré. The proceedings would be even further removed from Chad which would make it much more difficult for Chadian society to be involved or take any form of regional or national ownership in the prosecution.

These objections to universal jurisdiction have been summed up as follows: “considering the enormous effort and potential expense in collecting evidence, gathering witnesses, and trying accused perpetrators of horrific crimes committed extraterritorially, the motivation for almost every such national proceeding likely would have some foundation in politics or arise from a sense of judicial, and most likely Western, superiority.”<sup>148</sup>

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<sup>145</sup> Sharp, above n 27, at 154.

<sup>146</sup> HRW “Trial”, above n 97, at 12.

<sup>147</sup> Henry A. Kissinger “The Pitfalls of Universal Jurisdiction” (2001) 80(4) Foreign Affairs 86 at 90.

<sup>148</sup> Anthony Sammons “The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts” (2003) 21 Berkeley J.Int'l L. 111 at 138.

### *c. The Princeton Principles on Universal Jurisdiction*

Adding to these flaws is the fact that the doctrine is “not widely understood” as there are “no clear principles of international law to help guide the use of universal jurisdiction”.<sup>149</sup> At present, it cannot be classified as customary international law because state practice is too disparate and the domestic laws dealing with universal jurisdiction are varied and inconsistently applied.<sup>150</sup> For this reason a group of jurists and scholars met at Princeton University in 2001 and developed the Princeton Principles on Universal Jurisdiction.<sup>151</sup>

These Principles clarify the current law on universal jurisdiction and encourage its development. They are intended to help guide “those who believe that national courts have a vital role to play in combating impunity even when traditional jurisdictional connections are absent”,<sup>152</sup> and have been distributed as a document of the General Assembly of the UN.<sup>153</sup> The scholars and jurists responsible for the Principles were all of the opinion that universal jurisdiction is one means to achieve accountability and also, significantly, that there is still a place for universal jurisdiction in spite of the advent of the ICC. The fact that the ICC functions on a basis of complementarity, meaning it defers to the jurisdiction of national courts, is instructive here. Furthermore, it is recognised that the ICC has limited resources and support and will only be able to prosecute a small handful of international criminals. For an effective “antidote to impunity”<sup>154</sup> the ICC must work in conjunction with national legal systems.<sup>155</sup>

Conversely, some scholars argue that given the ICC, there is no current need for universal jurisdiction and, in view of its defects and complexities, this is desirable.<sup>156</sup> The ICC and the doctrine of universal jurisdiction can be seen as pursuing similar goals and thus the ICC should be the preferred option providing “a forum that is free

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<sup>149</sup> Macedo, above n 131, at 4.

<sup>150</sup> *The Princeton Principles on Universal Jurisdiction*, above n 127, at 24.

<sup>151</sup> Macedo, above n 131, at 4.

<sup>152</sup> *The Princeton Principles on Universal Jurisdiction*, above n 127, at 41.

<sup>153</sup> Macedo, above n 131, at 5.

<sup>154</sup> *Ibid*, at 6.

<sup>155</sup> *The Princeton Principles on Universal Jurisdiction*, above n 127, at 16.

<sup>156</sup> Gabriel Bottini "Universal Jurisdiction after the creation of the International Criminal Court" (2003-2004) 36 N.Y.U.J.Int'l Law & Pol. 503 at 505.

of the deficiencies from which universal jurisdiction suffers and respect for human rights is guaranteed.”<sup>157</sup>

All these criticisms and controversies aside, I agree with the authors of the Princeton Principles. I believe universal jurisdiction, if exercised according to a system of clear guidelines, has much potential as a tool of accountability and as a means of overcoming impunity for grave international crimes. To look at this issue from another perspective, one could pose the question that if universal jurisdiction was not available to fill this gap in accountability, what alternative is there? Even fervent critics of universal jurisdiction recognise that there are situations where the only available jurisdiction is universal jurisdiction.<sup>158</sup>

#### ***IV. ICJ Case***

Regardless of the controversies surrounding the exercise of universal jurisdiction, the possibility of a Belgian trial is dependent on the outcome of the case brought before the ICJ by Belgium against Senegal.<sup>159</sup> The Court’s jurisdiction is based on the unilateral declarations made by both Senegal and Belgium accepting the jurisdiction of the Court to solve legal disputes concerning the interpretation or application of a rule of international law.<sup>160</sup> The Torture Convention also itself provides for recourse to the ICJ when negotiation and arbitration procedures have failed.<sup>161</sup>

Belgium contends that Senegal has repeatedly failed to comply with its obligations under the Torture Convention and also that there is a general obligation under international custom to punish crimes against international humanitarian law, which encompasses crimes against humanity.<sup>162</sup> Belgium has requested the Court to declare that Senegal must either prosecute or extradite Habré and also asked for provisional measures requiring Senegal to ensure Habré is kept under its control and surveillance.

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<sup>157</sup> Ibid, at 562.

<sup>158</sup> Ibid, at 561.

<sup>159</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*

<sup>160</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Application Instituting Proceedings)* [2009] General List No. 144 at 13 and 15 [*Belgium v Senegal, Application Instituting Proceedings*]

<sup>161</sup> Torture Convention, art 30.

<sup>162</sup> *Belgium v Senegal, Application Instituting Proceedings*, above n 160, at 13.

These provisional measures were refused because of an assurance from Senegal to the Court that it would not allow Habré to leave its territory.<sup>163</sup>

As for Senegal's obligations under the Torture Convention, "[t]he existence of the obligation is incontestable as [it] is explicit on the face of the Convention"<sup>164</sup> and the CAT has already ruled that Senegal has breached the Torture Convention. Accordingly, the Court will, in all likelihood, declare that Senegal must comply with the Convention and either prosecute Habré or extradite him to Belgium. If this is so, Senegal is bound under the UN Charter to comply with the ruling.<sup>165</sup> In these circumstances, the Torture Convention is functioning on a state-to-state or international level, which is different to a state party applying the Convention domestically against an individual. Senegal cannot invoke any deficiencies in its national laws to escape compliance with an ICJ declaration of an international legal obligation. In the case of Senegal's non-compliance with the ICJ judgment, Belgium would have recourse to possible intervention by the Security Council.<sup>166</sup>

Belgium's argument that there is a customary obligation to prosecute crimes against humanity poses an interesting question. This will be the first time the ICJ has to decide whether there is indeed such an obligation, or merely a right to prosecute these crimes. Belgium asserts such an obligation can be found "in numerous texts of secondary law (institutional acts of international organizations) and treaty law"<sup>167</sup> and thus it would be anomalous if there were no equivalent obligation at customary international law.

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<sup>163</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Provisional Measures)* Summary 2009/3 at 6, available online at <[www.icj-cij.org](http://www.icj-cij.org)>.

<sup>164</sup> Dapo Akande "Belgium brings case against Senegal in the ICJ over Failure to Prosecute Hissène Habré" (2009) EJIL: Talk! <[www.ejiltalk.org](http://www.ejiltalk.org)>.

<sup>165</sup> The Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945), art 94(1) [UN Charter].

<sup>166</sup> UN Charter, art 94(2).

<sup>167</sup> *Belgium v Senegal, Application Instituting Proceedings*, above n 160, at 13. "The obligation to prosecute the perpetrators of such crimes is indicated in the resolutions of the General Assembly of the United Nations (see, for example, resolution 3074 (XXVIII), para. 1), the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 (Art. 9), and in numerous calls by the international community to combat impunity (see, for example, the preamble of the Statute of the ICC, 4th-6th consideranda, the Constitutive Act of the African Union, Article 4 (c), and various Security Council resolutions)."

Recently the International Law Commission has noted that this issue needs to be examined. The Special Rapporteur appointed to consider the issue of the obligation to extradite or prosecute seemed to accept in his report that if states ratify various treaties which all contain the obligation to extradite or prosecute, this indicates a general intention to be bound to such a principle thus forming the basis of a customary law principle on the issue.<sup>168</sup> However, the opposite argument could also be advanced in that if there was a general desire for an obligation to prosecute crimes against humanity, then the interested states could draft a convention as they did with torture and genocide, to give two examples. In my view, it is improbable that the ICJ will rule in Belgium's favour on the existence of the claimed customary obligation. No current treaty creates a positive obligation to prosecute extra-territorially committed international crimes<sup>169</sup> and "evidence of practice to support this would be hard to find".<sup>170</sup>

Senegal has yet to submit its counter-memorial and was recently granted a time extension. However, Senegal will deny the existence of such a custom and assert that Habré is immune from any proceedings as a former head of state, the same argument used to evade Belgium's extradition request. This argument would not be upheld in the ICJ due to the *Pinochet* precedent, namely that former head of state immunity is incompatible with the Torture Convention and "must be deemed to have been implicitly removed."<sup>171</sup> Senegal could also rely on the judgment of the ECOWAS court, by which it is bound, that a prosecution before Senegal's national courts would violate the prohibition against retroactivity.

Of course the ICJ will have to grapple with the reasoning of the ECOWAS court judgment, which, given its dubiousness, may lead to contradictory pronouncements of

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<sup>168</sup> Zdzislaw Galicki, Special Rapporteur *Third report on the obligation to extradite (aut dedere aut judicare)* at [124], A/CN.4/603 (2008).

<sup>169</sup> See Torture Convention, art 7(1) "The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution." See also Genocide Convention, art 6 "Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

<sup>170</sup> Akande, above n 164.

<sup>171</sup> *Ibid.*

law.<sup>172</sup> In this event, the ICJ ruling would prevail due to its status as a truly international court. Under article 92 of the UN Charter, the ICJ is designated as the principal judicial organ of the UN. Article 103 of the Charter states that in the event of conflict between obligations arising under the Charter and other obligations of member states, the Charter obligations prevail. Thus the ICJ ruling would take precedence over the ECOWAS court ruling on Senegal. Also, as already mentioned, under article 94(2) failure to comply with an ICJ judgment may result in the involvement of the Security Council.

#### *V. Summary*

Despite the many legal questions surrounding a Belgian prosecution, it remains a possibility to try Habré. Once again I must reiterate that this is dependent on the decision of the ICJ, which is not expected until 2012. In my opinion, the ICJ will hold that Senegal must comply with its obligations under the Torture Convention and either prosecute Habré itself or extradite him to Belgium.

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<sup>172</sup> Hessbruegge, above n 61.

## CHAPTER FOUR

### AN AD HOC SOLUTION

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The possibility of a more independent autonomous tribunal as a solution to Habré's impunity has attracted little attention. Perhaps this is because creating an entirely new tribunal with the objective of prosecuting one man would be an impractical and overly resource-intensive response. This need not be a definitive impediment as these tribunals have shown a degree of malleability, meaning they can be customised to fit a specific situation. It is worth considering such a tribunal in light of the fact that the alternatives do not presently provide any resolution to this problem. I will explain the various forms these tribunals have taken in an endeavour to determine which would be the most appropriate to prosecute Habré and to assess whether there is in fact any merit in pursuing this course of action.

#### *I. An International Criminal Tribunal*

Such a tribunal can be defined as a “creation of the international community, employing international law and international prosecutors and judges.”<sup>173</sup> At present, there are two methods for creating these tribunals.

##### *a. Tribunal established by Security Council Resolution*

Two well-known examples of such tribunals are the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively). Both tribunals were created by Security Council Resolutions under Chapter VII of the UN Charter. At the time of creating the ICTY, there was considerable disagreement over the power of the Security Council to establish such a body. This course of action was justified by reference to several articles in the UN Charter. First, article 29 gives the Security Council the power to establish “such subsidiary organs as it deems necessary for the

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<sup>173</sup> Chandra Lekha Sriram "Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone" (2005-2006) 29 Fordham Int'l L.J. 472 at 474 ["Wrong-Sizing"].

performance of its functions”. Second, the situation in the former Yugoslavia was deemed to be a threat to international peace and security under article 39, a precondition to the exercise of any enforcement measures. And finally, the establishment of an international criminal tribunal was seen to be a measure “not involving the use of armed force” under article 41, which was subsequently criticised as being a “most far-reaching use” of this article.<sup>174</sup> It is now settled that establishing international criminal tribunals falls within the scope of the Security Council’s Chapter VII powers.<sup>175</sup>

Nevertheless, the ICTY came into being on 25 May 1993<sup>176</sup> and the ICTR followed just over a year later on 8 November 1994.<sup>177</sup> The legality of creation of both tribunals was challenged in the first cases heard before them, *Tadić* and *Kanyabashi*.<sup>178</sup> In both instances, the challenge was dismissed. The Appeals Chambers confirmed the respective situations as constituting threats to international peace and security and affirmed the validity of their establishment and jurisdiction.

In the years following the establishment of the two international criminal tribunals, it became increasingly clear that the Security Council was reluctant to repeat what it had done again.<sup>179</sup> Several factors influenced this unwillingness including the diverging interests of the five permanent members of the Security Council and criticisms of the tribunals themselves. They proved enormously expensive, together accounting for about 15 per cent of the total UN general budget by 2004.<sup>180</sup> In 2009 the ICTR alone had spent over US \$1 billion.<sup>181</sup> Also, the Security Council would not have envisioned that the tribunals would take almost 20 years to fulfil their mandates. Completion strategies have been undertaken for both the ICTY and the ICTR, which have had to be extended several times. The Security Council has now made it clear that their work will be finished by 31 December 2014 with any remaining issues to be dealt with by the International Residual Mechanism for Criminal Tribunals. Further criticisms are

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<sup>174</sup> Schabas, above n 8, at 22.

<sup>175</sup> *Ibid*, at 53.

<sup>176</sup> SC Res 827, UN Doc S/Res/827 (1993).

<sup>177</sup> SC Res 955, UN Doc S/Res/955 (1994).

<sup>178</sup> *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at [301]. *Kanyabashi* (ICTR-96-15-T), Decision on Jurisdiction, 18 June 1997 at [20].

<sup>179</sup> Schabas, above n 8, at 32.

<sup>180</sup> *Ibid*, at 6.

<sup>181</sup> Fiss, above n 31, at 66.

the “physical and psychological distance”<sup>182</sup> between the trials and local populations of the countries where the atrocities occurred,<sup>183</sup> and also that the two tribunals are ill-equipped to deal with more than a handful of cases.<sup>184</sup>

This leads to the conclusion that the possibility of such a tribunal being established as a solution to Habré’s impunity is negligible. It is unlikely the Security Council would classify this specific situation as a threat to international peace and security under article 39 of the UN Charter. The crimes Habré is accused of took place two decades ago and Habré has been living peacefully in Senegal ever since. Although a potential argument could be made that Habré’s impunity threatens the stability of the region, this would probably not prompt the Security Council to act.<sup>185</sup> Furthermore, a tribunal of this form would be unsuitable to try only Habré himself.

#### ***b. Tribunal established by agreement***

The Special Court for Sierra Leone (SCSL) provides another possible model for an international criminal tribunal. It was a more modest attempt at a criminal tribunal in light of the huge expense involved with the ICTY and ICTR. On 14 August 2000, the Security Council adopted Resolution 1315, instructing the UN Secretary-General to proceed with the negotiation of an agreement with the government of Sierra Leone to establish an “independent special court”.<sup>186</sup> This was in response to crimes committed during the Sierra Leone Civil War. Consequently, a bilateral treaty between the UN and the Sierra Leonean government was signed on 16 January 2002 bringing into being a “treaty-based sui generis court of mixed jurisdiction and composition”.<sup>187</sup>

The SCSL is unique in that it can be conceived of as a hybrid court as well as an international tribunal. It has both national and international elements, including a mixture of applicable law and personnel. On the other hand, the SCSL is different to

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<sup>182</sup> Ibid, at 62.

<sup>183</sup> The ICTY is seated in The Hague and the ICTR in Arusha, United Republic of Tanzania.

<sup>184</sup> Laura A. Dickinson "The Promise of Hybrid Courts" (2003) 97(2) AJIL 295 at 302.

<sup>185</sup> This argument was made in the Report of the Group of Experts for Cambodia in relation to former Khmer Rouge leaders. See *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135* at [141], UN GOAR, 53rd sess, agenda item 110(b) (1999).

<sup>186</sup> SC Res 1315 at [1], UN Doc S/Res/1315 (2000).

<sup>187</sup> *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* at [9], UN Doc S/2000/915 (2000).

other truly hybrid ventures undertaken by the UN in that it is an international tribunal independent of the domestic law and legal system, meaning it has primacy over the national courts of Sierra Leone.<sup>188</sup> Its creation is viewed as having emanated from the Security Council, even if somewhat indirectly.<sup>189</sup> An interesting question that arose before the SCSL was whether a treaty-based international ad hoc tribunal could exercise jurisdiction that cannot be exercised by the national courts of the state that created it. The Special Court responded that because it was established to fulfil an international mandate and is part of the machinery of international justice, it can exercise jurisdiction that does not already reside within the authority of the government of Sierra Leone.<sup>190</sup>

The legitimacy of the Special Court was challenged in one of the first cases before the SCSL, *Kallon*.<sup>191</sup> In rejecting this challenge, the Appeals Chamber affirmed the Security Council's power to establish international criminal tribunals and held that it had not acted unlawfully in delegating authority to the Secretary-General to negotiate the formation of the SCSL because, under article 98 of the UN Charter, the Secretary-General is required to perform such functions as are entrusted to him by the Security Council.

One issue regarding the SCSL is to what extent it can affect the rights of third states. Unlike the ICTY and ICTR, which were created by binding Security Council resolutions, third states are not legally bound to cooperate with the SCSL. This issue arose when the SCSL indicted Charles Taylor, President of neighbouring Liberia, in 2003. Fortunately, Nigeria, where Taylor was living in exile, and Liberia both eventually cooperated and Taylor was handed over to the SCSL in March 2006. This demonstrates a weakness of this type of tribunal, namely that it will be reliant on the voluntary cooperation of third states.

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<sup>188</sup> In *Kallon* the Appeals Chamber of the SCSL held that it is an international tribunal and was established outside the national court system of Sierra Leone. See *Kallon et al.* (SCSL-04-14, 15 and 16-AR72(E)), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004 at [49].

<sup>189</sup> Schabas, above n 8, at 55.

<sup>190</sup> *Taylor* (SCSL-03-01-I), Decision on Immunity from Jurisdiction, 31 May 2004 at [30].

<sup>191</sup> *Kallon et al.*, above n 188.

Again, the SCSL does not provide a suitable model for a potential tribunal to prosecute Habré. It is still too costly (it is expected to cost about US \$57 million<sup>192</sup>) and large to warrant establishing a similar institution in Senegal. Furthermore, “[a]bsent a determination that issues of international peace and security are involved, it is questionable whether the Security Council has jurisdiction to act with respect to criminal justice issues.”<sup>193</sup> In Resolution 1315 the Security Council did not explicitly state that it was acting under its Chapter VII powers but it did say the situation in Sierra Leone continued to constitute a threat to international peace and security. As mentioned above, it would be difficult to classify Habré’s situation as such a threat.

## ***II. A Hybrid Tribunal***

In my opinion some form of hybrid tribunal would provide the best fit with the circumstances of Habré’s case.

### ***a. ‘International’ hybrid tribunal***

This category represents the most recent generation of ad hoc tribunals. A hybrid tribunal is a court of mixed judicial composition where “both the institutional apparatus and the applicable law consist of a blend of the international and the domestic.”<sup>194</sup> These hybrid tribunals are argued by some to provide a perfect middle ground between purely international tribunals on one hand, and national prosecutions on the other, assimilating the benefits of both while seeking to remedy their shortcomings.<sup>195</sup> Examples of such tribunals include hybrid courts in Kosovo and East Timor, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and most recently, the Special Tribunal for Lebanon (STL).

The advantages associated with this latest development in the field of international justice are numerous. First, the existing hybrid tribunals are all situated in the countries where the crimes occurred, offering a degree of proximity lacking with the ICTY and ICTR. Hybrid tribunals can thus more easily reach the local society.

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<sup>192</sup> Chandra Lekha Sriram "New mechanisms, old problems? Recent books on universal jurisdiction and mixed tribunals." (2004) 80(5) *International Affairs* 971 at 976 [“New mechanisms”].

<sup>193</sup> Schabas, above n 8, at 68-69.

<sup>194</sup> Dickinson, above n 184, at 295.

<sup>195</sup> Sriram “New mechanisms”, above n 192, at 975-976. See also Moghadam, above n 29, at 494.

Second, hybrids can be tailored to a specific situation, signalling an element of flexibility. This is evidenced by the fact that hybrid tribunals have been established in varying forms and contexts, recognising that each situation of conflict is entirely unique and that there can be no “cookie-cutter solutions to these highly complex problems”.<sup>196</sup> The international element contributes to the legitimacy of the tribunal within the local population by adding an increased perception of impartiality and independence, while the domestic influence means the court is better suited to the needs of the post-conflict state. These tribunals are considerably more cost-effective than their international counterparts and, finally, the local judges benefit from exposure to international justice and training in this area, which plays a part in building the capacity of the local judiciary.

The ECCC and STL were both created by agreements between the UN General Assembly and the governments of Cambodia and Lebanon respectively. The ECCC came into being after the agreement was ratified and incorporated into domestic law by the Cambodian government. It is “a Cambodian court with international participation that will apply international standards”,<sup>197</sup> meaning it is part of the existing court structure in Cambodia with a panel of Cambodian and international judges applying Cambodian law.<sup>198</sup> Conversely, the STL agreement was not ratified by the Lebanese parliament, which compelled the Security Council to bring the agreement into effect by means of Resolution 1757 with the agreement and statute of the tribunal annexed.<sup>199</sup> On one view, this would bring the STL closer to a resolution-based tribunal than a treaty-based tribunal. Arguably, Resolution 1757 established the STL pursuant to the Security Council’s Chapter VII powers, as the Security Council has no unilateral power to impose treaty obligations on member states. Another interesting aspect of the STL is that the preamble of its statute refers to it as a “tribunal of an international character”, which is inconsistent with the use of the word ‘special’ in its title. Although the STL has certain international elements, its jurisdiction is confined to Lebanese national law.

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<sup>196</sup> Dickinson, above n 184, at 306.

<sup>197</sup> “Introduction to the ECCC” Extraordinary Chambers in the Courts of Cambodia <[www.eccc.gov.kh/en/](http://www.eccc.gov.kh/en/)> last accessed 8 October 2011.

<sup>198</sup> Moghadam, above n 29, at 493.

<sup>199</sup> SC Res 1757 at [1], UN Doc S/Res/1757 (2007).

In February 2011, the Appeals Chamber of the STL itself issued an interlocutory decision in which the judges gave their view on the character of the STL, its mandate and applicable law. This decision held that “the Tribunal is authorized to construe Lebanese law with the assistance of international treaty and customary law that is binding on Lebanon” regarding the crime of terrorism.<sup>200</sup> Since, there is no mandate in the STL’s statute to act under international law, this is somewhat of a landmark decision. In this decision, the STL is referred to as an “international court” but the Tribunal leaves unanswered the question of whether the STL is a treaty- or resolution-based creation.<sup>201</sup>

The tribunals in Kosovo and East Timor are different again in that they were established “through domestic regulations forming specialized panels of international and national judges with jurisdiction over the most serious crimes against international law.”<sup>202</sup>

These various examples demonstrate the claimed flexibility of hybrid tribunals. The mandate and structure of each has been adapted to fit the specific situation or conflict in an attempt to provide the best response and, as the interlocutory decision by the STL shows, the judges are ready to engage in the development of international law.<sup>203</sup> The potential benefits of such an approach being pursued in relation to Habré are obvious. The most appropriate model to follow, as identified by the AU, would be the ECCC by creating Extraordinary African Chambers in Senegal. The ECCC was created to prosecute senior members of the Khmer Rouge, not as a response to a current or even recent conflict.<sup>204</sup> This would be analogous in Habré’s case as his crimes were committed some time ago. Following the precedent of the ECCC, an agreement could be negotiated between the UN General Assembly and Senegal creating this tribunal, incorporating UN support and personnel into a Senegalese setting. The international involvement would hopefully provide a barrier to any

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<sup>200</sup> “Summary of President Cassese’s speech” (2011) Special Tribunal for Lebanon (STL) <[www.stl-tsl.org](http://www.stl-tsl.org)>.

<sup>201</sup> *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL-11-01/I), 16 February 2011 at [26] [*Interlocutory Decision*].

<sup>202</sup> Moghadam, above n 29, at 493.

<sup>203</sup> The Appeals Chamber of the STL held that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has emerged. See *Interlocutory Decision*, above n 201, at [85].

<sup>204</sup> The atrocities committed took place in the seventies.

further political meddling from Senegal. If the Senegalese Parliament was not forthcoming in agreeing or incorporating the agreement into national law, as in Lebanon the Security Council could step in to enforce the agreement by resolution and impose the tribunal. Alternatively, if Senegal was unwilling to undertake such a venture, an agreement could conceivably be made between the UN and Chad. Care would need to be taken to ensure that Chad was in fact capable of implementing such a tribunal given the problems identified in chapter one.

Plans to establish both the ECCC and STL were originally initiated by the Prime Ministers of Cambodia and Lebanon. Each wrote a letter to the UN asking for assistance in forming tribunals to deal with a specific situation. Similarly, President Wade could make such a request to the UN or, failing that, President Deby of Chad or even the President of the AU Commission.

One identifiable setback is that no tribunal, international or hybrid, has ever been established to try one man. The narrowest mandate belongs to the STL which, subject to an extension, has jurisdiction principally over one incident and potentially over other connected incidents,<sup>205</sup> but even this is broader than just Habré. Of course, it is acknowledged that Habré did not work alone in committing his crimes. Thus perhaps the obstacle could be overcome by formulating a broader mandate for any future tribunal. The AU may already have realised this potential challenge as it suggested that its Extraordinary African Chambers be permitted to try persons bearing the greatest responsibilities for the atrocities committed in Chad. Many of those fitting this description are members of the Chadian government but presumably any issues of immunity could be overcome due to the international element of the tribunal. Of course, cooperation from the Chadian government would be preferable, though perhaps not so easily obtainable in these circumstances.

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<sup>205</sup> The mandate of the STL is to try “persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks.” Statute of the Special Tribunal for Lebanon, art 1, UN Doc S/Res/1757 (2007).

All of these tribunals have been established in conjunction with the state where the conflict or atrocities occurred. One fundamental difference with the Habré case is that the tribunal would most likely be negotiated with Senegal, although Chad would probably be forthcoming with its consent and cooperation. Consequently, there would need to be a concerted effort to ensure Chad's inclusion in the proceedings, though evidently this is an issue for whichever option is ultimately undertaken. In addition, perhaps one of the major objectives of these tribunals – reconciliation and maintenance of peace in the post-conflict state – would be made redundant with a Senegalese-based tribunal. In my opinion, it would still be effective in affirming the African commitment to rejecting impunity and promoting justice and, further, in helping the region to deal with similar situations in future.

***b. 'National' hybrid tribunal***

One final possibility could be a tribunal created by two or more states without any international support. The establishment of such a tribunal between Senegal and Belgium has been discussed in some research.<sup>206</sup> A tribunal of this nature, ie between two states, would set a precedent, although it could be viewed as a relative of the Nuremburg Trials and also the ICC, both multinational tribunals created by groups of states acting together. The justification for the Nuremburg Tribunal was that the Allies did together what any one of them might have done singly.<sup>207</sup> This precedent provides the authority that sovereign states can delegate power to an international tribunal, in whose creation they participate, as illustrated by the creation of the ICC.<sup>208</sup>

Arguably, both Belgium and Senegal now have the necessary legislation and jurisdiction to undertake Habré's prosecution.<sup>209</sup> This counters the legal objection that together they would be doing something they are not competent to do alone. Acting jointly makes sense from a practical point of view. Belgium has already conducted an extensive investigation into the charges laid against Habré and also possesses significant experience in prosecuting international crimes. The tribunal would be

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<sup>206</sup> Moghadam, above n 29, at 475.

<sup>207</sup> Schabas, above n 8, at 7.

<sup>208</sup> Ibid, at 54.

<sup>209</sup> Although Senegal's Statute of Limitations would still pose a barrier to torture charges.

situated in Senegal to quell concerns about distance from Chad but also to enable regional capacity building by having local Senegalese judges sit alongside their Belgian counterparts. A Belgian role may have the same effect that international involvement has had in the international hybrid tribunals. It would increase the perception of impartiality and independence of the tribunal and there is little chance that the Belgian judges would succumb to political pressure from Senegalese politicians.

It should be noted that “international law has relatively little to say about the authority of sovereign states to establish courts and to define crimes over which they have jurisdiction.”<sup>210</sup> But states are “entitled to punish crimes to the extent that they do not encroach upon the sovereign authority of other states”.<sup>211</sup> Accordingly, the precedent set by the ICC’s creation would suggest that this tribunal could be established pursuant to a bilateral treaty between Belgium and Senegal. Any issues surrounding immunities would be overcome given the cooperation of the Chadian government. Furthermore, the treaty would be governed by international law which would endow the tribunal with an international mandate.

An alternative course of action would be a less autonomous tribunal, more “along the lines of the special units created by domestic regulation in East Timor, Kosovo, or Bosnia and Herzegovina.”<sup>212</sup> This would be, in essence, a Senegalese tribunal with a strong element of judicial cooperation from Belgian judges, investigators, and prosecutors participating on these panels “to share their growing expertise as adjudicators of international crimes.”<sup>213</sup> This is a less contentious, and thus perhaps more realistic, option. The results of the Belgian investigation would be incorporated, the advantage being that any fresh trial would not be delayed by the need to conduct a completely new investigation. The benefit of this option is that it does not require the construction of a new institution or training of new personnel. The trial would be a sort of Belgian-Senegalese ‘joint venture’.

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<sup>210</sup> Schabas, above n 8, at 67.

<sup>211</sup> *SS Lotus (France v Turkey)* [1927] PCIJ Ser. A (Judgments) No. 10 (Judgment No. 9) (1929). See Schabas, above n 8, at 67.

<sup>212</sup> Moghadam, above n 29, at 508-509.

<sup>213</sup> *Ibid*, at 509.

### *III. Summary*

A hybrid tribunal, whether with international involvement or not, remains a viable option to prosecute Habré. Seemingly, this solution would provide the best of both worlds and would probably be accepted by most involved parties. Whether or not the international community and states involved view this solution as feasible and realistic to prosecute one man remains to be seen. In my opinion, prosecuting Habré alone is unlikely to be regarded as serious enough to warrant the establishment of an international tribunal. The most realistic path to take would be a Senegalese trial with judicial assistance from Belgium along with incorporation of the Belgian investigation results.

## CONCLUSION

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With so many factors to take into consideration and a range of possible options, it is difficult to say one way or another which presents the best resolution to the problem posed by Habré's impunity. Nevertheless, I will summarise my conclusions to identify the most appropriate forum in which to prosecute Habré. I will also offer some reflections on a possible course of action for similar situations arising in future.

Regardless of which option is chosen, Habré's trial will be costly and time consuming. It is therefore better to focus on which solution can provide the most effective outcome, in the sense of a successful prosecution. I agree with the general consensus that an African solution is the most preferable in dealing with African problems. In the best-case scenario, Habré would be tried by a court with some knowledge and understanding of the historical and social context of his crimes. An African trial would have a much more profound impact in Chad by facilitating confrontation with its difficult past, but also more widely in the region by sending a definitive message rejecting impunity and finally putting words into action in actually conducting a trial. Unfortunately, the political will is seriously lacking. The cliché 'one step forward, two steps back' is fitting to describe the series of events surrounding Habré's trial as every development has been thwarted by a never-ending deluge of obstacles.

As things currently stand, a national Senegalese prosecution is a legal impossibility due to the binding nature of the ECOWAS court judgment and the exclusion of torture from the amendment to Senegal's Statute of Limitations. Furthermore, the reluctance of the Senegalese government to undertake this prosecution has proved debilitating. Senegal could still fulfil its international obligations under the Torture Convention by extraditing Habré to Belgium, assuming the ICJ rules that Senegal is bound to do so in the forthcoming judgment.

The possibility of an African ad hoc tribunal is more promising, yet still vulnerable to Senegalese unwillingness. Perhaps if Senegal comes under enough pressure from the

AU and the international community alike, it will be goaded into accepting such an initiative.

I am thus led to the rather disheartening conclusion that, despite the preferability of an African trial for Habré, this is not plausible, at least in the near future.

The advantages of an ad hoc tribunal are numerous. International involvement in a tribunal resembling the ECCC, or Belgian involvement in a more national hybrid, would hinder political meddling from Senegal and also increase the perception of legitimacy of the trial. Senegal, and Africa more generally, would benefit from the experience of judges with expert knowledge of international law – a helpful starting point for African judges to be able to manage these prosecutions in future. Alas, the disadvantages may outweigh their counterparts. In all likelihood, the narrow mandate of any potential tribunal, ie prosecuting only Habré, would make it difficult to justify its existence. The logistics and cost associated with these types of tribunal suggest that in this particular case, there is probably an easier and cheaper way to achieve results. This perhaps explains why this option has not been explored in relation to Habré.

Furthermore, the establishment of an ad hoc tribunal would be the most contentious option as it has the most legal hurdles to overcome. No doubt Habré will challenge the legitimacy and jurisdiction of whatever court or tribunal eventually tries him, meaning it is best to take the least controversial route.

In light of Africa's unsuitability and the difficulties involved in establishing an ad hoc tribunal, a Belgian trial is better than no trial at all for the purposes of accountability and justice. The risk inherent in this option is that it could result in a "hollow courtroom victory"<sup>214</sup> due to its distance and lack of involvement from Chad and the fact that it goes against the wishes of the AU. Although justice would be served on a symbolic level, the situation in post-conflict Chad would remain unchanged.<sup>215</sup> A successful prosecution may also be undermined by objections to the doctrine of universal jurisdiction. However, as pointed out in the AU-EU Expert Report on

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<sup>214</sup> Sharp, above n 27, at 172.

<sup>215</sup> Ibid, at 172-173.

Universal Jurisdiction, the African concerns about this doctrine “need to be backed by a real willingness on the part of African states to prosecute the relevant crimes themselves.”<sup>216</sup> And as of yet, the AU has still to prove that it has some bite to its bark in its fight against impunity. With this type of prosecution, the victims get their day in court and it is “still possible to provide a degree of retributive and corrective justice for the voiceless victims of mass atrocities”.<sup>217</sup> The Belgian option would provide the most efficient solution and is the most feasible. This will only happen now if the ICJ decides that Senegal must either prosecute or extradite Habré and Senegal complies by extraditing him.

In my opinion, the ideal solution would be an African ad hoc tribunal with Belgian involvement and incorporation of the Belgian investigation. This combines the benefits of both these options to create a ‘perfect fit’ solution.

As for the future, one must face the somewhat cynical reality that these situations will become fewer due to the advancing ages of former dictators. The African Court of Justice and Human Rights, as already discussed, is not capable of providing a solution in Habré’s case. Nonetheless, its development in the area of criminal law should be encouraged in order to build regional judicial capacity. African states should be urged to extend the competence of the Court to enable it to meet any future prosecutions of former African dictators. As for prospective situations, ie future African dictators, hopefully the ICC will fulfil its objective in this sphere.

It has been suggested that “examining the Habré case in some detail may reveal strategies that might be used in future prosecutions of this sort to make a meaningful, sustained mark on the countries where prosecutions are held and from where the victims come.”<sup>218</sup> However, it seems to me that these situations are always going to be so unique and context-specific that a solution for one situation will not necessarily be appropriate for another. The value of international law is that it continues to adapt and develop, promising “ever-increasing avenues to pursue justice”.<sup>219</sup>

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<sup>216</sup> “AU-EU Expert Report”, above n 134, at 39.

<sup>217</sup> Marks, above n 40, at 167.

<sup>218</sup> Sharp, above n 27, at 165.

<sup>219</sup> Sriram “New mechanisms”, above n 192, at 979.

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