

# The *Pinochet* Precedent in Africa: Prosecution of Hissène Habré

by Inbal Sansani\*

The October 1998 arrest of former Chilean dictator Augusto Pinochet in London warned dictators worldwide that international impunity for gross human rights violations is no longer guaranteed. The February 2000 indictment of former Chadian dictator Hissène Habré in Senegal confirmed that the *Pinochet* case was not an isolated attempt at forcing accountability, but that victims of human rights abuses would indeed use the *Pinochet* example to seek justice against their perpetrators. Although Pinochet's arrest and subsequent legal proceeding in the United Kingdom signaled a positive development in the operation of transnational justice, precarious legal and political realities remain valid concerns. The *Habré* case reflects this spectrum of dramatic legal advances and setbacks.

On February 3, 2000, Dakar Regional Court (Court) in Senegal indicted Habré, Chad's exiled former dictator, on charges of being an accomplice to torture. The arrest of Habré, now 57 years old, marked the first time an African head of state had been indicted by the Court of another African country. The elation felt by the victims surrounding Habré's indictment was short-lived. On July 4, 2000, in a decision heavily criticized nationally and internationally, a three-member Indicting Chamber (Chamber) dismissed the charges against Habré. Despite Senegal's 1986 ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which promotes the principle of universal jurisdiction, the Chamber ruled that Senegalese courts did not have jurisdiction to arbitrate this controversy. The Chamber quashed Habré's indictment on the grounds that Senegal was an improper venue for his trial because his crimes had not been committed there.

Habré's prosecutors argue that the principle of universal jurisdiction articulated in the "no safe haven" provision in Article 7 of the CAT, expressly obliges states to either prosecute or extradite alleged torturers in its territory, making Senegal an appropriate forum for this indictment. The Chamber's decision is currently on appeal before the *Cour de Cassation* (Supreme Court), Senegal's highest court, which was expected to hear the case on March 6, 2001. Both the principle of universal jurisdiction and the *Pinochet* precedent dictate that Habré can and should be prosecuted in Senegal, and that the Chamber's decision to quash his indictment should be reversed.

## Background

Hissène Habré, also known as the "Desert Fox," rose to power in Chad, a former French colony, in 1982 by overthrowing the government of Goukouni Wedeye. The United States and France provided Habré's one-party regime with hundreds of millions of dollars and helped train his intelligence service in order to maintain an anti-communist presence in North Africa. The United States and France supported Habré despite widespread evidence that he orchestrated extensive human rights abuses, including extrajudicial killings and torture.

In 1990, Habré was deposed in a civil war by Chad's current president Idriss Deby, Habré's former minister of defense and military chief of staff. Habré subsequently fled Chad and sought exile in Senegal. In 1992, Deby commissioned respected jurists to investigate the human rights abuses of the

Habré years. This Truth Commission (Commission) accused Habré's government of "tens of thousands of political murders and systematic torture." According to the Commission, Habré's National Security Service, the *Direction de la Documentation et de la Sécurité* (DDS) carried out most of the arrests, torture, assassinations, and large-scale massacres. Habré specifically targeted various ethnic groups in Chad, such as the Sara, Hadjerai, and the Zaghawa on the alleged basis that they posed a threat to his rule. Under his rule, the DDS killed an estimated 40,000 people and tortured an estimated 200,000 people.

Although the Commission recommended the immediate prosecution of those responsible for the Habré regime's crimes, the Deby government failed to pursue its recommendations because Deby and many ranking officials of his government had executed Habré's orders and were thus involved in the crimes.

## Universal Jurisdiction and the Principle of *Aut Dedere Aut Judicare*

Universal jurisdiction—the authority of domestic courts to prosecute certain crimes committed abroad by and against foreign citizens—is a facet of extraterritorial jurisdiction. It recognizes that all states must help bring to justice the perpetrators of particular crimes of international concern, no matter where the crime was committed, and regardless of the

nationality of the perpetrators or their victims. There are four traditional theories of criminal jurisdiction: territorial (applicable when a crime occurs in the prosecuting nation's territory); active personality (defined by the nationality of the perpetrator); passive personality (defined by the nationality of the victim); and protective (applicable when a crime violates a nation's particular interest or security). Universal jurisdiction is an exception to international law's

traditional requirements of national or territorial links, and is applicable to those whose criminal acts render them *hostes humani generis*, the enemies of all humankind. Such acts often are committed by those who act from, or flee to, a foreign jurisdiction, or by those who act under the protection of the state. Therefore, the other jurisdictional bases are insufficient to hold such perpetrators accountable. As the only jurisdictional principle that does not require a nexus between the criminal act and the prosecuting nation, universal jurisdiction grants the broadest range of jurisdictional power. Piracy is generally cited as the original subject of universal jurisdiction. Following its extension to slave trading, the law of universal jurisdiction greatly expanded as a result of the post-World War II war crimes trials. The Nuremberg Tribunal expanded universal jurisdiction to apply to genocide, crimes against humanity, and war crimes.

In addition to customary international law, certain international treaties such as the 1949 Geneva Conventions (for example, see Articles 146 and 147 of the Fourth Geneva Convention) and the CAT (Article 7) enumerate the types of crimes that give rise to universal jurisdiction. The principle of *aut dedere aut judicare*—"either extradite or prosecute"—is explicitly delineated in these instruments. Pursuant to this prin-

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principle, international treaties oblige states parties to either try or extradite those believed to have committed them. According to Senior Coordinator of the Lawyers Committee for Human Rights' International Justice Program Bruce Broomhall, in "ordinary usage, 'universal jurisdiction' encompasses both *permissive* and *mandatory* forms, where a state *may* and where a state *must* exercise jurisdiction," a differentiation which "largely parallels the distinction between the doctrine's manifestations under customary and under conventional international law." Universal jurisdiction becomes mandatory once a state ratifies or accedes to a treaty that mandates it, like the Geneva Conventions or the CAT. Permissible universal jurisdiction is more sweeping; it is exercised as a matter of custom, rather than only as a party to a convention.

The interpretation of universal jurisdiction of the state in which such a case is brought will ultimately decide whether a prosecution may proceed. The doctrine's inherent reliance on national authorities to enforce international norms makes its application difficult. Broomhall asserts that because national courts exercising universal jurisdiction are endowed with the "*de facto* status of agents of the international community," pivotal decisions may reflect domestic decision-makers' calculations regarding justice, the national interest, and other criteria. Indeed, government interference with the judiciary in the *Habré* case, which the Union of Senegalese Judges deplored as "repeated violations" of the Constitution and Senegalese law, suggests that the government forced the judiciary to act with a political agenda.

#### Application of Universal Jurisdiction in *Pinochet*

The authority of the Spanish judge Baltazar Garzón to order Pinochet's arrest on the grounds of universal jurisdiction was a striking feature of the Pinochet controversy. Spain's arrest of Pinochet was grounded in a domestic statute incorporating the principle of universal jurisdiction. Specifically, the Spanish courts validated their jurisdiction on Article 23.4 of the Spanish Judicial Law, which allows prosecution of

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non-Spanish citizens for certain crimes committed outside Spain, among them genocide, terrorism, and other crimes under international law contained in treaties ratified by Spain. The Spanish courts considered three factors: the relevant legislation passage dates; whether the legislation was substantive or procedural and thus applicable to conduct occurring before its passage; and its relationship to an earlier Spanish law allowing for extraterritorial prosecutions. Although the Spanish courts discussed universal jurisdiction, they ultimately grounded their decision in the domestic statute. Judge Garzón requested the United Kingdom arrest and extradite Pinochet to Spain when he arrived in London for medical treatment. In Britain, the House of Lords' grounds for jurisdiction over Pinochet relied on nationally implemented legislation of the CAT, which provided for universal jurisdiction. The House of Lords determined that torture could only be considered an extraditable crime after the U.K.'s 1988 ratification of the CAT. It was the incorporation of Article 7 of the CAT into the U.K.'s domes-



Photo courtesy of Corbis Sygma

Chadian plaintiffs with their supporters and Senegalese lawyers at the Dakar courthouse after giving testimony against Hissène Habré, January 2000.

tic law, not the underlying customary law norm, which granted jurisdiction over Pinochet. Senegal's signatory status to the CAT suggests that its national courts have comparable power.

#### Legal and Political Trials in Senegal

##### *Genesis of the Case*

In early 1999, Delphine Djiraibe, President of the Chadian Association for the Promotion and Defense of Human Rights, requested the assistance of Human Rights Watch (HRW) in bringing Habré to justice in Senegal. Although Senegal has served as Habré's "safe haven" since his exile from Chad, Senegal's ratification of the CAT and other major human rights treaties, as well as its democratic tradition and relatively independent judiciary, suggested that it could be a promising host for a successful prosecution. An investigation by international and domestic researchers ensued in Chad, and a coalition of Chadian, African, and international human rights groups were organized to support the private criminal complaint. The group included the Chadian Association of Victims of Political Repression and Crime (AVCRP); the Dakar-based African Assembly for the Defense of Human Rights; the Chadian League for Human Rights; the Senegalese National Organization for Human Rights; the London-based Interights; the International Federation of Human Rights Leagues; and the French organization *Agir Ensemble pour les Droits de l'Homme*. The representatives of the participating organizations chartered the International Committee for the Trial of Hissène Habré to assure the victims' continuous legal representation, witness protection, and domestic and international public support.

On January 26, 2000, the AVCRP and seven individual Chadians officially accused Habré of being an accomplice to torture, barbarous acts, and crimes against humanity in the Dakar Regional Court. The torture charge was grounded in Senegal's 1986 ratification of the CAT, the "barbarity" charges were based on a Senegalese statute, and customary international law supported the coalition's demand that Senegal fulfill its obligation to prosecute those accused of crimes against humanity. AVCRP files detailing 97 political killings, 142 cases of torture, 100 "disappearances," and 736 arbitrary arrests, a 1992 report by a French medical team on torture under Habré's regime, and the 1992 Commission report, support the charges in the complaint. Investigating Judge Demba Kandji then sought the advice of state prosecutor Abdulaye Gaye, who offered his formal approval to Habré's prosecution on January 28, 2000. Gaye's quick response reflected the plaintiffs' urgency that Habré be taken into

custody or have his presence legally ensured according to Article 6 of the CAT. The plaintiffs sought to prevent Habré's flight from Senegal and to allow a judge to hear their testimony before they returned to Chad.

On February 3, 2000, after hearing the testimony of six of Habré's victims and receiving information regarding hundreds of other crimes, Judge Kandji summoned Habré to the Court and indicted him on charges of accomplice to torture and placed him under virtual house arrest. A judicial order restricted Habré's movements to the two Dakar zones where he has houses, barred him from making public declarations, required him to report to a police post weekly, and ordered the confiscation of his firearms and passport. Further, Judge Kandji also commenced an investigation against persons to be named later for crimes against humanity, disappearances, and barbarous acts, reserving the potential to indict Habré or others on these charges.

#### *Habré's Motion to Dismiss*

While Judge Kandji continued his investigation into the case, on February 18, 2000, Habré's lawyers filed a motion to dismiss the case before the Indicting Chamber of Dakar's Court of Appeals. His defense team asserted three claims. First, Habré's lawyers argued that under Senegalese law, Senegalese courts do not have the power to adjudicate crimes committed in Chad. Habré's lawyers cited Article 669 of the Criminal Procedure Code, which delineates that "Senegal's extraterritorial competence over foreigners was limited to . . . crimes against state security and counterfeiting of the national seal or official currency." Second, Habré's defense contended that crimes committed prior to Senegal's 1986 ratification of the CAT could not be prosecuted because the implementing legislation that followed in 1996 did not expand the courts' jurisdictional power to torture committed abroad. By asserting these claims, Habré tested the Chamber's resolution to indict him. Third, Habré's lawyers argued the prosecution was barred by a three-year statute of limitations for minor offenses. Habré's defense team characterized his alleged crimes as "minor" in order to assert that a three-year statute of limitations applied rather than the ten-year statute of limitations for "serious" crimes.

#### *Response to Motion to Dismiss*

In response to Habré's first claim that Senegal may not exercise jurisdiction over him, the victims' lawyers asserted the "no safe haven" provisions embodied in Articles 5-7 of the CAT expressly oblige Senegal to either prosecute or extradite Habré. The prosecution emphasized Senegal's right to exercise jurisdiction over Habré, as well as its duty to do so as a State Party to the CAT, regardless of the breadth of national legislation. The prosecutors answered Habré's second claim about implementing legislation necessary to institute the CAT provisions in the national code by citing the express terms of Article 79 of the Senegalese constitution, allowing international treaties to override Senegal's legal code once they are ratified. The Chamber could have asserted universal jurisdiction over Habré on the ground that Senegal had ratified the CAT, and, therefore, was bound as a State Party to extradite him to another country or to prosecute him in Senegal. Although Senegal did not enter any reservations to the CAT, the Chamber decided to rule in accord with the

power specifically extended to it by the Senegalese legislature. The Chamber's decision suggests that the CAT's implementation into national law is incomplete. Further, they argued that the 1986 CAT provisions, and the 1996 Senegalese implementing legislation, could not be applied retroactively. Senegal ratified the CAT on June 26, 1987. Most of the crimes alleged in the complaint against Habré were committed after 1987. Hence, if the Chamber allowed universal jurisdiction on the ground of Senegal's CAT commitment, this alone would allow Habré's indictment.

This argument highlighted the constitutional obligation of Senegal to adhere to the CAT once the legislature ratified it. Finally, the victims' lawyers answered Habré's statute of limitations claim by arguing that pursuant to Article 7 of the Criminal Procedure Code, a ten-year statute of limitations for serious crimes applies to the case. The prosecution further argued that, according to Senegalese law, the statute of limitations count only began once prosecution became possible. Therefore, Habré's prosecution could only begin when he fell from power on December 1, 1990. The January 2000 commencement of the case occurred less than ten years later.

#### *Political Interference in the Judicial Process*

The initially rapid progression of the case stalled in March under newly-elected Senegalese President Abdoulaye Wade. Wade's victory was considered a revitalization of Senegal's democracy because it ended forty years of one party rule. However, it would negatively impact the victims' case against Habré. A conflict of interest emerged when President Wade appointed Habré's attorney, Madické Niang, as his special advisor on judicial matters, while Niang continued to defend Habré. Niang advised the president on legal affairs as he continued to argue the indictment against his client should be quashed. In May 2000, the assistant state prosecutor, François Diouf, joined Habré's motion for dismissal.

In May 2000, another 53 Chadian victims, as well as a French woman whose Chadian husband had been murdered in 1984, joined the original plaintiffs. On May 16, 2000, both parties and the state prosecutor presented arguments to Dakar's three-judge Indicting Chamber on Habré's request to dismiss the case. The judgment of the Indicting Chamber was originally expected on June 15, but was postponed until July 4, 2000. On June 30, a few days before the Indicting Chamber delivered its opinion, the Superior Council of the Magistracy hastily convened a meeting presided by President Wade and his minister of justice. At the meeting, Judge Kandji was transferred from his post as chief investigating judge of the Dakar Regional Court—and the Habré investigation—to become assistant state prosecutor at the Dakar Court of Appeals. According to Reed Brody, Advocacy Director of HRW, there is no doubt that Judge Kandji's transfer was a reprisal for his handling of the Habré case, and "a way for the government to block [his] continuing probe." Judge Kandji's removal foreshadowed the Indicting Chamber's decision.

#### *Dismissal of Charges*

On July 4, 2000, the Indicting Chamber dismissed the charges against Habré on the ground that Senegal was an improper venue for his prosecution because his crimes had

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not been committed there. The court held it did not need to entertain Habré's two additional claims. Despite the requirement of *aut dedere aut judicare* clearly expressed in Article 7 of the CAT, the Indicting Chamber focused on Article 5, which provides that states adopt legislation establishing the right to adjudicate controversies of extraterritorial torture. The Indicting Chamber's emphasis on Article 5 allowed it to reject Senegal's CAT obligations on the premise that the extent of the implementing legislation prevailed over ratification of international covenants. The Indicting Chamber distinguished a previous *Cour de Cassation* decision, *Abdulaye Barry c/ Biscuiterie de Medina*, involving administrative law, which subordinated national law to an international treaty on the ground that criminal law operates under stricter rules. The Indicting Chamber rejected the victims' assertion that Article 79 of the Senegalese constitution grants Senegal jurisdiction over Habré because of its 1986 ratification of the CAT. Since Senegal's power to prosecute Habré would have been based on the principle of universal jurisdiction, as it is embodied in the CAT, the Indicting Chamber's restriction on the CAT's applicability to Habré's case prevented the exercise of universal jurisdiction.

On February 2001, the state prosecutor, Aly Ciré Ba, argued before the Criminal Chamber of the *Cour de Cassation* that the charges against Habré should be reinstated. Contrary to the assistant state prosecutor François Diout's support of Habré's request for dismissal in May 2000, Ba has endorsed the victims'

position. Court President Mireille Ndiaye announced a decision would be rendered on March 20, 2001.\*\*

### Conclusion

As the first post-*Pinochet* case, the Habré prosecution accurately reflects both the promise and the difficulties of effectively invoking universal jurisdiction. Although the *Pinochet* precedent did not introduce dramatic conceptual developments, its political aftermath was spectacular. Pinochet's arrest sent a strong message to former and current heads of state accused of gross human rights violations. The arrest made clear that the international institutionalization of impunity, which previously sheltered heads of state from accountability, would no longer be preserved.

Senegal has the opportunity to end a former dictator's exile. Moreover, Senegal is poised to strengthen the *Pinochet* precedent by affirming the validity of universal jurisdiction in its prosecution of Hissène Habré. By rejecting the Indicting Chamber's narrow interpretation of universal jurisdiction and by sustaining the constitutional provision stating that international commitments supercede domestic legislation, the *Cour de Cassation* would allow Senegal to fulfill its international duty to extradite or prosecute alleged perpetrators of human rights abuses. 🌐

\* *Inbal Sansani is a J.D. candidate at the Washington College of Law and an articles editor for the Human Rights Brief.*

\*\* *At the time of publication, the decision had not yet been released.*

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## Dean Grossman and WCL Students Appear Before Inter-American Court

by Dee Daniels\*

Through an application process with the Washington College of Law (WCL), three WCL students were selected to accompany Claudio Grossman, Dean and Co-Director of the Center for Human Rights and Humanitarian Law, to the Inter-American Court on Human Rights (Court). The Court is located in San Jose, Costa Rica, and held its 44th regular session from November 12-25, 2000. As a member and current President of the Inter-American Commission on Human Rights (Commission), Dean Grossman was selected to serve, along with Professor Helio Bicudo, as a Commission delegate for the *Awas Tingni* case. In that capacity, Dean Grossman supervised the overall preparation of the case, developed case strategy, and formulated the opening and closing statements. The Dean brought WCL students because of his desire to advance WCL's mission of providing students who are dedicated to human rights with the opportunity of obtaining practical experience in human rights law.

Dean Grossman and the Commission presented to the Court the case of the Sumo Indian Community of *Awas Tingni*. The Sumo indigenous people, who are from the North Atlantic Coast of Nicaragua, suffered human rights abuses and live in a precarious state of existence because of the Nicaraguan Government's failure to recognize the *Awas Tingni* Community's right to their land. The latest incidence of this failure resulted in the Nicaraguan government unlawfully conceding their land to SOLCARSA, a South Korean company seeking to profit from the resources in their fertile lands. The concession resulted in SOLCARSA exploiting the *Awas Tingni* land and even logging areas located outside of the conceded area. After exhausting all domestic remedies, the *Awas Tingni* Community presented a successful petition to the Commission as to the injustices they suffered. Convinced of

the legitimacy of the claim, the Commission presented the first indigenous land rights case before the Court.

Indigenous rights leaders from various communities in the Americas as well as international human rights advocates constituted the majority of the Court's audience. The most impressive component of the audience, however, was the attendance of 23 members of the *Awas Tingni* Community. The majority of community members who attended did not own birth certificates or any identification, and had never traveled outside of their land in Nicaragua. Thus the gathering of these members outside of their home was a significant feat. The participating students were able to interact with the *Awas Tingni* Community members and discuss the case with Dean Grossman and the other members of the Commission who represented the *Awas Tingni* Community before the Court.

Since the Court does not allow its sessions to be televised or videotaped for security reasons, the only way to observe a session is by attending one. Although the WCL students had no formal role in the hearing, observing a case is the best introduction to the Court. It provided the students with the valuable opportunity of familiarizing themselves with the jurisprudence and procedures of the Inter-American human rights system. Dean Grossman plans on taking three more students to observe and participate in another case that will come before the Court in the 2001-2002 academic year. In addition to reading the briefs and becoming knowledgeable about the case, these students may be able to prepare witnesses and participate in researching the legal arguments involved. 🌐

\* *Dee Daniels is a J.D. candidate at the Washington College of Law. She participated in the presentation of the *Awas Tingni* case before the Court.*