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ECOWAS Court Judgment in *Habré v. Senegal* Complicates Prosecution in the Name of Africa.

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Introduction

A complex international legal battle has been fought for more than a decade about holding former Chadian President Hissène Habré, dubbed the "African Pinochet" by human rights organizations, accountable for international crimes.

In the latest development, the Court of Justice of the Economic Community of Western African States ("ECOWAS Court") issued a decision in favor of Habré that might

derail efforts to have Habré tried on behalf of the African Union ("AU") in Senegal, where he currently resides.

The ECOWAS Court's finding that Habré may only be tried in an "ad hoc special tribunal of an international character" could set the fledgling regional court on a jurisprudential collision course with the International Court of Justice ("ICJ"), which has been seized by Belgium in the same matter.

Background

Hissène Habré allegedly committed crimes against humanity, war crimes, and torture, after seizing power in Chad in 1982 and imposing himself as President.

A Chadian Commission of Inquiry, set up after his overthrow in 1990, estimated that under his rule more than 40,000 people were victims of summary executions, extrajudicial killings, torture, or arbitrary detention.[1]

In 2000, victims lodged a criminal complaint in Senegal, to where Habré had fled. An indictment was issued, but was soon thereafter dismissed on grounds that Senegal

lacked the necessary jurisdiction to try Habré for alleged crimes committed abroad. Senegal's highest court, the Cour de Cassation, confirmed the dismissal on appeal.[2] Other victims turned to Belgium to seek justice invoking a law providing Belgian Courts with universal jurisdiction over international crimes committed abroad.[3] In 2005, a Belgian judge issued an international arrest warrant charging Habré with crimes against humanity, war crimes, and torture. Victims also sought recourse with the United Nations Committee against Torture, which in May 2006 decided that Senegal had violated its obligation under the Convention against Torture by failing to either prosecute Habré or comply with Belgium's request for extradition.[4] Refusing extradition, Senegal brought the case to the attention of the AU. In July 2006, the AU mandated Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for [a] fair trial." [5] In 2007 and 2008, Senegal enacted constitutional and penal law amendments providing its courts with jurisdiction to prosecute any individual for acts or omissions, which, at the time of their commission, constituted crimes according to the rules of international law relating to acts of genocide, crimes against humanity, and war crimes.

Notwithstanding these amendments, the process stalled, as Senegal demanded that donors assume the entire costs of the investigation and trial. Following long negotiations, the AU, donors, and Senegal reached agreement that US \$11.7 were needed for this purpose.[6] On November 24, 2010, donors pledged the necessary funds, removing what had seemed to be the final obstacle to a prosecution.

Judgment of the ECOWAS Court

While negotiations over Habré's prosecution in Senegal dragged on, several International courts were seized of the matter. On February 19, 2009, Belgium filed a case with the ICJ, demanding that Senegal prosecute or extradite Habré to Belgium in accordance with its obligation under the Convention against Torture. The case remains pending. Meanwhile, Habré turned to regional courts to stop Senegal from prosecuting him. A case

filed before the African Court on Human and Peoples' Rights was dismissed, because Senegal has not yet accepted the Court's competence to take up individual complaints.

In October 2008, Habré also filed in parallel a case with the ECOWAS Court. Based in Abuja, Nigeria, the ECOWAS Court was conceived to be an institution akin to the European Union's European Court of Justice—a judicial body mandated to ensure that the member states of the economic and customs union comply with its undertakings. As only member states could initially bring cases to the Court, it remained idle for many years. In 2005, however, ECOWAS member states gave the Court jurisdiction to take up cases brought by individuals, including those based on alleged violations of the African Charter on Human and Peoples' Rights and international human rights instruments. The Court has since become increasingly active, with the majority of the cases having a human rights dimension.

Habré based his case primarily on the argument that Senegal passed the laws Necessary to assert jurisdiction over his alleged international crimes only after he committed them.

This, Habré claimed, violated his right under Article 15 of the International Covenant on Civil and Political Rights ("ICCPR"), which stipulates that "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."

In its judgment of November 18, 2010, the Court partially upheld Habré's claim. It Found that a trial in a Senegalese court under the existing national legal framework would violate the prohibition of retroactive criminal laws, but left open a window of opportunity for accountability. The Court held that:

[T]he mandate received by [Senegal] from the African Union provides it rather with a mission of conceiving and suggesting all proper modalities to prosecute and judge strictly within the scope of an ad hoc special procedure of an international character as is practiced in international law by all civilized nations.[7]

In order to reach this conclusion, the Court reasoned:

[A]lthough the crimes of which Habré stands accused did not, at the time, constitute crimes under Senegalese law (by virtue of which Senegal violates the principle of non-retroactivity set out by [Article 15 ICCPR]), they were regarded by international law as such. . . .

The Court shares the noble objectives contained in the mandate of the African Union and translating into practice the adherence of this exalted organisation to [end] impunity for violations of grave human rights violations and to protect the rights of victims.

Nevertheless, the Court highlights that the mandate of the African Union has to be implemented in accordance with international custom that has

taken the practice in such situations to establish ad hoc or special jurisdictions. . . . Therefore, any other endeavour of Senegal outside such a framework would violate, on the one hand, the principle of non-retroactivity of criminal law, upheld by [international human rights instruments] and, on the other hand, would impede respect for the [stand against impunity] stipulated by the same international documents. [8]

Prohibition to Retroactively Assert Jurisdiction over International Crimes?

The Court's reasoning merges two questions: whether Senegal has jurisdiction Under international law to prosecute Habré; and whether such a prosecution would comply with the prohibition of retroactive criminal laws under international human rights law. The Court essentially concludes that international custom requires 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 they were committed.

The assertion of such a custom is difficult to harmonize with a whole range of cases in which national courts have retroactively asserted jurisdiction over international crimes.

These cases date back to Israel's prosecution of Holocaust-planner Adolph Eichmann For international crimes that were committed before the State of Israel and its Domestic criminal laws came into existence. Today, international law even points to a Customary duty of states to exercise their jurisdiction over international crimes.[9]

The ECOWAS Court's finding of a breach of Article 15 ICCPR also seems hard to reconcile with its plain wording, which only requires that the crime in question

constituted a criminal offence, under national or international law, at the time it was committed.

The travaux préparatoires of this provision, as well as the savings clause contained in Article 15(2) ICCPR, both indicate that by adding the reference to "international law," the drafters intended to prevent a person from escaping punishment for an International crime by pleading that the offense was not punishable under the national law of the state trying the person.[10] The rationale behind the prohibition of retroactive criminal laws is to put the perpetrator on notice that his or her action constitutes a crime, but this is already served if the perpetrator could have known that he or she was committing what is recognized as a crime on the international plane.

No Universal Jurisdiction; No Immunity

The ECOWAS Court did not discuss the basis under international law for Senegal's jurisdiction to try Habré. Unlike Belgium, Senegal is not acting on the basis of the much discussed principle of universal jurisdiction, where a state seeks the extradition and prosecution of a suspect found abroad, notwithstanding the absence of any link on the basis of territory or nationality. Instead, Senegal merely asserts territorial jurisdiction over a resident for crimes he committed elsewhere.[11] This jurisdictional basis is further buttressed by a mandate of the competent regional organization.

The case also does not raise the question of whether a former head of state can still Assert immunity for international crimes committed while in office (a proposition now widely contested), as Chad waived any claim to immunity Habré would have had in 2002.

Implications for Belgium's Case Before the ICJ

If Habré is not prosecuted in Senegal and Belgium pursues its ICJ case against Senegal, the ICJ will probably have to engage, at least implicitly, with the reasoning of the ECOWAS Court, given that Belgium, like Senegal, also established its jurisdiction over International crimes only after Habré allegedly committed such crimes.

If the ICJ were to follow the legal reasoning of the ECOWAS Court, it could well find in Senegal's favor, as Belgium's extradition request would be serving a prosecution in Breach of Article 15 ICCPR. However, for the reasons set out above, it is likely that the ICJ will not accept this rationale. The specter of conflicting judgments relating to the same person therefore looms.

Conclusion and Outlook

The judgment has placed Senegal in the unenviable position of facing conflicting Demands from the AU, the ECOWAS Court, and potentially also the ICJ.

In a recent interview, President Abdoulaye Wade of Senegal announced that, given That the ECOWAS Court's decision contradicts the AU mandate, he will raise the matter at the upcoming AU Summit (January 27-31, 2011) and demand that the AU "take its case back."^[12] He also indicated that he might extradite Habré to Belgium or "send him elsewhere," thereby letting a prosecution under AU auspices collapse.

The AU member states will now have to consider how to square the mandate given to Senegal to try Habré with the ECOWAS Court's ambiguous holding that this be done as "an ad hoc special procedure of an international character." One option would be to set up a hybrid international tribunal in Senegal akin to the Special Court for Sierra Leone.

As the ECOWAS Court has not taken issue with the AU mandate itself, which demands Habré to be tried in a "competent Senegalese court," it is also conceivable to set up a Special Chamber in the Senegalese Court with a mixed bench of national and International judges. The AU has reportedly proposed such a special jurisdiction, composed of judges from Senegal and AU member states.[13] A precedent for this model would be the Extraordinary Chamber in the Courts of Cambodia, set up to try the crimes of the Khmer Rouge—except that a prosecution in a Senegalese Special Chamber would be based on international criminal law alone.

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Endnotes:

[1] Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex President Habré, his Accomplices and/or Accessories (May 7, 1992), available at

<http://www.usip.org/files/file/resources/collections/commissions/Chad-Report.pdf>.

[2] See Frederic L. Kirgis, The Indictment of a Former Head of State in Senegal, ASIL INSIGHTS,

Feb. 2000, available at <http://www.asil.org/insigh41.cfm>.

[3] Cf. Stefaan Smis & Kim Van der Borght, Belgian Law Concerning the Punishment of Grave

Breaches of International Humanitarian Law, ASIL INSIGHTS, July 2003, available at <http://www.asil.org/insigh112.cfm>.

[4] Comm. Against Torture, *Guengueng et al. v. Uruguay*, Commc'n No. 181/2001, U.N. GAOR,

36th Sess., U.N. Doc. CAT/C/36/D/181/2001 (Aug. 2, 2006).

[5] Afr. Union Conference, 7th Sess., Decision on the Hissène Habré Case and the African Union,

§ 5(ii), Doc. Assembly/AU/3 (VII) (2006).

[6] Reed Brody, A Trial for Habré?, RADIO NETHERLANDS WORLDWIDE (Dec. 14, 2010,

11:49am), available at <http://www.rnw.nl/international-justice/article/a-trial-habre>.

[7] *Hissène Habré v. Senegal*, Decision No. ECW/CCJ/JUD/06/10, ¶ 61 (Ct. of Justice of the Econ.

Union of West Afr. States Nov. 18, 2010) [unofficial translation of the French original], available at

<http://www.hrw.org/en/habre-case>.

[8] *Id.* ¶ 58.

[9] See, e.g., Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S.

90 (entered into force July 1, 2002).

[10] See Manfred Nowak, CCPR COMMENTARY § 5 n.9 (2d ed. 2005).

[11] Cf. Arrest Warrant of 11 April 2000 (*Dem. Rep. Congo v. Belg.*), 2002 I.C.J. 3, § 41 (Feb. 14)

(joint separate opinion of Judges Higgins, Kooijmans, & Buergenthal).

[12] *Le président sénégalais Abdoulaye Wade* [Interview with President Abdoulaye Wade],

FRANCE 24 (Dec. 11 2010), <http://www.france24.com/fr/20101211-le-president-senegalais-senegal-abdoulaye-wade-entretien>.

[13] Senegal Must Prosecute or Extradite Hissène Habré, HUMAN RIGHTS WATCH, Jan. 18,

2011, available at <http://www.hrw.org/en/news/2011/01/18/united-nations-senegal-must-prosecute-or-extradite-hiss-ne-habr>.