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HUMAN RIGHTS WATCH

**ECOWAS ECOWAS Ruling: Hissein Habre
v. Republic of Senegal**

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November 18, 2010

**THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF
STATES OF WEST AFRICA (ECOWAS)**

SITTING IN ABUJA, NIGERIA

THIS Thursday, November 18, 2010

In the Case

Hissein Habré case *cl* REPUBLIC OF SENEGAL

GENERAL ROLE No. *ECW/CCJ/APP/07/08* JUDGEMENT

NO: *ECW/CCJ/JUD/06/10*

18 November 2010

Composition of the Court

1. Hon. J. Awa Daboya NANA - President
2. Hon. Judge M. Benfeito Mosso RAMOS - Member
3. Hon. Hansine N. J. Donl - Member
4. Hon. Judge Anthony A. BENIN - Member
5. Hon. Mr. J. Eliam Potey - Member

Assisted by Tony Anene - MAIDOH - Clerk

Rendered its decision which reads as follows:

JUDGEMENT OF THE COURT

1. By application dated October 1, 2008, registered at the Registry of the Court October 6, 2008, Mr. Hissein Habre, former President of the Republic of Chad, took our Court for a declaration that the State of Senegal has committed violations of human rights against him through the disregard of fundamental legal principles as follows:

- non-retroactivity of criminal law enshrined in Articles 11.2 of the Universal Declaration of Human Rights, 7.2 of the African Charter on Human and Peoples' Rights and the Constitution of the State of Senegal;
- the effective use stated in Article 8 of the Universal Declaration of Human Rights and by Article 3.4 of the International Covenant on Civil and Political Rights;
- the authority of res judicata;
- equality before the law and to justice enshrined in Articles 7 and 10 of the Universal Declaration of Human Rights, Articles 14.1 and 26 of the International Covenant on Civil and Political Rights and Article 7.4 of the Constitution of the State of Senegal;
- independence of the judiciary enshrined in Articles 10 and 11 of the Universal Declaration of Human Rights, Article 14 of International Covenant on Civil and Political Rights and Article 1 of the Charter African Charter on Human and Peoples' Rights;
- separation of powers stated in Article 1.a of the ECOWAS Protocol on Democracy and Good Governance as well as by the Constitution of the State of Senegal;
- the right to a fair trial enshrined in Article 7.1 of the African Charter on Human and Peoples' Rights; the conflict between Community law of ECOWAS and the Senegalese criminal law and the constitutional principle of convergence.

2. Hissein Mr. Habre said all prosecutions were brought against him by the State of Senegal in disregard of legal principles outlined above perpetuate violations of his rights, the Complainant accordingly requests that the Court finds that obligation for the State of Senegal to meet these legal principles preclude the implementation of any proceedings against him for offenses related to the period when he was President of the Republic of Chad and intimate to the State of Senegal to comply with the said principles and cease prosecution and / or action of the above listed leaders against him.

3. By application request response dated December 16, 2008, victims, successors and assigns rights of victims and victims' associations have asked the Court pursuant to Article 89 of the Rules of Procedure of the Court for Parties to the main cause.

4. By interlocutory decision *ECW/CCJ/ADDI11109* 17 November 2009, the Court stated:

- **inadmissible the application to intervene,**
- **ordered the prosecution of the case and**
- **leaves the costs of each party to bear.**

5. The Republic of Senegal in its reply has raised a hand except the Court lacked jurisdiction because of the absence before the Senegalese courts of judicial proceedings against Mr. Habré and other Hissein hand, the objection to admissibility of the request based on the referral to the UN Committee against Torture.

6. The Court, on exceptions to jurisdiction and inadmissibility, dated May 14, 2010, issued the decision No. *ECW/CCJ/ADD/02/10* following: **"The Court is competent to know the case before it was seized by Mr. Hissein Habre;**

Said that the request of Mr. Hissein Habre is in order;

Accordingly, rejects the preliminary objections raised by the State of Senegal;

Ordered further discussion

Reserve Costs "

THE FACTS

The facts according to the Applicant

7. Hissein Mr Habre has said he served as President of the Republic of Chad from 1982 to 1990 before being overthrown in a coup d'état perpetrated by Mr Deby Idriss SNWT current President of this country. That since his ouster, he was granted political asylum granted by the authorities in Senegal, where he is resident.

8. The Applicant states that it is the subject of several proceedings before the Senegalese courts in January 2000, seven Chadian nationals and the association of "Victims of Crimes and Political Repression in Chad " (AVCRP) submitted to the Dean of judges instruction at the Tribunal Regional Senior Dakar a complaint with a civil action against him.

9. That having been charged Feb. 3, 2000 on charges of "complicity in crimes against humanity" and "torture and barbarity", he filed a complaint with the indictment Court of Appeal of Dakar has the effect of the annulment of the proceedings against him.

10. That July 4, 2000, the indictment has acceded to his request and ordered the cancellation of the minutes of the indictment and subsequent proceedings on the grounds that the substantive law in Senegal did not contain provisions on the crime against humanity and that when under "the principle of legality of crimes and penalties stated in Article 4 of the Penal Code Senegalese courts could materially know these facts."

11. That indictment also found that the facts of torture did not fall within the provisions of Section 669 of the Criminal Procedure Code which lists the Senegalese case in which an alien can be prosecuted in Senegal acts committed outside that State.

12. That on appeal by the plaintiffs, the First Chamber of the Court of Cassation in criminal matters, in its ruling of March 20, 2001 and believes that "no procedural text only recognizes universal jurisdiction for Senegalese courts" to judge allegations against Mr. Hissein Habre. The Supreme Court has held that if the New York Convention against Torture of 10 December 1984 16 June 1986 ratified by the State of Senegal provides for such jurisdiction, the fact remains that "The execution of the Convention requires to be taken by Senegal prior legislative measures. " The Supreme Court then dismissed the appeal.

13. That at the end of 2000, the Belgian court receives complaints filed against him has opened an investigation for crimes against humanity. The judge handling the case was issued, September 20, 2005 an international arrest warrant against him. That asked for an opinion on the extradition request made by Belgium, the indictment of the Court of Appeal in Dakar declared itself incompetent by a decree of November 25, 2005.

14. The Complainant contends that although the judicial authorities of Senegal came to rule and make the final decisions and bear the authority of res judicata on the case against all odds, the President of the Republic of Senegal decided to refer the matter to the African Union.

15. At its meeting on 1 and 2 July 2006, the Conference of African Union then gives the Republic of Senegal mandate to prosecute and judge him "on behalf of Africa by a competent court with guarantees a fair trial. "

16. Mr. Hissein Habre contends that contempt of court decisions already made and in violation of the general principles of law, Senegal then began changing its

laws and its Constitution to allow for its continuation and new trial by a Senegalese court, thus violating the conditions and guarantees of a fair trial. He asks the Court to find violations in respect of the principle of non-retroactivity of criminal law, principles of equal justice and the right to a fair trial.

Facts by Defendant

17. The State of Senegal while acknowledging the various decisions of these courts on the indictments against Mr. Hisssein Habre during the period when he was President of the Republic of Chad, said the debate is solely at the development conformity of its legislation with its international commitments in this regard indicates that the Defendant, seized by the same plaintiffs who initiated proceedings against Mr. Hisssein Habré to justice in Senegal, the UN Committee against Torture, reminded State of Senegal "that according to article 5 paragraph 2 of the Convention, as a State Party, it shall adopt the necessary legislative reforms to establish its jurisdiction over the acts specified in the statement."

18. The State of Senegal concludes that to comply with its obligations under international conventions it has reformed its criminal law in carrying out constitutional and legislative changes that the Applicant considers to violate his human rights and he says he has taken no legal action against Mr. Hisssein Habre.

STATEMENT OF MEANS OF RIGHT OF PARTIES

Average Applicant

19. Mr. Hisssein Habre cites several international instruments on human rights. It cites section 11.2 of the Universal Declaration of Human Rights, Article 7.2 of the African Charter on Human and Peoples' Rights to argue that the State of Senegal had violated the principle of non retroactivity criminal law for undertaking the constitutional and legislative reforms in order to try him again.

He added that his right to an effective remedy says to article 8 of the Universal Declaration of Human Rights and Article 3.4 of the International Covenant on Civil and Political Rights has been violated.

20. Mr. Hissein Habre argues that the principles of equality before the law and the courts by sections 7 and 10 of the Universal Declaration of Human Rights, also by Articles 14.1 and 26 of the International Covenant on Civil and Policies and Article 7.4 of the Senegalese Constitution were violated.

21. The Complainant also alleges violation of the principles of separation of powers and independence of the judiciary and cites Article 1.a of the ECOWAS Protocol on Democracy and Good Governance, and the Senegalese Constitution the various international instruments listed above.

22. Finally, Mr. Hissein Habre argues that the new criminal law provisions are contrary to Senegalese law ECOWAS community, in particular the Protocol on Democracy and Good Governance, which uphold the constitutional principle of convergence.

Average Respondent

23. The government of Senegal has noted the date of referral to the Court by Mr. Hissein Habre, there is no Senegalese courts proceedings against the Applicant, not only that there was no an act of pursuit, but no decision of conviction under the reform text that Mr. Hissein Habre is in its application is reached.

24. The Respondent explained that the objections raised by the petitioners refer to the adoption by the State of Senegal to constitutional and legislative reforms, including in the Penal Code and the Code of Criminal Procedure and the adoption of such measures can not constitute violations of Human Rights.

25. The Government of Senegal reports that Mr. Hissein Habre does not establish a violation of the principle of non-retroactivity of criminal law and concludes that the violations alleged by the Applicant are hypothetical and not

actual. Concerning the actual use, the Respondent articulates that in the case of a constitutional law individuals are excluded from this right, and indicates that in other areas such right exists because Mr. Houssein Habré was able to capture the indictment of Court of Appeal in Dakar, which upheld his claim. Concerning equality before the law and justice, the State of Senegal observes firstly that the legal provisions criticized by Mr. Houssein Habre are general and impersonal and do not refer by name, and also points out that 'if a trial involving the Complainant, it is unrealistic to bet equality before the law.

26. In total, the State of Senegal states only complying with its international obligations by adapting its legislation to the New York Convention of 1984 and the Statute of the International Criminal Court, and decided to reject all applications by Mr. Houssein Habre.

Analysis of the Court

27. The questions of violations of human rights subject to the discretion of the Court can be grouped into five parts namely:

- the existence of proceedings against Mr. Houssein Habre
- interpretation of the Protocol on Democracy and Good Governance,
- the effective remedy,
- the separation of powers and the independence of the judiciary and
- non-retroactivity of criminal law.

a) The violations of human rights related to the existence of a case against Mr. Habre Houssein

28. The questions of violations of his human rights invoked by Mr. Houssein Habre in relation to equality before the law and justice, the authority of res judicata and the right to a fair trial, to be relevant and lead the Court to rule, require the prior existence of a proceeding or criminal prosecution against Mr. Houssein Habre on the basis of the reforms introduced by the State of Senegal.

29. At this stage no procedures or act of prosecution against Mr. Hissein Habre is as stated in the State of Senegal, that does not deny the Applicant, whose concern lies in the possibility of new proceedings against him based on the compliance of its criminal law made by the State of Senegal to comply with its international commitments.

30. Essentially these violations alleged by the Applicant related to a hypothesis and allow the Court to say that they are only potential, so he objection must exclude them from discussion.

b) The violation related to the interpretation of the Protocol on Democracy and Good Governance

31. Mr. Hissein Habre citing the following provision of the Protocol on Democracy and Good Governance for ECOWAS, which states that: **"the rights contained in the African Charter on Human and Peoples' Rights and international instruments are guaranteed in each Member State of ECOWAS, any individual or organization the ability to make this guarantee by the courts of common law or by a special court or any national institution established within the framework of an international instrument Rights "** which refers to the African Charter on Human and Peoples' Rights, criticized the Senegalese law to be contrary to Community law of ECOWAS and of violating the principle of non-retroactivity of criminal law and the constitutional principle of convergence.

32. The Applicant based on Article 9 of the Protocol on the Court which empowers the Court to assess the failures of states to their obligations under the Treaty and other Community texts, asks the Court to declare that the Senegal had violated the principle of non-retroactivity of criminal law and thus committed a breach of duty online community.

33. However, as the case of a breach of a Community obligation by a Member State, the Applicant, an individual is not entitled to refer the Court to the terms of Article 10 of Additional Protocol on the Court , also on this point must be dismissed the complaint made by Mr. Hissein Habre.

c) The violation related to effective remedy

34. The Applicant based on the International Covenant on Civil and Political Rights which enshrines "the effective remedy by the competent national courts against acts violating the fundamental rights that are recognized by the Constitution or by law" Defendant complains that the d have infringed its right to effective remedy to the extent that section 74 of the Constitution of Senegal excludes the exercise of this right by individuals. Mr. Hissein Habre explained that this exclusion was prevented from raising a breach of the principle of non-retroactivity of criminal law during the introduction by the State of Senegal to new provisions in its Constitution.

35. But since the right of Appeal analyzed the right of an individual can apply to a court for a declaration or a right to punish the violation of a right. This right to effective remedy is different from the limited constitutional remedy reserved by the laws of a State to a number of individuals to establish the unconstitutionality of one or more laws.

36. Hissein Mr. Habré can not claim the right to effective remedy as provided for in international instruments protecting human rights to require the State of Senegal made available to the control of constitutionality of a law then well as texts Senegalese permit to any individual.

37. What any event Mr. Hissein Habre offers no concrete evidence of violations of the right to effective remedy in that it belongs v. State within its functioning to predict whether to grant or does not give an individual the constitutionality of a

statute by action. The simple fact of not having foreseen this possibility does not imply the absence of the right to an effective remedy.

38. The Court believes that the alleged deprivation by Hissein Habre of not being able to benefit from the possibility of constitutional law which he believes is the source of the violation of his rights, not can be regarded as the right to effective remedy. The right to effective remedy as contemplated by the Complainant can not succeed in this action and the Court rejects this claim.

d) The violation related to the separation of powers and independence of justice.

39. Mr. Hissein Habre believes that constitutional and legislative reforms undertaken by the government of Senegal is an interference by the executive and legislative powers in the fields of the judiciary.

40. The Court notes that if the principle of separation of powers is a fundamental principle recognized in all societies enocratism, the fact that a state change its constitution and its laws can be invoked by an individual to violate his human rights without any other consideration.

41. The Court believes that the principle of non-separation of powers is not in itself a violation of human rights if any consequence of this non-separation of powers does not affect a specific right of man protected by international treaties.

42. The Court notes that in this case the mere allegation of interference by the executive and legislative branches of the State of Senegal gained from the change in its Constitution and its penal law does not constitute a violation a specific human right of Mr. Hissein Habré and is in no way a violation of judicial independence. The Court therefore rejects this argument.

e) Breach of the principle derived from the non-retroactivity of criminal law.

43 . The Complainant asserts that the non-retroactivity of criminal law that is enshrined in these words : "**No person shall be sentenced for actions or omissions which were not when they occurred, a legally punishable offense. No penalty may be imposed if it was not anticipated at the time the crime was committed. Punishment is personal and can be imposed that the offender "** ;

" No one shall be sentenced for actions or omissions which, when it was committed did not constitute a criminal offense under national or international. Similarly, it will inflict no heavier penalty than was applicable at the time the crime was committed " by Articles 7.2 of the African Charter on Human and Peoples and 11.2 of the Declaration Universal Human Rights, was violated by the State of Senegal.

44. He cites in this order following sections of the Senegalese penal code 431.6 and 9 of the Constitution of the State of Senegal: "**Notwithstanding the provisions of Article 4 of this Code, any individual may be tried or sentenced for acts or omissions referred to in this chapter and Article 295-1 of the Penal Code, which at the time and place they were required for a criminal offense based on the general principles of law recognized by all nations, whether or not it constitutes a contravention of the law in effect at that time and place** " and "**However, the provisions of the preceding paragraph does not preclude the prosecution, trial and conviction of any person for any acts or omissions which, when they were committed, was criminal according to the rules of international law to the facts of genocide, crimes against humanity and war crimes "** ,

45. He noted that before the introduction of these texts in the legal system of the State of Senegal by constitutionnelles reforms and laws, the Senegalese courts,

acting in the proceedings against him for genocide, crimes against humanity, war crimes, torture, had to see that these crimes did not exist in the Senegalese criminal law.

46. Mr. Hissein Habre considers the amendment to its criminal law by the State of Senegal and the insertion in the Penal Code offenses that did not have a stated aim to have him tried, in so doing the State Senegal's violates the principle of non-retroactivity of criminal law and will certainly violate his rights under article 7.2 of the African Charter on Human and Peoples' Rights and Article 11.2 of the Universal Declaration of Human Man.

47. Finally, Mr. Hissein Habre also refers to Articles 11 and 24 of the Rome Statute establishing the International Criminal Court, which under the principle of non retroactivity limiting the jurisdiction of this Court and criminal liability for events occurring after entry into force of the Statute.

For its part the State of Senegal maintains that it has to comply with its international obligations it has made changes criticized by the applicant and added that the retroactive jurisdiction of its courts for acts of genocide, crimes against humanity, war crime does not establish a new offense with retroactive effect to the extent these facts are required for criminals under the rules of international law at the date of their commission.

48. However, despite the denials of Defendant's perfunctory, the Court noted that beyond the justification of the compliance of its legislation with its international commitments, the government of Senegal has seriously infringed the provisions of Article 7.2 of the African Charter on Human and Peoples' Rights and Article 11.2 of the Universal Declaration of Human Rights which prohibits the retroactive provision of a criminal.

49. The question of the Court now is whether the various mechanisms engaged by Senegal namely the establishment of structures to meet the mandate given by

the African Union is a violation of Articles 7.2 and 11.2 African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights, as claimed Mr. Hissein Habré?

50. The Applicant itself binds the violation of his rights, not a concrete fact, but the evident willingness and displays the state of Senegal to bring him to trial and apply the new indictments brought into his criminal law, so the Court notes that the Respondent taken as such, the violation is attached to a hypothesis, gives an abstract and not concrete.

51. In this regard, the Court reiterates that the decision Hadidjatou Mani Koraou Cl Niger State to reiterate that it is not competent to examine laws **in Abstrato** but specific cases of rights violations The Man. It recalls also in the same direction the jurisprudence of the European Court of Human Man **in the case opposing the Christian Federation of Jehovah's Witnesses to France** , where it notes that Article 34 of the European Convention on Human The Man does not permit a "**complaining in the abstract of a law by the mere fact that it seems to infringe the Convention** "and that it does not suffice for an individual applicant to claim that a law violates his mere existence of the rights it enjoys under the Convention and the law must be applied to his detriment (Stop 10 Kloss and others v. Germany). And gives in principle a breach of human rights is seen at **post** when the violation has already occurred.

52. However, that ruling has been some mitigation evocation of "quite exceptional circumstances did admit that the risk of a future violation gives an applicant the status of victim of a violation of the Convention" (application No. 282 Noel ou/95 Naru Taura and 18 Others v. France dec, OR 12/4/1995 83 p.112). The jurisprudence of the European Court of Human Rights is not isolated, cf. Dudgeon v. United Kingdom, October 22, 1989, Soering v. United Kingdom, July 7, 1989). For in such a situation the applicant may claim a victim, he must

produce reasonable and convincing evidence of the likelihood of achieving a breach in what concerns personally, mere suspicion or conjecture is insufficient for this respect.

53. In this case the fear of Mr. Hissein Habre to see the state of Senegal prosecution against him on the basis of constitutional and legislative reforms made by the Respondent is she a mere suspicion or conjecture, or rather this Does reasonable and convincing evidence of likelihood of occurrence?

54. First, the Court finds that the State of Senegal has requested and obtained from the African Union a mandate to prosecute and try Mr. Habré Hissein behalf of Africa by a competent court with trial guarantees just.

55. The Court also noted that to implement such a mandate given by the African Union, the State of Senegal, in which justice was already seen by the final decisions, the lack of indictments in the legal internal acts for which the African Union has mandated the Respondent has used the new constitutional and legislative provisions which retroactivity is criticized by the Applicant.

56. The Court also notes that the State of Senegal prior to the appointment of a magistrate for instruction in the procedure against Mr. Habré Hissein and have received some funds to cover the trial.

57. The Court finally notes that the passport of Mr. Hissein Habre would have been removed, it is put under house arrest and forbidden to leave the territory of Senegal. Given these circumstances, the Court can only agree that there are reasonable and convincing evidence of probability of occurrence of the violation of Articles 7.2 and 11.2 of the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights at the expense of Mr. Hissein Habre, and accordingly the status of victims of violation of his human rights claimed by the Applicant on the basis of these international instruments is proven, that it must therefore to rectify.

58. However, the extent and the main purpose of this case stems from the mandate given by the African Union, Senegal to judge *"on behalf of Africa by a competent court with guarantees of a fair trial"*, the Court must find the equation or the balance between the bottom of the mandate and methods typically borrow international law in such situations.

The Court noted that the bottom of the mandate of the African Union expressed that the International Covenant on Civil and Political Rights has devoted its article 15 where the text provides:

1. *"No one shall be condemned for é or omission which did not constitute a criminal offense under national or international level at the time they were committed. Similarly, there shall be imposed no greater sentence than the one that was applicable at the time the offense was committed. If subsequent to this offense, the law provides for a lighter penalty, the offender shall benefit thereby.*
2. *Nothing in this section does s precludes the trial and conviction of any person for any act or omission which, when they were committed, was criminal, according to general principles of law recognized by all nations. "*

The first paragraph of this text, the Court noted that if the factual basis of the intention to try the applicant did not constitute *criminal acts under national law of Senegal* (in Senegal or violates the principle of non retroactivity enshrined in the text) they are under the *international law* obligation as such. However, it is to avoid impunity for acts considered, *according to international law as criminal* that paragraph 2 of Article 15 of the Covenant provides for the possibility to judge or condemn *"any person for any acts or omission which, when they were committed, was criminal, according to general principles of law recognized by all nations . "*

The Court therefore share the noble objectives contained in the mandate of the African Union and reflects the high adhesion of this Organization to the

principles of impunity for serious violations of human rights and the rights of victims.

However, the Court noted that the implementation of the mandate of the African Union should follow the international practice which has become customary in such situations courts to create ad 'hoc or special. The phrase " ..

jurisdiction " contained in this term means nothing other than the establishment of a judicial ad 'hoc creation and powers find their low relief in the provisions of Article 15. 2 of the International Covenant on Civil and Political Rights and that Senegal is responsible for proposing the principal forms and modalities of implementation of such a structure.

Thus, any company in Senegal outside such a framework would violate, firstly, the principle of non-retroactivity of criminal law, as enshrined in international human rights as an inalienable right and other hand, would obstruct the principle of impunity by the same dedicated international texts.

For these reasons

59. The Court:

- Considering the revised ECOWAS Treaty of 24 July 1993
- Considering the Universal Declaration of Human Rights of 10 December 1948
- Considering the African Charter on Human and Peoples' Rights of 27 June 1981
- Having regard to the International Covenant on Civil and Political Rights of 16 December 1966
- Given the ECOWAS Supplementary Protocol on Democracy and Good Governance,
- Considering the Protocol of 1999 and the Additional Protocol of 2005 relating to the Court of Justice of the ECOWAS Community,

- Considering the Rules of Procedure of the Court of 28 August 2002
60. Given the interlocutory judgments of 17 November 2009 EWC/CCJ/ADD/11 and EWC/CCJIADD/02/10 of May 14, 2010 rendered in the case and above.
61. The Court Ruling publicly contradictorily, the substantive rights of Man and as a last resort, and after deliberation.
- **Notes** the existence of evidence corroborating probability likely to prejudice the rights of Mr. Man Houssein Habre on the basis of constitutional and legislative reforms made by the State of Senegal.
- **Said that** 'in this context the State of Senegal must comply with compliance decisions made by its national courts in particular to respect the authority of res judicata;
- **Accordingly** , the Court orders to Senegal on the principle of absolute non-retroactivity;
- **Said** that the mandate given him by the African Union gives it more of a mission design and suggestion from all modalities to continue to try and strictly within the framework of a special procedure ad hoc nature of international law as practiced in International by all civilized nations;
- **Rejects** all other claims of Mr. Houssein Habre as ineffective.

COSTS

62. Finds that each party bear its own costs.

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