



## **Submission to the Committee of Eminent African Jurists: Options for Hissène Habré to Face Justice April 2006**

A Belgian judge has indicted the former Chadian President Hissène Habré for his alleged role in thousands of political killings, systematic torture, and violent campaigns against different ethnic groups. Belgium has asked for Mr. Habré's extradition from Senegal, where he lives and where he was first indicted on atrocity charges in 2000. The president of Senegal, Abdoulaye Wade, in turn requested the January 2006 summit of the African Union (A.U.) to "indicate the competent jurisdiction" for the trial of Mr. Habré. On January 24, 2006, the A.U. set up a Committee of Eminent African Jurists (CEAJ) to consider the options available for Hissène Habré's trial, taking into account, inter alia, "fair trial standards," "efficiency in terms of cost and time of trial," "accessibility to the trial by alleged victims as well as witnesses," and "priority for an African mechanism."

This paper examines Senegal's legal obligations as well as the different options for bringing Mr. Habré to justice. It notes that—whatever the outcome of the A.U. review—Senegal is under an obligation to prosecute or to extradite Hissène Habré. It concludes that Mr. Habré's extradition to Belgium is the most efficient, realistic, and timely option for ensuring that Mr. Habré is able to respond to the charges against him with all the guarantees of a fair trial. If the CEAJ wished to propose an African option, it should recommend Mr. Habré's trial in Senegal. Chad does not offer the guarantee of a fair trial. Establishment of a new ad hoc African tribunal to try Mr. Habré's alleged crimes would require enormous political will, would be years in the making, and would probably cost over U.S.\$100 million, while no existing African tribunal appears to have judicial competence over the alleged crimes. Hissène Habré's victims have already been waiting for fifteen years to find a court to hear their case, and many of the survivors have already died.

The victims' first attempt to bring Hissène Habré to justice was in Senegal, six years ago. When a Senegalese judge indicted Mr. Habré on charges of crimes against humanity and torture in January 2000, it was hailed as a new dawn for African justice. The Senegalese courts later ruled, however, that they had no competence to try Hissène Habré. President Wade had already spoken out against Hissène Habré's trial in Senegal. President Wade then stated that he would nevertheless hold Hissène Habré in Senegal and that "if a country capable of organizing a fair trial—there is talk of Belgium—wants him, I do not foresee any obstacle." President Wade has indeed kept Hissène Habré in Senegal, and Belgium is now seeking Mr. Habré's extradition.

Senegal, as the state on whose territory Hissène Habré is living, has since 1990 been under a legal obligation to prosecute or extradite Hissène Habré pursuant to the 1984 United Nations (U.N.) Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture). Senegal cannot elude this obligation by referring the matter to the African Union. Rather, the African Union should consider its role as seeking to help Senegal discharge its treaty obligations. Belgium has stated that if Senegal fails to extradite Hissène Habré, it will pursue remedies against Senegal under the convention.

### **Recommendations to the Committee of Eminent African Jurists**

The Committee of Eminent African Jurists should:

1. Re-affirm that Senegal has a legal obligation to extradite or prosecute Hissène Habré based on the 1984 U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.
2. Recommend that Senegal extradite Hissène Habré to Belgium. This the most concrete, realistic, and timely option for ensuring that Mr. Habré is able to respond to the charges against him with all the guarantees of a fair trial.

If the ready available option of extradition to Belgium is not chosen because the A.U. wishes to pursue the possibility of an African mechanism, the CEAJ should propose that Mr. Habré be tried in Senegal, with Senegal incorporating the results of the four-year Belgian pre-trial investigation. The CEAJ should add the proviso that if Senegal is unable or unwilling to make the necessary legislative changes by the January 2007 A.U. summit to give its courts judicial competence

over Mr. Habré's alleged crimes, the A.U. should recommend that Senegal extradite Hissène Habré to Belgium.

3. In order to deal with issues of a similar nature in the future, recommend that:

- All African states ratify the principal international anti-impunity instruments including the Rome Statute of the International Criminal Court, the U.N. Convention against Torture, and the Geneva Conventions, and that they bring their domestic legislation into harmony with these conventions so that they are in a position to fulfill their obligations without undue delay; and
- A fund be created, open to international donors, to assist African states in bringing to justice the perpetrators of the worst international crimes.

## **Background**

### ***The Alleged Crimes of Hissène Habré***

Hissène Habré ruled Chad from 1982 until 1990, when he was deposed by current President Idriss Déby Itno. His one-party government was marked by widespread atrocities. Mr. Habré periodically targeted various ethnic groups such as the Sara (1983-84), Chadian Arabs, the Hadjerai (1987), and the Zaghawa (1989-90), killing and arresting group members en masse when he believed that their leaders posed a threat to his regime. The exact number of Mr. Habré's victims is not known. A 1992 Chadian government truth commission accused Mr. Habré's regime of some forty thousand political murders and systematic torture.<sup>1</sup> These acts were not connected to Chad's armed conflict with Libya. Most predations were carried out by Mr. Habré's political police, the Documentation and Security Directorate (DDS), whose directors all came from Mr. Habré's small Gorane ethnic group and which reported directly to Mr. Habré. Torture was a common practice in the DDS detention centers. Among the most common forms of torture was *arbatachar* binding in which a prisoner's four limbs were tied together behind his back, leading to loss of circulation and paralysis.

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<sup>1</sup> Commission D'Enquête Nationale du Ministère Tchadien de la Justice, Les Crimes et Détournements de L'Ex-Président Habré et De Ses Complices.

In 2001 Human Rights Watch discovered the files of the DDS. Among the tens of thousands of documents in the files were daily lists of prisoners and of deaths in detention, interrogation reports, surveillance reports, and death certificates. The files detail how Mr. Habré placed the DDS under his direct authority, organized ethnic cleansing, and kept tight control over DDS operations. They reveal the names of 1,208 persons who died in various jails, including one on the grounds of Mr. Hissène Habré's presidential compound. The documents mention a total of 12,321 victims of different forms of abuse. In these files alone, Hissène Habré received 1,265 direct communications from the DDS about the status of 898 detainees.

The truth commission also accused Mr. Habré of stealing some 3.32 billion CFA francs (U.S.\$5,926,520 at today's rates) from the national treasury in the days before his flight to Senegal. The total amount taken by Hissène Habré during his rule is said to be considerably higher.

### ***The Attempts to Prosecute Hissène Habré***

After Mr. Habré fled Chad, he eventually settled in Senegal. The Chadian truth commission recommended the prosecution of Hissène Habré and his accomplices. The Chadian government did not seek Mr. Habré's extradition, however. As noted below, the government of Chad has supported Hissène Habré's extradition to Belgium and has formally waived his immunity.

### ***Senegal***

In January 2000, a number of Chadian victims filed a criminal complaint against Hissène Habré in Senegal, where he lives. Jurisdiction was asserted on the basis, inter alia, of the 1984 U.N. Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, ratified by Senegal, which obliges states to either prosecute or extradite alleged torturers who enter their territory. The Constitution of Senegal provides that "the treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of the laws."<sup>2</sup> Senegal had informed the U.N. Committee against Torture in 1990 and again in 1995 that Senegalese courts could exercise jurisdiction over acts of torture committed by non-Senegalese outside of Senegal.<sup>3</sup>

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<sup>2</sup> Senegalese Constitution, article 98 ("Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois").

<sup>3</sup> United Nations, "Initial Report of Senegal to the Committee against Torture," (United Nations, 1990), CAT/C/5/Add.19, para. 93. See also United Nations, "Second Report of Senegal to the Committee against Torture" (United Nations, 1995), CAT/C/17/Add.14, para. 42 ("The legal provisions ... do not in any way hinder

In February 2000, a Senegalese court charged Mr. Habré with torture and crimes against humanity and placed him under house arrest. After he was elected in March 2000, however, Senegal's President Abdoulaye Wade stated publicly on a number of occasions that Mr. Habré would not be tried in Senegal. In July 2000, the magistrate who had indicted Habré and was pursuing his pre-trial investigation was transferred from his post and shortly thereafter the court of appeals dismissed the charges, ruling that Senegalese courts had no competence to pursue acts of torture that were not committed in Senegal.

In a joint appeal, the U.N. Commission on Human Rights' special rapporteurs on the independence of judges and lawyers and on torture "expressed their concern to the Government of Senegal over the circumstances surrounding the recent dismissal of charges" and "reminded the Government of Senegal of its obligations under the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment to which it is party."<sup>4</sup> Nevertheless, the *Cour de Cassation*, Senegal's court of final appeals, upheld the ruling on March 20, 2001, holding that Mr. Habré could not stand trial in Senegal for crimes allegedly committed elsewhere because Senegal had not incorporated the provisions of the Convention against Torture into its code of criminal procedure, and because—despite the constitutional provision cited above—such incorporation was required for a criminal prosecution.<sup>5</sup>

However one views the Senegalese courts' interpretation of Senegalese domestic law—and the decision has been criticized by at least one eminent Senegalese jurist<sup>6</sup>—it cannot

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the prosecution of torture offences committed in Senegal or abroad and are therefore in keeping with the Convention against Torture) and para. 43 ("The aim of the Convention is to ensure that a person who has committed torture and is present in the territory of a State party is arrested, so that he may answer for the acts of which he is accused").

<sup>4</sup> Office of the United Nations High Commissioner for Human Rights, "United Nations Rights Experts Express Concern Over Dismissal of Charges Against Hissène Habré," Press Release, August 2, 2002 [online], <http://www.unhcr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>.

<sup>5</sup> Cour de Cassation, Crim, Arrêt n° 14 du 20 mars 2001, "Souleymane Guengueng et autres Contre Hissène Habré," [online], [http://www.hrw.org/french/themes/Habré-cour\\_de\\_cass.html](http://www.hrw.org/french/themes/Habré-cour_de_cass.html). The Cour de Cassation said, "Qu'aucun texte de procédure ne reconnaît une compétence universelle aux juridictions sénégalaises en vue de poursuivre et de juger, s'ils sont trouvés sur le territoire de la République, les présumés auteurs ou complices de faits [de torture] ... lorsque ces faits ont été commis hors du Sénégal par des étrangers; que la présence au Sénégal d'Hissène Habré ne saurait à elle seule justifiées les poursuites intentées contre lui."

<sup>6</sup> According to Guibril Camara, president of the Cour de Cassation and member of the U.N. Committee against Torture, the decision "flies in the face of Article 27 of the Vienna Convention on the Law of Treaties" and "its worst defect" is its "partial and superficial reading of the Convention against Torture" (Camara, "Les Conventions internationales et la loi interne à travers la jurisprudence au Senegal," in "Les Conventions internationales et la loi interne à travers la jurisprudence," Royaume du Maroc—Ministère des droits de l'homme, Centre de documentation d'information et de formation en droits de l'homme. Actes de séminaire, 2001).

excuse Senegal's failure to prosecute Mr. Habré. As the Vienna Convention on the Law of Treaties states, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."<sup>7</sup>

Following the *Cour de Cassation* decision, the Chadian victims/plaintiffs lodged a communication against Senegal with the U.N. Committee against Torture,<sup>8</sup> alleging a violation of the Convention against Torture. In April 2001, President Wade declared publicly that he had given Habré one month to leave Senegal. In a preliminary ruling issued in April 2001, however, the committee called on Senegal to "take all necessary measures to prevent Mr. Hissène Habré from leaving the territory of Senegal except pursuant to an extradition demand."<sup>9</sup> U.N. Secretary-General Kofi Annan privately appealed to President Wade to heed the committee's call. Senegal has indeed scrupulously respected that request.

### **Belgium**

Following the *Cour de Cassation* decision, Mr. Habré's victims also announced that they would seek his extradition to Belgium, where twenty-one of Mr. Habré's victims, including three Belgian citizens, had filed suit under Belgium's former "universal jurisdiction" law. That law, in its original form, allowed Belgian courts to judge particular crimes of international concern, such as genocide, crimes against humanity, or war crimes, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims. The international law principle of universal jurisdiction, which is incorporated into the legislation of many countries, holds that every state has an interest in bringing to justice the perpetrators of certain atrocities no matter where they were committed.

President Wade stated in September 2001 that following the intervention of U.N. Secretary-General Annan he had agreed to hold Hissène Habré in Senegal pending an extradition request. President Wade has kept that promise. In addition, President Wade said that "if a country capable of organizing a fair trial—there is talk of Belgium—wants him, I do not foresee any obstacle."<sup>10</sup>

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<sup>7</sup> Article 27. Senegal ratified the Vienna Convention in 1986.

<sup>8</sup> Souleymane Guengueng et Autres C/ Sénégal, Communication Présentée au Comité Contre la Torture (Article 22 de la Convention), pour violation des Articles 5 et 7 de la Convention [online], <http://www.hrw.org/french/themes/habre-cat.html>.

<sup>9</sup> Letter from Chief, Support Services Branch, Office of the High Commissioner for Human Rights, to Reed Brody, Human Rights Watch, April 2001 [online], [http://www.hrw.org/french/themes/images/guengueng\\_small.jpg](http://www.hrw.org/french/themes/images/guengueng_small.jpg).

<sup>10</sup> *Le Temps* (Geneva), September 27, 2001.

The complaints against Mr. Habré were deemed admissible by the Belgian courts. In February and March 2002, at the invitation of the Chadian government, the Belgian judge, a prosecutor, and a police team visited Chad where they interviewed dozens of witnesses, visited Mr. Habré's prisons and mass graves together with former detainees, and took copies of the DDS files.

A multitude of cases were filed in Belgium against sitting officials of other countries. In February 2002, the International Court of Justice (ICJ), in a case brought by the Democratic Republic of Congo (DRC) against Belgium based on the arrest warrant issued against the DRC Foreign Minister Abdoulaye Yerodia Ndombasi,<sup>11</sup> said that certain high-ranking sitting officials enjoyed "immunity of jurisdiction" from prosecution before the courts of another state. As a result, a Belgian court later dismissed the attempted prosecution of Israel's Prime Minister Ariel Sharon on immunity grounds. Other cases—including several against African heads of state—were then dismissed on immunity grounds as well.

The ICJ left open the question of immunity of jurisdiction for former office-holders. It made clear, however, that immunity belongs not to the individual but to the state, and that the office-holder will "cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity."<sup>12</sup> In an October 2002 letter to the Belgian judge investigating the charges against Mr. Habré, Chad's justice minister, Djimnain Koudj-Gaou, removed any doubts as to Mr. Habré's immunity, writing, "Mr. Hissène Habré can not claim to enjoy any form of immunity from the Chadian authorities."<sup>13</sup>

The Belgian parliament repealed its universal jurisdiction law in July-August 2003. Most of the cases filed under that law were then dismissed. A transitory clause permitted the maintenance of cases in which the judicial investigation had already begun and in which there were Belgian plaintiffs, however. The Habré case met these criteria as the investigating judge had already carried out a mission to Chad and three of the original plaintiffs were Belgian citizens for many years before the case was filed. Politically, the Habré case was also considered "safe" because the government of Chad was pressing for his extradition to Belgium and President Wade had specifically said that he would look

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<sup>11</sup> Arrest Warrant of April 11, 2000, (Democratic Republic of Congo v. Belgium), Judgment of February 14, 2002, by the International Court of Justice.

<sup>12</sup> *Ibid.*, para. 61.

<sup>13</sup> This letter is reproduced at <http://www.hrw.org/french/press/2002/tchad1205a.htm>.

favorably on an extradition request from Belgium for Hissène Habré. Other cases that continue in Belgium include those in which Belgian citizens were killed in Guatemala and Rwanda.

The four-year investigation by a Belgian judge resulted in an international arrest warrant for Mr. Habré on September 19, 2005, charging him with genocide, crimes against humanity, war crimes, torture, and serious violations of international humanitarian law.

### ***Belgium's Extradition Request***

Also on September 19, 2005, Belgium made an extradition request to Senegal. The request cited, *inter alia*, article 8 of the Convention against Torture, which provides that, as between states parties, the convention serves as a legal basis for extradition for acts of torture.

On October 5, 2005, U.N. Secretary-General Kofi Annan said, "I think the indictment of the [Belgian] Court ought to be respected and countries around the world should cooperate."<sup>14</sup>

On October 26, 2005, Alpha Oumar Konaré, president of the African Union Commission, said, "Regarding Hissène Habré, the Senegalese government has said that if a country wants to try him, it is committed to deliver him to justice. From all the information that we have, his case is with the Senegalese judicial system so that such a procedure is commenced and we can only support such a procedure."<sup>15</sup>

Acting pursuant to the extradition request, the Senegalese authorities arrested Hissène Habré on November 15, 2005.

On November 18, the special rapporteur of the U.N. Commission on Human Rights on torture and other cruel, inhuman, or degrading treatment or punishment, Manfred Nowak, welcomed the arrest and called on the Senegalese government to extradite Mr. Habré to Belgium.

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<sup>14</sup> A transcript can be found online at [http://transcripts.cnn.com/TRANSCRIPTS/0510/07/i\\_dl.01.html](http://transcripts.cnn.com/TRANSCRIPTS/0510/07/i_dl.01.html).

<sup>15</sup> "Alpha Konaré pour l'extradition de Hissène Habré," Panapress, October 27, 2005, ("Concernant Hissène Habré, le gouvernement sénégalais avait dit que si un pays veut le juger, il s'engage à le livrer. D'après toutes les informations que nous avons, le dossier est au niveau de la justice sénégalaise pour Thequ'une telle procédure soit engagée et nous ne pouvons que l'approuver").



On November 24, 2005, the president of Chad, Idriss Déby Itno, called on President Wade to extradite Mr. Habré to Belgium.

On November 24, 2005, the state prosecutor (*Ministère Public*) recommended to the Indicting Chamber of the Court of Appeals of Dakar that it declare itself without jurisdiction to rule on the extradition request.

On November 25, 2005, the Indicting Chamber of the Court of Appeals of Dakar ruled that it had no jurisdiction to rule on the extradition request, saying that Mr. Habré, as a former head of state, enjoyed an “immunity of jurisdiction” pursuant to the Yerodia decision of the International Court of Justice<sup>16</sup> that could not be lifted by the Indicting Chamber.<sup>17</sup> (In the opinion of Human Rights Watch, this is a manifest misinterpretation of the Yerodia decision since, as described above, that decision confirmed that the that the office-holder will “cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity,” which Chad had done in this case.)

The court therefore asked the prosecutor to go before another court (“*mieux se pourvoir*”), and implied that the appropriate jurisdiction to lift Mr. Habré’s immunity was the High Court of Justice (which is the only court in Senegal competent to hear a case against the president of Senegal, and can only be seized by the parliament), thus throwing the case into a legal limbo. Under the Senegalese law on extradition, if the opinion of the Indicting Chamber “rejects the extradition request, the request cannot be granted.”<sup>18</sup> “In the contrary case, the extradition can be authorized by decree.”<sup>19</sup> It is in this second case that the extradition request finds itself after the Indicting Chamber could not rule. In other words, under a literal reading of the law, President Wade may now authorize the extradition of Hissène Habré by decree. Alternatively, the prosecutor could, as the court suggested, ask the parliament to seize the High Court of Justice. In a note circulated to the African Union at its January 2006 session, however, the government of Senegal said that as a result of the court’s decision, the extradition case was “closed.”<sup>20</sup>

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<sup>16</sup> Arrest Warrant of April 11, 2000, (Democratic Republic of Congo v. Belgium), Judgment of February 14, 2002, by the International Court of Justice.

<sup>17</sup> Excerpts of the court decision are reproduced at <http://hrw.org/french/docs/2005/11/26/chad12091.htm>.

<sup>18</sup> "Si la Chambre d'accusation rejette la demande d'extradition, celle-ci ne peut être accordée," article 17.

<sup>19</sup> "Dans le cas contraire, l'extradition peut être autorisée par un décret," article 18.

<sup>20</sup> NOTE de présentation du point de l'ordre du jour de la Sixième Session de la Conférence des chefs d'Etat et de gouvernement de l'Union africaine proposé par le Sénégal et intitulé "L'affaire Hissène HABRE et l'Union africaine" (Assembly/AU/8(VI) Add.9).

On November 26, 2005, the day after the court decision, the interior minister of Senegal issued an order placing Hissène Habré “at the disposition of the President of the African Union,” and stating that after forty-eight hours Hissène Habré would be expelled to Nigeria. On November 27, the foreign minister of Senegal, Cheikh Tidiane Gadio, stated that Hissène Habré would remain in Senegal. The foreign minister announced in a communiqué that:

Following an interview between His Excellency Maître Abdoulaye Wade, President of Senegal, and His Excellency Olusegun Obasanjo, President of the Federal Republic of Nigeria, and President of the African Union, it was agreed to bring the issue before the next summit of Heads of State of the African Union, scheduled for Khartoum (Sudan) on 23 and 24 January 2006.<sup>21</sup>

The communiqué continued that:

The State of Senegal, sensitive to the complaints of victims who are seeking justice, will abstain from any act which could permit Mr. Hissène Habré to not face justice. It therefore considers that it is up to the African Union summit to indicate the jurisdiction which is competent to try this matter.<sup>22</sup>

As noted below, from a legal standpoint, the role of the African Union can only be a political or consultative one. The treaty obligation to ensure that Hissène Habré not escape justice belongs to Senegal, and Senegal cannot transfer that obligation to the African Union.

### ***The African Union***

In the run-up to the African Union summit, most leading human rights NGOs in Africa called for Hissène Habré’s extradition to Belgium either immediately or if the African Union were unable, after a short period, to arrange his trial in Africa.

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<sup>21</sup> “Suite à un entretien entre Son Excellence Maître Abdoulaye Wade, président du Sénégal, et Son Excellence Olusegun Obasanjo, président de la République fédérale du Nigeria et président de l’Union africaine, il avait été convenu de porter devant le prochain sommet des chefs d’Etat de l’Union africaine prévu à Khartoum (Soudan) du 23 au 24 janvier 2006.”

<sup>22</sup> “L’Etat du Sénégal, sensible aux plaintes des victimes qui demandent justice, s’abstiendra de tout acte qui pourrait permettre à M. Hissène Habré de ne pas comparaître devant la justice. Il considère, en conséquence, qu’il appartient au sommet de l’Union africaine d’indiquer la juridiction compétente pour juger cette affaire.”

The West African Civil Society Forum which met in Niamey, Niger from January 4-6, 2006 preceding the Economic Community of West African States (ECOWAS) Heads of State and Government Summit brought together over one hundred representatives from civil society organizations in the fifteen member states of ECOWAS. It adopted a resolution stating that if the African Union could not organize Hissène Habré's trial in Africa within one year, it should recommend Hissène Habré's extradition to Belgium.

On January 16, 2006, thirty-five leading civil society groups from across Africa<sup>23</sup> “urge[d] that the African Union recommend to Senegal that it extradite the former Chadian dictator Hissène Habré to Belgium.” The groups said, “We all would have preferred to see Hissène Habré tried in Africa. But the fact is that Senegal refused to prosecute Mr. Habré in 2000 when it had the opportunity to do so, Chad has never sought Mr. Habré's extradition (and could not guarantee him a fair trial), and no other country has asked for Mr. Habré's extradition.”<sup>24</sup>

Similarly, at the African Civil Society Consultation on Engagement with the A.U. organized in Nairobi on January 13-14, 2006, more than forty NGOs<sup>25</sup> adopted a statement on the Habré case which concluded that:

The African Union must now propose a concrete, realistic and fundable plan which would lead to Hissène Habré's prompt and fair trial in Africa. If the A.U. is unable to set such a plan in motion, with tangible progress by the mid-2006 summit, we would reluctantly conclude that Mr. Habré's extradition to Belgium is the only possibility for justice and the A.U. should advise Senegal accordingly.

At its Sixth Ordinary Session in Khartoum, the Assembly of the African Union “reiterate[d] the A.U.'s commitment to fighting impunity” and decided “to set up a Committee of Eminent African Jurists to be appointed by the Chairperson of the

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<sup>23</sup> The groups included the Inter-African Union for Human Rights (IUHR) which itself brings together forty member NGOs working in different African countries, the leading human rights groups in Chad, as well as The Ivorian Movement for Human Rights (MIDH), the Burkinabe Movement for Human and People's Rights (MBDHP), the Djibouti League for Human Rights Hurinet—Uganda, the National Society for Human Rights—Namibia and the Kenya Human Rights Commission.

<sup>24</sup> See Human Rights Watch, “A.U. Summit: African NGOs Urge Justice in Habré Case,” January 16, 2006 [online], <http://www.hrw.org/english/docs/2006/01/16/africa12487.htm>.

<sup>25</sup> The NGOs included: the African Centre For Democracy And Human Rights Studies; CREDO For Freedom Of Expression & Associated Rights; African Women's Development & Communication Network—FEMNET; Centre For The Study Of Violence And Reconciliation; Southern Africa Non-Governmental Organisation Network (Sangonet); and Third World Network—Africa.

African Union in consultation with the Chairperson of the Commission of the African Union” to “consider all aspects and implications of the Hissène Habré case as well as the options available for his trial” and to submit a report to its next Ordinary Session in June 2006.<sup>26</sup> The assembly asked the CEAJ to take into account the following benchmarks:

- Adherence to the principles of total rejection of impunity;
- Adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings;
- Jurisdiction over the alleged crimes Mr. Habré should be tried for;
- Efficiency in terms of cost and time of trial;
- Accessibility to the trial by alleged victims as well as witnesses;
- Priority for an African mechanism.

The assembly also mandated the CEAJ “to make concrete recommendations on ways and means of dealing with issues of a similar nature in the future.”

### **Senegal’s Legal Obligations**

Senegal, as the state on whose territory Hissène Habré is present, is under a legal obligation to prosecute or extradite Hissène Habré. This obligation flows from the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ratified by Senegal in 1986.<sup>27</sup>

Article 5(2) of the convention provides:

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over [acts of torture] *in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him...*<sup>28</sup>

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<sup>26</sup> “Decision on the Hissène Habré Case and the African Union,” (Doc.Assembly/AU/8(VI)), Add. 9, [online], [http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th\\_ord\\_KHARTOUM\\_Jan2006.pdf](http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf); also available at <http://hrw.org/english/docs/2006/01/24/chad12571.htm>.

<sup>27</sup> The Geneva Conventions and customary international law would also seem to contain the same obligation, but will not be examined here.

<sup>28</sup> Emphasis added.

Article 5 must be considered in conjunction with article 7(1), which reads:

The State Party in the 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.

Taken together, these provisions create the “obligation either to extradite alleged torturers or to try them on the basis of universality of jurisdiction.”<sup>29</sup>

According to the chairman of the U.N. Working Group entrusted with drafting the 1984 convention, and the ambassador who prepared the text of the convention’s first draft, article 5 (and 7) is:

*A cornerstone in the Convention, an essential purpose of which is to ensure that a torturer does not escape the consequences of his acts by going to another country. As with previous conventions against terrorism, [...] the present Convention is also based on the principle *aut dedere aut punire*; in other words, the country where the suspected offender happens to be shall either extradite him for the purpose of prosecution or proceed against him on the basis of its own criminal law.*<sup>30</sup>

Lord Browne-Wilkinson, the senior judge of the Judicial Committee of the House of Lords presiding over the Pinochet case, in fact noted that:

The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal—the torturer—could find no safe haven....<sup>31</sup>

Other judges on the court in London ruled in the same vein.<sup>32</sup>

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<sup>29</sup> Rodley, *The Treatment of Prisoners in International Law* (ed. 2), 1999, p. 129.

<sup>30</sup> J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, p. 131, emphasis added.

<sup>31</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Ex Parte Pinochet)* [1999] 2 W.L.R. 827.

Senegal's obligation to extradite or prosecute was not contingent on, and preceded, both the victims' filing of a criminal complaint in 2000 and Belgium's extradition request of 2005.<sup>33</sup>

Senegal has failed to respect this obligation by neither prosecuting nor extraditing Hissène Habré who is credibly accused of systematic acts of torture. The government of Senegal recognized as much in the note which it circulated to the A.U. Assembly in January 2006.<sup>34</sup>

In his communiqué of November 27, the foreign minister of Senegal, Cheikh Tidiane Gadio, began by stating that "Senegal is in no way directly concerned by the case of Hissène Habré."<sup>35</sup> However, Senegal, as the state on whose territory Hissène Habré is present is indeed concerned by the case, and has contracted a legal obligation under the

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<sup>32</sup> See Lord Goff: (The Torture Convention of 1984 "is concerned with the jurisdiction of national courts, but its 'essential purpose' is to ensure that a torturer does not escape the consequences of his act by going to another country. [...] Article 7 [...] reflects the principle aut dedere aut punire, designed to ensure that torturers do not escape by going to another country.") Lord Millet: ("The Convention thus affirmed and extended an existing international crime and imposed obligations on the parties to the Convention to take measures to prevent it and to punish those guilty of it. As Burgers and Danielius explained, its main purpose was to introduce an institutional mechanism to enable this to be achieved. Whereas previously states were entitled to take jurisdiction in respect of the offence wherever it was committed, they were now placed under an obligation to do so. Any state party in whose territory a person alleged to have committed the offence was found was bound to offer to extradite him or to initiate proceedings to prosecute him.") *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Ex Parte Pinochet)* [1999] 2 W.L.R. 827.

<sup>33</sup> As Lord Browne-Wilkinson noted in the Pinochet decision, "Throughout the negotiation of the Convention certain countries wished to make the exercise of jurisdiction under Article 5(2) dependent upon the state assuming jurisdiction having refused extradition to an Article 5(1) state. However, at a session in 1984 all objections to the principle of aut dedere aut punire were withdrawn. 'The inclusion of universal jurisdiction in the draft Convention was no longer opposed by any delegation': Working Group on the Draft Convention U.N. Doc. E/CN. 4/1984/72, para. 26" (*Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Ex Parte Pinochet)* [1999] 2 W.L.R. 827). This confirms the account of Burgers and Danielius: "There were delegations which considered that jurisdiction should be dependent on an extradition request having been made but refused. However, this was not the predominating opinion, and not the opinion that was reflected in the Convention" (J. Herman Burgers and Hans Danielius, *The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 1988, p. 78).

<sup>34</sup> "The non-incorporation, in our positive law, of the rules of judicial competence set forth in the Convention thus prevented the national jurisdictions for investigating and treating this case" ("La non adaptation, dans notre droit positif, des règles de compétence posées par cette Convention, empêchait ainsi les juridictions nationales d'instruire et de traiter cette affaire.") NOTE de présentation du point de l'ordre du jour de la Sixième Session de la Conférence des chefs d'Etat et de gouvernement de l'Union africaine proposé par le Sénégal et intitulé "L'affaire Hissène HABRE et l'Union africaine" (Assembly/AU/8(VI) Add.9). As noted above, a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Vienna Convention on the Law of Treaties, art. 27).

<sup>35</sup> "Le Sénégal n'est en aucune manière directement concerné par l'affaire Hissène Habré."

Convention against Torture, to prosecute or extradite Hissène Habré. It cannot elude this legal obligation by referring the matter to the African Union.

Just after the A.U. Assembly, the Belgian government re-iterated that it was waiting for Senegal's response to its extradition request and that if the request were refused, Belgium would invoke the provisions of the U.N. Convention against Torture that provide for arbitration and recourse to the International Court of Justice.<sup>36</sup>

## **Options for the Trial of Hissène Habré**

Human Rights Watch welcomes the commitment of the Senegalese authorities to ensure that Hissène Habré's victims have their day in court and that Mr. Habré answers the charges against him within the context of a fair trial. Indeed, as noted above, Senegal has an international legal obligation under the U.N. Convention against Torture either to prosecute or to extradite Hissène Habré for the acts of torture of which he is accused. Human Rights Watch also welcomes the African Union's resolution on the case which "reiterates the A.U.'s commitment to fighting impunity."

Several possibilities exist for the trial of Hissène Habré. Human Rights Watch agrees with the A.U. Assembly that any arrangement for the trial of Hissène Habré must be measured against a series of benchmarks including: adherence to international fair trial standards, including the independence of the judiciary and impartiality of the proceedings; efficiency; and accessibility to Chadians. While Human Rights Watch also agrees that "priority" should be given to an African mechanism—and indeed Human

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<sup>36</sup> In an answer to a parliamentary question on January 26, 2006, the Belgian vice-prime minister and minister of justice, Mme. Laurette Onkelinx, stated that "in the case of a refusal to extradite, Belgium will request application of article 30 of the Convention Against Torture of December 10<sup>th</sup>, 1984. This provision governs disputes between State Parties to the Convention concerning its application or interpretation. We are in the negotiation phase provided for by this article. Belgium has questioned Senegal using diplomatic means on the decision made regarding the extradition request. The Convention provides in effect that the requested state must extradite the accused or judge him under national jurisdiction. In the case of the failure of the negotiations, arbitration will be requested by Belgium, as provided for by article 30 of the Convention. If the two States do not reach an agreement on the organization of this arbitration during the six months after the request, Belgium will submit the dispute to the International Court of Justice, again in accordance with the procedure envisioned by article 30 of the Convention." ("En cas de refus d'extradition, la Belgique demandera l'application de l'article 30 de la Convention contre la torture du 10 décembre 1984. Cette disposition régit les différends entre les États parties à la Convention concernant son application ou son interprétation. Nous sommes dans la phase de négociation prévue par cet article. La Belgique a interpellé le Sénégal par voie diplomatique sur une décision prise relative à la demande d'extradition. La Convention prévoit en effet que l'État requis extrade la personne réclamée ou la fasse juger par une juridiction nationale. En cas d'échec de la négociation, un arbitrage sera demandé par la Belgique, comme prévu par l'article 30 de la Convention. Si les deux États n'arrivaient pas à un accord sur l'organisation de cet arbitrage dans les six mois de la demande, la Belgique soumettrait le différend à la Cour internationale de Justice, toujours selon la procédure prévue par l'article 30 de la Convention.")

Rights Watch participated in the filing of the original case in Senegal in 2000—this preference should not obscure the ultimate goal of a speedy and fair trial for Mr. Habré and justice for his victims.

One of the benchmarks established by the A.U. for the CEAJ to consider is “efficiency in terms of cost and time of trial.” The trial of Hissène Habré will inevitably involve hundreds of witnesses and, depending on where it is held, many millions of dollars. The difficulties of proving crimes committed in another country over fifteen years ago are considerable. As an example, the recent trial in London of Afghan warlord Faryadi Zardad was estimated to have cost over three million pounds (U.S.\$5.2 million).<sup>37</sup> The costs of the two Belgian trials of Rwandans for taking part in the 1994 genocide ranged from 250,000 to 500,000 euros.<sup>38</sup> This does not include the pre-trial investigation and salaries. If an entire new court were established, the costs could easily rise to over U.S.\$100 million as the following examples illustrate:

- The Special Court for Sierra Leone, a joint endeavor of the United Nations and the government of Sierra Leone to bring to justice those who bear the greatest responsibility for grave crimes committed in that country’s armed conflict, and which is located in Sierra Leone, has cost U.S.\$79 million in the first three years of its operation, and has several years still to run.<sup>39</sup>
- The United Nations has sought U.S.\$56.3 million<sup>40</sup> for the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, for the prosecution of surviving leaders of the Khmer Rouge regime.

The International Criminal Tribunal for Rwanda and its counterpart the International Criminal Tribunal for the former Yugoslavia will have both cost over U.S.\$1 billion, but these operations are considerably more complex than the present case.

If the trial is held in Belgium, the costs will, of course, be borne by Belgium and would not require the inherent costs of setting up a new judicial structure.

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<sup>37</sup> “‘Huge Challenge’ of Afghan Torture Case,” BBC, July 18, 2005 [online], <http://news.bbc.co.uk/1/hi/uk/4693787.stm>.

<sup>38</sup> Human Rights Watch interview with Belgian prosecutor.

<sup>39</sup> “Special Court for Sierra Leone Budget 2005-2006” [online], <http://www.sc-sl.org/Documents/budget2005-2006.pdf>.

<sup>40</sup> See Khmer Rouge Trial Task Force, Royal Government of Cambodia, “Chronology of Developments Relating to the KR Trial” [online], <http://www.cambodia.gov.kh/krt/english/chrono.htm>.



Another benchmark set forth by the assembly is time. Hissène Habré's victims have already been waiting for fifteen years to find a court to hear their case, and it has been almost six years since they filed the first case in Senegal. Many of the victims have died since then, including one of the plaintiffs in the Senegal case, and one of the lead plaintiffs in Belgium, both of whom died as a result of their mistreatment under Habré.

The proceedings of a trial must be made accessible to the Chadian population. The Special Court for Sierra Leone, for instance, is implementing outreach programs to make the court accessible to the Sierra Leonean population, and may be considered a model. Video summaries are prepared twice a month and audio summaries once a week, and these summaries are distributed to radio and TV stations. If the trial is held outside of Chad, as it should be, additional efforts must be made to inform a distant public.

## **Chad**

Chad would be the natural place to try Hissène Habré. It is the country where his alleged crimes were committed, where the victims reside and where the evidence is located. Chad has never formally sought Mr. Habré's extradition, however (despite occasional claims to the contrary). Even if it were to do so, there are important reasons not to send Mr. Habré back to Chad: there is a serious risk that Mr. Habré—a former dictator who still has many political enemies in Chad—would be mistreated or even killed.<sup>41</sup> In addition, Chad's weak judiciary is not in a position to guarantee Habré a fair trial or to carry out the proceedings efficiently. According to the independent expert of the U.N. Commission on Human Rights, "in Chad, the authorities have not been able to set up a system for the administration of justice."<sup>42</sup> The cases filed by victims in Chadian courts in October 2000 against Habré-era ex-DDS agents accused of murder and torture are stalled five years later because the Chadian investigative judge does not have the necessary financial means, security, or personnel at his disposal to allow him to properly

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<sup>41</sup> In 1992, dozens of Habré's collaborators, forcibly returned to Chad by Nigeria, were tortured and killed. (See Amnesty International, "Tchad, le cauchemar continue," April 1993.) According to Hissène Habré himself, "Extraditing someone to Déby's Chad would simply be like signing his death warrant" ("extrader quelqu'un vers le Tchad de Déby, cela revient tout simplement à signer son arrêt de mort") ("Hissène Habré, Un dictateur face à la justice," *Jeune Afrique l'Intelligent*, February 15-21, 2000).

<sup>42</sup> "Report of Mónica Pinto, Independent Expert on the Situation of Human Rights in Chad, 27 January 2005" (United Nations, 2005), E/CN.4/2005/121, para. 64. See also U.S. Department of State, *Country Reports on Human Rights Practices: 2005*, Released March 8, 2006, "The judiciary was ineffective, underfunded, overburdened, vulnerable to acts of intimidation and violence, and subject to executive interference."

carry out his investigation.<sup>43</sup> The return of Hissène Habré could also become a factor of political destabilization in a country in which several rebel groups are operating and which is threatened by spill-over violence from Darfur, Sudan.<sup>44</sup>

In his announcement of November 25, the Senegalese minister of foreign affairs stated that “Senegal, conscious that the presence of Mr. Habré in Chad could have serious consequences which would not permit the exercise of dispassionate justice, had excluded the option of his return.”<sup>45</sup> Human Rights Watch welcomes this declaration and agrees that the return of Hissène Habré to Chad to stand trial would not be appropriate. The government of Chad also appears to agree that Mr. Habré’s trial in Chad would not be appropriate. As noted above, the government of Chad has consistently supported Hissène Habré’s extradition to Belgium, inviting the Belgian judge to investigate in Chad and informing the Belgian judge that it waived any immunity of jurisdiction that Hissène Habré might seek to assert.

## **Senegal**

As noted above, Hissène Habré’s victims originally sought to have him tried in Senegal, the country where he has lived since 1990. Senegal was then, and still is, under a legal obligation to prosecute Hissène Habré if he is not extradited. After a Senegalese judge indicted Mr. Habré in 2000 on charges of torture and crimes against humanity, the appellate courts ruled that Senegal had not enacted legislation to implement the Convention against Torture and therefore had no judicial competence to pursue the charges because the alleged crimes had been committed by a non-Senegalese outside of Senegal.<sup>46</sup>

Consistent with the interpretation of Senegalese law by its *Cour de Cassation*, Hissène Habré could still be tried in Senegal if Senegal modified its code of criminal procedure to provide its courts with jurisdiction to try international crimes such as genocide, crimes

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<sup>43</sup> Human Rights Watch, “Chad: The Victims of Hissène Habré Still Awaiting Justice,” A Human Rights Watch Report, vol. 17, no. 10(A), July 2005 [online], <http://hrw.org/reports/2005/chad0705/index.htm>.

<sup>44</sup> Human Rights Watch, “Darfur Bleeds: Recent Cross-Border Violence in Chad,” *A Human Rights Watch Report*, February 2006 [online], <http://hrw.org/backgrounders/africa/chad0206/>.

<sup>45</sup> “Le Sénégal, conscient que la présence de M. Habré au Tchad pourrait y entraîner des conséquences graves qui ne permettraient pas l’exercice d’une justice sereine, avait écarté l’option du renvoi.”

<sup>46</sup> Senegal’s criminal procedure code gives its courts judicial competence over non-Senegalese for acts committed outside of Senegal only in cases of “a crime or of an offence detrimental to state security, or of counterfeiting of the State Seal of the national currency in circulation” (“d’un crime ou d’un délit attentatoire à la Sûreté de l’Etat ou de contrefaçon du sceau de l’Etat, de monnaie nationale ayant cours”) (article 669).

against humanity, war crimes, and torture even when the crimes were committed extraterritorially.<sup>47</sup> Although this course was suggested at a seminar organized by the Ministry of Justice and Senegalese human rights groups in March 2003, and specific text was adopted there,<sup>48</sup> the proposition was never taken up, and it is not clear that the political will exists in Senegal to do so now.

In 2003, President Wade explained that:

Mr. Habré will not be tried in Senegal because the acts were committed elsewhere and because the victims themselves are outside Senegal. I don't want to find myself with a trial in which the civil parties and the defense produce two to three thousand witnesses. That would hold the Senegalese judicial system up to ridicule.<sup>49</sup>

In October 2005, President Wade repeated that:

Hissène Habré cannot be judged properly in Dakar because the judge wanting to investigate the crimes or the acts that Hissène Habré is charged with, what can he do? He will not be able to go to Chad and the victims will bring one thousand witnesses and the other side will also bring one thousand witnesses.<sup>50</sup>

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<sup>47</sup> Such a modification would not be barred by the principle of non-retroactivity because at the time of their commission, Mr. Habré's alleged crimes were already proscribed by Senegal and international law. See article 15 of the International Covenant on Civil and Political Rights (Persons can be tried for acts or omissions that were "criminal according to the general principles of law recognized by the community of nations" under laws enacted after these acts or omissions).

<sup>48</sup> "Atelier de validation de l'avant projet de loi de mise en œuvre du Statut de Rome," organized by the Senegalese Ministry of Justice in collaboration with the Organisation Nationale des Droits de l'Homme (ONDH) and with the support of the Canadian Department of Foreign Affairs and International Trade, March 18-20, 2003.

<sup>49</sup> *Walfadjiri* (Senegal), February 24, 2003 ("Monsieur Habré ne sera pas jugé au Sénégal parce que les faits ont été commis ailleurs et parce que les victimes se trouvent, elles aussi, ailleurs qu'au Sénégal. Je ne veux pas me retrouver avec un procès où les parties civiles et la défense produiront deux mille à trois mille témoins. Cela ridiculiserait la justice sénégalaise...").

<sup>50</sup> President Wade made the following statement in the interview: "At that time (when the victims brought a complaint against Habré in Dakar), I said I was against it. Hissène Habré cannot be judged properly in Dakar because the judge wanting to investigate the crimes or the acts that Hissène Habré is charged with, what can he do? He will not be able to leave his seat to go to Chad and the victims will bring one thousand witnesses and the other side will also bring one thousand witnesses. So the judges will find themselves then with hundreds and hundreds our thousands of witnesses without knowing exactly what ought to be done. Reasonably, he cannot be judged in Dakar which is why I completely agree with the judgment that was passed in Dakar." ("Alors là, j'ai dit, je suis contre. Hissène Habré ne peut pas être bien jugé à Dakar parce que le juge de Dakar qui veut connaître des crimes ou des faits qu'on impute à Hissène Habré, qu'est-ce qu'il peut faire ? Il ne peut pas se déplacer pour aller au Tchad et les victimes vont amener 1000 témoins et l'autre partie va aussi amener 1000

If, however, the fruits of the Belgian pre-trial investigation—notes from the judge’s mission to Chad, police reports, witness interviews, and in particular, the thousands of DDS documents and the analysis of these documents—could be used by the Senegalese courts, this would not only reduce the cost involved, but would eliminate the long delay that would be caused by conducting a whole new probe.

In addition, the CEAJ could explore the possibility of external assistance (international or African Union) to pay for the added costs such as the transportation of witnesses and victims and the recruitment of additional personnel. In this regard, it is quite possible that Belgium would agree to help defray the costs of such a trial in Senegal.

Alternatively, a kind of hybrid Belgian-Senegalese court might be possible in which the resources and personnel of the two countries would be combined at a trial to take place in Senegal.

This solution is contingent on Senegal’s political will to adopt the necessary legislation to establish judicial competence over Mr. Habré’s alleged crimes—will that has heretofore been lacking—and optimally to allow incorporation of the results of the Belgian pre-trial investigation (or to allow some sort of hybrid court). If this solution is chosen, then, a proviso should stipulate that if Senegal were unable to make the necessary legislative changes by the January 2007 summit to give its courts judicial competence over Mr. Habré’s alleged crimes, the A.U. should recommend that Senegal extradite Hissène Habré to Belgium.<sup>51</sup>

To test the feasibility of such a solution, the CEAJ might wish—before the July 2006 summit—to contact the Belgian and Senegalese authorities.

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témoins. Alors les juges vont se trouver là entre des centaines et des centaines ou des milliers de témoins sans trop savoir ce qu’il y a à faire. Raisonnablement il ne peut pas être jugé à Dakar c’est pourquoi je suis tout à fait d’accord avec le jugement qui a été rendu à Dakar” (Transcript of TV5 Interview, October 12, 2005.)

<sup>51</sup> There is precedent for such a deadline. In July 2005, the U.N.-mandated Commission of Experts that reviewed Indonesia’s and Timor-Leste’s prosecution of serious crimes in Timor-Leste in 1999 recommended that Indonesia strengthen its legal capacity, that its Attorney General’s Office review its prosecutions and that some cases be reopened. If the recommendations are not implemented within six months from a date to be determined by the secretary-general, the commission recommended that the Security Council adopt a resolution to create an ad hoc criminal tribunal for Timor-Leste located in a third state (“Summary of Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999,” (United Nations, 2005), S/2005/458 [online], <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/TL%20S2005458.pdf>).

## ***Other African Countries***

Another possibility would be Hissène Habré's trial in a third African country. In the fifteen years since Hissène Habré fled Senegal, no other African country has asked for his extradition nor heretofore taken any initiative to ensure that the victims of Mr. Habré's alleged crimes have their day in court. It is unclear whether any African country has laws (such as those in Belgium, Spain, or Germany) permitting it to commence an investigation for crimes committed abroad by non-nationals when the accused is not in its territory and then to seek the accused's extradition, and certainly none has the practice of trying non-nationals for crimes committed extraterritorially. Similarly, while there were many foreigners among Mr. Habré's victims, African countries do not seem to give their courts competence to punish a crime committed abroad against one of their nationals (the "passive personality" basis of jurisdiction). There were, for instance, Senegalese victims of Hissène Habré, and yet Senegal's courts ruled that they had no competence to hear the case.

If an African country with an independent judiciary that has competence over the acts and adheres to international fair trial standards—preferably a Francophone country—were rapidly to seek Hissène Habré's extradition, this could constitute a viable option. That country should have abolished the death penalty, or agreed not to impose it in this case. That country would have to bear the costs, or have the costs borne through international assistance.

This option would still have the disadvantage of requiring that the pre-trial investigation—to which Belgium devoted years—begin all over again. An arrangement would thus need to be devised that would permit the results of the Belgian investigation to be transferred to that country, as described above in the section on Senegal.

## ***An African Tribunal***

No existing African Union tribunal has the jurisdiction or the infrastructure to conduct the criminal trial of Hissène Habré. Neither the African Court for Human and Peoples' Rights, nor the Court of Justice of the African Union is operational yet, and neither is competent to hear a criminal case.

### ***The African Court of Justice***

The protocols that establish the Court of Justice, which were provided for by the Constitutive Act of the African Union, have not yet received enough ratifications by member states to bring the Court into force. In any case, the Court's competence is restricted to disputes between member states which have ratified the protocols; its jurisdiction does not extend to criminal matters.<sup>52</sup>

### ***The African Court of Human and Peoples' Rights***

Similarly, while the African Court of Human and Peoples' Rights has been in force since January 2004, under its protocol, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned" (art. 3). It does not have competence over alleged crimes by individuals.

The lack of criminal competence is moreover suggested by the criteria for selection of judges. African Court of Human and Peoples' Rights judges are to have "recognized practical, judicial or academic competence and experience in the field of human and peoples' rights."

The two African courts have no legal mandate to receive the transfer of detainees from other countries or to maintain persons deprived of their liberty. Beyond this, the two African courts do not have the infrastructure required to prepare and adjudicate criminal trials. They have, for instance, no investigators, forensic experts, police, witness protection programs, or pre-trial and during-trial detention facilities. To extend the competence of the current African courts to allow them to try Mr. Habré would thus also require the creation of the infrastructure of a criminal court, with all the budgetary implications of the establishment of a new tribunal described below.<sup>53</sup>

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<sup>52</sup> See article 19 of the Protocol of the Court of Justice of the African Union: "The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to: (a) the interpretation and application of the Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (g) the nature or extent of the reparation to be made for the breach of an obligation."

<sup>53</sup> Plans for a new African Court that would combine these two courts are currently underway and would also create additional delays. At its Ordinary Session in Addis Ababa in July 2004, the African Union, in effect, decided to merge the two courts into a single jurisdiction.

### ***A Permanent Court***

One proposal would be to create a standing African court to try the worst international crimes, including those allegedly committed by Hissène Habré. This proposal would, for cases committed after the July 2002 entry into force of the Rome Statute, duplicate the jurisdiction of the International Criminal Court (ICC), however. Under the Rome Statute, the ICC already may investigate and prosecute those individuals accused of crimes against humanity, genocide, and crimes of war when national courts are unwilling or unable to do so. Twenty-seven African states are parties to the ICC. Senegal was the first state to ratify the Rome Statute.

If such a court were to have retrospective, rather than prospective, jurisdiction, so as to not unnecessarily duplicate the efforts of the ICC, there would be little prospect for its adoption. The experience in preparing the Rome Statute suggests that few states would be willing to bring into force a mechanism that would be able to try crimes of the past. As noted below, the costs of a permanent tribunal would be enormous.

### ***An Ad Hoc Court***

Another possibility is to establish an ad hoc tribunal only to prosecute the crimes allegedly committed by Hissène Habré (or perhaps, to use the Sierra Leone formulation, to prosecute those persons who bear the greatest responsibility for serious violations of human rights and humanitarian law in Chad from 1982 to 1990). This might be an appealing possibility, politically and symbolically. However, to come to fruition, such a new tribunal would have to overcome enormous hurdles.

The first hurdles are sustained political will and time. The Special Court for Sierra Leone took two years to establish from the time it was requested in June 2000 by Ahmad Tejan Kabbah, president of Sierra Leone. It was another two years—June 2004—before trials actually began. Approving the Khmer Rouge Tribunal in Cambodia took seven years of negotiations, through 2004, and the judges and other personnel are still yet to be selected. An ad hoc court would mean asking Hissène Habré's victims to wait for many more years, precisely at the moment in which a strong and independent judiciary has initiated proceedings.

Another very large hurdle is money. Funding would be needed for the recruitment of judges, the prosecutor's office, the registry (including witness and victim support), and the defense office. As noted above, the Special Court for Sierra Leone, which might be roughly comparable except for its in-country location, has cost U.S.\$79 million in its first three years of operation. Additional costs for a trial of Hissène Habré held outside of

Chad would include the transportation of hundreds of witnesses and the travel to Chad to conduct the investigation.

Even the Special Court for Sierra Leone, which has made significant strides towards bringing justice for atrocities that were committed during the Sierra Leone armed conflict, still faces limited and uncertain funding, as it is primarily financed through voluntary contributions of states. At a meeting in September 2005, states pledged less than U.S.\$10 million to finance the activities of the Special Court, far short of the U.S.\$25 million sought for the upcoming year.

One way to reduce at least the costs of the pre-trial investigation would be to make some arrangement by which the results of the Belgian investigation could be transferred.

## **Belgium**

Belgium is the most viable and straightforward option for a trial of Hissène Habré because the Belgian justice system has already investigated the charges and issued an arrest warrant and an extradition request, and because Belgium offers the immediate possibility of a fair trial before an independent court. A number of Hissène Habré's victims are Belgian citizens and they are seeking justice in the Belgian courts.

A Belgian judge and the Belgian judicial police have been investigating the charges against Hissène Habré since 2001, pursuant to that country's former "universal jurisdiction" law. Dozens of witnesses have gone from Chad to Belgium to testify before the judge. In 2002, at the invitation of the Chadian government, the Belgian judge, a prosecutor, and a police team visited Chad where they interviewed dozens of witnesses, including victims as well as collaborators of Hissène Habré, and visited Mr. Habré's prisons and mass graves together with former detainees. The judge also took copies of thousands of documents from the abandoned files of Hissène Habré's DDS, including daily lists of prisoners and of deaths in detention, interrogation reports, surveillance reports, and death certificates.

Belgium has two successful experiences in trying cases relating to the 1994 genocide in Rwanda. In 2001, four Rwandans, including two nuns, were convicted of taking part in the genocide. In 2005, two Rwandan businessmen were convicted of war crimes and murder during the genocide. Both trials were considered fair. The accused were represented by lawyers of their choice paid for by the Belgian government.



Although Belgium has a regrettable colonial past, it is important to note that Belgium played no role in the events of the Hissène Habré period in Chad and has no colonial relationship with Chad. Belgium would thus offer a politically neutral forum.

It is important to note that Mr. Habré's victims—Chadians, Senegalese, as well as Belgians—strongly favor his trial in Belgium.<sup>54</sup>

Belgium also offers the fastest possibility for a fair trial.

### **Future Situations**

The A.U. Assembly also mandated the CEAJ “to make concrete recommendations on ways and means of dealing with issues of a similar nature in the future.”

By “issues of a similar nature,” the assembly presumably meant the situation of exiled former heads of state accused of committing serious crimes against international law such as genocide, crimes against humanity, war crimes, and torture. We thus leave aside the questions of what the African Union should do to *prevent* sitting heads of state from committing such crimes or how countries in transition to democracy should deal with the crimes of previous regimes.

In the opinion of Human Rights Watch, the way to deal with similar situations in the future, like the way to deal with the case of Hissène Habré, is by respecting and applying the principles of the African Union,<sup>55</sup> the applicable norms of international law, and the international accountability mechanisms already in place. These include the rules against impunity for the worst international crimes, the conventions which require states to extradite or prosecute the worst offenders, and the International Criminal Court. Looked at in this light, there is no need for new mechanisms to deal with issues of this nature.

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<sup>54</sup> "Habré's victims have waited 15 years to find a court to hear our case, and many of the survivors—including two of my closest friends, who filed the case with me in Senegal six years ago—have already died. Belgium is ready, willing and able to hear the case.... it has an independent judiciary willing to give us—and Habré—a fair trial. After 15 years, surely Senegal and the African Union must allow us to have our day in court." Souleymane Guengueng, (founder and vice-president of the Chadian Association of Victims of Crime and Political Repression), "Send Habré to Belgium for Trial," *International Herald Tribune*, January 16, 2006." See also, Souleymane Guengueng "Il faut juger Hissène Habré," *Jeune Afrique l'Intelligent*, January 22, 2006).

<sup>55</sup> Article 3(h) of the Constitutive Act of the African Union contains the promotion and protection of "human and people's rights in accordance with the African Charter on Human and People's rights and other relevant human rights instruments" as one of the objectives of the African Union. Article 4 of the same act enunciates as a founding principle of the African Union "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities."

The case of Hissène Habré illustrates this point. As described above, Senegal was under a legal obligation to prosecute or extradite Hissène Habré once he arrived in its territory.<sup>56</sup> Had Senegal lived up to its international obligations, the objectives of the Convention against Torture would have been fulfilled, Hissène Habré would not have continued to enjoy impunity for his alleged crimes, the victims would not have turned to a Belgian court and the issue would not have reached the African Union.

The reason given by the Senegalese courts for Senegal's inability to fulfill its treaty obligations was its failure to incorporate in its criminal procedure code a provision giving its courts judicial competence to pursue acts of torture committed by non-Senegalese outside of Senegal, as required by the Convention against Torture. This appears to be a widespread problem among African states which have ratified the convention. The CEAJ should therefore recommend that states not only ratify the relevant conventions, such as the Convention against Torture and the Geneva Conventions, but also bring their domestic legislation into harmony with these conventions so that they are in a position to fulfill their obligations.

As noted above, Senegal's president on a number of occasions ruled out Hissène Habré's trial in Senegal on the ground that such a trial would involve hundreds of witnesses and prove too costly for the Senegalese courts. It is true that the trial of Hissène Habré, or that of other former heads of state, when conducted outside the country where the crimes took place, would inevitably cost millions of dollars. The CEAJ might therefore look at ways in which the financial burden on the forum state of meeting its international obligations could be reduced or shared evenly by African states, through a sort of "Africa Justice Fund" and/or via international cooperation.

For international crimes committed after July 2002, the International Criminal Court regime would seem to offer the strongest guarantee against impunity where national jurisdictions are either unwilling or unable to bring to justice the alleged perpetrators. Twenty-seven African states are parties to the ICC, and the CEAJ could recommend that all African states ratify the Rome Statute of the ICC and incorporate the required provisions into their domestic legislation.

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<sup>56</sup> Although it is not legally relevant to Senegal's obligations, it should be noted that Hissène Habré's flight from Chad on December 1, 1990, and his eventual arrival in Senegal were not part of any "deal" in which Mr. Habré was assured of immunity from prosecution. Hissène Habré fled Chad for neighboring Cameroon as the troops of current President Idriss Déby Itno advanced on the capital N'Djamena. At the request of the president of Cameroon, Senegal agreed to allow Mr. Habré to take up residence there.

In order to deal with issues of a similar nature in the future, the CEAJ should thus recommend that:

- All African states ratify the principal international anti-impunity instruments, including the Rome Statute of the International Criminal Court, the U.N. Convention against Torture, and the Geneva Conventions, and they bring their domestic legislation into harmony with these conventions so that they are in a position to fulfill their obligations; and
- A fund be created, open to international donors, to assist African states in bringing to justice the perpetrators of the worst international crimes.