



# The Trial of Hissène Habré

## Time is Running Out for the Victims

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## **I. Introduction and Recommendations**

Sixteen years after former Chadian President Hissène Habré fled to Senegal, the victims of his brutal regime are still waiting for justice. Habré has twice been indicted for crimes against humanity—in Senegal and Belgium—and has been twice arrested but released, so the victims still await their day in court.

Hissène Habré was first indicted in Senegal in 2000, but courts ruled that he could not be tried there. His victims then turned to Belgium and, after a four-year investigation, a Belgian judge in September 2005 issued an international arrest warrant charging Habré with crimes against humanity, war crimes, and torture committed during his 1982-90 rule. Pursuant to a Belgian extradition request, Senegalese authorities arrested Habré in November 2005. When a Senegalese court refused to rule on the extradition request, the Senegalese government announced that it had asked the African Union (AU) to recommend “the competent jurisdiction” to try Habré. On July 2, 2006, the AU, following the recommendation of an African Union Committee of Eminent African Jurists and a ruling by the United Nations Committee Against Torture, called on Senegal to prosecute Hissène Habré “on behalf of Africa,” and Senegalese President Abdoulaye Wade declared that his country would do so.

President Wade’s agreement to try Hissène Habré was a turning point in the long campaign to bring him to justice. Senegal has also announced the establishment of a commission to prepare Habré’s trial. However, six months have passed since President Wade’s agreement without substantial progress. And the challenges lying ahead should not be underestimated. In particular, Senegal is now faced with the complex and costly task of investigating and prosecuting massive crimes committed many years ago in another country. In addition, Hissène Habré’s supporters in Senegal form a powerful pressure group trying to block justice.

This briefing paper makes the following recommendations to the Government of Senegal, and to other relevant actors, to assist Senegal in what will hopefully be the

first trial before the national courts of one African country for serious international crimes committed in another.

### *To Senegal*

- Maintain the required legal measures to ensure that Hissène Habré does not leave the country.
- Amend national law to include crimes against humanity, war crimes, torture, and genocide, and to provide universal jurisdiction over these crimes.
- Begin an investigation against Hissène Habré for crimes against humanity, war crimes, and torture.
- Seek material and technical support from international partners and donors to conduct the investigation and trial of Hissène Habré.
- Create a special unit to investigate serious international crimes, and seek training for police and judicial personnel in proving international crimes.
- Formally request the assistance of Belgium, particularly the results of the four-year Belgian investigation into Habré's alleged crimes.
- Take the necessary measures to ensure the safety of victims, witnesses, and all others involved in the Habré case.
- Ensure the accessibility of the Habré trial to the Chadian people.

### *To the African Union*

- Name a special envoy or coordinator for the investigation and trial of Hissène Habré. This person could be charged with following through on the African Union's promise of support to Senegal, and with helping Senegal obtain support from elsewhere, while insisting on the need for measurable political commitment from Senegal.

- Assist Senegal in obtaining the resources to investigate and prosecute Hissène Habré.

#### *To Chad*

- Cooperate fully with Senegal throughout the investigation and trial.
- Take the necessary measures to ensure the safety of victims, witnesses, and their family members.
- Ensure the accessibility of the Habré trial to the Chadian people by promoting radio and televised broadcasts in Chad throughout the proceedings.

#### *To Belgium*

- Cooperate fully with Senegal throughout the investigation and trial, especially by making available the results of its four-year investigation into the alleged crimes of Hissène Habré.
- Maintain readiness to seek a ruling from the International Court of Justice if Senegal fails to meet its legal commitments.

#### *To International Partners and Donors*

- Signal to Senegal the international interest in the Hissène Habré case.
- Support Senegal in the complex and costly task of investigating and prosecuting serious international crimes, though financial assistance and training, while insisting on the need for measurable political commitment from Senegal.

#### *To the United Nations Committee Against Torture*

- Monitor Senegal's implementation of its recommendation that Senegal bring Hissène Habré to justice.

## II. Background

### Hissène Habré's Rule

Hissène Habré ruled Chad from 1982 until he was deposed in 1990 by current President Idriss Déby Itno and fled the country. The rule of his one-party regime was marked by widespread atrocities. Habré periodically targeted various ethnic groups such as the Sara (1984), Hadjerai (1987), Chadian Arabs, and the Zaghawa (1989-90), killing and arresting group members en masse when he believed that their leaders posed a threat to the regime. The exact number of Habré's victims is not known. A 1992 Chadian truth commission accused Habré's regime of some 40,000 political murders and systematic torture. Most predations were carried out by Habré's political police, the Documentation and Security Directorate (DDS), whose directors all came from Habré's small Gorane ethnic group and which reported directly to 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 or her back, leading to loss of circulation and paralysis.

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 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 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 Habré of stealing some 3.32 billion CFA francs (more than US\$6.62 million at today's rates) from the national treasury in the days before he fled Chad. The total amount taken by Habré during his rule is said to be considerably higher.

After Habré fled Chad he soon settled in Senegal. The truth commission recommended the prosecution of Hissène Habré and his accomplices. The Chadian government did not seek Habré's extradition, however. As noted below, the government of Chad has supported Hissène Habré's prosecution abroad.

## Habré Is Indicted in Senegal

In January 2000 a number of Chadian victims filed a criminal complaint against Hissène Habré in Senegal. Jurisdiction was asserted on the basis, inter alia, of the 1984 UN Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, ratified by Senegal,<sup>1</sup> which obliges states to either prosecute or extradite alleged torturers who enter their territory.

In February 2000 a Senegalese court charged Habré with torture and crimes against humanity, and placed him under house arrest. After Abdoulaye Wade was elected president of Senegal in March 2000, however, he stated publicly on a number of occasions that Habré would not be tried in Senegal. In July 2000 the magistrate who had indicted Habré and was pursuing the pretrial 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. The *Cour de Cassation*, Senegal's court of final appeals, upheld the ruling on March 20, 2001, holding that 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.<sup>2</sup>

Following the *Cour de Cassation* decision, the Chadian victims/plaintiffs lodged a communication against Senegal with the UN Committee Against Torture (CAT),

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<sup>1</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by Senegal on August 21, 1986.

<sup>2</sup> Cour de Cassation, Crim, Arrêt n° 14 du 20 mars 2001, "Souleymane Guengueng et autres Contre Hissène Habré," [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 justifier les poursuites intentées contre lui."

alleging a violation of the Convention against Torture.<sup>3</sup> 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 CAT called on Senegal to “take all necessary measures to prevent Hissène Habré from leaving the territory of Senegal except pursuant to an extradition demand.”<sup>4</sup> UN Secretary-General Kofi Annan privately appealed to President Wade to heed the committee’s call. Senegal has indeed scrupulously respected that request, and Hissène Habré remains in Senegal to this day.

## **The Case Moves to Belgium**

In the face of the Senegalese dismissal, another group of Hissène Habré’s victims filed a case against Habré in Belgium, to create the possibility of extraditing him to stand trial there. Twenty-one victims, including three Belgian citizens, were plaintiffs in that action before Judge Daniel Fransen of the Brussels District Court.

Belgian law at the time expressly incorporated the principle of “universal jurisdiction”—that every state may bring to justice the perpetrators of 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. (In July 2003 that law was repealed, but the repeal did not affect the Habré case because the investigation had already begun and because there were Belgian citizen plaintiffs.)

In February and March 2002 Judge Fransen visited Chad together with a Belgian state prosecutor and four policemen. The team interviewed witnesses and Habré-era officials, toured former grave sites, and visited the five N’Djamena jails where the DDS had systematically tortured prisoners; they were accompanied at the jails by former inmates who described their inhumane treatment and torture. The team took copies of the DDS files to Belgium for forensic analysis.

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<sup>3</sup> Souleymane Guengueng et Autres C/ Sénégal, Communication Presented before the Committee Against Torture (Article 22 of the Convention), for violation of Articles 5 and 7 of the Convention, <http://www.hrw.org/french/themes/habre-cat.html>.

<sup>4</sup> Letter from Hamid Gaham, chief, Support Services Branch, Office of the UN High Commissioner for Human Rights, to Reed Brody, Human Rights Watch, April 27, 2001, [http://www.hrw.org/french/themes/images/guengueng\\_small.jpg](http://www.hrw.org/french/themes/images/guengueng_small.jpg).



In October 2002 the government of Chad told Judge Fransen that it would waive any immunity that Habré might seek to assert.

Finally, on September 19, 2005, after a four-year investigation, Judge Fransen issued an international arrest warrant against Hissène Habré. The same day Belgium asked for Habré's extradition from Senegal.

### **Senegal Sends the Extradition Request to the African Union**

The extradition request received the support of such international authorities as UN Secretary-General Kofi Annan, Chairman of the African Union Commission Alpha Oumar Konaré, and Manfred Nowak, the special rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman, or degrading treatment or punishment. Chadian victims came to Senegal to tell their stories, and Senegalese victims of Habré's rule confirmed their accounts. At the same time, Habré used the money he had allegedly stolen from the Chadian treasury to build support in influential sectors of Senegalese society.

The Senegalese authorities arrested Hissène Habré on November 15, 2005. However, following the recommendation of the state prosecutor, on November 25 the Indicting Chamber of the Court of Appeals of Dakar ruled that it had no jurisdiction to rule on an extradition request against a former head of state. Under Senegalese law, the decision thus went to President Wade. On November 26, 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." On November 27 the foreign minister of Senegal, Cheikh Tidiane Gadio, announced in a communiqué that

The State of Senegal, sensitive to the complaints of victims who are seeking justice, will abstain from any act which could permit 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>5</sup>

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<sup>5</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

At its January 2006 summit the African Union 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."<sup>6</sup>

Just after the AU Summit the Belgian government reiterated that it was waiting for Senegal's response to its extradition request and that if Senegal refused to extradite Habré or prosecute him in Senegal, Belgium would invoke the provisions of the UN Convention against Torture that provide for arbitration and recourse to the International Court of Justice.<sup>7</sup>

## The United Nations Rules Against Senegal

In a decision rendered on May 19, 2006, on the merits of the victims' communication, the UN Committee Against Torture concluded that Senegal had violated the UN Convention against Torture by failing to prosecute or extradite Habré. The Committee called on Senegal "to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since Belgium has made an extradition request, to comply with that request, or, should the case arise, with any other

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sommet de l'Union africaine d'indiquer la juridiction compétente pour juger cette affaire." See <http://hrw.org/french/docs/2005/11/27/chad12130.htm>.

<sup>6</sup> Declaration on the Hissène Habré Case and the African Union, January 24, 2006, <http://hrw.org/english/docs/2006/01/24/chad12571.htm>.

<sup>7</sup> In an answer to a parliamentary question on January 26, 2006, the Belgian vice-prime minister and minister of justice, 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, 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.")

extradition request made by another State, in accordance with the Convention.”<sup>8</sup> The Committee also noted Senegal’s obligation to “adopt the necessary measures, including legislative measures, to establish its jurisdiction” over Hissène Habré’s alleged crimes.<sup>9</sup>

### **The AU Mandates Senegal to Prosecute Habré “On Behalf of Africa”**

In its report to the July 2006 AU Summit, the CEJG noted, “Since Habré is within its territory Senegal should exercise jurisdiction over him. As a State party to the Convention Against Torture, Senegal is under an obligation to comply with all its provisions.” Citing the CAT ruling, it added that “[i]t is therefore incumbent on Senegal in accordance with its international obligations, to take steps, not only to adapt its legislation, but also to bring Habré to trial.” It therefore concluded that “Senegal is the country best suited to try Habré as it is bound by International law to perform its obligations.”<sup>10</sup>

On July 2 the African Union, following the recommendation of the CEJG, called on Senegal to prosecute Hissène Habré “on behalf of Africa,”<sup>11</sup> and President Wade declared that Senegal would do so.<sup>12</sup>

After four months of silence, on November 2, 2006, Senegalese government spokesman El Hadji Amadou Sall said that Senegal would revise its laws to permit Habré’s trial, and would establish a governmental commission under the minister of justice to oversee the legal changes, make contact with Chad, create a witness

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<sup>8</sup> Committee Against Torture, Communication No. 181/2001: Senegal 19/05/2006 – CAT/C/36/D/181/2001, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/aafdd8e81a424894c125718c004490f6?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/aafdd8e81a424894c125718c004490f6?Opendocument) (accessed December 19, 2006).

<sup>9</sup> *Ibid.*, para. 10. CAT also wished “to receive information from the State party [Senegal] within 90 days on the measures it has taken to give effect to its recommendations.” *Ibid.*, para. 11.

<sup>10</sup> Report Of The Committee Of Eminent African Jurists On The Case Of Hissene Habre, paras. 17, 18, and 28, [http://www.hrw.org/justice/habre/CEJA\\_Reporo5o6.pdf](http://www.hrw.org/justice/habre/CEJA_Reporo5o6.pdf).

<sup>11</sup> Decision On The Hissene Habre Case And The African Union, Doc. Assembly/Au/3 (Vii), <http://www.hrw.org/english/docs/2006/08/02/chad13897.htm>.

<sup>12</sup> “We thought Senegal was the country best placed to try him and I think we must not flee from our responsibility,” said President Wade. BBC News, “Senegal Trial for Ex-Chad Leader,” <http://news.bbc.co.uk/2/hi/africa/5139350.stm>.

protection program, and raise money to carry out the investigation and trial.<sup>13</sup> That commission began to meet in December. At this writing, however, the relevant law revisions have not been made (see also Section IV, below).

For its part, the African Union seems to have taken no particular steps to follow up its resolution. Shortly after the AU decision, the Chairman of the AU Commission Alpha Oumar Konaré said that Hissène Habré's trial should take place "as soon as possible," but no timetable was set forth.<sup>14</sup>

### III. The Challenges Ahead

The decision by the African Union to request that Senegal hold the trial of Hissène Habré, and President Wade's commitment to do so, mark a potential turning point in the long effort to bring Habré to justice. If fair and transparent, this trial would be a milestone in the fight to hold perpetrators of atrocities responsible for their crimes.

But the commencement of a case, the investigation of the charges, the collection of evidence—particularly in Chad—and the trial itself, in addition to the possible execution of sentence, will pose serious ethical, legal, political, and of course material and practical problems.

Senegal is not the first country to confront the difficulties of such a procedure. States such as Israel (in the 1960s with the Eichmann case), and later the United Kingdom, the Netherlands, Denmark, Norway, Spain and Belgium, to name just a few, have had to face the challenge of trying foreigners on their soil for serious international crimes committed against foreigners abroad.<sup>15</sup> But Senegal does appear to be the first developing country to accept such a challenge.

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<sup>13</sup> Communiqué: Le Sénégal prépare activement le jugement de M. Hissène Habré, <http://hrw.org/french/themes/communiquedHabre110206.pdf>.

<sup>14</sup> "Personne n'est au-dessus des lois, pas même les dirigeants" *Le Monde*, July 7, 2006: "Il faut que le procès ait lieu dans les meilleurs délais."

<sup>15</sup> Human Rights Watch, *Universal Jurisdiction: The State of the Art*, vol. 18, no. 5(D), June 2006, <http://www.hrw.org/reports/2006/ijo606/ijo606web.pdf>.

It is critical the trial be conducted “as soon as possible.” Hissène Habré’s victims have been fighting for 16 years to achieve their right to justice. Many of the survivors of Habré’s regime have died in that time, including two of the victims who participated in the initial complaint in Senegal in 2000. The longer the case against Hissène Habré is delayed, the fewer of his victims will be alive when the trial is held, which would be an additional injustice.

## Financial and Logistical Challenges

The trial of Hissène Habré will inevitably involve hundreds of witnesses and millions of dollars. The difficulties of proving crimes committed in another country over 15 years ago are considerable. As an example, the recent trial in London of Afghan warlord Faryadi Zardad was estimated to have cost over £3 million (\$5.2 million).<sup>16</sup>

Even before any trial, of course, the principal cost will be in completing the investigation. The Belgian judge and a team of police officers who deal exclusively with international crimes spent several *years* conducting their inquiry into Habré’s alleged crimes, including their February-March 2002 visit to Chad (see above). It is estimated that the Belgian police spent four person/years on the investigation,<sup>17</sup> with much more work still to be done.

Assuming that the Senegalese investigating authorities obtain access to the Belgian file through mutual legal assistance, there will still be more work to do, including visits to Chad to take evidence, and further analysis of the thousands of DDS documents.

There will be a number of logistical challenges. Dozens, if not hundreds of witnesses for the prosecution and defense, as well as other experts, will have to give testimony, particularly those who were not heard during the investigation phase. The vast majority of these witnesses will come from Chad, but some will come from other places in the world. Their transportation, housing, security and other costs will have

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<sup>16</sup> “‘Huge Challenge’ of Afghan Torture Case,” *BBC News Online*, July 18, 2005, <http://news.bbc.co.uk/1/hi/uk/4693787.stm> (accessed December 19, 2006).

<sup>17</sup> Human Rights Watch interview with Belgian judicial police, December 21, 2006.

to be borne.<sup>18</sup> For those unable to come to Dakar, the possibility of testifying by video-link might be considered.<sup>19</sup>

## Personnel and Training

One obstacle to the successful investigation and prosecution of international crimes is the relative lack of familiarity with investigating and prosecuting such cases among domestic law enforcement agencies, whose work principally involves domestic offenses. Prosecutions for crimes against humanity are daunting and resource-intensive for a variety of reasons: they involve not only criminal offenses with which domestic prosecutors have little experience, but also the prospect of extraterritorial investigations, language barriers,<sup>20</sup> the need to understand the historical and political context in which the alleged crimes occurred, and the gathering of evidence to prove elements of crimes of a type never adjudicated in a country's domestic courts.

A number of European countries, such as Denmark, the Netherlands, Norway, Belgium, and to a lesser extent the UK, have responded to these challenges by creating units within police and prosecutorial authorities that specialize in the investigation and prosecution of trans-national crimes. These units include not only investigators and prosecutors, but also translators, military analysts, historians, and anthropologists, on an as-needed basis.<sup>21</sup>

The Belgian investigation into Hissène Habré's alleged crimes was carried out by a special police unit that was created in 1998 to deal exclusively with international crimes. The unit now includes six experienced investigators and is part of the crime section of the judicial police of the *arrondissement judiciaire Bruxelles*. So far the

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<sup>18</sup> Chadian President Idriss Déby Itno declared in a radio interview with Radio France internationale on July 4, 2006, "Matériellement, financièrement, nous allons contribuer. Le Tchad aura la lourde responsabilité bien sûr de prendre en charge des victimes, non seulement de les amener à Dakar mais aussi de les prendre en charge dans leur séjour. Et si l'Etat sénégalais nous demandait encore d'autres contributions, nous sommes vraiment prêts à le faire."

<sup>19</sup> In the Zardad case (see above), 16 witnesses testified at the trial via video hook-up from the British embassy in Kabul.

<sup>20</sup> A factor also in the Senegalese investigation and prosecution of the Habré case: many Chadians do not speak French.

<sup>21</sup> Human Rights Watch, *Universal Jurisdiction: The State of the Art*, vol. 18, no. 5(D), June 2006, <http://www.hrw.org/reports/2006/ijo606/ijo606web.pdf>.

unit has investigated international crimes committed in a number of countries, including Rwanda, Guatemala, Burma, as well as Chad.

In Senegal police and prosecuting authorities have no background or training in international crimes. Until now (and pending the promised law revisions) Senegal's code of criminal procedure does not provide for the prosecution of most extraterritorial crimes, and crimes against humanity are not part of the criminal code. It will be necessary to seek special training for those who will investigate and prosecute the Habré case. That training might include managing complex investigations; investigative techniques for proving violations of international humanitarian law; evidentiary standards unique to international humanitarian law (for example, "command responsibility"); collecting and processing forensic evidence; interviewing witnesses to mass crimes (including dealing with sensitive and traumatized witnesses); and evidence handling procedures (including maintaining a chain of custody).

In addition, Senegalese judges have not had the opportunity (with the exception of those sitting in the benches of international courts) to deal with crimes against humanity or massive crimes. As in Iraq, Sierra Leone, Rwanda, Timor-Leste and elsewhere, they could greatly benefit from training by specialists in that field. This training could include:

- The applicable substantive international criminal law as it will be incorporated in Senegalese legislation (in particular crimes against humanity and war crimes).
- Complex case/trial best practices with respect to, for example,
  - (a) courtroom management (for trial and appeal judges and court support staff, including translators and interpreters);
  - (b) case file management (for prosecutors and investigating judges);
  - (c) victim and witness participation, protection, and support measures, including psychological support and possible relocation;
  - (d) case materials filing and archiving;

- (e) cooperation with other Senegalese authorities with respect to matters such as the speedy arrangement of visas for witnesses from Chad and the protection of vulnerable witnesses; and
- (f) outreach (including broadcasting of proceedings).

There are a number of organizations that specialize in providing technical training, advice and support to investigative personnel and to judges.<sup>22</sup>

### **Incorporating the Results of the Belgian Investigation**

As described above, the Belgian authorities—the investigating judge and a special unit of experienced investigators who deal exclusively with international crimes—spent years putting together evidence in this case before issuing the indictment. If the fruits of that investigation—police reports, witness interviews, and in particular the thousands of DDS documents and the analysis of those 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 starting from scratch, and would allow the Senegalese teams to concentrate on new and additional elements. In addition, many witnesses interviewed by the Belgian authorities have since died. Respect for those, especially the victims, who gave their testimony to the Belgian judge (often at great sacrifice—see below) also demands that this evidence be put to its best possible use. Given how long the victims have had to wait for justice, it would be cruel to add years to the case by starting all over.

The Belgian authorities have told Human Rights Watch that they are ready to turn over that information to Senegalese investigators, if the latter are serious about prosecuting Hissène Habré. By means of letters rogatory, the Senegalese judge can ask his or her Belgian colleague to provide the file, and the Belgian judge and the police investigators can be called as witnesses.

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<sup>22</sup> Among these are the Institute for International Criminal Investigations (IICI) and the International Criminal Law Services Foundation, which helped prepare this list of potential training needs.



## **Accessibility**

One of the major challenges to maximizing the impact of Hissène Habré's trial will be to ensure accessibility of the proceedings to the Chadian people, who are the most interested and affected. Even when a trial is held domestically, this issue is of utmost importance. 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. Holding Habré's trial thousands of miles away from his victims and the scenes of his alleged crimes creates significant challenges to maintaining the accessibility of the proceedings. It will be difficult, if not impossible, for many Chadians to attend proceedings in Dakar.

Arrangements should be made to have the proceedings televised and recorded, if possible, or at least summarized for broadcast in Chad. Journalists and representatives of Chadian civil society, especially human rights groups, should be present in Dakar to follow the trial.

## **Witness Protection**

In a case as politically charged as this, where testifying either for or against Hissène Habré may endanger witnesses and their families, witness protection must be a top priority. Hissène Habré has enemies and supporters in both Chad and Senegal. In particular, as noted above Habré has reportedly used money allegedly stolen from the Chadian treasury to create a network of support in Senegal. This has created an atmosphere of intimidation in prior proceedings.

In January 2000 Daniel Bekoutou, a Chadian journalist working in Dakar and covering Habré's prosecution, received repeated death threats, was physically harassed, and was eventually forced to flee Senegal. During the court hearings in 2005 Habré's supporters bullied victims who came from Chad to attend the proceedings. Habré's lawyers went as far as to characterize a staff member of Human Rights Watch working with the victims as a "hateful Jew" who was "anti-Islam."

In Chad, as well, the victims and their supporters have been the target of intimidation and even attacks from Hissène Habré's supporters, many of whom still hold key posts in the country's security apparatus. The victims' Chadian lawyer, Jacqueline Moudeina, was severely injured by shrapnel from a grenade thrown at her by security forces commanded by one of Habré's accused henchmen. A number of victims have been threatened or have lost their jobs.<sup>23</sup>

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The African Union and international donors should assist Senegal in meeting these challenges. In fact, the African Union gave a mandate to "the Chairperson of the Union, in consultation with the Chairperson of the Commission, to provide Senegal with the necessary assistance for the effective conduct of the trial," and called upon "the International Community to avail its support to the Government of Senegal."

In a communique dated November 2, 2006, the Senegalese government complained that Senegal had not received "one euro or one dollar" to help with the trial.<sup>24</sup> But there is no evidence that Senegal has approached any potential funders. Senegal should present to the African Union and potential international donors a detailed plan, budget, and timetable for the investigation and trial. The budget should include an estimate of the costs of the investigation (including the training of police in the investigation of international crimes, and missions to Chad and Belgium) and the trial (including witness protection and access for Chadians). While judicial investigations will naturally be subject to unforeseen developments, a timetable will serve as an important yardstick to measure progress, and a budget will allow the donor community to appreciate the costs involved.

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<sup>23</sup> For more details, see Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, vol. 17, no. 10(A), July 2005, <http://www.hrw.org/reports/2005/chado705/index.htm>.

<sup>24</sup> Communiqué: Le Sénégal prepare activement le jugement de M. Hissène Habré.

## IV. Legal Questions

The prosecution of Hissène Habré raises a number of legal questions:

### Legal Reform

In order to take account of the Senegalese *Cour de Cassation* decision of March 20, 2001, criminal charges against Hissène Habré will only be possible after a modification of the Senegalese criminal procedure code.

The acts imputed to Hissène Habré directly, as an accomplice, or on the basis of command responsibility, include crimes against humanity and war crimes. These crimes currently do not appear in the Senegalese criminal code and will have to be incorporated in order to allow prosecution on these charges.

The *Cour de Cassation* ruling held that the Senegalese courts did not have competence to try Habré for acts of torture even though the Senegalese criminal code had been modified by law n° 96.15 of August 28, 1996, to include acts of torture. Because article 669 of the code of criminal procedure had not been amended, the judges ruled that “the Senegalese courts are without competence to take up acts of torture committed by a foreigner outside of its territory regardless of the nationality of the victims.”<sup>25</sup> Thus, whether for torture or the other crimes discussed above, such as crimes against humanity and war crimes, it will be necessary to amend the code of criminal procedure to permit the bringing of charges against Hissène Habré, a foreigner, for crimes committed outside of Senegal against Senegalese or non-Senegalese. The UN Committee Against Torture and the AU Committee of Eminent African Jurists both found, in the words of the latter, that “[i]t is therefore incumbent on Senegal in accordance with its international obligations, to take steps, not only to adapt its legislation, but also to bring Habré to trial.”<sup>26</sup>

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<sup>25</sup> “Les juridictions sénégalaises sont incompétentes pour connaître des actes de torture commis par un étranger en dehors du territoire quelle que soit la nationalité des victimes.”

<sup>26</sup> See Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, para. 18.

In November 2006 the Senegalese Council of Ministers adopted draft legislation addressing these questions, but the draft was not taken up by the parliament. The Senegalese parliament, when it reconvenes, will thus have to urgently take up these questions.

### **Maintaining Habré’s Presence in Senegal**

A requisite for the trial is obviously that Hissène Habré remains in Senegal. Article 6.1 of the Convention against Torture stipulates that “any State Party in whose territory a person alleged to have committed any [acts of torture] is present, shall take him into custody or take other legal measures to ensure his presence.” Senegal has always upheld this obligation. When the UN Committee Against Torture in 2001 called on Senegal to “take all necessary measures to prevent Hissène Habré from leaving the territory of Senegal except pursuant to an extradition demand,” President Wade agreed to hold Habré in Senegal. In November 2005 Senegalese Minister of Foreign Affairs Cheikh Tidiane Gadio declared that Senegal would not take any actions that could allow Habré to escape justice (see above).

### ***Nullum crimen, nulla poena sine lege***

This is not a case of “retroactive” application of the law. The crimes of which Hissène Habré is accused existed either in customary international law or in treaties ratified by Senegal and Chad at the time the acts were committed. Their incorporation into Senegalese law would not result in the creation of new criminal offenses but in the establishment of national mechanisms to prosecute and punish acts that were already prohibited. The principle “*nullum crimen, nulla poena sine lege*” (“no crime or penalty without a law”)—that one cannot be penalised for doing something that is not prohibited by law—would thus be respected. Article 15 of the International Covenant on Civil and Political Rights, ratified by Senegal,<sup>27</sup> allows the trial and punishment of just this sort of case. It provides:

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<sup>27</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Senegal on February 13, 1978.

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

### ***Ne bis in idem***

Hissène Habré has never been tried or acquitted in Senegal or elsewhere. Complaints were filed against him, an investigation was opened, and he was indicted. The Court of Appeals of Dakar and then the *Cour de Cassation* of Senegal dismissed the charges on the ground that Senegalese courts did not have the competence to try him. The merits of the charges were never considered.<sup>28</sup>

### **Statute of Limitations**

The crimes of which Hissène Habré is accused have no statute of limitations under international law. The AU Committee of Eminent African Jurists considered that “in view of the nature and gravity of the crimes alleged against him, Hissène Habré cannot benefit from any period of limitation (i.e. prescription).”<sup>29</sup> In any event, Senegalese law provides a 10-year statute of limitations for crimes such as torture and murder. Under Senegalese law, the statute does not run when prosecution is not possible (as when Hissène Habré was head of state until December 1990),<sup>30</sup> and is

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<sup>28</sup> There is a Senegalese case on this point: Arrêt n° 214 du 18 décembre 1984 de la Chambre d'accusation de la Cour d'appel de Dakar sur une demande d'extradition des autorités judiciaires maliennes concernant Mone Antoine dit Abdoulaye Traoré alias Yoda Marcel Martin Fulgence.

<sup>29</sup> See Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, para. 14.

<sup>30</sup> Article 7 of the criminal procedure code states, “La prescription est suspendue par tout obstacle de droit ou de fait empêchant l'exercice de l'action publique.”

stopped and begins again when a penal action is commenced (as was done in January 2000).<sup>31</sup> The interval was thus less than the 10-year statute of limitations.

## Immunity

Hissène Habré does not benefit from any immunity. In an October 2002 letter to the Belgian judge investigating the charges against Habré, Chad's justice minister, Djimnain Koudj-Gaou, wrote, "Hissène Habré cannot claim to enjoy any form of immunity from the Chadian authorities." According to the International Court of Justice, state representatives "cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity."<sup>32</sup> Moreover, the AU Committee of Eminent African Jurists "considered that Hissène Habré cannot shield behind the immunity of a former Head of State to defeat the principle of total rejection of impunity that was adopted by the Assembly [of heads of state in January 2006]."<sup>33</sup>

## Independence of the Judiciary

It is no secret that Hissène Habré, who is accused by Chad's truth commission of emptying out his country's treasury before fleeing, has powerful supporters in Senegal who have tried to influence the course of justice. There have also been allegations of direct interference in the judiciary. In 2000, after a Senegalese court charged Habré with torture and crimes against humanity, the magistrate who had indicted Habré and was pursuing the pretrial investigation was transferred from his post. An appeals judge considering Habré's motion to dismiss the prosecution was given a promotion while the motion was *sub judice*. These actions (and the dismissal of the charges) led to a joint appeal by the UN special rapporteurs on the independence of judges and lawyers and on torture, who "expressed their concern to the Government of Senegal over the circumstances surrounding the recent dismissal

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<sup>31</sup> Article 7 of the criminal procedure code also states, "En matière de crime, l'action publique se prescrit par dix années révolues à compter du jour où le crime a été commis si dans cet intervalle, il n'a été fait aucun acte d'instruction ou de poursuite. S'il en a été effectué dans cet intervalle, elle ne se prescrit qu'après dix années révolues à compter du dernier acte."

<sup>32</sup> See Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), International Court of Justice, Judgment of 14 February 2002, para. 61.

<sup>33</sup> See Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, para. 13.

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.”

The Government of Senegal should take the necessary measures to prevent any interference with the judicial proceedings now foreseen.