

FIGHTING IMPUNITY UNSUCCESSFULLY IN AFRICA: A CRITIQUE OF THE AFRICAN UNION'S HANDLING OF THE HISSÈNE HABRÉ AFFAIR

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I. INTRODUCTION

Impunity for the commission of grave infringements of humanitarian law and for the perpetration of mass violations of human rights having an international dimension has been and continues to be a most serious problem.¹ It does not pertain only to the African continent but has been a cause for concern for almost all parts of the world. Moreover, it is closely connected with the need to put into place an effective multilateral criminal justice system. Thus, combating impunity demands that a mechanism be devised which will ensure that those responsible for heinous crimes are prosecuted and, upon conviction, receive sentences commensurate to their offences. As has been argued, the assumption that the creation of an international justice system would always generate positive results is both wrong and naïve.² Given the lack of any other alternative that would stand the test of time, however, it is submitted that, even though there might be good tribunals and bad tribunals, the establishment of a judicial entity cannot be wrong in itself.

The Preamble to the Rome Statute establishing the International Criminal Court (ICC) affirms that the most serious crimes of concern to the international community must not go unpunished and determines to put an end to impunity for perpetrators. Equally, the creation of the International Criminal Court for the former Yugoslavia and the International Criminal Court for Rwanda by the UN Security Council and, later on, the establishment of the so-called hybrid

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1 P. G. Lauren, 'From Impunity to Accountability: Forces of Transformation and the Changing International Human Rights Context', in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, United Nations University Press (2004), p. 15.

2 T. Howland and W. Calathes, 'The U.N.'s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation', 39 *Virginia Journal of International Law* (1998): 135, 139.

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tribunals in Sierra Leone, Cambodia and Lebanon with UN assistance could be legitimised, if for no other reason, by the following two needs: first, to ensure that impunity does not prevail and, second, that alleged perpetrators are prosecuted effectively before a tribunal subscribing to the fundamental rules and principles of international criminal justice.

Notwithstanding the global and regional initiatives to combat impunity, it seems true to say that in Africa an ethos of impunity has prevailed for a very long time. Somehow, successive African leaders have come to believe that the perpetration of atrocities could and would be tolerated. Consequently, when at the turn of the millennium the Constitutive Act of the African Union (AU) was negotiated, it was an achievement of some note that the rejection of impunity became one of its fundamental principles, while the long-standing policy of non-interference in member states' domestic affairs was partially overturned.³ In these and other respects, the Constitutive Act innovated and broke away from the legacy of its predecessor, the Organization of African Unity, which was labelled 'a club for dictators';⁴ however, legal provisions in the constitutive instruments of international organisations are meaningful only when they are respected and rigorously implemented by both the member states and their organs.

This paper looks into one particular long-standing case of impunity, that of the former President of Chad Hissène Habré. Even though Habré is by no means the only former, or serving, African head of state who has until now escaped justice for allegedly perpetrating mass human rights violations,⁵ his is the only case that has been actively pursued by the AU. For almost seven years, the AU has attempted unsuccessfully to bring him to trial. What perhaps African leaders have been slow in understanding is that the Habré case has (not inadvertently) been turned into a test case for the whole continent. The AU has had a unique opportunity to show not only to the victims of the atrocities committed during his reign in Chad but also to African populations and to the world at large that it is capable of handling a case which is similar to others that have happened before and will probably occur again. Based on a close examination and analysis of how the AU has handled this affair, this paper questions whether the AU is truly committed but also well equipped to fight impunity. Finally, this paper traces the evolution of the Habré case and looks into the role that other actors (for example, Belgium, the International Court of Justice and the UN Committee Against Torture) have played.

3 Article 4(o) of the Constitutive Act. While article 4(g) enshrines the principle of non-interference, article 4(h) gives to the AU the (collective?) right to intervene in a member state when war crimes, crimes against humanity and genocide have allegedly been committed provided that the Assembly has authorised it. Article 4(h) could be regarded as a manifestation of the Responsibility to Protect (R2P) norm; for its application to Libya during the 2011 events, see R. Thakur, 'Libya and the Responsibility to Protect', Institute of Security Studies Situation Report, 6 March 2012, available at <http://www.issafrica.org> (accessed 2 June 2014).

4 M. Meredith, *The State of Africa—A History of Fifty Years of Independence*, The Free Press (2006), p. 680.

5 Generally, see B. Baker, 'Twilight of Impunity for Africa's Presidential Criminals', 25 *Third World Quarterly* (2004): 1487.

II. HISSÈNE HABRÉ: THE UNSUCCESSFUL ATTEMPTS TO BRING ANOTHER AFRICAN DICTATOR TO JUSTICE

Habré, who has also been referred to as an ‘African Pinochet’,⁶ belongs to that generation of brutal African dictators who wrecked their countries’ structures and institutions and sentenced the population to bad government, underdevelopment and low standards of living. In their turn, the policies pursued by these dictators have resulted in their countries’ inability to take full advantage of the economic growth and expansion that Africa (and the world at large) has experienced in the last fifteen years. On the other hand, it should be emphasised that, generally speaking, most states and international organisations never challenged or questioned the legality of the power that these dictators wielded (and still hold, for example in Zimbabwe). On the whole, the global community has been more concerned with those African countries suffering under apartheid and colonial rule and more lenient with those countries ruled by indigenous regimes which had assumed power in military *coups d’état* negating human rights and fundamental freedoms.

Even though Habré did not have the longevity of other African dictators (he ruled Chad between June 1982 and December 1990), his regime was characterised by mass and uncontrolled violations of human rights and breaches of fundamental freedoms.⁷ When he was overthrown by Idriss Deby, he found refuge in neighbouring Senegal, where he still resides, as will later be explained, in pre-trial detention by the Extraordinary African Chambers. In 1999, the NGO Human Rights Watch (HRW) started an investigation into the atrocities committed during his time in office. Two years later, it unearthed the names of 1,200 individuals who had died while in police custody.⁸ Subsequent investigations revealed thousands of other cases of torture as well as of practices which could be described as ethnic cleansing.⁹

While Habré was leading a relatively quiet life in Senegal, in January 2000, seven individuals alongside the NGO Association des Victimes des Crimes et Répressions Politiques au Tchad (AVCRP), brought a lawsuit against him before

6 R. Brody, ‘The Prosecution of Hissène Habré – An “African Pinochet”’, 35 *New England Law Review* (2001): 321; R. Brody and H. Duffy, ‘Prosecuting Torture Universally: Hissène Habré, Africa’s Pinochet?’, in H. Fischer, C. Kress and S. R. Lueder (eds), *International and National Prosecution of Crimes under International Law – Current Developments*, Berlin Verlag (2001), p. 823.

7 K. Neldjingaye, ‘The Trial of Hissène Habré in Somalia and its Contribution to the Development of International Criminal Law’, in C. Murungu and J. Biegon (eds), *Prosecuting International Crimes in Africa*, Pretoria University Law Press (2011), pp. 185, 188ff.

8 R. Brody, ‘The Prosecution of Hissène Habré: International Accountability, National Impunity’, in N. Roht-Arriaza and J. Mariezcurrene (eds), *Transitional Justice in the 21st Century – Beyond Truth v Justice*, Cambridge University Press (2006), pp. 278, 279.

9 Available at <http://www.hrw.org/legacy/justice/habre/habre-police.htm> (accessed 3 June 2014). The HRW data were further evaluated in R. Romesh, J. Klingner and S. Weikart, *State Coordinated Violence in Chad under Hissène Habré – A Report by Benetech’s Human Rights Data Analysis Group to Human Rights Watch and the Chadian Association of Victims of Political Repression and Crimes*, Human Rights Data Analysis Group, February 2010, available at <http://www.hrdag.org/about/chad.shtml> (accessed 2 June 2014).

the courts of Senegal claiming that he was a direct accomplice in the perpetration of crimes against humanity and acts of torture.¹⁰ In his defence before the investigating judge, Habré declared that he was not aware of the accusations; however, the judge indicted him as an accomplice to the criminal acts accused of and put him under house arrest.¹¹ This was an important step towards fighting impunity (apparently it constituted the first ever time that a former head of state was prosecuted in the country where he had found refuge). But the lawsuit collapsed six months later when the Court of Appeal of Dakar held that it was not possible to bring a criminal prosecution against him for crimes against humanity because they were not envisaged in Senegal's legal system as punishable offences.¹² In March 2001, the Cour de Cassation, the highest ranking court in Senegal, upheld its ruling that his physical presence in Senegal could not justify the commencement of a criminal prosecution against him.¹³

As will be explained, this conclusion was rather improbable and ran against peremptory rules of international law to which, at least as a matter of principle, Senegal ought to subscribe. Moreover, the Court of Appeal and the Cour de Cassation had failed to take into cognisance article 98 of the Senegalese Constitution, which, like in most states subscribing to the monist theory, affords properly ratified international treaties a legal authority standing higher than domestic legislation. Given that Senegal had ratified the UN Convention against Torture and Inhuman or Degrading Treatment (Torture Convention)¹⁴ on 21 August 1986, it follows that the prohibition and punishment of acts of torture, as stipulated in the Convention, became an integral part of its domestic legal order as of the day on which it entered into force for Senegal.

Thus, even though at the time Senegal had not actually implemented the Torture Convention, it is submitted that the acts of torture allegedly committed by Habré after 26 June 1987 (the Convention's entry into force) and before December 1990 (Habré's fleeing from Chad) were within the ambit of the Senegalese legal order. This submission is further supported by article 14 of the Convention: it stipulates that contracting parties must ensure in their legal systems that torture victims can obtain redress. The Committee against Torture (the Convention's supervisory body created under article 22) has authoritatively interpreted article 14 to mean that the place where the torture acts were committed is of no relevance¹⁵ and,

10 The lawsuit text is available at <http://www.hrw.org/legacy/french/themes/habre-plainte.html> (accessed 2 June 2014).

11 The interrogation text is available at <http://www.hrw.org/legacy/french/themes/habre-inculpation.html> (accessed 2 June 2014).

12 Court of Appeal of Dakar, *Ministère Public et François Diouf Contre Hissène Habré*, Decision (arrêt) No. 135 of 4 July 2000, available at <http://www.hrw.org/french/themes/Habre-decision.htm> (accessed 2 June 2014).

13 Cour de Cassation du Sénégal, *Souleymane Guengueng et Autres Contre Hissène Habré*, Decision (arrêt) No. 14 of 20 March 2001, available at http://www.hrw.org/legacy/french/themes/habre-cour_de_cass.html (accessed 2 June 2014); partly reprinted in 125 *International Law Reports* 569.

14 Concluded on 10 December 1984, in force since 26 June 1987, 1465 UNTS 85.

15 Committee against Torture, 34th Session, 2–20 May 2005, Conclusions and recommendations, UN Doc. CAT/C/CR/34/CAN, paras 4(g) and 5(f) (7 July 2005).

consequently, contracting parties must provide for redress even if the acts were perpetrated outside their jurisdiction.¹⁶

The Cour de Cassation conveyed a clear message: Senegalese authorities were not prepared to prosecute a former foreign head of state. It followed that the victims of the alleged atrocities committed during the Habré era and their relatives had to seek another way for their lawsuit if they were to be examined again by domestic courts. A possible (but not straightforward) way would have been to take advantage of the principle of universal jurisdiction, pursuant to which there was no statutory limitation for offences coming within its scope.¹⁷ There was a catch, however, namely that a third state had to be willing and able to invoke this principle and to pursue it before the competent Senegalese authorities.¹⁸

III. BELGIUM BECOMES DIRECTLY INVOLVED IN THE HABRÉ CASE

A large number of European states have enshrined the principle of universal jurisdiction in their domestic legal order.¹⁹ This principle disassociates the venue of the prosecution with the nationality of the alleged perpetrator, the nationality of the victims as well as the place where the offences allegedly took place. Thus, article 1 of the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*), promulgated in June 2002, stipulates that it shall apply to all crimes violating international law and envisaged in its provisions, even when they were committed in a foreign state and have no link whatsoever to the German territory.²⁰ Belgium is another European state which has inserted this principle in its legal system and has proven that it is prepared to actively pursue it. Thus, in June 2001 the Brussels Cour d'Assises (Crown Court) sentenced four nationals of Rwanda, who were found guilty of direct involvement in the 1994 genocide, to imprisonment ranging between twelve and twenty years.²¹

16 C. K. Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad', 18 *European Journal of International Law* (2007): 921.

17 S. P. Marks, 'The Hissène Habré Case: The Law and Politics of Universal Jurisdiction', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press (2004), p. 131.

18 M. Henzelin, *Le Principe de l'universalité en droit pénal international. Droits et obligations pour les Etats de poursuivre et de juger selon le principe de l'universalité*, Helbing & Lichtenhahn (2000).

19 It has been argued that any state may prosecute those committing international crimes in its capacity as agent or trustee of the global community and, consequently, there is no requirement for a more direct link with the alleged crimes; see J. Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction', 7 *Journal of International Criminal Justice* (2009): 945, 952.

20 German Federal Gazette I (2002), p. 2254. For English translation, see G. Werle and F. Jessberger, 'International Criminal Justice Is Coming Home: The New German Code of Crimes Against International Law', 13 *Criminal Law Forum* (2002): 191, 214ff.

21 The so-called 'Butare Four' case, Verdict of 8 June 2001, available at <http://www.irinnews.org/printreport.aspx?reportid=22091> (accessed 2 June 2014); L. Reydam, 'Belgium's First Application of Universal Jurisdiction: The Butare Four Case', 1 *Journal of International Criminal Justice* (2003): 428.

It follows that the criminal complaint lodged on 8 May 2003 against Habré before Belgian courts by a group of Belgian citizens of Chadian origin was a well-calculated move: victims and their relatives took advantage of its legislation on universal jurisdiction²² even though it was not connected to the criminal acts allegedly perpetrated by Habré.²³ The then applicable legislation of Belgium (Law of 16 June 1993 on the suppression of grave violations of international humanitarian law, as amended by the Law of 23 April 2003)²⁴ gave to its judicial authorities the discretion to be seized of criminally punishable acts violating humanitarian law (in the broad term of the word) irrespective of the state where allegedly perpetrated, of the alleged perpetrators' nationality and of when they were committed (there is no statute of limitations).²⁵ The liberal provisions of the 1993 Law led to the lodging of an impressive number of criminal complaints against serving heads of state and senior members of government, even though, as was to be expected, most failed to result in criminal prosecutions.²⁶

Following the May 2003 complaint, Belgian prosecutors moved promptly and forwarded requests to Senegal for the investigation of the acts allegedly perpetrated by Habré. Senegal refused to cooperate, claiming that it was not in a position to satisfy them. Belgium persisted. On 19 September 2005, it issued an international arrest warrant against Habré, accusing him of, *inter alia*, committing crimes against humanity, and asked Senegal for his extradition. This was the first extradition request lodged and, as will later be explained, three more have followed. On 25 November 2005, the Court of Appeal of Dakar held that it did not have the required jurisdiction over Habré and rejected the extradition request.²⁷

22 Cf. J. Panakova, 'Law and Politics of Universal Jurisdiction', 3 *Amsterdam Law Forum* (2011) 49, 71 arguing that universal jurisdiction empowered Habré's victims.

23 The complaint text is available at <http://www.hrw.org/legacy/french/press/2003/tchad0603.htm> (accessed 2 June 2014).

24 *Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*, published in *Moniteur belge* of 7 May 2003. In August 2003, the Law was repealed and replaced; see L. Reydam, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law', 1 *Journal of International Criminal Justice* (2003): 679.

25 G. Schamps, 'L'Incrimination du crime de génocide, du crime contre l'humanité et des crimes de guerre en droit belge à la lumière du droit international humanitaire', in A. Jacobs (ed.), *Actualités de droit pénal et de procédure pénale*, Larcier (2004), p. 329.

26 Over the years, complaints have targeted, *inter alia*, the following individuals: the President of Iraq Saddam Hussein, the Israeli Prime Minister Ariel Sharon, the President of Ivory Coast Laurent Gbagbo, the President of Rwanda Paul Kagame, the President of Cuba Fidel Castro, the President of the Central African Republic Félix Patassé, the President of the Republic of Congo Denis Sassou Nguesso, the President of the Palestinian Authority Yasser Arafat, the President of Chile Augusto Pinochet, the President of Iran Hashemi Rafsanjani, the Minister of Interiors of Morocco Driss Basri, and, finally, the President of the USA George Bush, his Vice President Dick Cheney and his Secretary of State Colin Powell, on which see L. Walleyn, 'The Sabra and Shatila Massacre and Belgian Universal Jurisdiction', in J. Borneman (ed.), *The Case of Ariel Sharon and the Fate of Universal Jurisdiction*, Princeton Institute for International and Regional Studies (2004), pp. 60, 67.

27 Court of Appeal of Dakar, Decision (arrêt) No. 138 of 25 November 2005, available at <http://www.hrw.org/legacy/french/docs/2005/11/26/chad12091.htm> (accessed 2 June 2014). For commentary supporting it, see S. Bula-Bula, *Senegalese Jurisdiction versus Belgian Universal*

In justifying the rejection, it relied partially on the judgment of the International Court of Justice (ICJ) in *Arrest Warrant of 11 April 2000*.²⁸

In that case, the ICJ had considered the legality of Belgium prosecuting and issuing an arrest warrant against Abdoulaye Yerodia Ndombasi, then Minister of Foreign Affairs of the DRC. He was accused of crimes against humanity and grave breaches of the Geneva Conventions of 1949 and the Additional Protocols of 1977. The warrant had been issued pursuant to the aforementioned 1993 legislation. The majority of ICJ judges did not consider whether Belgium was within its rights to prosecute a serving minister of a foreign state but reverted the question as to whether the accused was immune from prosecution on account of the office held. Finally, the ICJ held that Belgium had failed to respect his immunity from criminal jurisdiction and, given the inviolability which he enjoyed under international law, ordered Belgium to cancel the arrest warrant. As to the applicability of *Arrest Warrant* to the case before the Court of Appeal, there was a crucial difference, namely that Yerodia was a serving public official whereas Habré was a former head of state who had deliberately fled his country (presumably to avoid arrest and prosecution).

The gist of the Court of Appeal ruling was echoed two days later in an announcement of the Senegalese Ministry for Foreign Affairs, which argued that:

Le Sénégal n'est en aucune manière directement concerné par l'affaire Hissène Habré ... pour notre pays, M. Habré est un chef d'Etat qui ... demander l'hospitalité du Sénégal.²⁹

[*Senegal is in no way directly concerned by the Hissène Habré case ... for our country Mr Habré is a head of state who ... has sought hospitality in Senegal.*]

Both the Court of Appeal ruling and the Foreign Ministry position should be criticised. The fact that Habré had left Chad, that he was residing in another country and that this other country tolerated his presence had consequences under international law. He could not continue to claim in Senegal immunities which he had when he was head of state in Chad, and Senegal could not treat him as a serving head of state vis-à-vis its relations with a third state (Belgium), which had claimed jurisdiction over him. By choosing to reside in Senegal, Habré had subjected himself to Senegal's legal order and, under international law, Senegal had duties and obligations towards other states.

Arguably, the case of Belgium's extradition request has similarities with the way the British House of Lords handled in the late 1990s the request for the extradition of the former President of Chile (1974–90) Augusto Pinochet. When he came to Britain to receive medical treatment, in October 1998, he was arrested

Jurisdiction, no date, available at <http://sbulabula.wordpress.com/publications/senegalese-jurisdiction-versus-belgian-universal-jurisdiction> (accessed 2 June 2014).

28 *Democratic Republic of the Congo v Belgium*, Judgment of 14 February 2002, [2002] *ICJ Reports* 3.

29 Communiqué of 27 November 2005, available at <http://www.hrw.org/legacy/french/docs/2005/11/27/chad12130.htm> (accessed 2 June 2014).

and placed under house arrest pursuant to a Spanish international arrest warrant alleging that he was responsible for multiple counts of torture against Spanish nationals in Chile during his reign. Fighting his extradition to Spain, Pinochet maintained that he was immune from prosecution as a former head of state under the relevant provisions of English law, namely the State Immunity Act 1978.³⁰ The latter was promulgated, *inter alia*, to give effect in English law to the provisions of the European Convention on State Immunity, which was adopted on 16 May 1972 under the auspices of the Council of Europe and aimed at substituting the doctrine of absolute state immunity to that of restricted immunity.³¹ Approving his extradition to Spain by a vote of six to one, the House of Lords held that Pinochet, as a former head of state, was not entitled to state immunity. Given that the alleged crimes were not perpetrated on British soil, the House of Lords ruled that only those allegedly committed after the entry into force of the legislation implementing the Torture Convention in domestic law (namely, section 134 of the Criminal Justice Act 1988 applicable to torture committed in the UK or elsewhere) and creating the crime of torture could be prosecuted under national law.³² But Pinochet was neither extradited to Spain nor prosecuted in Britain: in January 2000, the then Home Secretary Jack Straw ordered his release³³ having blocked the extradition process on medical grounds.³⁴ Exactly thirteen years later, however, Britain invoked the universal jurisdiction crime of torture, as enshrined in section 134 of the Criminal Justice Act 1988, to arrest a Nepalese army officer and charge him with two counts of torture allegedly committed in Nepal in 2005.³⁵

Despite the offhand way that the Senegalese government brushed off Belgium's request for extradition in 2005, its direct involvement in the Habré affair resulted in putting Senegal in a very tight spot: on the one hand, it wanted to maintain the reputation of a state subscribing to fundamental freedoms and human rights and, on the other hand, it did not wish to become embroiled in the criminal prosecution of a former dictator who not only had become the alleged perpetrator of embarrassing violations of humanitarian law but had also been given, without many questions asked, a new home in its territory and until then shelter from prosecution. Arguably, there was another dimension to Senegal's refusal: if it had arrested and extradited Habré on the basis of the Belgian request, it might have sent the wrong message to (serving and former) African leaders charged with

30 17 *International Legal Materials* (1978): 1123.

31 The Convention, which came into force on 11 June 1976, *Council of Europe Treaty Series* No. 074, 11 *International Legal Materials* (1972): 470, has been ratified by only eight states.

32 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [1999] 3 All ER 97.

33 BBC News, 'Pinochet "Unfit to Face Trial"', 12 January 2000, available at http://news.bbc.co.uk/2/hi/uk_news/599526.stm (accessed 3 June 2014).

34 For the Home Secretary's full statement on Pinochet's release, see http://news.bbc.co.uk/2/hi/uk_news/politics/663444.stm (accessed 3 June 2014).

35 See BBC News, 'Nepal's Colonel Kumar Lama Charged in UK with Torture', 5 January 2013, available at: <http://www.bbc.co.uk/news/world-asia-20914282> (accessed 3 June 2014). At present his trial is scheduled to begin in autumn 2014.

human rights violations, namely that they might soon find themselves standing accused. Arguably, this shows how the ethos of impunity, which has become so prevalent in Africa to the point of being considered as part of the political culture, is interwoven with the Habré case.

IV. THE INVOLVEMENT OF THE AU ASSEMBLY AND THE 'AFRICANISATION' OF THE HABRÉ CASE

Notwithstanding these considerations, it was also clear that Senegal could not decline Belgium's arrest warrant and at the same time remain idle. It had to do something and fast, if not for any other reason than to show the world that Habré would not escape prosecution. The way out came in December 2005: Senegalese President Abdoulaye Wade reached agreement with Nigerian President Olusegun Obasanjo, who at the time held the AU Presidency, that the Habré case did not concern only Senegal but the whole of Africa and, consequently, the matter ought to be discussed at the forthcoming (Sixth) Ordinary Session of the Assembly in January 2006. Thus, the case was 'Africanised': Senegal placed Habré at the disposal of the AU and asked it to consider what should be done. Undoubtedly, this was a shrewd move because at the same time: (a) the difficulties posed by rejecting Belgium's extradition request were (at least provisionally) overcome; (b) the Habré case became an issue of concern (not to mention a problem) for the whole of Africa; and (c) Senegal itself did not have to take any adverse measures against a former head of state and to deal with its obligation, under general international law, to examine the allegations for torture implicating Habré.³⁶

The 'Africanisation' of the Habré case was not based on any legal argumentation. To find a relevant legal basis, one ought to resort to article 4 of the AU Constitutive Act. It enumerates the fundamental AU principles and includes the sanctity of human life as well as the condemnation and rejection of impunity. Thus, it could be argued that the Assembly discussed the Habré case within the context of combating impunity.³⁷ If this were the case, the Assembly was presented with a first-class opportunity to address a specific case of impunity and take swift and effective action showing that an international organisation is able to handle such cases.

Perhaps this was too much to ask of the African Union, which has condoned impunity for so long. In the event, the Assembly did what any other international organisation would have probably done in similar circumstances: it set up a Committee of Eminent African Jurists with the mandate 'to consider all aspects

36 In Resolution 2000/43 of 20 April 2000 on torture, E/CN.4/RES/2000/43, the (now defunct) UN Commission on Human Rights emphasised the general obligation of all states to investigate all complaints concerning acts of torture and ensure that those individuals encouraging, ordering or perpetrating them are brought to trial and severely punished; see further the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which were annexed to that Resolution.

37 Note that AU Assembly decisions are rarely preceded by a legal reasoning.

and implications of the Hissène Habré case as well as the options available for his trial' by taking into consideration a number of benchmarks.³⁸ Even though, as will be explained, the Committee submitted its Report on time, in the meantime a crucial development had occurred leading to a new state of affairs that this body could not have taken into consideration: it concerned the involvement of the UN Torture Committee.

V. ANOTHER COMPLICATION: THE UN TORTURE COMMITTEE CASTIGATES SENEGAL

On 18 April 2001, a group of Chadian nationals had filed a complaint against Senegal before the Torture Committee. They claimed, *inter alia*, that, by evading proceeding with the criminal prosecution of Habré and at the same time by refusing to hand him over to a third state which was willing to bring him to trial, Senegal had violated article 7 of the Convention; they also requested compensation.³⁹ Article 7 incorporates the Latin rule *aut dedere aut judicare*, which, signifies that contracting parties (*in casu* Senegal) must either extradite the person who is located in their territory and is suspected of having committed torture and/or similar acts or go ahead with his prosecution.

To put it otherwise, it is not a case of whether contracting parties do not want to or lack the ability to (e.g., due to the complexity of the legal process) or for whatever other reason are unable to prosecute individuals accused of torture: they have no option but to either deal with the prosecution themselves or let another state (no need to be a contracting party to the Convention) to assume this responsibility, if of course sufficient evidence was alluded.⁴⁰ The application of said rule does not require that the contracting party in question has the obligation to exercise jurisdiction on the suspect on the basis of its domestic law, as the Court of Appeal of Dakar had argued in November 2005. On the contrary, pursuant to article 7(1) of the Convention, it is only required that the suspect be located in the territory over which the contracting party in question exercises jurisdiction. There is no doubt that this condition was met in the case of Habré and, if for no

38 AU Assembly, *Decision on the Hissène Habré Case and the African Union*, AU Doc. Assembly/AU/Dec. 103(VI) (24 January 2006).

39 UN Committee against Torture, *Communication No. 181/200: Suleymane Guengueng and others v Senegal*, UN Doc. CAT/C/36/D/181/2001.

40 Generally, see C. Bassiouni and E. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers (1997); C. Mitchell, *Aut Dedere, Aut Judicare: The Extradite or Prosecute Clause in International Law*, Graduate Institute ePapers, Geneva, 2009, available at <http://iheid.revues.org/249> (accessed 3 June 2014). Note that since 2005 the UN International Law Commission has included 'the obligation to extradite or prosecute' in its work programme pursuant to General Assembly Resolution 60/22 of 23 November 2005; UN General Assembly, *Fourth Report on the Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)* by Zdzislaw Galicki, Special Rapporteur, UN Doc. A/CN.4/648 (31 May 2011).

other reason, the decisions of the Senegalese courts (both the Court of Appeal and, before it, the Cour de Cassation in March 2001) were seriously wanting.⁴¹

The Torture Committee delivered its findings in May 2006. In very precise terms, it determined that Senegal had failed to fulfil its article 7 obligations.⁴² In particular, it held that at the time the complaint was lodged, Senegal had a duty to prosecute Habré for alleged acts of torture, unless it was proven that no sufficient evidence existed; however, as of 19 September 2005 (i.e., the day Belgium issued the international arrest warrant against Habré), Senegal had come under another situation, which was covered pursuant to article 7. It followed that Senegal had the choice of extraditing Habré to another state, if it was not prepared to submit him to its own judicial authorities for prosecution. Senegal chose to refuse both these options and for that reason it was in breach of its obligations.

Exercising its right to reply to the Committee's findings, very cleverly Senegal exonerated itself of all responsibility by claiming that, in order to avoid possible impunity, it had 'deferred the case to the African Union for consideration' and, therefore, it was not in violation of article 7.⁴³ Since then, the Torture Committee has considered that there is an ongoing follow-up dialogue between the complainants and Senegal and has requested that the latter submit information regarding the implementation of its findings.⁴⁴ Even though it has been rather obvious that Senegal has no intention of honouring its obligations, the Committee does not seem prepared to record Senegal's refusal to comply; however, this aspect of the proceedings goes beyond the scope of the present paper.

VI. AFRICANISATION *VERSUS* INTERNATIONALISATION OF THE HABRÉ CASE

The Report of the Committee of Eminent African Jurists was promptly placed before the Seventh Ordinary Assembly Session in July 2006.⁴⁵ It recommended that Habré be tried in one of the following venues (in the order that they appeared): Senegal, because it was under an obligation imposed by international law to do so;

41 For a recent example of treaty incorporating the rule *aut dedere aut judicare*, see article 31 of the Convention on Action against Human Trafficking, *Council of Europe Treaty Series* No. 197, adopted in May 1995, in force since 1 February 2008; for analysis, see K. Magliveras, *Combating Trafficking in Persons: The Role and Action of International Organisations*, Centre of International and European Economic Law, Working Papers 6, Ant. N. Sakkoulas Publishers (2007), pp. 27ff.

42 United Nations, *Report of the Committee against Torture, Thirty-fifth session and Thirty-sixth session*, UN Doc. A/61/44 (2006), para. 72, pp. 85–6.

43 United Nations, *Report of the Committee against Torture, Thirty-seventh session and Thirty-eighth session*, UN Doc. A/62/44 (2007), pp. 112–15, in particular p. 113.

44 United Nations, *Report of the Committee against Torture, Thirty-ninth session and Fortieth session*, UN Doc. A/62/44 (2008), pp. 126–31; *Report of the Committee against Torture, Forty-third session and Forty-fourth session*, UN Doc. A/65/44 (2010), pp. 188–94; *Report of the Committee against Torture, Forty-fifth session and Forty-sixth session*, UN Doc. A/66/44 (2011), pp. 173–81; and *Report of the Committee against Torture, Forty-seventh session and Forty-eighth session*, UN Doc. A/67/44 (2012) pp. 199–200.

45 The Report is available at http://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf (accessed 3 June 2014).

Chad, because it had the principal responsibility to bring Habré to trial and punish him if found guilty and, to that end, it ought to collaborate with Senegal; or any other of the forty-five African states which had ratified the Torture Convention.⁴⁶ Finally, the Assembly, after establishing that the AU did not have a legal organ competent to try Habré, ordered Senegal to proceed, *on behalf of Africa*, with his criminal prosecution and to guarantee that he receives a fair trial (emphasis added).⁴⁷ A few days later, the Senegalese Cabinet welcomed the Assembly decision 'to transfer to Africa, via Senegal, the jurisdiction to try' Habré.⁴⁸

The Assembly decision should be criticised on two grounds. First, because the purpose for which Senegal had resorted to the AU was not simply to receive an 'order' to set in motion its domestic criminal proceedings. Indeed, as has been explained, this obligation flowed from the rules of international law (arguably preemptory in nature) and there was no need for it to be confirmed by the Assembly. On the contrary, what Senegal had argued was that its internal legal system did not allow the prosecution of Habré and that a solution (and not mere guidance) ought to be given. It is most unfortunate that the Assembly did not address this specific issue for, if it had done so, it should have concluded that, as per international law, jurisdiction to prosecute was vested with Senegal; as explained, the UN Torture Committee had reached exactly this conclusion.

Second, the core of the Habré case has been the scourge of impunity in Africa and the (associated) lack of judicial (or quasi-judicial) transnational mechanisms with the mandate to deal with the many cases of alleged commission of mass crimes by individuals, especially by former heads of state or government and senior public officials. This point deserves further elaboration. These are cases coming neither into the ambit of ICC jurisdiction⁴⁹ nor within the jurisdiction of the currently debated new section to be attached to the African Court of Justice and Human Rights⁵⁰ with the mandate to try individuals for international crimes.⁵¹ The reason is that the criminal offences allegedly committed by Habré (and this

46 For the ratification table, see <http://www2.ohchr.org/English> (accessed 3 June 2014).

47 AU Assembly, *Decision on the Hissène Habré Case and the African Union*, AU Doc. Assembly/AU/Dec. 127 (VII) (2 July 2006), para. 5. Note that at the time the European Parliament had called on Senegal to extradite Habré to Belgium, if no 'African' solution could be given; see Resolution of 16 March 2006 on impunity in Africa and in particular the case of Hissène Habré, noted in *Bulletin of the European Union*, 3-2006, point 1.5.8.

48 Gouvernement du Sénégal, Conseil des Ministres, 6 July 2006, available at <http://www.gouv.sn/Conseil-des-ministres-du-6-juillet.html> (accessed 4 June 2014).

49 Although certain commentators have entertained the idea that the ICC could have a role to play in fighting impunity in Africa, arguably they have failed to show how it applies to cases such as Habré; see, for example, R. Bellelli, 'The Establishment of the System of International Criminal Justice', in R. Bellelli (ed.), *International Criminal Justice. Law and Practice from the Rome Statute to its Review*, Ashgate (2010), pp. 5, 56ff.

50 For the latest version of the draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, see AU Doc. Exp/Min/IV/Rev.7 (15 May 2012); G. Naldi and K. Magliveras, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg', 9 *International Organizations Law Review* (2012): 387, 440–6.

51 If the International Criminal Law Section is set up, this Court will become the first ever judicial organ of an intergovernmental organisation with jurisdiction over member states' citizens in the area of criminal law, an area where states traditionally exercise their sovereignty.

applies equally to crimes committed by other African dictators, some of whom are still in power) were perpetrated before their establishment. To that extent, there are similarities with the heinous crimes perpetrated during the Khmer Rouge regime in Cambodia and the challenges being faced by the Extraordinary Chambers in the Courts of Cambodia (ECCC), the prototype of hybrid criminal courts.⁵²

For the above reasons, one would have realistically expected that the Assembly, as the forum encompassing all African leaders (except the King of Morocco), would see the larger picture and, on the basis of similar developments in the global community, take advantage of the experience gained, avoid the mistakes made, and take the fight against impunity one step further. In sum, in July 2006 African leaders missed another opportunity to show their determination in combating impunity and to align themselves with developments elsewhere. On the contrary, they downsized the Habré case to simply selecting a suitable (or not, as it has turned out to be) jurisdiction for his trial. Thus, they internationalised the Habré case but kept it within the confines of a dysfunctional African state of affairs. As later events have shown, however, the internationalisation of the case was the only correct approach to have been taken.

VII. SENEGAL FINALLY ADOPTS THE NECESSARY LEGISLATIVE CHANGES

Although the Assembly had given Senegal a clear order to prosecute Habré, Senegal did almost nothing to implement it. In January 2007, the Eighth Ordinary Assembly Session reiterated Senegal's obligation and suggested that it avail itself of other African countries' experience to organise the trial.⁵³ Arguably, Senegal was under a legally binding duty to give effect to the Assembly decision and the latter ought to have exercised its powers more vigorously. In particular, article 9(1)(e) of the Constitutive Act mandates the Assembly to monitor the implementation of AU decisions and to ensure compliance by member states. Moreover, pursuant to article 23(2) thereof, the Assembly is authorised to impose sanctions on any recalcitrant member which has failed to comply with decisions.⁵⁴ Until today, this has never happened. The Assembly's right to monitor the implementation of decisions, however, constitutes at the same time an obligation which is owed to complying member states.

It was more than a year later that finally Senegal took some significant steps towards materialising its mandate. In particular, in the course of 2008, on the one hand, three judges and two prosecutors were appointed to work on the trial and,

52 Generally, see K. Magliveras, 'Difficulties and Status of Efforts to Create an International Criminal Court in Cambodia', 3 *Asia-Pacific Journal on Human Rights and the Law* (2002): 105. For the interplay between hybrid courts and the trial of Habré, see T. Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré', 39 *Columbia Human Rights Law Review* (2007–2008): 471.

53 AU Assembly, *Decision on the Trial of Mr Hissène Habré and the African Union*, AU Doc. Assembly/AU/Dec.157 (VIII) (30 January 2007).

54 Generally, see K. Magliveras and G. Naldi, *The African Union*, Kluwer Law International (2009), pp. 99–101.

on the other hand, article 9 of the Constitution was amended, the very provision which in previous years the Senegalese government had invoked in order to justify its inability to prosecute Habré. The new article 9 reads as follows:

Article 9

Toute atteinte aux libertés et toute entrave volontaire à l'exercice d'une liberté sont punies par la loi.

Nul ne peut être condamné si ce n'est en vertu d'une loi entrée en vigueur avant l'acte commis.

Toutefois, les dispositions de l'alinéa précédent ne s'opposent pas à la poursuite, au jugement et à la condamnation de tout individu en raison d'actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels d'après les règles du droit international relatives aux faits de génocide, crimes contre l'humanité, crimes de guerre.

La défense est un droit absolu dans tous les états et à tous les degrés de la procédure.⁵⁵

[Any infringement of civil liberties and wilfully obstructing the exercise of any freedom are punishable by law.

No one shall be condemned except under a law which came into effect before the act was committed.

However, the provisions of the preceding paragraph do not preclude the prosecution, the trial and the punishment of any individual through acts or omissions, which, when they were committed, were criminal according to the rules of international law concerning acts of genocide, crimes against humanity or war crimes.

The defence is an absolute right in all states and at all stages of the procedure.]

The Constitutional amendment led to three very significant changes. The first was to lift the prohibition of the *ex tunc* application of the criminal legislation for the commission of certain crimes. In accordance with the new article 9 of the Constitution, the principle *nulla crimen nulla poene sine lege* is no bar to prosecuting acts, which at the time of perpetration constituted criminally punishable acts pursuant to the rules of international law, namely genocide, crimes against humanity and war crimes. The amendment was in line with article 15(2) of the International Covenant on Civil and Political Rights of 1966.⁵⁶ It stipulates

55 Constitutional Law No. 2008-33 of 7 August 2008. For the current text of the Constitution, which was originally promulgated in 2001, see <http://www.gouv.sn/spip.php?rubrique17> and <http://www.unhcr.org/refworld/docid/49f5d1f22.html> (accessed 3 June 2014). Interestingly enough, the Constitution's Preamble affirms its adhesion, *inter alia*, to the French Declaration of the Rights of Man and the Citizen (1789). Generally, see M. Niang, 'The Senegalese Legal Framework for the Prosecution of International Crimes', 7 *Journal of International Criminal Justice* (2009): 1047; L. Bingham, 'Trying for a Just Result? The Hissène Habré Affair and Judicial Independence in Senegal', 23 *Temple International and Comparative Law Journal* (2009): 77.

56 In force since 23 March 1976, 999 UNTS 171.

that contracting parties, as an exception, are free to decide that individuals shall be tried and punished 'for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations'.⁵⁷ The fact that article 15(2) refers to 'any person' signifies that contracting parties may not choose to exclude certain individuals from its ambit on account, for example, of the office held; consequently, even heads of state, whether in power or not, may be prosecuted accordingly. That the multilateral instruments prohibiting torture and other forms of degrading or inhuman treatment have been ratified and followed by states overwhelmingly,⁵⁸ leaves no doubt that the general principles of 'the community of nations' include the prohibition of acts of torture as well.

The second change was that the new article 9 of the Constitution deleted the previous provision which had time-barred the prosecution of genocide, crimes against humanity and war crimes after ten years of their perpetration. This was necessary for the prosecution of Habré considering that the crimes accused of had allegedly been committed more than eighteen years ago.

Finally, the third change was that the new article 9 lifted the previous stipulation prohibiting the criminal prosecution of offences committed outside the territory of Senegal, another vital precondition for prosecuting Habré.⁵⁹

Those who might have expected that the Habré case would have proceeded at an accelerated rate were soon disappointed because Senegal put forward another obstacle: it could not handle the cost of the trial. The Ministry of Justice had put the tag (grossly overestimated as it turned out) at the equivalent to US\$43 million USD (at the time around €27.4 million). The cost of the trial was not a new consideration but one of the issues discussed when in late January 2008 at the invitation of President Wade a delegation of experts from the European Union had visited Dakar to consider the logistics required for the trial, including the cost.⁶⁰ Thus the question of who was going to pick up the tag became a weapon

57 Senegal ratified it on 13 February 1978. Note that article 7(2) of the African Charter on Human and Peoples' Rights (1981) (the Banjul Charter) does not stipulate this exception to the principle *nulla crimen nulla poene sine lege*.

58 Pertaining to Senegal, see, *inter alia*, article 5 of the Universal Declaration of Human Rights of 1948, article 7 of the International Covenant on Civil and Political Rights, article 5 of the Banjul Charter, and UN General Assembly Resolution 3452 (XXX) of 9 December 1975 embodying the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Note that the European Union has laid down rules governing trade with third countries in goods which could be used for, *inter alia*, torture and cruel treatment or punishment, Regulation 1236/2005 of the Council of 27 June 2005, *Official Journal of the European Union*, L 200, 30 July 2005, p. 1.

59 Note that in early February 2007 Senegal adopted a Law allowing the criminal prosecution of acts of genocide, crimes against humanity, war crimes and acts of torture even if they had been committed outside its territory. As this criminal legislation did not have retrospective effect, however, the amendment of the Constitution was necessary to accuse Habré of acts which had been perpetrated before its entry into force; see <http://www.hrw.org/news/2007/02/02/senegal-new-law-will-permit-habr-s-trial> (accessed 3 June 2014).

60 Council of the European Union, *13th ECOWAS–EU Ministerial Troika Meeting, Luxembourg, 28 April 2008, Final Communiqué*, Doc. 8936/08, para. 24, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/100203.pdf (accessed 3 June 2014).

in the Senegalese government's hands and a good cause to drag its feet. On 15 September 2008, fresh complaints accusing Habré of crimes against humanity and torture were lodged with a Senegalese prosecutor by fourteen victims. They were supported by a coalition of African and international human rights groups.⁶¹ This move arguably aimed at putting even further pressure on Senegal to terminate its inactivity. The authorities reacted by saying that the complaints' examination should not proceed unless and until the international community had first secured the necessary funding for holding the trial.⁶² Moreover, in late January 2009, President Abdoulaye Wade went on record saying that he intended to send Habré back to Chad or to deliver him to the African Union, if the funding was not promptly received by Senegal.

President Wade's threat to deliver Habré was not accidental. On 1 February 2009, the Twelfth Ordinary Assembly Session opened and the question of the trial of Habré was on the agenda. Its outcome was a typical example of the way African leaders have been acting when confronted with matters that they do not want to or cannot deal with or they do not know how to deal with. The Decision⁶³ started by congratulating Senegal for taking the necessary measures to carry out the mandate to bring Habré to trial. This offering of congratulations between African leaders, even when the recipient has only done what was expected, constitutes a feature of African diplomacy. Thereafter, the Decision 'notes' that even if the European Union had drafted the budget for holding the trial, the necessary funds had not been collected. For this reason, AU member states, the European Union, and the so-called 'partner countries' and 'partner institutions' were invited to send their contributions directly to the AU Commission. Thus the Assembly confirmed Senegal's claim that the issue of the funding constituted an insurmountable obstacle (as if all other difficulties had been overcome) and, implicitly, blamed the European Union for the delays in prosecuting Habré.

VIII. BELGIUM BRINGS SENEGAL BEFORE THE INTERNATIONAL COURT OF JUSTICE

Senegal might have hoped that it had been given a six-month reprieve considering that the Assembly meets every six months; however, Belgium, yet another time, stirred the waters by instituting on 19 February 2009 proceedings against Senegal before the ICJ. Belgium asked the ICJ to rule that the respondent is under the obligation either to bring criminal proceedings against Habré or to extradite him to Belgium to stand trial there. Moreover, based on the aforementioned threats

61 Human Rights Watch, 'Chad: Victims Charge Habré with Crimes Against Humanity', 15 September 2008, available at <http://allafrica.com/stories/200809160945.html> (accessed 3 June 2014).

62 Human Rights Watch, 'African Union: Press Senegal for Habré Trial', 28 January 2009, available at <http://www.hrw.org/en/news/2009/01/28/african-union-press-senegal-habr-trial> (accessed 3 June 2014).

63 AU Assembly, *Decision on the Hissène Habré Case*, AU Doc. Assembly/AU/Dec. 240(XII) (3 February 2009).

by Senegal that it had no intention to keep Habré in its territory if its demands were not met, Belgium also filed a request for interim measures, which would have forced Senegal to continue exercising control over him, namely by ensuring that Habré did not leave its territory. In May 2009, the ICJ rejected (with one vote against) the request because, based on the facts produced by Belgium, the requirements, which were envisaged in article 41 of ICJ Statute to show urgency justifying the issuance of interim measures, were not met.⁶⁴ As is later explained, in July 2012 the ICJ gave its judgment in favour of Belgium.

Interestingly enough, Belgium's application to the ICJ was not mentioned during the Thirteenth Ordinary Assembly Session in July 2009 even though the developments in the Habré case were discussed.⁶⁵ Although the application was directed only against Senegal, in reality it was the whole of Africa that was the respondent before the ICJ. This is because for so many years the AU but also African states have tolerated impunity and have repeatedly shown indifference to the fact that those who have committed, directly or indirectly, as principals or as instigators, mass crimes against their populations escape prosecution and go unpunished.

In July 2009, the Assembly expressed its regret because, in spite of its previous decisions, no member state had made voluntary contributions towards Habré's trial and reiterated its appeal. It was rather clear that the Assembly expected that the cost of the trial be met by what the AU rather euphemistically refers to as 'partner countries', principally the former colonial powers and China, the very country that has effectively colonised parts of the continent.⁶⁶ As far as the AU itself is concerned, the Assembly decided it will make solely 'a token contribution to the budget'. Moreover, it requested Senegal and the AU Commission in collaboration with the partner countries and the European Union to discuss the possibility of holding a donors' conference. While one would have regarded it as an option to be considered, the Decision invited all partners to participate in the Donors Round Table to be held in Dakar during the last quarter of 2009. It turned out that the Assembly had completely miscalculated the feasibility of holding it at such short notice for, when it met in February 2010 for the Fourteenth Ordinary Session, it called again on the partners to ensure that it would take place within 2010. Regrettably, the Assembly failed again to determine the AU's token contribution to the budget.⁶⁷

64 International Court of Justice, 'Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*)', Request for the Indication of Provisional Measures, Order of 28 May 2009, [2009] *ICJ Reports* 139, 156 at para. 76.

65 AU Assembly, *Decision on the Hissène Habré Case*, AU Doc. Assembly/AU/Dec. 246(XIII) (3 July 2009).

66 Generally, see A. Huliaras and K. Magliveras, 'In Search of a Policy: European Union and U.S. Reactions to the Growing Chinese Presence in Africa', 13 *European Foreign Affairs Review* (2008): 399.

67 AU Assembly, *Decision on the Hissène Habré Case*, AU Doc. Assembly/AU/Dec. 272(XIV) (2 February 2010). In January 2011, it finally decided to contribute US\$1 million; it is unclear whether the funds have ever been released.

IX. THE DONORS PLEDGE TO FINANCE THE TRIAL, BUT COULD IT TAKE PLACE IN SENEGAL? THE JUDGMENT OF THE ECOWAS COURT OF JUSTICE

At its Fifteenth Ordinary Session, the Assembly set the date for the Donors Round Table.⁶⁸ It was finally held on 24 November 2010 and resulted in pledges of US\$11.7 million/€8.6 million, fully covering the estimated cost of the trial.⁶⁹ The previous week, however, there had been an important development which added another twist in the affair. In particular, the Court of Justice of the Economic Community of West African States (ECOWAS) ruled that Senegal must try Habré through special or ad hoc proceedings of an international character. The ruling was given in the context of *Hissène Habré v Senegal*, an application brought on 1 October 2008 by Habré himself.⁷⁰ He claimed that, as Senegal had promulgated the legislation on the basis of which it asserted jurisdiction over his alleged crimes only after their commission, it had violated his right under article 15 of the International Covenant on Civil and Political Rights, which enshrines the principle *nulla crimen nulla poene sine lege*. In its Judgment of 18 November 2010, the Court, citing, *inter alia*, the jurisprudence of the European Court of Human Rights, partially upheld Habré's claims, namely that his trial in Senegal under the existing domestic legal framework would violate the rule prohibiting the application of retroactive criminal laws.⁷¹

It is submitted that this conclusion is wanting because the Court gave a rather convoluted interpretation of article 15(2), reference to which has been made above. Moreover, it did not answer the question of whether the Constitutional amendments of 2008 were in line with article 15(2) and within Senegal's sovereign right to uphold the rules of international law to ensure that a person, who has willingly resided in its territory and has submitted himself to its jurisdiction, could be held accountable for the criminal charges levelled against him. The Court noted that even though the factual basis of the intention to try Habré did not constitute criminal acts under Senegalese law, there was an international law obligation to do so and, in order to avoid impunity for the acts accused of, article 15(2) came into play.

68 AU Assembly, *Decision on the Hissène Habré Case*, AU Doc. Assembly/AU/Dec. 297(XV) (27 July 2010).

69 See *Table ronde des donateurs pour le financement du procès de Monsieur Hissène Habré, Document final*, 24 November 2010, available at <http://www.hrw.org/en/news/2010/10/14/legal-documents> (accessed 3 June 2014). For further details, see AU Commission, *Progress Report of the Commission on the Hissène Habré Case*, AU Doc. Assembly/AU8(XVII) (2011), presented on 30 June 2011 during the Seventeenth Ordinary Assembly Session.

70 See F. Viljoen, *International Human Rights Law in Africa*, 2nd edn, Oxford University Press (2012): pp. 454ff.

71 Decision No. ECW/CCJ/JUD/06/10, 18 November 2010, available at <http://www.courtceowas.org/> (assessed 3 June 2014); for commentary, see V. Spiga, 'Non-retroactivity of Criminal Law. A New Chapter in the Hissene Habré Saga', 9 *Journal of International Criminal Justice* (2011): 5; S. T. Ebobrah, 'Human Rights Developments in African Sub-regional Economic Communities 2010', 11 *African Human Rights Law Journal* (2011): 216, 239–40.

While the Court ‘share[d] the noble objectives contained in the mandate of the African Union and reflect[ed] the high adhesion of this Organisation to the principles of impunity for serious violations of human rights and the rights of victims’,⁷² it went on to say that the implementation of the AU mandate should follow the international practice which had become customary in such situations, namely to create *ad hoc* or special jurisdictions. In the present case, however, this

means nothing other than the establishment of judicial *ad hoc* powers [which] find their low relief in the provisions of Article 15.2 of the International Covenant on Civil and Political Rights and that Senegal is responsible for proposing the principal forms and modalities of implementation of such a structure.

Thus, any endeavours by Senegal outside such a framework, on the one hand, would violate the principle of non-retroactivity of criminal law, which is enshrined in international human rights as an inalienable right, and, on the other hand, would obstruct the principle of impunity protected by the [aforementioned] international instruments.⁷³

In the operative part of the Judgment, the Court held that there existed evidence leading to the conclusion that the constitutional and legislative reforms introduced by Senegal could prejudice the rights of Habré; held that, in this context, Senegal must comply with the decisions of its courts and respect the authority of *res judicata* that they carry; ordered Senegal to respect the principle of absolute non-retroactivity of criminal legislation; and concluded that Senegal, in the context of the AU mandate, must continue its attempts to devise the proper modalities to put Habré on trial within the strict framework of a special procedure of an *ad hoc* nature, as practised in international law by all civilised nations.

Thus, the ECOWAS Court agreed with the contention advanced by Habré that his trial by Senegal’s domestic courts on the basis of the Constitutional amendments and the criminal legislation promulgated in 2007–8 would constitute a violation of his human rights. The Court chose not to stop there, however, but moved on to overturn its conclusion by suggesting that he could be tried by a tribunal with an international character.⁷⁴ Even though the Court did not indicate what kind of tribunal it had in mind, arguably it meant the aforementioned Extraordinary Chambers in Cambodia, the Special Court for Lebanon⁷⁵ and the Special Court for Sierra Leone.⁷⁶ It is of some interest to note that the Special Court of Lebanon severely criticised the judgment for stating that the retroactive

72 Decision No. ECW/CCJ/JUD/06/10, *ibid.*, para. 58.

73 *Ibid.*

74 According to M. Bennouna, ‘How to Cope with the Proliferation of International Courts and Coordinate Their Actions’, in A. Cassese (ed.), *Realizing Utopia. The Future of International Law*, Oxford University Press (2012), pp. 287, 291, this case shows the lack of coordination between states and between international institutions and tribunals in fighting impunity.

75 K. Magliveras, ‘Hariri and Lebanon: Rethinking International Criminal Tribunals’, 23 *International Enforcement Law Reporter* (2007): 100.

76 C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press (2013).

application of the Senegalese legislation would be admissible if Habré's trial were to be carried out by an international tribunal. According to the Special Court of Lebanon, this 'conclusion that does not appear to be logically and legally justified'.⁷⁷

X. THE AU MOVES UNSUCCESSFULLY TO INTERNATIONALISE THE TRIAL OF HABRÉ

Even though the AU was in no way compelled to give effect to the judgment of the ECOWAS Court (its legal order is quite separate from that of the AU), in January 2011 the Sixteenth Ordinary Assembly Session requested the AU Commission to consult with Senegal and finalise the modalities for the expeditious trial of Habré by creating 'a special tribunal with an international character' consistent with that judgment.⁷⁸ Arguably, the Assembly had found in the judgment's conclusions a window to terminate the impasse over the Habré case. Whatever the reasons which drove the Assembly to reverse after five years its rejection of such a tribunal, it finally accepted the obvious, namely the establishment of a special tribunal. AU negotiations with Senegal reached an advanced stage but were never concluded because Senegal chose to withdraw in May 2011.⁷⁹ This and similar moves demonstrated that President Wade did not want the trial to be held in Senegal⁸⁰ but, at the same time, did nothing to address the pressing and persevering issue of impunity.

An argument, which apparently had not been discussed, is whether the African Court on Human and Peoples' Rights could have had a role to play in examining if Senegal was under an obligation to prosecute Habré, especially in view of the provisions of the UN Torture Convention. This argument is based on the wide-ranging jurisdiction with which the African Court, unlike other regional human rights courts, has been endowed.⁸¹ In particular, according to article 3 of the Protocol, it can hear all disputes concerning the interpretation and application not only of the Banjul Charter but also of any other international or regional human rights instrument ratified by contracting parties (*in casu*, the Torture Convention).

77 Special Tribunal for Lebanon, Appeals Chamber, Case No. STL-11-01/I, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, at note 240, 50 *International Legal Materials* (2011): 509.

78 AU Assembly, *Decision on the Hissène Habré Case*, AU Doc. Assembly/AU/Dec. 340(XVI), para. 9 (31 January 2011).

79 US Department of State, Office of Global Criminal Justice, *Report to Congress: Report on Steps Taken by the Government of Senegal to Bring Hissène Habré to Justice*, 6 June 2012, available at http://www.state.gov/j/gcj/us_releases/reports/2012/193222.htm (accessed 3 June 2014).

80 For example, on 13 January 2011, Wade told his Cabinet he was committed to return the Habré case to the AU; see Gouvernement du Sénégal, Conseil des Ministres, 13 January 2011, available at <http://www.gouv.sn/Conseil-des-Ministres-du-13.1056.html> (accessed 3 June 2014).

81 The Court was established pursuant to a Protocol attached to the Banjul Charter, which was adopted in 1998 and entered into force on 25 January 2004. For analysis, see G. Naldi and K. Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights', 16 *Netherlands Quarterly of Human Rights* (1998): 431.

Moreover, under article 4, it may provide advisory opinions on any legal matter relating to such instruments at the request of the member states and any AU organ. Finally, provided that contracting parties have made a declaration accepting the Court's competence to receive cases instituted by individuals and by NGOs enjoying observer status at the African Commission on Human and Peoples' Rights, it can also hear individual petitions.⁸²

Access to the Court, regulated in article 5(1) of the Protocol, has been drafted very broadly. Thus applicants could be any of the following: (a) AU organs; (b) the contracting party which has filed a complaint before the African Commission and the party against which the complaint was lodged; (c) contracting parties whose citizens have allegedly been victims of human rights violations; and (d) NGOs and natural persons (subject to the above declaration). Considering that Senegal ratified the Protocol in September 1998 but has not accepted its competence to hear individual petitions and that Chad has signed but not ratified the Protocol, it follows that a contentious case could not have been brought by a member state. There was no bar to requesting an advisory opinion, however, and, given its previous resolutions on the Habré case, the Assembly would have been the appropriate organ to do so. If the Assembly had filed for an advisory opinion, the Court's jurisdiction might have been disputed *ratione temporis* on the ground that Habré's alleged crimes were perpetrated long before it was established. It could have been counter-argued, however, that the subject matter was not whether Habré was or was not responsible for the commission of the alleged crimes but whether Senegal had violated its obligations, principally under the Torture Convention. There is no doubt that the Assembly's requesting an advisory opinion would have been a bold move. Having said that, it is also true that, on the one hand, the Habré saga has always required bold actions and, on the other hand, such a request would have forced the Court to deal with gross violations of human rights and the prevailing ethos of impunity.

The Assembly next discussed the Habré case during the Seventeenth Ordinary Assembly Session (July 2011) and called on member states to declare their willingness to have his trial moved into their territory.⁸³ At the Eighteenth Ordinary Assembly Session (January 2012), Rwanda stated that it was prepared to do so, no doubt drawing from its experience in prosecuting individuals for their involvement in the 1994 genocide.⁸⁴ The Assembly recorded Rwanda's proposal and asked the Commission to study the financial and legal implications.⁸⁵ On its behalf, Belgium was keeping up the pressure on Senegal. On 17 January 2012,

82 See article 5(3) in conjunction with article 34(6) of the Protocol.

83 AU Assembly, *Decision on the Hissène Habré Case*, AU Doc. Assembly/AU/Dec. 371(XVII) (30 July 2011).

84 Generally, see D. Magsam, 'Coming to Terms with Genocide in Rwanda: The Role of International and National Justice', in W. Kaleck, Michael Ratner, Tobias Singelstein and Peter Weiss (eds), *International Prosecution of Human Rights Crimes*, Springer (2007), p. 159.

85 AU Assembly, *Decision on the Hissène Habré Case*, AU Doc. Assembly/AU/Dec. 401(XVIII) (30 January 2012).

it filed the fourth request for Habré's extradition⁸⁶ alleging that the Senegalese government had deliberately failed to transmit the appropriate documentation to the competent court.⁸⁷ The Court of Appeal of Dakar has apparently not ruled on it.

At the time of the Eighteenth Ordinary Assembly Session, President Wade was embroiled in intricate domestic affairs which he himself had caused by insisting on amending the Constitution to allow him to seek a third continuous term in office. The population disapproved: in the presidential elections of February 2012, he got less than 35 per cent of the popular vote. Wade then competed in a second round⁸⁸ which he lost to opposition leader Macky Sall. In a rare move for African politics, but consistent with Senegal's reputation as a functioning democracy and a model country as regards democratic institutions, Wade immediately conceded defeat.⁸⁹ In June 2012, the new regime sent out the right signals that it was committed to move forward with the trial of Habré.⁹⁰ But the events that took place a month later were so forceful that they changed the situation dramatically.

XI. THE ICJ DELIVERS ITS JUDGMENT. AU AND SENEGAL ARE LEFT WITH NO OPTION BUT TO CREATE THE 'EXTRAORDINARY AFRICAN CHAMBERS'

In July 2012 by the ICJ gave judgment in *Belgium v Senegal*.⁹¹ It was a disaster for Senegal, albeit largely expected. By fourteen votes to two (Judge Xue and Judge ad hoc Sur dissenting), the ICJ ruled that Senegal had breached its obligation under article 7(1) of the Torture Convention by failing to submit the

86 The second extradition request was filed on 15 March 2011. On 18 August 2011, it was declared inadmissible by the Court of Appeals of Dakar because the arrest warrant did not accompany the extradition request. The third request, filed on 5 September 2011, was treated on 10 January 2012 by the same Court as inadmissible because the arrest warrant attached to it was not an authentic copy; see Human Rights Watch, 'Belgium/Senegal: World Court to Hear Habré Trial Dispute', 16 February 2012, available at <http://www.hrw.org/news/2012/02/16/belgiumsenegal-world-court-hear-habr-trial-dispute> (accessed 3 June 2014).

87 Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, 'Sending of a Fourth Extradition Request by Belgium to Senegal for Mr Hissène Habré', Press Release, 18 January 2012, available at http://diplomatie.belgium.be/en/Newsroom/news/press_releases/foreign_affairs/2012/01/ni_180112_extradition_habre.jsp (accessed 3 June 2014).

88 'Senegal Presidential Race Heads to Runoff, a Humiliating Blow to Incumbent Wade', *Washington Post*, 29 February 2012, available at <http://www.washingtonpost.com> (accessed 3 June 2014).

89 A. Look, 'Senegal's Wade Concedes Electoral Defeat, Draws Praise', *Voice of America*, 25 March 2012, available at <http://www.voanews.com> (accessed 3 June 2014)

90 R. Skelton, 'Senegal Readies for Trial of Chad's Habré, Justice Ministry Says', *Bloomberg Businessweek*, 4 June 2012, available at <http://www.businessweek.com> (accessed 3 June 2014).

91 International Court of Justice, 'Questions Relating to the Obligation to Prosecute or Extradite', Merits, Judgment of 20 July 2012, [2012] *ICJ Reports* 422; for commentary, see S. Shah, 'Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*)', 13 *Human Rights Law Review* (2013): 351; M. Andenas and T. Weatherall, 'International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (*Belgium v Senegal*) Judgment of 20 July 2012', 62 *International and Comparative Law Quarterly* (2013): 753.

Habré case to the competent national authorities for prosecution. Moreover, it ruled unanimously that, if Senegal were not to extradite him, it must promptly commence his prosecution. The ICJ clarified that, even though the Convention offers to contracting parties two choices (namely, extradition or submission to domestic prosecution), this should not be construed to mean that they have equal weight. Whereas extradition is an option open to Senegal as a contracting party to the Convention, the latter treats Habré's prosecution as an international obligation that it must fulfil. It follows that violation of this duty constitutes a wrongful act resulting in Senegal's international responsibility.⁹² To put it otherwise, under the terms of the Torture Convention, Senegal, as a contracting party, is under the paramount duty to prosecute Habré. If Senegal does not give effect to this obligation, it bears liability and it could be held accountable. But it could escape responsibility if it were to extradite him to another state having jurisdiction over him.

Furthermore, the ICJ did not accept any of the defences put forward by Senegal. In particular, it held that Senegal's duty to comply with its obligations under the Torture Convention could not be affected by the decision of the ECOWAS Court of Justice; that the financial difficulties and the lack of support vis-à-vis the trial of Habré could not justify its failure to initiate proceedings against him; that the referral of the matter to the AU Assembly was no legitimate reason to delay complying with its obligations; and, finally, that the difficulties with its internal legal system and the delayed adoption of the necessary legislation to comply with the Convention could not justify its breach of the obligation enshrined in article 7(1).⁹³

Finally, as regards the temporal aspects of the case, the ICJ held that although 'the prohibition on torture is part of customary international law and has become a peremptory norm (*jus cogens*)', the actual obligation to prosecute alleged perpetrators can only arise once the Convention has entered into force for the contracting party in question. In the case of Senegal, this was June 1987 and a number of complaints against Habré for allegedly perpetrating serious crimes had been submitted after that date. By the same token, Belgium was entitled to complain about Senegal's non-compliance with the Convention after 1999 and, indeed, Belgium had demanded that Senegal comply since 2000, that is, when the first complaint against Habré was lodged before its domestic courts.⁹⁴

The importance of the ICJ judgment lies in the fact that it affirmed that the totality of contracting parties to the Torture Convention (they are now 153 states) have the right to demand that fellow parties give full effect to their duties emanating from it. And this without taking into consideration, on the one hand, the alleged acts of torture had taken place before the contracting party claiming non-fulfilment of obligations by a fellow party had acceded to the Convention

92 International Court of Justice, *ibid.*, para. 95.

93 *Ibid.*, paras 111–13. As regards the latter defence, the ICJ held that it contravened article 27 of the Vienna Convention on the Law of Treaties (1969), a provision reflecting customary international law.

94 *Ibid.*, paras 96, 99, 100, 102, 104.

and, on the other hand, whether the person(s) accused of committing them and/or the alleged victim(s) had any links with the complainant party. In conclusion, what in effect that ICJ said was that any state party could not only pass judgment on another party's performance as regards the fulfilment of its duties under the Convention but also take the necessary measures to make sure that there is no impunity for acts of torture, the very essence of the principles of universal jurisdiction.

The ICJ judgment did not offer to Senegal much room for manoeuvring since it was categorically stated that it had violated its obligations under article 7(1) of the Torture Convention and has remained in breach since 2000, that is, when the first complaint against Habré was filed. Senegal turned again to its natural ally, the AU. Following negotiations in late July 2012, the two sides signed an Agreement on 22 August 2012 creating a special criminal tribunal, the 'Extraordinary African Chambers', within the existing Senegalese court system in the capital Dakar.⁹⁵ In December 2012, Senegal's National Assembly allowed President Macky Sall to ratify the Agreement with the AU.⁹⁶ The Extraordinary African Chambers, whose Statute was approved on 30 January 2013,⁹⁷ opened on 8 February 2013.⁹⁸ The funds pledged during the Donors Round Table in 2010 will now be allocated to the Chambers, while former US Secretary of State Hillary Clinton has stated that her government is committed to assist with the prosecution of Habré.⁹⁹

According to article 1 of the Statute, the establishment of the Chambers aims at allowing Senegal to prosecute the international crimes committed in Chad between 7 June 1982 and 1 December 1990 and to conform to its international obligations. This object is qualified in article 3. It stipulates that the Chambers are empowered to prosecute and try those who are most responsible for crimes and grave violations of international law, of international custom and of the international conventions ratified by Chad, provided they were perpetrated on Chadian territory during the aforementioned period of time. According to article 4, not all possible crimes perpetrated come under their jurisdiction but only the following: genocide, crimes against humanity, war crimes and torture.¹⁰⁰ As was to be expected, the criminal offences over which the Chambers have competence are not time-barred (article 9), while the planning, aiding or abetting

95 The Agreement is available at <http://www.chambresafriaines.org> (accessed 4 June 2014).

96 Loi No. 2012-25, available at <http://www.chambresafriaines.org> (accessed 4 June 2014).

97 Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990, available at <http://www.chambresafriaines.org> (accessed 4 June 2014). The Agreement and the Statute are reprinted with an Introductory Note by R. Adjovi in 52 *International Legal Materials* (2013): 1020.

98 M. Simons, 'Senegal: Trial for Chad's Ex-Ruler', *The New York Times*, 8 February 2013, available at <http://www.nytimes.com> (accessed 3 June 2014).

99 See Hillary Rodham Clinton, *Remarks on Building Sustainable Partnerships in Africa*, 1 August 2012, University of Cheikh Anta Diop, Dakar, Senegal, available at <http://photos.state.gov/libraries/senegal/323264/pdf/clinton-ucad-sp-2012-08-01.pdf> (accessed 3 June 2014).

100 The definitions and the constituent elements of these crimes are set out in articles 5–8 of the Statute. It is interesting that no international treaties are cited other than the Geneva Conventions of 1949 and the Additional Protocol II of 1977.

of the offences has been criminalised (article 10(2)). Moreover, the official position of any accused person (including a head of state) does not exonerate him or her of criminal responsibility and is not a ground for mitigating the penalty (article 10(3)). The Extraordinary African Chambers is a unique criminal tribunal, born out of necessity, and should be viewed and analysed in this context, making comparisons with similar institutions rather difficult.¹⁰¹

The Statute deprives Habré of any claim to the immunity to which former heads of state might be entitled for acts (as well as omissions) carried out in their official capacity. It should be noted that, as of late, the question of immunity of dignitaries has shifted to the direction of limiting it or even abandoning it when the accused faces charges of genocide, crimes against humanity and the like.¹⁰² The highest sentence envisaged in the Statute is life imprisonment, which reflects the international nature of the Extraordinary African Chambers and the fact that, for some time now, large segments of the international community have moved towards abolishing the death penalty.¹⁰³ The Chambers are equipped with separate sections to handle investigations, trials and appeals against decisions.

From the wording of the Statute two issues of importance stand out. The first issue has to do with the fact that apparently Chad is longer competent (and for that matter responsible) to prosecute and try those individuals (of Chadian nationality) who have allegedly committed any of the above crimes when the Habré regime was in power. To put it otherwise, Chad may no longer have the right to institute criminal proceedings for the alleged offences committed in its territory. The situation is akin to Chad having surrendered this right to the Chambers, while the AU may not take it away not least because Chad is not a party to the agreement of August 2012.

The second issue has to do with whether the Chambers are entitled to prosecute and try not only Habré but other individuals as well, as envisaged in articles 1 and 3 of the Statute. It is submitted that Senegal's international obligation as concerns

101 Cf. S. Williams, 'The Extraordinary African Chambers in the Senegalese Courts. An African Solution to an African Problem?', 11 *Journal of International Criminal Justice* (2013): 1139.

102 Cf. International Criminal Court, Pre-Trial Chamber I, *The Prosecutor v Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Judgment of 12 December 2011, available at <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf> (accessed 3 June 2014); for commentary, see K. Magliveras and G. Naldi, 'The ICC Addresses Non-cooperation by State Parties in Arresting President Al-Bashir: The *Malawi* Decision', 6 *African Journal of Legal Studies* (2013): 137.

103 Note that the Iraqi Special Tribunal and its successor the Supreme Iraqi Criminal Tribunal, established to try Iraqis accused of genocide, crimes against humanity, war crimes or other serious crimes allegedly committed between 1968 and 2003, allowed the death penalty for those crimes envisaged in the Penal Code of 1969. For those not envisaged therein (e.g., crimes against humanity), however, the Tribunal was directed to be guided by the sentences issued in 'relevant international precedents'; see article 24(e) of the Statute of the Iraqi Special Tribunal, Coalition Provisional Authority (CPA) Order Number 48 of 2003, published in *Iraqi Official Gazette*, Issue No. 3980, 10 December 2003, available at <http://www.loc.gov/law/help/hussein/docs/CoalitionProvisionalAuthorityOrder48en.pdf>. For the Penal Code of 1969, see <http://www.loc.gov/law/help/hussein/docs/IraqiPenalCodeof1969.pdf> (accessed 4 June 2014).

the bringing to trial of those responsible for the atrocities committed during the Habré regime centres around the prosecution of only Habré. If, for the sake of argument, Senegal (and any other state) wished to prosecute other individuals for the same atrocities, they could do so by applying either the provisions of the Torture Convention or the principle of universal criminal jurisdiction, as enshrined in their domestic legal orders; however, such prosecutions would be on the basis of domestic criminal law and before ordinary national criminal courts.

To elaborate on this argument, the reason why the Chambers were established in Senegal and not in another African state (for example, Rwanda, which, as has been mentioned, volunteered to hold Habré's trial) is because Habré has resided in its territory and because Senegal has an international obligation (flowing from the Torture Convention as confirmed by the ICJ¹⁰⁴) to initiate criminal proceedings against him. These two conditions do not appear to be fulfilled in the case of other individuals who might be implicated in the atrocities.¹⁰⁵ On 2 July 2013, Habré, who had in the meantime unsuccessfully petitioned the ECOWAS Court of Justice to order the suspension of the Chamber's operation,¹⁰⁶ was charged with crimes against humanity, torture and war crimes and placed in pre-trial detention. The Prosecutor has requested the indictment of five other Chadians who have been charged in Chad and/or are wanted by Chad for torture-related crimes.

XII. CONCLUSIONS

The judgment of the International Court of Justice in *Belgium v Senegal* made the Habré case again a priority for the African Union. Although the AU could have asked Senegal to extradite him to Belgium, it opted for the Extraordinary African Chambers, a choice which had always been open to it. It is clear that the AU has opted for an 'African solution to an African problem'.¹⁰⁷ Had Habré been extradited to Belgium, it would have been up to its authorities to show that jurisdiction could be asserted over him and that he could be tried before its domestic courts. Equally, it would have been open to Habré to challenge the legality of his surrender and to invoke all other defences available to him not only before domestic courts but also before competent transnational judicial and

104 It should be recalled that Belgium's principal submission before the ICJ was that Senegal was obliged to bring criminal proceedings against only Habré for crimes of torture and crimes against humanity in which he was allegedly involved as perpetrator, co-perpetrator or accomplice; *Belgium v Senegal*, *supra* note 64.

105 Note that there are no provisions in the Agreement or in the Statute concerning the extradition of Chadian nationals to Senegal to stand trial before the Extraordinary African Chambers.

106 The petition, which was lodged on 23 April 2013 and was based on the Chambers' illegitimacy and its inability to provide him a fair trial, was dismissed on 5 November 2013 on the ground of lack of jurisdiction; *Hissène Habré v Republic of Senegal*, ECW/CJ/APP/11/13, available at <http://www.courtecawas.org> (accessed 4 June 2014).

107 'African solution to Africa's problems' is one of the AU's founding principles.

quasi-judicial entities to which Belgium is answerable, including the European Court of Human Rights¹⁰⁸ and the Human Rights Committee.¹⁰⁹

Habré's is not the only case of impunity with an international dimension that the AU has been unable and unwilling to address in a resolute manner. The case of the President of Sudan al Bashir and his alleged direct involvement in the Darfur massacre (genocide according to the ICC¹¹⁰) also stands out. The AU's inadequate stance in the Habré case should be treated in the context of the ethos of impunity that is prevalent in Africa. This is not impunity for offences perpetrated by ordinary individuals. On the contrary, it concerns heads of state and high-ranking officials who committed, participated in the commission of or allowed through their inaction mass crimes to be perpetrated, crimes which have destroyed human life and human dignity.

As of late, the intervention of part of the international community as well as of individual states has somewhat contributed to restricting impunity in Africa. This kind of intervention has its limits, however, and it is probably unsustainable over a long period of time. It is high time that Africa itself did soul searching in how to deal with it. In particular, the AU owes it to the population of its member states to tackle those individuals who in the past were accused of serious human rights violations, those who are currently accused and those who in the future will stand accused. Africa's emancipation (or renaissance, as put by former South African President Mbeki¹¹¹), one of the founding pillars of the AU, can no longer be entrusted to third parties, be they international institutions or partner-countries. Impunity is closely associated with emancipation but also with corruption, unaccountability and violation of fundamental freedoms, all those elements condemning countries to permanent underdevelopment.

Africa should promote a culture of accountability as a matter of urgency. That the ICC as well as the other tribunals operating in the context of the African regional organisations have a role to play is undisputed. It is an issue of contention to what extent they can do so without outside interference. Even these entities cannot deal with cases of impunity that go back many years, however. With the AU having shown over so many years that it is unable, unwilling and unenthusiastic to address determinedly the trial of Habré, it is clear that individual African states must take the problem of impunity in their own hands. The wait-and-see-but-take-no-resolute-action stance followed by Senegal has only perpetuated impunity and

108 Cf. article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms protecting the right to fair trial, *Council of Europe Treaty Series* No. 005, 213 UNTS 222, in force since 3 September 1953. Belgium ratified it on 14 June 1955.

109 Cf. article 14 of the International Covenant on Civil and Political Rights protecting the right to fair trial. On 17 May 1994, Belgium acceded to the Optional Protocol to the Covenant on Civil and Political Rights, 999 UNTS 302, in force since 23 March 1976.

110 ICC Pre-Trial Chamber I, *Second Warrant of Arrest for Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09, 12 July 2010, available at <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (accessed 3 June 2014).

111 See M. Mbeki, 'The African Renaissance', 3 *South African Yearbook of International Affairs* (1998/1999): 120; P. Vale and S. Maseko, 'South Africa and the African Renaissance', 74 *International Affairs* (1998): 271.

should serve as the example to be avoided in the future. The Habré case has become a missed opportunity for the African Union and its organs to show to the world that the declarations committing it to fight impunity actually mean it. It remains to be seen whether the Extraordinary African Chambers will be able to finally bring Habré to the dock and try him according to international criminal and procedural standards.