

The Development of the Habré Case in Senegal

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Thank you.

As Reed said, in February 2000, Hissene Habre was indicted in Senegal on torture charges, and placed under house arrest. I believe that was a historic decision for African human rights lawyers. First of all, it was the first time that an African had been charged with atrocities by the court of another African country. Second, the very idea of bringing charges against a former head of state in Africa was a great challenge we had to face when we decided to finally bring a case against Hissene Habre in Senegal.

After meeting with the judge, one of the victims that we brought to Dakar from Chad said, “My heart is filled with joy. I have waited nine years to tell a court of law about the horrors which were inflicted on me and my fellow prisoners.” And that was even before the indictment. So when a few days later, Judge Kandji went even further and indicted Habre, my heart was also filled with joy, but for another reason. I remembered a discussion at Harvard about the Pinochet case. A Japanese American student rose and said—he wanted to express his confidence in the justice system in England—“After all, this is the land of the Magna Carta, this is not some African country.” And the day the indictment was decided, I wished I had his telephone number.

Unfortunately, an Appeals Court in Dakar quashed the indictment, on the ground that, under domestic law, Senegal’s courts have no competence over acts of torture committed outside of Senegal’s territory. And just last week, Senegal’s highest court confirmed that decision, adding that the mere presence of an alleged torturer in Senegalese territory doesn’t trigger the prosecution under the UN Convention Against Torture that Senegal has ratified.

I wanted not to speak about specifics of the case, but rather to share with you some of the lessons that, as an African human rights lawyer, I learned from this case.

I think one of the first lessons for future universal jurisdiction cases in Africa is that we probably will need to be more careful in building the case and trying to win the case before the court of public opinion before we build the case before the courts of justice. And for me, when I look back, I think this is probably one of the earliest ways we failed, to be frank. Because what we saw as our strong position, because of the independence of the judiciary in Senegal—there are very open-minded judges in Senegal, it is a very open democratic society, compared to other African countries—later happened to be our

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weakness in the case. Whereas many lawyers in other African countries can reasonably understand that the head of state may commit some of these errors, for Senegalese lawyers, that is not the case. And we had to persuade the public opinion in Senegal to convince them that this really happened. But by the time we began to appeal to public opinion, it was too late. The Senegalese lawyers for Habre, which was a very good team of lawyers, had already read the case before the court of public opinion. So while we wasted our time searching international law, searching for evidence in Chad, meanwhile the Senegalese lawyers for Hissene Habre were very busy persuading local public opinion. They even asserted that this was about Western plot, Western imperialism, that Hissene Habre was the victim of some kind of French, American and Libyan plot. And yet we are speaking about someone who committed crimes on a scale never reached by Idi Amin, Mobutu, Bokassa combined. So when we started to make our case before the court of public opinion, it was too late.

When the judge, Judge Mireille Ndiaye, President of the Criminal Chamber of the Court d’Cassacion read her decision last week and said that the mere fact of Hissene Habre happening to be in Senegal cannot trigger the prosecution by a Senegalese judge under the UN Convention against Torture, I think she was echoing some of the consensus we heard when we filed the case the first time. Because we had people, even journalists and even Senegalese lawyers, throughout Africa asking us, “Why Hissene Habre? Why ten years later?” Because Chad is not Chile. Chad is not a country in transition. And unfortunately, Chad is not well known, even for Africans. My first encounter with atrocities committed by Hissene Habre was in 1994, when I first visited Chad. So it was hard for us to make the case that this is a bad guy. He was silent for ten years in Senegal. He was a good Muslim, he went to mosque every Friday, he donated to charity, and he is very good looking—he’s a handsome guy. And so his lawyers successfully said “this is a victim of Western human rights groups.” So I think in the future we will need to be more careful. I think these universal jurisdiction cases are tried both before the court of public opinion and before the court of justice.

The second lesson is that I think we need a new generation of human rights lawyers in Africa. What I mean is this: human rights lawyers in Africa, especially in French-speaking African countries, tend to be best trained in reacting to prosecution by the state, representing the poor people, union leaders, journalists, political opponents to the government. They are not prepared to be proactive lawyers, to bring cases to justice, to challenge government decrees. And universal jurisdiction cases are the kind of cases in which we need proactive lawyers, lawyers that will bring cases to justice, and not wait for the government to trigger the prosecution.

In the Habre case we suffered from that. We worked with our Senegalese colleagues, a couple of very good lawyers, but they lacked the kind of experience with what I would call the prosecution culture that we definitely need in cases of universal jurisdiction for international crimes. And of course, the defense team of Hissene Habre seemed more comfortable, because that corresponds to the kind of practice that we African lawyers are accustomed to. We are lawyers that seek to challenge the state prosecution on behalf of the poor, on behalf of the persecuted and the prosecuted. We are not the kind of lawyers

that tend to dig up and collect evidence and to attack before the courts. And the legal team leader in Senegal, Boukounta Diallo, at the very time we were arguing the case before the *Cour de Cassation*, was involved in another case on behalf of two generals from Cote d'Ivoire who were being prosecuted for an alleged coup attempt. And he was more successful in Cote d'Ivoire than in our case in Dakar, just because of this difference.

The last point: I think in Africa we definitely need to break the international law/domestic law division. Judges likely to hear criminal cases and international crimes cases are judges with a legal background in private criminal law. And in many law schools in Africa, especially in French-speaking Africa, criminal law is part of private law, part of national law, as opposed to international law, which is not considered real law at all, because international law is thought of as part of a discipline that diplomats deal with, that the UN deals with, and it is not the kind of law that a serious attorney brings to a serious discussion in a criminal proceeding. For the majority of judges in Africa, there is no room for international law in a national court of justice. 'Law' in the phrase 'the judge applies the law' means domestic, national law as opposed to international conventions. So I think we will need, as African lawyers, to work hard to break this dichotomy between domestic law and international law.

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