

TRYING FOR A JUST RESULT? THE HISSÈNE HABRÉ AFFAIR AND JUDICIAL INDEPENDENCE IN SENEGAL

Laura Bingham*

C'est le Président qui décide et le ministre de la Justice fait descendre les instructions chez les magistrates. Ces derniers d'exécuter comme dans l'Armée. Séparation des pouvoirs version sénégalaise, quoi.

—Samba Alaar¹

I. INTRODUCTION

The anticipated trial of Hissène Habré, ex-President of Chad, in the criminal courts of Senegal, could signal a watershed moment in the history of international justice and has already thrust this coastal West African nation into the international spotlight.² One lingering obstacle jeopardizes the entire endeavor: the independence deficit of Senegal's judiciary. Promoters of the Habré trial often assume that Senegal's judiciary is sufficiently independent and logistically capable of taking on an international trial of considerable magnitude.³ This assumption

* J.D. 2007, Berkeley School of Law, University of California. M.A. 2004, Central European University in Budapest, Hungary. Law clerk for the Honorable Lawrence F. Stengel in the Eastern District of Pennsylvania, 2007-08, and the Honorable Raymond J. Dearie, Chief Judge, E.D.N.Y., 2008-09.

1. *'Inséparation' des pouvoirs*, LE POPULAIRE, Nov. 14, 2006, at 1. (Senegal) ("The President and the Justice Ministry, like commanding officers in an army, dictate the actions of the judiciary. This is the separation of powers, Senegalese style." Author's trans., copy on file with the author. "Samba Alaar" is a fictitious person, akin to "John Doe" in English).

2. See, e.g., Letter (Nov. 16, 2006) (on file with author) (urging modification of the Senegalese Code of Criminal Procedure in order to try Habré in Senegal for crimes committed in Chad between 1982 and 1990.) "L'affaire Habré constitue une excellente opportunité pour le Sénégal de continuer à être l'un des pays les plus engagés dans la lutte contre l'impunité." ("The Habré trial is a great opportunity for Senegal to continue to be one of the most active countries battling impunity for international crimes") (author's trans., copy on file with author).

3. The term "international justice promoters" is used generally as shorthand for a loose network of actors, mostly within international human rights organizations, international tribunals, and academia, focused on developing an international criminal law and forums with jurisdiction to try violators—with the ultimate goal of ending impunity for such atrocities and promoting peace. See JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 99 (2004) (identifying "promoters" of transitional justice as "organizers and advocates of transitional justice"). I occasionally refer more specifically to the "promoters" of the Habré trial. These actors include the U.S.-based organization, Human Rights Watch, the Senegalese chapter of Amnesty International—including its President, Demba Ciré Bathily, who is representing the plaintiffs in the Senegalese action—as well as various Senegalese human rights organizations, such as RADDHO (*Rencontre Africaine pour la Défense des Droits de l'Homme*), where I worked as an intern in the fall of 2006. Together with seven other regional and local human rights organizations, RADDHO formed a Coalition (COSJEHAB) to ensure that Habré

underemphasizes disquieting, fundamental flaws in the current structure and administration of the Senegalese judicial system.⁴ Moreover, by pressing forward with urgent demands for justice in the Habré affair, international justice promoters tend to overlook the significance of judicial independence, and courts generally, as an increasingly important facet of the international development movement.⁵ As a result, the Senegalese judiciary faces the thorny task of serving as a contested space,⁶ at the intersection of two highly political international enterprises: international justice and international development.⁷

stands trial in Senegal. For more information about the activities of these groups, *see generally* HUMAN RIGHTS WATCH, THE CASE AGAINST HISSENE HABRE, <http://hrw.org/justice/habre/> (last modified Mar. 12, 2009) [hereinafter THE CASE AGAINST HISSENE HABRE]; for more information about the efforts of COSJEHAB, *see generally*, RADDHO, <http://www.raddho.africa-web.org/index.htm> (last visited Apr. 9, 2009).

4. *See, e.g.*, SHELDON GELLAR, DEMOCRACY IN SENEGAL: TOCQUEVILLIAN ANALYTICS IN AFRICA 159 (2005) (describing the judiciary as an “Achilles’ heel of Senegalese democracy”). *See also*, Part III, *infra* (discussing judicial independence and corruption in Senegal).

5. This point will be further elaborated in Parts III and IV, *infra*; however, it bears noting here two dominant strains in development theory and practice that display such judicialization: Rule of Law promotion and Rights-Based Approaches (RBA) to international development. *See generally* Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law*, CARNEGIE PAPERS, NO. 55 (Jan. 2005), available at <http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf>; Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, CARNEGIE PAPERS, NO. 41 (Oct. 2003), available at <http://www.carnegieendowment.org/files/wp41.pdf>; WILLIAM G. O’NEILL, INTERACTION, AN INTRODUCTION TO THE CONCEPT OF RIGHTS-BASED APPROACH TO DEVELOPMENT: A PAPER FOR INTERACTION (Dec. 2003), http://www.interaction.org/files.cgi/2495_RBA_1-5-04.pdf.

For descriptions of specific judicial reform projects undertaken recently, *see, e.g.*, Report from William Davis to USAID/Jordan, *Advancing the Independence of the Jordanian Judiciary*, (July 2005); Report from the Mitchell Group to USAID/Macedonia, *Evaluation Report Of The Macedonia Court Modernization Project*, (May 13, 2005), http://pdf.usaid.gov/pdf_docs/PDACG190.pdf; LINN HAMMERGREN, WORLD BANK, PERFORMANCE INDICATORS FOR JUDICIAL REFORM PROJECTS, (Mar. 2002), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/Hammergrenperformance.pdf>.

6. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT’L L. 401, 411 (2006) [hereinafter *International Courts and Tribunals*].

7. On the growing attention to judicial independence within the development community, *see* SIRI GLOPPEN, ROBERTO GARGARELLA & ELIN SKAAR, EDS., DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES (2004); JENNIFER A. WIDNER, BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA (2001) [hereinafter RULE OF LAW]; Mary Dudziak, *Who Cares about Courts? Creating a Constituency for Judicial Independence in Africa*, 101 MICH. L. REV. 1622, 1625-28 (2003) (discussing Widner’s RULE OF LAW); Christopher Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 606-07 (1996); Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT’L L. 573, 610-615 (2000) (discussing the importance of promoting public confidence in the legal systems of African countries); H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1240-46, 1295-1310 (2006); Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist’s Perspective on the African Case*, 95 AM. J. INT’L L. 64, 72 (2001) (heralding a “critical juncture” in the capacity of the legal community to aid development) [hereinafter *Courts and Democracy*].

The primary concern voiced in this article is the potential negative impact that the Habré trial could have on the legal system of Senegal.⁸ This concern stems from the overarching observation that the ideal of global or transnational justice in international legal theory and practice, rightly or wrongly, is perpetually vulnerable to charges of illegitimacy.⁹ At the same time, calls for a strong judicial role in democracy promotion and international development are currently on the rise.¹⁰ These two fields also envision conflicting roles for the Senegalese courts. On one hand, the trial court must deliver to its international promoters a fair trial by their standards. On the other hand, justice-focused reform efforts require courts to acknowledge and correct their structural and functional weakness—their *inability* to offer a fair and efficient trial. The risks in trying Habré in Senegal are that such a trial invites an unacknowledged tension in the different political functions that its courts will be called upon to perform as the trial unfolds,¹¹ and fosters unreasonable expectations in the legal system, and could therefore result in a debilitating deficit in the perceived legitimacy of Senegal’s judiciary.¹²

The concept of legitimacy in international law has received considerable theoretical scrutiny and requires definition. In the context of international organizations, Professor David Caron advocates a focus on the resonance that allegations of illegitimacy might find with various sets of actors as a helpful barometer for assessing the role legitimacy plays in practice.¹³ In Senegal, and in

8. For an excellent meditation on the role that development strategies linked to the Habré should play in Chad, see Dustin N. Sharp, *Human Rights in Transition: Prosecutions, Development and Justice: The Trial of Hisssein Habré*, 16 HARV. HUM. RTS. J. 147, 150 (2003) (stating that “[b]oth the Pinochet and Habré cases carry a powerful potential for change that has been undermined by the strategic decisions of the lawyers involved with the cases, who tend to focus on building precedent and international institutions rather than on the more local benefits that these prosecutions might help to bring about.”)

9. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 29-47 (1998) (describing the limitations of criminal trials to address the aftermath of war crimes); KINGSLEY CHIEDU MOGHALU, *GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS* 172 (2006) (concluding that “the desire and attempts at moving from the *internationalization* of justice for war crimes (which relates to standards and is consistent with international society) to its *globalization*, which relates to jurisdiction . . . over war crimes, has failed”); Diane F. Orentlicher, *Whose Justice? Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1061-67 (2004) (arguing that human rights professionals should take the “democratic critique” of international justice seriously).

10. See, RULE OF LAW, *supra* note 7; Larkins, *supra* note 7; Prempeh, *supra* note 7.

11. The social function of courts is examined further in Part II with respect to international justice and Part III with respect to democracy promotion as part of international development. Part IV will compare and contrast these functions as they come into play in the case of the Habré affair. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE POLITICAL ANALYSIS* 17-28 (1981); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION*, 1-53 (1981) (offering an overview of the political theory of courts, noting in particular “that it will be increasingly difficult for scholars who do empirical research on government, or governance, to avoid encountering a great deal of law and courts.” *Id.* at 1); *International Courts and Tribunals*, *supra* note 6.

12. GELLAR, *supra* note 4, at 159.

13. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87

sub-Saharan Africa generally, the judiciary functions as a weak, often corrupt extension of the executive, rather than an independent branch of the government.¹⁴ To put it mildly, allegations of illegitimacy lodged against Senegal's court system would resonate in every segment of society, particularly when the Habré trial places Senegal in the international spotlight—or under the international magnifying glass, as the case may be. This assertion is equally true even if allegations of illegitimacy attack purely external, international justice-related aspects of the trial, with Habré cast as an “African Pinochet” in the ongoing global campaign to end impunity for war crimes, torture, and crimes against humanity.¹⁵

Following this Introduction, Part II presents the Habré affair in more detail, situating the prosecution of Habré within the context of the international justice movement. Part III provides an overview of judicial independence in Senegal, especially in relation to the specific democratization process that has occurred since Senegal gained independence from France in 1960. Part IV elaborates on the inherent tension between the goals and motivations of international justice versus international development with respect to judicial institutions. The aim of Part IV is to illustrate the faltering confidence in the use of tribunals to achieve the goals of international justice, in stark contrast to the rising ambition within the international development community that courts can play an important role in advancing various development-related goals. The article concludes that by placing unrealistic demands on Senegalese courts, and by importing debates about the legitimacy of courts *per se* as institutions capable of delivering on the promises of international justice, the Habré trial could create or amplify perceptions of illegitimacy and political capture within the Senegalese legal system.¹⁶

Drawing on a variety of examples from international criminal and civil law, Part V explores several strategies for minimizing the concerns raised in this article as the Habré trial goes forward. In devising these strategies, I have encountered a growing body of literature addressing the need for interdisciplinary cross-fertilization in order to realize the full potential of international human rights

AM. J. INT'L L. 552, 552-62 (1993) [hereinafter *Legitimacy*]; see also THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990). For more information on “judicial legitimacy” see, e.g., Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388 (1995); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1357, 1390-409 (1991). On assessing the legitimacy of international tribunals, see Donna E. Arzt, *International Processes: Views on the Ground: The Local Perception of International Criminal Tribunals*, 603 ANNUALS AM. ACAD. POL. & SOC. SCIENCE 226, 227 (2006).

14. See, e.g., GIORGIO BLUNDO & JEAN-PIERRE OLIVIER DE SARDAN, EVERYDAY CORRUPTION AND THE STATE: CITIZENS & PUBLIC OFFICIALS IN AFRICA 143 (2006); GELLAR, *supra* note 4, at 159 (stating that “the courts remain an alien institution for the great majority of the Senegalese population, and the judiciary an appendage of the executive branch. As a result, the formal legal system constitutes one of the weakest aspects of Senegalese democracy”); DOUDOU NDOYE, *LE POUVOIR JUDICIAIRE AU SENEGAL FACE AUX AUTRES POUVOIRS: DOCTRINE POLITIQUE ET REALITES* (2002); Moussa Samb, *La gouvernance judiciaire au Sénégal: état des lieux in DROIT SENEGALAIS: DE LA JUSTICE COLONIALE AUX SYSTÈMES JUDICIAIRES AFRICAINS CONTEMPORAINS* (MAMADOU BADJI ET OLIVIER DEVAUX, EDS., 2006).

15. The term “African Pinochet” features prominently in the rhetoric used by Human Rights Watch to describe the case against Habré. See THE CASE AGAINST HISSENE HABRE, *supra* note 3.

16. See GELLAR, *supra* note 4, at 159.

litigation.¹⁷ Without fail, these authors identify a lack of “outward reflection”¹⁸ by human rights lawyers upon the web of political, legal and cultural phenomena that inevitably surrounds, and reacts to any international criminal prosecution. The promoters of Habré’s trial have exhibited the same “professional bias.”¹⁹

It is not my intention to diminish the efforts of so many dedicated advocates to bring the accused before a tribunal so that he will confront the victims in this case, victims who tell of heinous crimes visited upon the population of Chad during Hissène Habré’s regime. The task at hand is simply to caution that the impact of the Habré trial on the Senegalese judiciary is inevitable—though not inevitably negative. Since May 2006, when the African Union determined that Habré should be tried in Senegal,²⁰ human rights professionals have steadily pushed the Senegalese authorities to take action, calling the trial “a test of African justice.”²¹ The problem for promoters of the Habré trial, put simply, is that “Africa makes us look stupid.”²² With remarkable flair, the reigning political machinery in many African nations can manufacture a two-dimensional façade to indulge every easy assumption held by any variety of international development actors. When the façade succeeds, projects fail.²³

This article argues that such a façade nurses assumptions at the core of current efforts to bring Habré to trial in Senegal.²⁴ Both international justice and

17. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT’L L. 211 (2005); Sharp, *supra* note 8, at 151-52; Orentlicher, *supra* note 9, at 1062-64.

18. Dubinsky, *supra* note 17, at 303 (stating that “the human rights community has offered little outward reflection on whether an aggressive agenda focused on domestic courts may harm the very institutions to which these advocates have turned.”).

19. Sharp, *supra* note 8, at 151.

20. AFRICAN UNION, REPORT OF THE COMMITTEE OF EMINENT AFRICAN JURISTS ON THE CASE OF HISSÈNE HABRÉ, at ¶ 28-29 (May 2006), http://www.hrw.org/justice/habre/CEJA_Repor0506.pdf.

21. El Hadji Gorgui Wade Ndoeye, *Reed Brody, Conseiller Juridique de Human Rights Watch sur la Condamnation à mort de Hissène Habré*, SUD QUOTIDIEN, Aug. 18, 2008, <http://www.sudonline.sn/spip.php?article13235> (trans. by author).

22. Robert H. Bates, Political Science Department, Harvard University, NEW YORK TIMES, Nov. 12, 2003, <http://www.nytimes.com/2003/11/12/nyregion/12COLL.html>, 2, *quoted in* ZOË WILSON, THE UNITED NATIONS AND DEMOCRACY IN AFRICA 1 (2006) (“Africa makes us look stupid. It makes us realize that our assumptions require re-examination and reformulation”).

23. Many authors have noted the danger of accepting hollow promises from strongmen in exchange for donor support. See, e.g., WILSON, *supra* note 22. In the context of democracy promotion, see Thomas Carothers, *Democracy without Illusions*, in CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION 159-161 (2004); Larry Diamond, *Promoting Real Reform in Africa*, in DEMOCRATIC REFORM IN AFRICA: THE QUALITY OF PROGRESS 263-70 (2004). On the “deliberate obfuscation” in the use of human rights rhetoric by the development community in general, see Peter Uvin, *On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise*, 17 PRAXIS: FLETCHER J. DEV. STUD. 1 (2002).

24. Habré seized control of Chad in 1982, forcing Goukouni Oueddeï to flee to Cameroon. Habré has lived in exile in the Dakar suburb of Ouakam since he was ousted from power in 1990 by the current President of Chad, Idriss Déby Itno. I will use the terms “Habré affair” or “Habré prosecution” as shorthand throughout this text to stand for the totality of efforts to prosecute

international development interests stand to profit from sustained, honest consideration of the current independence deficit in Senegal's courts, as the prosecution of Hissène Habré takes shape. Most importantly, the Senegalese courts are not on trial. However, failing to assemble and operate under an accurate understanding of Senegal's legal system, as it functions today, may squander a rare opportunity to make it stronger in the future.

II. THE HISSÈNE HABRÉ AFFAIR AND INTERNATIONAL JUSTICE PROMOTERS

A. *International Pursuit: Chronicling the Prosecution of Hissène Habré*

1. Habré's Regime: 1982-1990

Hissène Habré, trained as a lawyer in France, returned to Chad in the 1970s, joining the culture of violence as a guerilla fighter and eventually becoming Prime Minister under General Félix Malloum (in power from 1978-79), and Minister of Defense under the 1979 transitional government (*gouvernement d'Union nationale et de transition*, GUNT) led by Goukouni Ouddeï (1979-82).²⁵ Habré broke with Goukouni in 1981, and formed the Armed Forces of the North (FAN), which waged a nine-month offensive on N'Djaména, devastating the capital.²⁶ The fighting in Chad attracted the newly minted Reagan administration's attention when Libyan President Muammar Qaddafi, who was named a "Soviet puppet and sponsor of terrorism,"²⁷ intervened with substantial military support for the Goukouni government, eventually forcing Habré to flee to Sudan.²⁸ In January 1981, after a visit by Goukouni to Tripoli, Qaddafi announced a merger between Chad and Libya to form the Islamic Republic of the Sahel.²⁹ Habré, distinguishing himself and FAN from Qaddafi, gained "massive covert support" from the United States in order to "bloody Qaddafi's nose."³⁰ On June 7, 1982, after Qaddafi

Habré in multiple jurisdictions for, *inter alia*, torture and crimes against humanity committed in Chad during his reign. The history of the Habré affair is discussed further in Part II, *infra*.

25. COMMISSION D'ENQUÊTE NATIONALE DU MINISTÈRE TCHADIEN DE LA JUSTICE [CENMTJ], *LES CRIMES ET DÉTOURNEMENTS DE L'EX-PRÉSIDENT HABRÉ ET DE SES COMPLICES* 7 (1993) [hereinafter CENTMTJ]; MARTIN MEREDITH, *THE FATE OF AFRICA* 352 (2005); Marcus Gee, *The Face of Evil*, *THE GLOBE AND MAIL*, Jun. 8, 2002 (Centerpiece); HUMAN RIGHTS WATCH, *HISSÈNE HABRÉ: REPÈRES BIOGRAPHIQUES ET HISTORIQUES*, (from RADDHO archive, copy on file with author); HUMAN RIGHTS WATCH, *CHAD: THE VICTIMS OF HISSÈNE HABRÉ STILL AWAITING JUSTICE*, Vol. 17, No. 10(A) at 3 (July 2005), <http://www.hrw.org/reports/2005/chad0705/chad0705.pdf> [hereinafter STILL AWAITING JUSTICE].

26. STILL AWAITING JUSTICE, *supra* note 25, at 3.

27. Gee, *supra* note 25.

28. MEREDITH, *supra* note 25, at 354.

29. *Id.*

30. STILL AWAITING JUSTICE, *supra* note 25, at 4. The "bloody Qaddafi's nose" quote is an oft-cited remark purportedly made by then U.S. Secretary of State Alexander Haig, see BOB WOODWARD, *VEIL: THE SECRET WARS OF THE CIA, 1981-1987* 97 (1987).

withdrew from Chad, Habré's troops took N'Djaména, installing him as ruler of a wasteland that had "disintegrated into a mêlée of rival factions."³¹

Habré ruled Chad as a ruthless dictator until 1990, when he was ousted by President Idriss Déby and fled to Senegal.³² Upon assuming power, Habré established the Documentation and Security Directorate (DDS), the organ through which the regime maintained control by terrorizing the population and eliminating political opposition.³³ In terms of scale, a report by a Justice Ministry Truth Commission (established by Déby in 1992) estimates that 40,000 Chadians died as victims of political assassinations and countless more fell victim to systematic torture.³⁴ A journalist describes the brutality of the DDS in the following terms:

The DDS killed thousands of prisoners and political opponents, whose bodies were concealed in mass graves around the capital. Thousands more were packed into a string of secret prisons in N'Djaména, one of them located on the grounds of the presidential palace and another, called La Piscine, created by putting a concrete roof on an old swimming pool. Torture was routine. Some prisoners were forced to put their mouths over the exhaust pipes of cars or trucks while the engines were running. Others were given shocks through electrodes clipped to their ears or genitals. When not being tortured, prisoners were forced 20 or 30 at a time into cells no bigger than a small washroom. The bodies of those who died in the cells were left for days.³⁵

Habré also used ethnicity as a means of controlling the population and stifling opposition.³⁶ In May of 2001, Human Rights Watch uncovered thousands of documents in the abandoned DDS headquarters in N'Djaména. "The documents trace in detail the campaign against ethnic groups that Hissène Habré perceived to be threats to his regime."³⁷ A preliminary statistical analysis of the documents

31. MEREDITH, AFRICA, *supra* note 25, at 354.

32. STILL AWAITING JUSTICE, *supra* note 25, at 4.

33. See CENMTJ, *supra* note 25. This report, generated by a Truth Commission established in 1992 by Déby, serves as primary documentation of the mass killings and torture carried out by the DDS and other entities under Habré's regime; it includes overwhelming evidence of the atrocities inflicted on the people of Chad during this period. One shocking example of brutality occurs in a section of the report labeled "*Les images de l'horreur*," which graphically depicts commonly-used torture methods such as "*Le pot d'échappement*" ("Serving of exhaust"), whereby a victim is bound and forced to hold his mouth to the exhaust pipe of a running truck. *Id.* at 114. See also, AMNESTY INTERNATIONAL, CHAD: THE HABRÉ LEGACY (2001), <http://www.amnesty.org/en/library/asset/AFR20/004/2001/en/224c23b0-d902-11dd-ad8c-f3d4445c118e/afr200042001en.pdf> (discussing the Truth Commission's establishment and findings).

34. AMNESTY INTERNATIONAL, *supra* note 33, at 6; see STILL AWAITING JUSTICE, *supra* note 25, at 4-5.

35. Gee, *supra* note 25.

36. CENMTJ, *supra* note 25, at 18; STILL AWAITING JUSTICE, *supra* note 25, at 4-6.

37. STILL AWAITING JUSTICE, *supra* note 25, at 6.

uncovered in 2001 revealed that Habré himself received 1,265 direct communications from the DDS about the status of 898 detainees.³⁸

On December 1, 1990, a rebel faction led by Déby successfully overthrew the Habré regime.³⁹ Habré took refuge in Senegal, residing in Dakar's seaside suburb of Ouakam with political asylum.⁴⁰ Habré left Chad with an estimated \$6.62 million USD in state funds.⁴¹ He is now married to a Senegalese wife, has children in Senegalese schools, and reportedly has a close relationship with influential marabouts, Senegal's enigmatic Muslim leaders.⁴²

2. The First Complaint Is Filed

In January 2000, a group of Chadian victims, supported by a coalition of Chadian and international human rights groups, and a number of Chadian NGOs,⁴³ filed a criminal complaint in the Dakar Regional Court in Senegal, charging Habré with torture and crimes against humanity.⁴⁴ To establish jurisdiction, the victims

38. *Id.* at 7 (citing Report from Benetech Initiative to Human Rights Watch, *Preliminary Statistical Analysis of AVCRP & DDS Documents* (Nov. 4, 2003), <http://www.hrw.org/legacy/justice/pdfs/benetechreport.pdf>).

39. STILL AWAITING JUSTICE, *supra* note 25, at 14.

40. See HUMAN RIGHTS WATCH, THE TRIAL OF HISSÈNE HABRÉ: TIME IS RUNNING OUT FOR VICTIMS, at 4 (Jan. 2007) <http://www.hrw.org/legacy/background/africa/habre0107/habre0107web.pdf> [hereinafter TIME IS RUNNING OUT].

41. *See id.*

42. This information is based largely on numerous informal interviews with Senegalese friends and acquaintances during the fall of 2006. For more detail on the role of Maraboutic brotherhoods (*confrérie*) in Senegalese politics, see GELLAR, *supra* note 4, at 30-35, 163-65; see also, TIME IS RUNNING OUT, *supra* note 40, at 21 (stating that “[i]t is no secret that Hissène Habré, who is accused by Chad’s truth commission of emptying out his country’s treasury before fleeing, has powerful supporters in Senegal who have tried to influence the course of justice.”).

43. STILL AWAITING JUSTICE, *supra* note 25, at 18. The coalition includes the Chadian Association of Victims of Political Repression and Crime (AVCRP), Human Rights Watch, the International Federation of Human Rights Leagues (FIDH), the Chadian League for Human Rights (LTDH), the Association for the Promotion of Fundamental Liberties in Chad (APLFT), the National Senegalese Human Rights Organization (ONDH), the African Assembly for the Defense of Human Rights (RADDHO), and the French organization AVRE, the Association for Victims of Repression in Exile, and Agir Ensemble pour les Droits de l’Homme. *Id.* at n. 31.

44. It should also be noted that in Senegal, a *partie civile*, such as the victims in the Habré case, will often bring a criminal complaint together with the Prosecutor, or independently through a procedure that is meant to compensate for “inertia” in the public prosecutor’s office. See NDONGO FALL, *LE DROIT PÉNAL AFRICAÏN À TRAVERSE LE SYSTÈME SÉNÉGALAIS* 19, 31, 72 (2003) (explaining that in an *action publique* the public prosecutor will often initiate a case on the basis of a complaint brought by a victim; however, where the prosecutor decides a complaint will not be pursued, the victim has the option of bringing a *plainte avec constitution de partie civile* in an *action civile*. The prosecutor can still intervene in an *action civile*, if the complaint is factually insufficient as a matter of law or fails to state an offense. *Id.* at 72) [“. . . sauf quand, la plainte transmise au procureur de la République, celui-ci adresse au juge d’instruction des requisitions de non informer parce que, pour des causes affectant l’action publique elle-même, les faits ne peuvent légalement comporter une poursuite pénale ou parce que, à supposer ces faits démontrés, ils ne peuvent admettre aucune qualification pénale”] (citing Article 77 of the Senegalese *CODE DE PROCEDURE PENALE*). The victims in the Habré case lodged a *plainte avec constitution de partie*

relied on the 1984 U.N. Convention Against Torture and Other Cruel, Inhumane or Degrading Punishment or Treatment (UNCAT),⁴⁵ which Senegal ratified in 1986.⁴⁶ Investigating Judge Demba Kandji indicted Habré on February 3, 2000, and placed him under house arrest.⁴⁷

3. “Politics Enter the Picture”: The Appellate Courts Reverse

On July 4, 2000, the Indicting Chamber (*Chambre d’Accusation*) of the Court of Appeals ruled in favor of Habré’s motion to dismiss the case (*Requête en annulation*), reversing Judge Kandji’s decision.⁴⁸ Leading up to this decision, Judge Kandji was transferred and “[a]n appeals judge considering Habré’s motion to dismiss the prosecution was given a promotion while the motion was *sub judice*.”⁴⁹ After Habré’s lawyers filed the motion to dismiss, the prosecutor’s office reversed its position on the merit of the case, and supported Habré.⁵⁰ More troubling still is the fact that Abdoulaye Wade, Président of Senegal, repeatedly “declared publicly that Habré would never be tried in Senegal.”⁵¹

The victims appealed the decision to the *Cour de Cassation*, the highest court for criminal appeals in Senegal.⁵² On March 20, 2001, however, the *Cour de Cassation* came down in favor of Habré, declaring that Senegalese courts did not have jurisdiction to try crimes committed in Chad by a foreign national, even the crime of torture under the UNCAT.⁵³ In a press release by the coalition supporting the Habré trial, the authors charge that “the decision of the Court of Appeals President, Tidiane Diakhaté, came down amidst an intense media and lobbying campaign orchestrated by Habré, who appears to have spent enormous sums in

civile in the *Tribunal Régional Hors Classe de Dakar*. For pertinent legal documents relating to the trial, see HUMAN RIGHTS WATCH, L’AFFAIRE HABRÉ: DOCUMENTS JURIDIQUES, <http://www.hrw.org/legacy/french/themes/habre-legal.htm> (last accessed Apr. 10, 2009); For the original complaint, see PROCES - VERBAL D’INTERROGATOIRE DE PREMIERE COMPARUTION, COUR D’APPEL DE DAKAR, <http://www.hrw.org/french/themes/habre-inculpation.html>.

45. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention against Torture].

46. Senegal was actually among the first signatories to the UNCAT, see UNITED NATIONS TREATY COLLECTION, RATIFICATION STATUS DATABASE, <http://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&id=129&chapter=4&lang=en> (last accessed on Apr. 11, 2009).

47. STILL AWAITING JUSTICE, *supra* note 25, at 19.

48. REPUBLIQUE DU SENEGAL, COUR D’APPEL DE DAKAR, CHAMBRE D’ACCUSATION, ARRET NO 135 DU 4 JUILLET 2000, available at <http://web.unimc.it/internazionale/Dottorato/Habre/Senegal1.pdf>.

49. TIME IS RUNNING OUT, *supra* note 40, at 20.

50. STILL AWAITING JUSTICE, *supra* note 25, at 19.

51. *Id.*

52. *Id.* The decision of the *Cour de Cassation* is available at Souleymane Guengueng et autres Contre Hissène Habré, *Cour de Cassation, Crim., Arrêt no 14* (Mar. 20, 2001), <http://web.unimc.it/internazionale/Dottorato/Habre/Senegal2.pdf> [hereinafter *Souleymane Guengueng*].

53. See Still Awaiting Justice, *supra* note 25, at 19; *id.* at 6.

order to ensure that the charges against him were dropped.”⁵⁴ With the independence and integrity of the judicial system clearly in question, and human rights advocates deploring the corrupt and political motives for the appellate decisions rejecting the case, the Habré affaire had come to an end in Senegal—for the time being.

4. The Belgian Case

Alongside the Senegalese action, twenty-one victims (including three Belgian nationals) filed a complaint against Habré under Belgium’s universal jurisdiction statute for genocide, crimes against humanity and torture.⁵⁵ In February and March of 2002, Judge Daniel Franssen, the Brussels district court judge assigned to the Habré case, traveled to Chad with a federal prosecutor and a team of evidence-gathering specialists to conduct a preliminary investigation of the charges.⁵⁶ Judge Franssen’s investigation continued for four years, culminating in an international arrest warrant issued against Hissène Habré on September 19, 2005.⁵⁷ The same day, Belgium formally requested the extradition of Habré from Senegal, so that the ex-dictator could stand trial for the charges brought against him.⁵⁸

5. Senegal’s Courts Deny Jurisdiction to Hear Extradition Request

When Belgium’s extradition request reached the Dakar Appeals Court Indictment Chamber, that court once again disclaimed jurisdiction over the matter, referring the question to President Wade.⁵⁹ Senegal then turned the Habré prosecution over to the African Union, stating:

54. Decision décevante de la justice sénégalaise dans l’affaire de Hissène Habré: les victimes feront appel de la décision qui annule les poursuites contre l’ex-dictateur tchadien, Dakar, Jul. 4, 2000 (free translation, copy on file with author). For an English version of a similar release, see Human Rights Watch, *Senegal Actions on Ex-Chad Dictator Deplored* (Jul. 4, 2000), <http://www.hrw.org/en/news/2000/07/04/senegal-actions-ex-chad-dictator-deplored>.

55. See, e.g., *Plainte de Souleymane Abdoulaye Tahir*, (Dec. 3, 2001), <http://www.hrw.org/legacy/french/themes/PlainteSouleymaneAbdoulaye.pdf>; *Still Awaiting Justice*, supra note 25, at 20. The fact that three of the complainants were Belgian became crucial when Belgium, under pressure mainly from the U.S., revised its universal jurisdiction statute to limit its scope; the Habré case was “grandfathered” through the system because, (1) three of the victims were Belgian nationals, and, (2) investigation had already commenced when the old law was repealed in April 2003. See *Still Awaiting Justice*, supra note 25, at n. 41 and accompanying text. See also *Requête des parties civiles au Ministre de la Justice concernant l’application de la loi de compétence universelle modifiée au cas Habré* (May 8, 2003) <http://hrw.org/french/press/2003/tchad0603.htm>; *Ministre de la Justice, Lettre du Ministre de la Justice concernant l’application de la loi de compétence universelle* (Jun. 12, 2003), <http://hrw.org/french/press/2003/tchad0612ltr.htm>. The repeal will be discussed infra Parts III and IV, with respect to the decline in the perceived feasibility of universal jurisdiction to prosecute genocidaires, torturers and war criminals.

56. *Still Awaiting Justice*, supra note 25, at 21.

57. *Time is Running Out*, supra note 40, at 7.

58. Human Rights Watch, *Resolution Adoptée par Le Senat Belge, 15 JUIN 2006* (June 14, 2006), <http://www.hrw.org/en/news/2006/06/14/resolution-adoptee-par-le-senat-belge-15-juin-2006>.

59. *TIME IS RUNNING OUT*, supra note 40, at 7 (noting that the decision passed to Wade

The State of Senegal, sensitive to the complaints of victims who are seeking justice, will abstain from any act which could permit Hissène Habré to not face justice. It therefore considers that it is up to the African Union summit to indicate the *jurisdiction which is competent to try this matter*.⁶⁰

It is interesting to compare this statement with one made by President Wade himself following the first round of decisions to emerge from Senegal's courts in the Habré case:

I was ready to send Hissène Habré anywhere, including his own country, Chad, but Kofi Annan intervened to have me keep Hissène Habré on my territory until he is requested by a judiciary. I have done this, but I do not want this situation to go on. *Senegal does not have the competence nor the means to judge him* (emphasis added).⁶¹

At the time the question was submitted to the African Union, it was clear that the Wade administration, whatever its motivations may have been, saw the Habré trial as a potential political and administrative quagmire.⁶² Nevertheless, at its January 2006 Summit, the African Union established a Committee of Eminent African Jurists (the Committee)⁶³ to decide where Habré should stand trial, and Senegal remained a viable option.⁶⁴

“under Senegalese law”).

60. TIME IS RUNNING OUT, *supra* note 40, at 7 (“*L’Etat du Sénégal, sensible aux plaintes des victimes qui demandent justice, s’abstiendra de tout acte qui pourrait sommet de l’Union africaine d’indiquer la juridiction compétente pour juger cette affaire.*”) (translation by Human Rights Watch).

61. STILL AWAITING JUSTICE, *supra* note 25, at 20 (quoting Pierre Hazan, *Le président sénégalais veut mettre sur pied un pacte africain antiterroriste*, LE TEMPS (Geneva), Sept. 27, 2001. (trans. by Human Rights Watch).

62. See HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE OF EMINENT AFRICAN JURISTS: OPTIONS FOR HISSÈNE HABRÉ TO FACE JUSTICE (April 2006), <http://www.hrw.org/legacy/background/africa/chad1205/chad1205.pdf> [hereinafter SUBMISSION TO THE COMMITTEE]. The Human Rights Watch submission in fact recommends trying Habré in Belgium. *Id.* at 2. The submission cites several occasions on which President Wade balked at the prospect of holding the Habré trial in Senegal. *Id.* at 19-20, n. 49, 50. In the Senegalese daily, *Walfadjiri*, Wade stated: “I don’t want to find myself with a trial in which the civil parties and the defense produce two to three thousand witnesses.” *Id.* (quoting WOLFADJIRI (Senegal), Feb. 24, 2003). In an interview with a Senegalese television station, Wade elaborated on his concerns over Senegal’s capacity to hold the trial: “Hissène Habré cannot be judged properly in Dakar because the judge wanting to investigate the crimes or the acts that Hissène Habré is charged with, what can he do? He will not be able to go to Chad and the victims will bring one thousand witnesses and the other side will also bring one thousand witnesses.” *Id.* (quoting TV5 Interview, Oct. 12, 2005).

63. AFRICAN UNION, DECLARATION ON THE HISSÈNE HABRÉ CASE AND THE AFRICAN UNION, Assembly/AU/Dec. 103 (VI) (Jan. 24, 2006), <http://hrw.org/english/docs/2006/01/24/chad12571.htm>.

64. See, e.g., SUBMISSION TO THE COMMITTEE, *supra* note 62.

6. The African Union Decision: African Solutions for African Problems

The Committee issued its report on May 1, 2006, expressly calling for an “African option.”⁶⁵ The report suggested several possibilities: a trial in either Senegal or Chad at the national level, or an *ad hoc* regional tribunal.⁶⁶ The report further observed that “Senegal is the country best suited to try Habré as it is bound by International law to perform its obligations.”⁶⁷ The following July the African Union Summit, taking note of the Committee’s recommendations, mandated Senegal “to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial.”⁶⁸

7. Two Years Later: New Legislation, Appointment of Judges, and a Constitutional Amendment

Notably changing his rhetoric, President Wade greeted the African Union’s decision with magnanimous optimism, affirming that Senegal “was the country best placed to try [Habré].”⁶⁹ However, in the four months immediately following the African Union Summit, neither Senegal nor the African Union took a single action to advance the trial.⁷⁰ Finally, on November 2, 2006, the government of Senegal reported that it had resolved to establish a commission within the Ministry of Justice, to oversee the necessary changes to Senegalese legislation in order to permit the trial to go forward.⁷¹ Nearly three months later, on January 31, 2007, Senegal’s National Assembly adopted legislation granting courts jurisdiction over Habré’s crimes.⁷² A year after this step, in January 2008, a European Union

65. REPORT OF THE COMMITTEE, *supra* note 20, at ¶ 27.

66. *Id.* at ¶¶ 28, 31.

67. *Id.* at ¶ 29.

68. AFRICAN UNION, DECISION ON THE HISSÈNE HABRÉ CASE AND THE AFRICAN UNION, Doc. Assembly/AU/3 (Vii) (August 2, 2006), <http://www.hrw.org/en/news/2006/08/02/decision-hissene-habre-case-and-african-union-doc-assemblyau3-vii> [hereinafter A.U. Dec. 3 (Vii)].

69. *Senegal, Trial for Ex-Chad Leader*, BBC NEWS (July 2, 2006), <http://news.bbc.co.uk/2/hi/africa/5139350.stm>.

70. *See* TIME IS RUNNING OUT, *supra* note 40, at 9.

71. *Id.* at 9-10. *See also* REPUBLIQUE DU SENEGAL, COMMUNIQUE: LE SENEGAL PREPARE ACTIVEMENT LE JUGEMENT DE M. HISSÈNE HABRÉ, (Nov. 2, 2006), <http://hrw.org/french/themes/communiqueHabre110206.pdf>. The primary amendment involved Article 669 of the Code of Criminal Procedure, which sets forth permissible grounds for Senegalese courts to exercise jurisdiction over crimes committed on foreign soil by non-nationals. Human Rights Watch and other Coalition members have argued that such changes do not raise a retroactivity issue, as Senegal (and customary international law) had already criminalized torture and other forms of cruel and inhumane treatment by ratifying the UNCAT in 1986. *See, e.g.*, TIME IS RUNNING OUT, *supra* note 40, at 18; Interview with Demba Ciré Bathily, President, Amnesty International Senegal, in Dakar, Senegal (Dec. 15, 2006) (on file with author).

72. Press Release, Human Rights Watch, *Senegal: New Law Will Permit Habré’s Trial*, Feb. 2, 2007, <http://www.hrw.org/english/docs/2007/02/02/senega15249.htm> (stating that the legislative action lifted the jurisdictional bar prohibiting prosecutions for atrocities occurring outside of Senegal).

delegation headed by ICC Registrar Bruno Cathala arrived in Dakar to assist with preparations for the trial.⁷³

Some of the structural aspects of the trial have also become manifest. First, and perhaps most importantly, Senegal already determined to try Habré before an ordinary criminal court, rather than a hybrid or “third generation” tribunal like the special courts in Sierra Leone, Lebanon, Cambodia and East Timor.⁷⁴ Regrettably, this decision curtails the mechanisms available to human rights and development actors for distinguishing the Habré prosecution from the domestic work of the Senegalese courts, a topic revisited in Part V.⁷⁵ On May 21, 2007, Senegal appointed judge Ibrahima Gueye to act as coordinator for Habré’s trial, counseled by a ten-person commission composed of members of the ministry of justice, communications experts and lawyers.⁷⁶ In July 2008, current Justice Minister M. Madické Niang also announced the names of three judges and two prosecutors who had been appointed to the Habré case.⁷⁷ The four judges, according to Niang, shall devote their activities exclusively to the Habré case for the duration of the affair.⁷⁸

On July 23, 2008, Senegal took a major step to advance the Habré prosecution, profoundly evidencing its commitment to the endeavor, when it passed a constitutional amendment that permits retroactive application of the atrocity crimes contained in Senegal’s criminal code.⁷⁹ The amendment erased any doubt that the earlier amendments to Section 669 of the criminal code permitting

73. Press Release, Human Rights Watch, *EU to Aid Gov’t in Preparing Hissène Habré’s Trial*, Jan. 19, 2008, <http://www.hrw.org/english/docs/2008/01/19/senegal17778.htm>.

74. See *La Cour d’assises préférée à une juridiction spéciale*, *SUD QUOTIDIEN*, Jul. 13, 2007 (explaining that former Minister of Justice Cheikh Tidiane Sy’s decision was based largely on the astronomical cost of constructing a special court, estimated by Human Rights Watch at \$100 million; trial in a Senegalese court would reduce that cost by nearly half); Mike Rosen-Molina, *Senegal Adopts Constitutional Amendment To Allow Trial Of Former Chad Dictator*, *JURIST*, Jul. 24, 2008, available at <http://jurist.law.pitt.edu/paperchase/2008/07/senegal-adopts-constitutional-amendment.php>.

75. Indeed, it bears noting that a working group established under the minister of justice, led by Malick Sow, concluded that a new jurisdiction should be created to try Habré “with a new building and 15 new judges, paid at top salaries on United Nations scales.” HUMAN RIGHTS WATCH, *HISSÈNE HABRÉ AND THE SENEGALESE COURTS: A MEMO FOR INTERNATIONAL DONORS* (Dec. 2007) at 5, <http://hrw.org/backgrounders/africa/habre1207/> [hereinafter *Memo to Donors*]. President Wade found the proposal “exorbitant.” *Id.* For a detailed consideration of the benefits a hybrid approach could bring to the Habré affair, see Tanaz Moghadam, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré*, 39 *COLUM. HUMAN RIGHTS L. REV.* 471 (2008).

76. Diadie Ba, *Senegal lifts final bar to trial of Chad’s Habré*, *REUTERS*, Jul. 23, 2008, <http://www.reuters.com/articlePrint?articleId=USL3103097920080723>.

77. Rosen-Molina, *supra* note 74.

78. See *Instruction de l’Affair Habré: Madické Niang annonce la nomination de 4 juges*, *LE QUOTIDIEN*, Jul. 24, 2008, http://www.lequotidien.sn/index.php?option=com_content&task=view&id=435&Itemid=8.

79. Press Release, Human Rights Watch, *Senegal: Government Amends Constitution to Pave Way for Hissène Habré Trial*, Jul. 23, 2008, <http://hrw.org/english/docs/2008/07/23/senega19438.htm>.

extraterritorial jurisdiction would apply to the crimes Habré is accused of committing during his reign.⁸⁰ Reed Brody, Advocacy Director of Human Rights Watch and a major proponent of the Habré prosecution, is quoted repeatedly in the chorus of press commentary on the constitutional amendment: “Senegal now has one of the world’s strongest laws for prosecuting atrocities.”⁸¹ However, even as excitement stirs over the appointment of court personnel and the retroactivity amendment, human rights advocates express concern that after eight years of legal maneuvering and eighteen years of extending political asylum to Habré Senegal lacks the political will to see the prosecution through to resolution.⁸²

8. Chad Announces a “Surprise” Verdict: Habré is Sentenced to Death and Senegal (over)Reacts

On August 15, 2008, just three weeks after Senegal amended its constitution and appointed judges and prosecutors in the Habré case, Chadian Court Clerk Enoch Ngartebaye announced that Habré and eleven others were convicted and sentenced to death in absentia for attacking the “constitutional order and the integrity and security of the territory”⁸³ by providing “financial, material and moral support” to rebel factions.⁸⁴ The case arises out of an attack on Chad’s capital, N’Djamena, on February 2-3, 2008, by rebel factions based in Sudan.⁸⁵ According to one report, “dozens of people accused of crimes against state security were put on trial in absentia on Tuesday [August 12, 2008], but they had no legal defense in the three-day hearing.”⁸⁶ The court, presided over by Judge Ngarhondo Dgide, did not issue arrest warrants for those sentenced in absentia.⁸⁷

In an initial response, promoters of Habré’s trial in Senegal reiterated their opposition to trying Habré in Chad “due to the weakness of the judicial system and

80. *Id.* “The constitutional amendment says that the principle of the non-retroactivity of criminal law does not bar the prosecution of acts ‘which, when they were committed, were criminal according to the rules of international law relating to genocide, crimes against humanity and war crimes.’ This amendment is in harmony with article 15(2) of the International Covenant on Civil and Political Rights, ratified by Senegal, which states that the non-retroactivity principal does not bar the prosecution of an act ‘which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.’” *Id.*

81. *Id.*

82. *See, e.g.,* Rosina-Molina, *supra* note 74; Ibrahima Diallo, *L’Etat face à ses responsabilités*, *SUD QUOTIDIEN*, May 17, 2008, available at <http://www.sudonline.sn/spip.php?article11131> (“It is the lack of sincere political will, not the need for monetary support,” that hampers efforts to try Habré in Senegal) (trans. by author).

83. RADDHO, EXILED FORMER PRESIDENT GETS DEATH SENTENCE IN CHAD (Aug. 16, 2008), <http://www.raddho.org/News/tabid/62/articleType/ArticleView/articleId/63/Default.aspx> [hereinafter DEATH SENTENCE IN CHAD].

84. *Chad Court Sentences Former Leader To Death*, LEGALBRIEF TODAY 2135, Aug. 19, 2008, available at <http://www.legalbrief.co.za/article.php?story=20080819074404321>.

85. *See Hissène Habré condamné à mort par contumace*, *LE QUOTIDIEN*, Aug. 16, 2008, available at http://www.lequotidien.sn/index.php?option=com_content&task=view&id=808&Itemid=6.

86. *Ex-Chadian Leader Receives Death Sentence*, *TAIPEI TIMES*, Aug. 17, 2008, at 6, available at <http://www.taipetimes.com/News/world/archives/2008/08/17/2003420587>.

87. *Id.*

the fact that it is often used for political means.”⁸⁸ The Senegalese Justice Minister, Madické Niang, reacted quite differently, declaring only two days after the decision issued that “if Habré had already been convicted for the same crimes in his native Chad, then ‘he can no longer be judged in any jurisdiction in the world.’”⁸⁹ Niang’s reaction raises hackles not only for its obvious haste, but also because of Niang’s personal connection to the Habré affair. Niang led Habré’s defense before he was named Justice Minister, at the same time the legislature was considering the retroactivity amendment.⁹⁰ Human Rights Watch sharply criticized the action as reminiscent of earlier incidents of political subterfuge behind the scenes of the Habré prosecution:

[T]he recent nomination of the former coordinator of Hissène Habré’s legal team, Mr. Madické Niang, as Minister of Justice – a key position for the organization of the trial – does nothing to alleviate our concerns regarding Senegal’s political will to undertake this case. Already in 2000, President Wade had named Mr. Niang his Special Legal Counsel, even though Mr. Niang continued at the time as Mr. Habré’s lawyer. The Council of the Senegalese bar association reacted by deciding that Mr. Niang would be suspended from representing clients as long as he held public office. Following the Council decision, President Wade named Mr. Niang Legal Counsel for the government, a nomination which human rights groups considered a ruse.⁹¹

After the dust settled, it was clear that double jeopardy was not triggered by the Chad proceedings.⁹² Mr. Niang’s reaction to the news of Habré’s conviction displays an unsettling absence of deliberation, particularly for an individual in a position of significant influence on, and interest in, the trial’s outcome. Promoters of the Senegalese action view the episode as further evidence that Senegal lacks the political will to judge Habré and that the trial “will be one more humiliation for Africa.”⁹³

88. DEATH SENTENCE IN CHAD, *supra* note 83 (quoting RADDHO Director Alioune Tine).

89. *Rights Groups Concerned Over Habré Trial*, AFP, Aug. 19, 2008, http://www.blnz.com/news/2008/08/18/Rights_groups_concerned_over_Habre_9359.html (quoting Justice Minister Madicke Niang).

90. Diallo, *supra* note 82.

91. HUMAN RIGHTS WATCH, OPEN LETTER TO THE INTERNATIONAL AND AFRICAN COMMUNITIES FROM THE INTERNATIONAL COMMITTEE FOR THE FAIR TRIAL OF HISSÈNE HABRÉ (Apr. 15, 2008), http://hrw.org/english/docs/2008/04/29/africa18666_txt.htm [hereinafter OPEN LETTER].

92. *See, e.g., Chad Says Habré Sentence Separate From Senegal Case*, REUTERS, Aug. 19, 2008, <http://www.reuters.com/article/latestCrisis/idUSLJ480055> (citing statement by Chad’s Justice Minister Jean Bawoyeu Alingue).

93. *Rights Groups Concerned Over Habré Trial*, *supra* note 89 (quoting Alioune Tine, head of the African human rights watchdog group RADDHO).

9. Logistical and Moral Hurdles Remain

The legislative changes instituted by the National Assembly in January 2007 and July 2008 eliminate the immediate, legal justification for the 2001 *Cour de Cassation* holding that Senegalese courts lack jurisdiction to try crimes committed by a foreign national outside of Senegal.⁹⁴ However, lingering concerns abound in the effort to establish a “competent Senegalese court with guarantees for a fair trial.”⁹⁵ As Human Rights Watch observes, in a report urging expeditious action in the Habré case, Senegal is the first developing country confronted with the prospect of trying an ex-dictator for international crimes.⁹⁶ Daunting financial, administrative and political hurdles must be overcome to meet the moral and legal obligations that Senegal has undertaken.⁹⁷ Mr. Niang claims that, to date, international donors have supplied no financial support to the endeavor, which is estimated to cost Senegal \$43 million.⁹⁸ One commentator, the BBC’s Tidiane Sy, suggests that Senegalese authorities jumped on the possibility of a double jeopardy problem because they are “trying to find a way out of the case or at least delay it.”⁹⁹

The remainder of this article argues that these hurdles threaten to derail more than the Habré prosecution. The Habré affair will transform Senegal’s judiciary, a façade concealing only the skeleton of an independent institution,¹⁰⁰ into a contested, strategic space occupied by arcane interests with unpredictable incentives regarding the role of judicial independence as a function of Senegalese democracy.¹⁰¹ But first, the Habré trial must be situated within the context of a larger project to establish the principle of universal jurisdiction as a legal reality—thereby ending impunity for the order of atrocities that Habré is charged with committing.

B. International Justice Promoters and the End of Impunity: The Habré Trial as Part of a Quest for Global Justice

Any political-strategic analysis of the Habré affair would be incomplete without acknowledging the role that a successful prosecution in Senegal could play in the context of long-term, international efforts to elevate the ideal of global

94. See *supra* Part II(A)(3).

95. A.U. Dec. 3(Vii), *supra* note 68, ¶ 29.

96. TIME IS RUNNING OUT, *supra* note 40, at 10.

97. A worthy, though tangential, question is the scope of the commitment Senegal has “taken on” as a State Party to the UNCAT and other international human rights instruments. The notion of commitment under international law can at best be described as a rather inscrutable, elastic constraint on sovereignty, concrete and rigid only when immediate political contingencies make it so. Today, Senegal’s commitment has expanded and crystallized such that it implicates extra-legal moral and cultural obligations that stretch across West and Central Africa and beyond.

98. *Senegal ‘Ready’ For Habré Trial*, BBC NEWS, Jul. 24, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7523019.stm>.

99. *Senegal Doubts Over Habré Trial*, BBC NEWS, Aug. 18, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7567646.stm>.

100. See *infra* Part III (discussing judicial independence in Senegal).

101. See *International Courts and Tribunals*, *supra* note 6.

justice to the status of positive law.¹⁰² As the scope of this article does not permit more than a cursory mention of the extensive commentary available on the development of universal jurisdiction,¹⁰³ let alone the Rome Statute that created the International Criminal Court,¹⁰⁴ this section attempts to focus more narrowly on arguments asserting the decline of global justice as legitimate, positive law.¹⁰⁵ This discussion intends to situate the prosecution of Habré as an important effort to rescue the concept of global justice from the clutches of normativity and allegations of illegitimacy.¹⁰⁶

The current political stalemate barring the full realization of the Rome Statute's preambular aspirations is a good starting point for illustrating the practical difficulties in establishing global justice as positive law.¹⁰⁷ In short, for

102. In fact, this contention is perhaps the most often cited justification for pursuing Habré in any forum, couched as "the fight to end impunity." "Global justice" is Kingsley Chiedu Moghalu's term for the *globalization* of the power to judge war criminals, "perhaps vested in a world society or a world government." GLOBAL JUSTICE, *supra* note 9, at 172. Moghalu argues that this project has failed.

103. For a good summary of universal jurisdiction, see Donald W. Jackson, *Sovereignty, Transnational Constraints, and Universal Criminal Jurisdiction*, in COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY 159-81 (Mary L. Volcansek & John F. Stack, Jr., eds. 2005). Human Rights Watch has also published a recent report on the status of universal jurisdiction statutes in Europe. HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE: STATE OF THE ART (June 2006), <http://hrw.org/reports/2006/ij0606/> [hereinafter UNIVERSAL JURISDICTION].

104. Rome Statute of the International Criminal Court pmb., July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute]; Preparatory Comm., *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/Conf.183/2/Add.1 1998 (14 April 1998), available at www.un.org/icc/prepcom.htm; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003); THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002); THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee ed., 1999); THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY (Mauro Politi & Giuseppe Nesi eds., 2001); WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2D ED. 2004); Jonathan Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 462 (1999); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381 (2000).

105. See MOGHALU, *supra* note 9, at 103 (suggesting that "while universal jurisdiction exists in limited forms in treaties and in the national laws of some states, it has gone into relative decline at a more general level").

106. See *id.* at 103 (stating that "the 'international community' is more of an aspiration than a reality."). To frame the debate, see UNIVERSAL JURISDICTION, *supra* note 103, (citing Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFFAIRS, July/August 2001, and reply by Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFFAIRS, September/October 2001; George Fletcher, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 580 (2003); Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 596 (2003).

107. See Rome Statute, *supra* note 104, at pmb., ¶ 9 ("Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.")

both political and legal reasons, the United States refuses to join or to support the ICC as an independent, international institution for trying the crimes enumerated in its statute.¹⁰⁸ Without such support, the “universalist aspirations of the ICC . . . will not be realized, stymied as it will be by the international society’s anarchical nature.”¹⁰⁹ Thus the ICC, a powerful symbol of global justice for certain especially heinous international crimes, to some degree now stands for the opposite: discord and dissent over how far states should scale back sovereignty to make good on the promise of universality.¹¹⁰

Another example demonstrating at least a partial about-face on the possibility of global justice arose during the Habré case in Belgium.¹¹¹ Owing largely to political pressure from the United States, Belgium repealed its 1993 universal jurisdiction statute in 2003, after the Habré investigation by Judge Franssen had already commenced.¹¹² The new statute limits jurisdiction to those cases where the perpetrator is a Belgian national or resident; where the victim is Belgian or had been a resident for at least three years before the crimes took place; or, where Belgium has a treaty obligation to prosecute.¹¹³ Again, in practice, the jurisdictional hooks grafted onto Belgium’s universal jurisdiction statute belie its universal application—dealing a “serious blow” to the universality principle as an instrument of positive law.¹¹⁴

Finally, Habré is often called the “African Pinochet,” after the multi-jurisdictional, landmark prosecution of Augusto Pinochet, former dictator of Chile.¹¹⁵ The “Pinochet precedent” put the principle of universal jurisdiction into practice, its exercise by Spain and Belgium marking “a high point for the doctrine of universal jurisdiction.”¹¹⁶ Ultimately, however, the key House of Lords ruling on Spain’s extradition request was grounded in Britain’s positive law obligations under the UNCAT.¹¹⁷ Indeed, Lord Browne Wilkinson has argued for the additional requirement of prior consent by the state of the accused in order to

108. *See, e.g.*, MOGHALU, *supra* note 9, at 136-48 (analyzing the political and legal motivations for abstention—or outright opposition—to the ICC on the part of the United States).

109. *Id.* at 155 (referring, through “anarchical nature,” to Hedley Bull’s characterization of international relations).

110. *Id.* at 172 (emphasizing the distinction between *internationalization* and *globalization*—the latter representing the “world society” arguably envisioned in the Rome Statute).

111. *See supra*, Part II(A)(4).

112. *See* MOGHALU, *supra* note 9, at 90-91.

113. *See id.* at 93; *Loi Relative Aux Violations Graves Du Droit International Humanitaire*, Aug. 5, 2003, MONITEUR BELGE (Law Gazette), No. 286, Aug. 7, 2003 (unofficial trans. in 42 INTERNATIONAL LEGAL MATERIALS 1248 (2003), available at <http://www.asil.org/ilm/ilm035.pdf>). For an overview of the changes, *see* Luc Reydam, *Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law*, 1 J. INT’L CRIM. JUST. 679 (2003).

114. MOGHALU, *supra* note 9, at 93.

115. *See, e.g.*, HUMAN RIGHTS WATCH, THE CASE AGAINST HISSÈNE HABRÉ, AN “AFRICAN PINOCHET,” May 2006, <http://hrw.org/english/docs/2005/09/30/chad11786.htm>.

116. MOGHALU, *supra* note 9, at 88.

117. *Id.*, at 89.

establish jurisdiction.¹¹⁸ His reasoning in part turns on the political inequality of sovereigns—despite the maxim that all states are equal under international law.¹¹⁹ The Habré affair implicates a primary concern underlying Lord Browne Wilkinson’s position: political realities suggest that universal jurisdiction will most likely be exercised by powerful states against citizens of weaker states.¹²⁰ Thus, by characterizing the Habré trial in Senegal as an “African option,” advocates shield the case from potential assertions of hegemony and illegitimacy of the Pinochet precedent.¹²¹

These examples suggest that the successful trial of Habré in Senegal will signify a vital advance in an ongoing, international process with the aim of establishing global justice as positive law. This article argues that concerns over the capacity of Senegal’s judicial system to take on such a weighty obligation do not fit neatly into the trajectory sketched above. This is especially true after the announcement that the trial will take place in national courts, rather than a specialized tribunal.¹²² As Professor Dubinsky concludes in his examination of the jagged fault line between transnational human rights cases, predicated on universal jurisdiction in one of its several incarnations, and harmonization efforts in the field of private international law: “Obvious problems arise when national courts seek to perform two inconsistent functions. Often they perform neither one well.”¹²³ It is for human rights practitioners engaged in the Habré prosecution to reconcile their demand for an end to impunity with the more pedestrian function of rendering justice in the national arena—and so far these actors have “offered little outward reflection on whether an aggressive agenda focused on domestic courts may harm the very institutions to which these advocates have turned.”¹²⁴

III. JUDICIAL INDEPENDENCE IN SENEGAL

A. Colonial Vestiges and Contemporary Constraints on Judicial Independence

Following independence in 1960, Senegal exhibited many infrastructural shortcomings often attributed to French colonial rule, which was defined by “a highly centralized state and the concentration of power in the hands of the executive.”¹²⁵ Independence, in fact, masked a hollow, “ceremonial” changing of

118. See PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, 49, n. 20 (2001), available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (citing Lord Browne Wilkinson).

119. *Id.*; see also MOGHALU, *supra* note 9, at 12-14, 100 (stating that there exist a *de facto* inequality amongst states).

120. MOGHALU, *supra* note 9, at 100.

121. REPORT OF THE COMMITTEE, *supra* note 20, ¶ 27; see also Moghadam, *supra* note 75, at 482-85.

122. See *supra* notes 74-76, and accompanying text.

123. Dubinsky, *supra* note 17, at 307-08.

124. *Id.* at 303.

125. GELLAR, *supra* note 4, at 43, 159. Again, this section is necessarily limited in scope to

the guard from French colonial power to local elites steeped in French culture, estranged from the wider population.¹²⁶ Indeed, throughout West Africa the concept of democracy entered local societies without content or context, in the language of the colonizer.¹²⁷ The judicial system, transposed by France in its own image, bore no relation to Senegalese conceptions of conflict resolution and “was largely devoid of Senegalese jurists” altogether.¹²⁸ Rural populations in Senegal avoided courts set up by French colonizers, turning instead to customary means of dispute resolution.¹²⁹ In short, after independence Senegal possessed only the faintest outline of a constitutional democracy and even the outline was a mere imitation of a system that had evolved within the confines of an entirely unrelated culture.¹³⁰ The vestiges of colonial rule linger today in several aspects of the Senegalese judicial system, most notably its subordination to the executive and its susceptibility to corruption.¹³¹ This section briefly examines the lingering presence of these two paramount shortcomings in Senegal’s modern judiciary. The following section addresses the heightened role that judicial independence plays in recent approaches to democracy promotion and economic development.

1. Subordination to executive power

Senegal shares with many of its West African neighbors the common evolution from colonial subject to “quasi-democracy”¹³² or, perhaps more accurately, “illiberal democracy.”¹³³ In sum, after colonization throughout West Africa, formal constitutions cloaked authoritarian regimes in the guise of

pointing out only broad strokes of the history of neo-colonial West Africa. For more detailed examination of the topic, see, e.g., CHARLES NTAMPAKA, *INTRODUCTION AUX SYSTÈMES JURIDIQUES AFRICAINS* 75-88 (2005) (discussing legal pluralism in post-independence West and Central Africa); MEREDITH, *supra* note 25, at 58-74; Samb, *supra* note 14, at 335-352.

126. See MEREDITH, *supra* note 25, at 70. For an in depth examination of the informal power relations between the Dakar and interior leaders, see CATHERINE BOONE, *POLITICAL TOPOGRAPHIES OF THE AFRICAN STATE: TERRITORIAL AUTHORITY AND INSTITUTIONAL CHOICE* 47-140 (2003) (discussing the development of rural power structures, especially the Sufi brotherhoods, and the “uneven institutional topography” in powersharing strategies in Senegal throughout colonization and after independence).

127. GELLAR, *supra* note 4, at 11. See also FREDERIC C. SCHAFFER, *DEMOCRACY IN TRANSLATION: UNDERSTANDING POLITICS IN AN UNFAMILIAR CULTURE* 22-54 (1998) (discussing the relationship between the French term *democratie* and *demokaraasi* in Wolof—a language understood by 80% of the Senegalese population).

128. GELLAR, *supra* note 4, at 54, 159. See also MAMADOU DIARRA, *JUSTICE ET DEVELOPPEMENT AU SENEGAL* 179-83 (1973); Sylvain Sankalé, *La Promulgation du Code Civil Français au Sénégal* in BADJI & DEVAUX, *DROIT SENEGALAIS*, *supra* note 14.

129. GELLAR, *supra* note 4, at 37.

130. See DIARRA, *supra* note 128, at 16 (discussing the “excess of imitation” [excès d’imitation] in which leaders have indulged).

131. See DOUDOU NDOYE, *DROITS ET RESPONSABILITES DES JUGES AU SENEGAL* (2000); DOUDOU NDOYE, *LE POUVOIR JUDICIAIRE AU SENEGAL FACE AUX AUTRES POUVOIRS* (2002); MOMAR TALLA SOCK, *LA CORRUPTION, LA POLITIQUE, ET LE DROIT AU SENEGAL* (2000); BLUNDO & OLIVIER DE SARDAN, *supra* note 14, 137-176; GELLAR, *supra* note 4, at 184.

132. *POLITICAL REFORM IN FRANCOPHONE AFRICA* 204-219 (Clark & Gardinier, eds., 1997).

133. Prempeh, *supra* note 7, at 1277 (citing Fareed Zakaria’s “epithet”).

democracy.¹³⁴ “Founders” of these new constitutional democracies hoarded power and state funds, quashed opposition and perpetuated historically and culturally ingrained perceptions of citizens as subjects and state institutions as instruments of domination.¹³⁵ The judicial branch constituted an independent branch of government in name only.¹³⁶ Senegalese academics, recognizing the functional inequality of the judiciary, even interpreted the words “judicial power” in the 1963 Constitution as a “ceremonial expression” [*verbalisme honorifique*].¹³⁷ Despite judicial reform and anti-corruption efforts during the Diouf administration, the judiciary’s power deficit in relation to the executive showed virtually no sign of improvement in the decades following independence.¹³⁸

The election of opposition candidate Abdoulaye Wade in 2000 marked a momentous occasion for Senegal, and West Africa generally, with power changing hands peacefully and democratically.¹³⁹ Wade campaigned on the issue of judicial reform, promising a stronger, more independent judiciary.¹⁴⁰ However, shortly after his election he circumvented constitutionally mandated procedures to install a new constitution by referendum, a constitution that actually *limited* the powers of the judiciary in relation to the executive.¹⁴¹ As one recent commentator notes, “six years after the democratic change of power [*alternance*], the Senegalese judicial system remains, even more than before, marked by pronounced dysfunction and improper management that has become difficult to eradicate.”¹⁴² Perhaps more

134. *Id.* at 1248-50.

135. *Id.*; GELLAR, *supra* note 4, at 156-57 (discussing Wade’s personalization of power while in office); Prempeh, *supra* note 7, at 1262-66 (discussing the “founding generation” attitude that courts and other state institutions existed to dominate the colonized, rather than as a legitimate component of collective government).

136. *See*, GELLAR, *supra* note 4, at 159.

137. DIARRA, *JUSTICE ET DEVELOPPEMENT AU SENEGAL*, *supra* note 128, at 181.

138. GELLAR, *supra* note 4, at 53 (stating that Diouf embarked on a campaign to check government corruption in 1981, though this project “quickly ran out of steam.”). On Diouf’s commitment to decentralization, see GELLAR, *supra* note 4, at 57. Finally the Judicial Reform Act of May 1992 abolished the customary Supreme Court, and established a *Conseil d’Etat*, a *Cour constitutionnelle*, and *Cour de Cassation*, after the French model.

139. GELLAR, *supra* note 4, at 11 (“The victory of Abdoulaye Wade and the opposition in the March 19, 2000 presidential elections was greeted with euphoria by opposition parties who previously had little faith in the ability of the regime in power to conduct elections fairly.”).

140. *Id.* at 159.

141. *See id.* (stating that “the 2001 Senegalese Constitution provided fewer protections for judges than the 1963 Constitution that nominated Supreme Court judges for life.”); *See also* DOUDOU NDOYE, *LA CONSTITUTION SÉNÉGALAISE DU 7 JANVIER 2001 COMMENTÉE* 22 (2001) [hereinafter *CONSTITUTION SÉNÉGALAISE*] (“[U]ne révision de la Constitution . . . devait légalement passer par le Parlement composé de ses adversaires en vertu de l’article 82 de la Constitution applicable”) (“[A] constitutional revision . . . is legally required to pass before the National Assembly composed of [Wade’s] political opposition in light of article 82 of the previous Constitution”) (trans. by author).

142. Samb, *supra* note 14, at 335 [Aujourd’hui, six ans après cette alternance au sommet de l’Etat sénégalaise, le système judiciaire sénégalais reste, plus encore qu’hier, marqué par de singuliers dysfonctionnements et par une mauvaise gouvernance devenue difficile à éradiquer.]

audacious still, though the 2001 Constitution admirably limited Presidential terms from seven years to five (Article 104), Wade himself declared that the provision would not apply to his term.¹⁴³

2. Corruption in the judiciary

Wade's personalized rule and tightening grip on Senegal's judiciary leaves the system vulnerable to allegations of opaqueness, illegitimacy and corruption. Surprisingly few studies of corruption in the everyday functioning of legal systems in Africa exist; however, several general points can help to trace the origin and operation of corruption in Senegal's courts for the purposes of this article.¹⁴⁴ As noted above, laws and institutions established by the French and retained after independence are often misunderstood, avoided or transgressed by Senegalese state officials and citizens.¹⁴⁵ Gellar explains that the role of negotiations in Senegal's oral society left the enforcement of laws—especially laws perceived as unfair or illegitimate—particularly vulnerable to corruption.¹⁴⁶ The influence of informal negotiations in the legal system is further facilitated by *agents d'affaires*, unofficial lobbyists “equipped with a briefcase and a rubber stamp of dubious origin” who loiter in Senegal's courts, waiting to exploit the legal system by diverting unsuspecting “clients” away from it.¹⁴⁷ Corruption in the ruling class is likewise attributable to Senegalese cultural traditions.¹⁴⁸ In precolonial Senegal, powerful aristocracies ruled over a rigidly hierarchical society, occasionally with ostentation and impunity.¹⁴⁹ As Gellar points out:

In contemporary Senegalese society, many of the mores associated with Senegal's aristocratic societies before the colonial conquest are still alive and orienting political and social relationships despite the destruction of the monarchies by the French more than a century ago. Those in power sometimes exhibit old *ceddo* modes of behavior, for example: amoral behavior, indifference to the public good, ostentatious consumption and gift-giving.¹⁵⁰

Given the colonial legacy of executive dominance explored above, the lack of an independent, legitimate judiciary leaves Senegalese democracy without a check on official corruption.¹⁵¹

143. NDOYE, *supra* note 141, at 27 (Wade's pronouncement recently came to pass in practice, as Senegalese voters reelected him—to a five-year term—in February of 2007.).

144. BLUNDO & OLIVIER DE SARDAN, *supra* note 14, at 141 (noting that such studies are “few and far between”).

145. GELLAR, *supra* note 4, at 54.

146. *Id.*

147. BLUNDO & OLIVIER DE SARDAN, *supra* note 14, at 164-5.

148. GELLAR, *supra* note 4, at 54.

149. *Id.* at 22-23, 54.

150. *Id.* at 23. *Ceddo* refers to a privileged military caste of royal slaves and nobles built up in the 17th and 18th centuries. *Id.* at 17.

151. *Id.* at 54.

The Habré case exemplifies the operation of both executive dominance and corruption in the Senegalese judiciary.¹⁵² When the case was before Senegalese courts in 2000-01, Judge Kandji was transferred from his post after indicting Habré and the appeals judge considering the defense motion to dismiss was given a promotion while the matter was before him.¹⁵³ The prosecutor's office, formally a part of the executive in Senegal, also reversed its position on the case, supporting Habré's motion to dismiss.¹⁵⁴ Even as recently as April 2008, while Senegal's legislature considered a constitutional amendment to quell retroactivity concerns, Habré's chief defense lawyer was named Minister of Justice.¹⁵⁵ Human Rights Watch, among others, attributes these political maneuvers, at least in part, to interference by Habré himself, and to the reluctance of President Wade to hold the trial in "his" courts.¹⁵⁶

B. The Judicialization of Development in Africa: In Search of "Constitutional Moments"

The Habré trial will thrust the Senegalese justice system into the intersection of two international projects: international justice, discussed in Part II, *supra*, and international development. This section introduces the recent trend toward "judicialization" of development in Africa.¹⁵⁷ Part II highlighted the decline in confidence that courts and tribunals can always deliver on the promise of global justice; however, development strategies advocating a heightened judicial role display newfound confidence in the promise of an independent, accessible

152. *See supra* Part II(A)(3) and (5).

153. *Time is Running Out*, *supra* note 40, at 20.

154. STILL AWAITING JUSTICE, *supra* note 25, at 19.

155. *See supra* notes 90-91, and accompanying text.

156. *Id.*; *see also*, MOGHALU, *supra* note 9, at 102 (citing the "well-known fact" of political interference in the 2000 proceedings).

157. Authors employ the term "judicialization" in various contexts to describe, in general, a process by which certain aspects of society become imbued with legal character—or where courts transform into strategic spaces within which diverse actors vie to achieve social or political aims. *See generally*, SHAPIRO, *supra* note 11; SHAPIRO & STONE SWEET, *supra* note 11, at 1-54; *International Courts and Tribunals*, *supra* note 6, at 411-19. Judicialization is often linked to the process of norm internalization and offered up, *inter alia*, as an explanation for why states obey international law. *See* Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996) [hereinafter *Transnational Legal Process*]; Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 436-437 (2003) [hereinafter *International Judicial System*] (discussing the "flurry of judicialization" in international law since the 1970s and 1980s. The argument runs: through increased use of law as a point of reference, norms become second nature and begin to dictate behavior. The process of "norm internalization" is an important underlying assumption on the part of authors now advocating for a stronger judicial role in democracy and rule of law promotion as a component of international development. *See, e.g.*, COURTS IN NEW DEMOCRACIES, *supra* note 7 (collecting articles from academics and practitioners regarding the role of the judiciary in democratization); Larkins, *supra* note, 7, at 606-07. *See also*, authorities cited *supra* note 5 (describing Rule of Law development, and the Rights-based approach to Development).

judiciary.¹⁵⁸ Given the overview of Senegal's legal system in the previous section, judicialization-based development strategies clearly call for significant reform, a necessity that places the courts of Senegal in the awkward position of providing a fair trial in the Habré affair, even as the legal system continues to manifest the typical shortcomings that international development workers seek to eradicate. After the overview of judicialization-based approaches to development presented here, Part IV analyzes the risks posed to these designs and to Senegal's legal system generally by holding the Habré trial in Senegal.

The contours of the relationship between democracy and justice, as well as concrete methods for establishing independent judicial institutions, have gone "remarkably unexplored" in theory and practice related to international development.¹⁵⁹ Nevertheless, certain fundamental principles underpin "explorations" advanced thus far. First, according to basic separation of powers doctrine, the judiciary acts as a check on executive and legislative power, a function that requires "political insularity," both structurally and *de facto*.¹⁶⁰ Second, courts can serve as an important, neutral forum for dispute resolution and mediation between citizens and the state.¹⁶¹ Two development strategies relying on these functions are rule of law promotion and rights-based approaches to development.¹⁶² The scope of this article does not permit a rich description of these two dynamic fields; however, a working definition to situate the reader is in order. Rule of law promotion seeks to ensure that state officials are subject to the law, and that laws embrace equal protection and guarantee due process.¹⁶³ This development strategy relates to the first function of courts identified above. Rights-based approaches couch a broader set of development goals in the language of rights, in an effort to encourage local participation by empowering citizens of developing states as "rights-holders" in relation to the duty-bearing state.¹⁶⁴ Thus, rights-based approaches tend to rely on the conflict resolution function of courts. In Senegal, as discussed above, the concentration of power in the executive often results in political instrumentalization of the court.¹⁶⁵ Where courts operate as mere

158. See, e.g., RULE OF LAW, *supra* note 7; *Courts and Democracy*, *supra* note 7; Prempeh, *supra* note 7, at 1244 (asserting that "current trends represent a significant new opportunity . . . to build constitutionalism in Africa." Prempeh also cautions against unbridled optimism, a point addressed below and not unrelated to the cautionary impulses expressed in this article.).

159. IAN SHAPIRO, *DEMOCRATIC JUSTICE* 5 (Yale University Press 1999); see also Larkins, *supra* note 7, at 607 (lamenting the "little attention that has been paid to judicial independence during democratization").

160. Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 59-60 (1993).

161. SHAPIRO, *supra* note 11, at 17 (discussing the conflict resolution function of courts); but see Caron, *supra* note 6, at 407 n. 22 (distinguishing Shapiro's assertion that conflict resolution is a means of the state ruling *through* law, from the state v. citizen scenario, where the state is subject to the rule of law).

162. See *supra* note 5 (citing authorities describing these strategies in more detail).

163. See Belton, *supra* note 5, at 5-6 for a broader definition.

164. See O'Neill, *supra* note 5, at 1-2.

165. See Larkins, *supra* note 7, at 609 (citing several requirements of "political insularity" such as preventing the removal of judges for unpopular decisions).

instrumentalities, judicialization-based development projects, like rule of law promotion and rights-based approaches, face intimidating obstacles at their very source.

In the specific context of African rule of law promotion, Jennifer Widner argues that African courts can consolidate independence following a “critical juncture,” a “confluence of events that causes the executive to delegate more authority to the courts and changes people’s willingness to take cases to judges for resolution.”¹⁶⁶ According to Widner, in Tanzania, “[t]he 1990s represented a critical juncture. Changes in the scale of social and economic life, new political rules of the game, and the agendas of aid donors all converged to create a historical turning point, a propitious time to redefine the position of the judiciary.”¹⁶⁷ Capitalizing on “critical junctures” as mechanisms to further judicial independence requires a complex, symbiotic political interaction between judges and the public.¹⁶⁸ Courts must “signal their openness to certain types of cases and to democratic norms and practices,”¹⁶⁹ whereas the public must be willing to trust and support the judiciary in its quest for independence.¹⁷⁰

Like Widner, other authors suggest that many African democracies sit poised to seize on a “critical juncture” or “constitutional moment.”¹⁷¹ This proposition is not surprising considering the increased focus on courts as a means of achieving rule of law and enhancing the enforcement of individual rights in the development context. Indeed, observers have heralded the Habré trial itself as an opportunity for Senegal’s courts to demonstrate a commitment to independence and fairness.¹⁷² However, a note of caution is necessary. First, the current optimism toward courts as harbingers of democracy contrasts sharply with the doubts noted in Part II concerning the utility of courts and tribunals in the international justice context. Thus, the Habré trial imports debates about the utility of courts in achieving social or political goals, just as the development world has taken the opposite stance. Second, Senegal’s courts currently operate under an unbalanced separation of

166. *Courts and Democracy*, *supra* note 7, at 75.

167. *RULE OF LAW*, *supra* note 7, at 25.

168. *See Courts and Democracy*, *supra* note 7, at 75; *cf. Dudziak, Who Cares?*, *supra* note 7, at 1625.

169. *Courts and Democracy*, *supra* note 7, at 75.

170. Dudziak, *supra* note 7, at 1625 (citing *RULE OF LAW*, *supra* note 7, at 155).

171. *See Prempeh*, *supra* note 7, at n.4 (collecting authorities). “Constitutional moment” comes from Bruce Ackerman’s *WE THE PEOPLE: TRANSFORMATIONS* (1998), cited in Prempeh, *Marbury in Africa*, *supra* note 7, at n.22 (defining the term as an “episodic point[] in a country’s constitutional history when previously settled understandings as to the nature and structure of the constitutional order are repudiated without recourse to the formal amendment procedure and replaced by new understandings that are widely accepted as legitimate.”).

172. Interview with Alioune Tine, Secretary General, RADDHO, in Dakar, Senegal (Dec. 12, 2006); interview with Demba Ciré Bathily, President, Amnesty International Senegal, in Dakar, Senegal (Dec. 15, 2006). *See also* Press Release, Human Rights Watch, *Speed up Trial of Chadian Ex-Dictator*, Jan. 26, 2007, <http://hrw.org/en/news/2007/01/26/senegal-speed-trial-chadian-ex-dictator> (“Senegal can show that African courts will deliver justice to African victims for atrocities committed by African leaders.”).

powers structure, crippled with severe underfunding.¹⁷³ Raising the expectation that these same courts could bring about a “constitutional moment” risks a potentially devastating blow to the perceived legitimacy of the Senegalese judicial system.¹⁷⁴ As Part IV argues, promoters of Habré’s trial in Senegal should heed this cautionary note as well; if the trial does not meet expectations under international *and* Senegalese standards, any potential occasion for seizing independence could dissolve into a legitimacy vacuum.

IV. “CONSTITUTIONAL MOMENT” VERSUS “QUICK FIX”: THE RISK OF TRYING HISSÈNE HABRÉ IN A SENEGALESE COURT

A. Competing Functions: The Contested Space of Senegal’s Courts

Trying Hissène Habré in Senegal requires the local judiciary to serve conflicting functions.¹⁷⁵ On one hand, the trial court must strive to meet an international standard of fairness and efficiency—the content of which remains uneven or altogether undefined. On the other hand, judicialization-based reform efforts require courts to examine self-consciously their own structural and functional weaknesses, and to admit that there are cracks in the façade of “fair and efficient” trials.¹⁷⁶ This section explores the competing demands placed on Senegal’s courts under these circumstances. The following section examines two specific examples of how performing these conflicting functions could leave the courts vulnerable to inferences of illegitimacy, thereby jeopardizing the success of both the Habré trial and judicial reform efforts.

Martin Shapiro’s study of courts provides a helpful framework for understanding the various functions that courts perform in society.¹⁷⁷ As Shapiro emphasizes, courts are inherently political institutions.¹⁷⁸ Even independent courts in developed democracies perform political functions.¹⁷⁹ However, to benefit a given society, courts must exercise political functions through a process with its own “social logic,” based on consent.¹⁸⁰ Under Shapiro’s “prototype of courts,”

173. See Prempeh, *supra* note 7, at 1244 (arguing that juridical constitutionalism without structural constitutionalism is a “quick fix” that could jeopardize rather than bolster the legitimacy of African legal systems). On underfunding in the Senegalese court system, see Samb, *supra* note 14, at 340.

174. Samb, *supra* note 14, at 340.

175. SHAPIRO, *supra* note 11, at 63 (“Like most other major political institutions, courts tend to be loaded with multiple political functions, ranging under various circumstances from bolstering the legitimacy of the political regime to allocating scarce economic resources or setting major social policies”); see also Dubinsky, *supra* note 17, at 307-08.

176. On the “unevenness” of international justice, see MOGHALU, *supra* note 9, at 100. On the need for candor in judicial reform, see Prempeh, *supra* note 7, at 1244; Diamond, *supra* note 23, at 270.

177. SHAPIRO, *supra* note 11.

178. *Id.*

179. *Id.*; Martin Shapiro, *Judicial Review in Developed Democracies*, in COURTS IN NEW DEMOCRACIES, *supra* note 7, at 7.

180. SHAPIRO, *supra* note 11, at 36-37.

consent originally meant actual consent to submit a dispute to a third-party neutral. As political systems evolved, constructive consent to dispute resolution through formal institutions substituted for actual consent.¹⁸¹ Thus, while judicial independence does not mean the courts must be free from politics, it does mean that political functions must be traceable to a coherent political system founded on consent of the people themselves.¹⁸² Applying Shapiro's prototype to the Habré affair exposes two critical points regarding the conflicting functions identified in this article: the trial will threaten both the coherence of Senegal's "social logic" and the consent of the Senegalese to accept courts as neutral institutions.

Holding an international criminal trial in a foreign domestic court necessarily threatens the "social logic" of the court as a dispute resolution institution.¹⁸³ The international legal realm discussed in Part II(B) constitutes, at minimum, a network of interrelated actors, both state and non-state, that operates with some degree of internal logic.¹⁸⁴ Regardless of whether the International Criminal Court and other such bodies function as a legal *system*, the logic by which these institutions operate is wholly unrelated to the "social logic" of Senegal's courts.¹⁸⁵ Therefore, the Habré trial could distort the internal coherence of Senegal's legal system in unpredictable ways. Thomas Carothers has noted similar risks in the context of international development, which can deform the local political process by "giving too much weight to some actors and robbing the process of its own internal coherence."¹⁸⁶ The Habré affair, for instance, has forced promoters to work through political channels in order to access justice, disproportionately emphasizing the role of the executive.¹⁸⁷ Furthermore, although independent courts perform political functions, the lack of a formal separation between law and politics in international society threatens to unravel the tenuous balance between political functions and political capture in the domestic setting.¹⁸⁸

Shapiro's prototype of courts also raises the issue of consent to submit disputes to formalized institutions.¹⁸⁹ As discussed in Part III, the Senegalese

181. *Id.*

182. The nature and scope of consent to international, or supranational, governance has captivated academics in the debate over why states obey international law and whether or not an international legal system exists at all. *See especially*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1968); Koh, *supra* note 123, at 205; Martinez, *supra* note 123, at 436; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273 (1997); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 *CAL. L. REV.* 1 (2005).

183. SHAPIRO, *supra* note 11, at 36-37.

184. MOGHALU, *supra* note 9, at 11, 171.

185. SHAPIRO, *supra* note 11, at 36-37.

186. Carothers, *supra* note 23, at 17.

187. *See supra* Part II.A.5 (stressing President Wade's involvement).

188. MOGHALU, *supra* note 9, at 176.

189. SHAPIRO, *supra* note 11, at 37.

historically regard judicial institutions as externally imposed and hegemonic.¹⁹⁰ Thus, the validity of consent under Shapiro's paradigm is questionable simply by dint of the fact that Senegal's legal system is a vestige of imperialism.¹⁹¹ The Habré affair echoes these hegemonic undertones, importing a set of international norms from a system that is unfamiliar to the vast majority of Senegal's population.¹⁹² To the extent that such echoes resonate with the local population, the perception of hegemony in the Habré affair could further threaten the underlying consent to law and courts, which would severely undermine the social logic by which they operate.¹⁹³

Finally, as this article outlined in Parts II and III, Senegal's courts must also navigate the inverse legitimacy axes of two international enterprises, both of which seek to appropriate courts as a means of achieving certain goals.¹⁹⁴ For international justice promoters, courts can legitimize and concretize the ideal of global justice; whereas for international development promoters courts can seize on a "constitutional moment" to consolidate independence and deepen democracy.¹⁹⁵ The utility of courts and tribunals to further global justice has recently received increased criticism, while new optimism attends the prospect of using courts to promote development.¹⁹⁶ This discrepancy pulls the citizens of Senegal in opposite directions with respect to the efficacy and promise of their judiciary. In light of the conflicting demands raised in this section, the greatest risk is that the trial court and other appendages of the Senegalese state will respond by manufacturing only the façade of fair trial—a "quick fix."¹⁹⁷ The following section explores this risk through several illustrations of the logistical hurdles Senegal faces in trying Habré.

B. Future Challenges in the Habré Affair: Risking a "Quick Fix"

This section analyzes three examples of current developments in the Habré prosecution that place the concerns raised above in relief. These illustrations do not provide an exhaustive overview of the challenges ahead, but serve as a means of illustrating the possible negative effects of conflicting demands on Senegal's courts in the Habré affair.

190. MOGHALU, *supra* note 9, at 100.

191. *See supra* Part III.A.

192. This is not to suggest that Senegal and the Senegalese are somehow cut off from international society. Senegal's commitment to the UNCAT serves as the basis for jurisdiction in the Habré case, for example. *See supra* at 12-13

193. SHAPIRO, *supra* note 11, at 37.

194. *See supra* Parts II(B) and III(B).

195. On courts and international justice, *see* MOGHALU, *supra* note 9; *International Courts and Tribunals*, *supra* note 6. On courts and development, *see* GLOPPEN, *supra* note 7; RULE OF LAW, *supra* note 7; *Courts and Democracy*, *supra* note 7; Prempeh, *supra* note 7, at 1244.

196. *See supra* Part II(B) on criticism of trial-centered strategies for international justice purposes. *See supra* Part III(B) on increased optimism for use of courts to deepen democracy.

197. Prempeh, *supra* note 7, at 1244.

1. Speedy trial concerns

Since the African Union's decision to try Habré in Senegal "on behalf of Africa,"¹⁹⁸ the case has stalled over the implementation of legislative reforms in order to expand the jurisdiction of Senegal's courts and the logistical realities of evidence gathering and funding.¹⁹⁹ International justice promoters are calling for swift justice and criticizing the delays.²⁰⁰ Promoters of Habré's trial raise the legitimate concern that eighteen years have already passed since Habré left Chad, increasing the difficulty of building an accurate historical record as evidence grows stale from year to year.²⁰¹ However, at a certain point, acceleration of the trial jeopardizes due process, resulting in a "quick fix"—the façade of a fair trial.²⁰² Senegalese authorities recently announced that Habré might not be tried "before three years," citing the same logistical hurdles identified here.²⁰³ This announcement met with criticism condemning the inefficiency of Senegal's courts.²⁰⁴ As Part III stressed, however, Senegal's judiciary labors under the menace of everyday corruption and severe lack of funding.²⁰⁵ To expect that additional political pressure and criticism will motivate the courts to conduct a *fair* speedy trial—a trial free of corruption—ignores these practical realities.

2. The Belgium docket

In an effort to accelerate Habré's trial, Human Rights Watch proposes that the trial court annex the fruits of Belgium's four-year investigation in the Habré case.²⁰⁶ According to one report, "[b]y means of letters rogatory, the Senegalese judge can ask his or her Belgian colleague to provide the file, and the Belgian judge and the police investigators can be called as witnesses."²⁰⁷ This procedure, however, both circumvents the role of the Senegalese court as an independent evidence-gathering tool, and smacks of the hegemonic tenor of war crimes trials that the African Union sought to avoid by exercising an "African option."²⁰⁸ First, transposing the Belgian case onto the process in Senegal causes the Senegalese trial court to function more as an instrumentality of international justice than as an independent institution. Part III noted the stifling lack of independence in the Senegalese judiciary and the current surge in efforts to strengthen judicial

198. A.U. Dec. 3(Vii), *supra* note 68.

199. See TIME IS RUNNING OUT, *supra* note 40, at 17.

200. See, e.g., SPEED UP TRIAL OF CHADIAN EX-DICTATOR, *supra* note 172.

201. See TIME IS RUNNING OUT, *supra* note 40, at 1.

202. Prempeh, *supra* note 7, at 1244.

203. See Press Release, Human Rights Watch, *New Law Will Permit Habré's Trial* (Feb. 2, 2007), <http://www.hrw.org/english/docs/2007/02/02/senega15249.htm>.

204. *Id.*

205. See Samb, *supra* note 14.

206. *Id.*

207. TIME IS RUNNING OUT, *supra* note 40, at 14.

208. REPORT OF THE COMMITTEE, *supra* note 20, at ¶ 27.

independence, structurally and functionally.²⁰⁹ Consequently, asking the Senegalese court to act as an agent for putting Belgium's docket to use works at cross-purposes with efforts to bolster judicial independence. Second, annexing the Belgium docket could leave the Habré trial vulnerable to criticisms grounded in the view that international justice reinforces the hegemony of strong states by cloaking crude power relations in the language of international norms.²¹⁰ In other words, the move could be perceived as backtracking on the promise of an African solution through "home-grown legalism," undermining confidence in the endeavor.²¹¹ While the utility and practicality of importing the Belgium docket is beyond question, to deem the procedure a simple matter of exchanging letters rogatory between "colleagues" conceals the complex political nuances of the situation.

3. The Chad Conviction

So far Habré's conviction and death sentence, handed down in August 2008 by a judge in Chad, has been characterized by human rights advocates as having "nothing to do with" to the process unfolding in Senegal.²¹² The wholesale refusal to engage with the decision in Chad gives pause. The interests of Chadian victims, and not the international precedent at stake, ought to guide the interpretation of any new bend in the course of Habré's extended pretrial proceedings. For instance, condemnation in Chad raises the specter of its consent to a Senegalese prosecution, an issue that is rarely broached by promoters of the Senegal action.

Helpful in this regard is Professor Diane Orentlicher's effort to reconcile universal jurisdiction with what she terms the "democracy critique:" the perception that universal jurisdiction cases are judge-driven and inherently anti-democratic.²¹³ Orentlicher cautions that "human rights professionals above all should take these claims seriously," and that while transnational human rights litigation is not "incurably undemocratic," there are three identifiable "benchmarks" which can help vest foreign courts with legitimacy in the exercise of universal jurisdiction.²¹⁴ These benchmarks are: (1) consent of those subject to the law, (2) institutional respect for the courts, earned through performance and especially by crafting judgments that "resonate with the deepest values of her own political community," and (3) "continuous colloquy between courts and society" to instill a perception that judges are accountable to those subject to judge-made laws.²¹⁵

209. *See especially* Prempeh, *supra* note 7 (discussing both the surge in hope that judiciaries will play an increasingly important role in African development, and the need for structural and functional reform of African constitutional democracies).

210. MOGHALU, *supra* note 9, at 14.

211. *Id.* at 177.

212. Brent Latham, *Human Rights Lawyer Expresses Concern over Progress in Habré Case*, VOA NEWS, Aug. 20, 2008, available at <http://www.voanews.com/english/archive/2008-08/2008-08-20-voa39.cfm>.

213. *See* Orentlicher, *supra* note 9, at 1062-67.

214. *Id.* at 1065-66.

215. *Id.*

The Chad decision generates a peculiar form of concurrent jurisdiction,²¹⁶ a phenomenon that promoters of Habré's trial have opted to dismiss as unrelated. But by securing a conviction, the Chad prosecution threatens to destabilize the Senegalese effort because it raises the question of consent, a facet of Professor Orentlicher's first benchmark.²¹⁷ No call for extradition is presently forthcoming and Chad's Justice Minister has clarified that the conviction is based on a distinct set of facts.²¹⁸ However, to deny the validity or relevance of the Chad conviction does no good, and leaves the specter of consent looming where Senegalese courts already fall short on Professor Orentlicher's other two benchmarks.²¹⁹

The reaction of former Habré lawyer turned Justice Minister is an equally troubling aspect of the Chad conviction, one that aligns more closely with development-related concerns.²²⁰ Mr. Niang's apparent eagerness to release Habré on a technicality received sharp criticism from international justice promoters, but these remarks were confined to the specific context of their impact on the prosecution.²²¹ A lack of engagement with the social logic of either Chad or Senegal emerged on both sides of the episode. One hopes that Mr. Niang's cavalier manipulation of the principle of double jeopardy has not set the tone for addressing future obstacles.

V. OVERCOMING THE RISKS: SOME SUGGESTIONS

A. Rhetoric

To a large extent, the concerns expressed in this article relate to the rhetoric of advocacy efforts on the part of international justice promoters.²²² Steeped in the

216. See Dubinsky, *supra* note 17, at 281-82 (stating that "[u]niversal jurisdiction is concurrent jurisdiction at its most extreme. Though other bases of jurisdiction can result in more than one country's involvement in adjudicating a dispute, universal jurisdiction potentially puts many courts in play, all with valid claims to jurisdiction.") While Professor Dubinsky is concerned primarily with the intersection of private law harmonization and universal jurisdiction-based atrocity cases (like the Habré prosecution), his insights resonate with equal force in the present context.

217. See Orentlicher, *supra* note 9, at 1101-02 ("[T]he notion of tacit acceptance has scant meaning when it comes to the exercise of jurisdiction by a foreign or international court. In this setting, international law requires specific acceptance of a court's exercise of authority, whether expressed through treaty, an ad hoc declaration, national law, or the more diffuse process of establishing customary international law.") Evidence of consent as Professor Orentlicher defines it can be found in the African Union's decision to exercise an "African option," Senegal's reformed criminal code and amended constitution, and the appointment of judges and prosecutors to Habré's trial in Senegal. A.U. Dec. 3 (Vii), *supra* note 68. However, Chad's action is an indication that consent "of those subject to the law" is a slippery notion indeed.

218. See *Chad Says Habré Sentence Separate From Senegal Case*, *supra* note 92.

219. See *supra* Part III.A.2.

220. See *supra* Part II.A.8 (discussing Mr. Niang's suggestion that double jeopardy would attach after the Chad prosecution).

221. See *Open letter*, *supra* note 91.

222. See HUMAN RIGHTS WATCH, THE CASE AGAINST HISSENE HABRE, <http://www.hrw.org/justice/habre> (last visited Apr. 7, 2009) (collecting background reports and

legal discourse of human rights, the goal of “building an international precedent” has really played a central role in the strategic choices being made in the Habré case.²²³ Advocacy papers and press releases regarding the Habré affair tend to stress Senegal’s international moral and legal obligations while exaggerating or glossing over the ability of Senegal’s judiciary to uphold the bargain.²²⁴ The advocacy campaign speaks in the language of international norms, a language that some would deem “façade legitimation,” or a thinly veiled attempt to deputize Senegal in the service of a less than holy international agenda.²²⁵ The problem with this rhetorical tone is the ease with which it can be reproduced by advocates and Senegalese authorities alike to obfuscate any cracks in the façade of a fair trial.²²⁶ If international justice promoters hope to advance their agenda through superficial platitudes about universalist concepts of justice, the trial of Hissène Habré could become a rhetorical chimera. Conviction would be a Pyrrhic victory indeed if inadequacies in the trial are assumed away, or “drap[ed] . . . in the mantle” of universal justice.²²⁷ In short, the political underbelly of the Habré affair cannot go ignored throughout the process without sacrificing the legitimacy of the outcome.²²⁸

Conversely, the inadequacies of the Senegalese justice system, if acknowledged, are not permanent obstacles.²²⁹ As this article has shown, the development community presents an alternative discourse on courts, as important mechanisms for promoting rights and the rule of law, but also in need of significant reform.²³⁰ Thus, one suggestion for overcoming the risks discussed in Part IV is a rhetorical shift toward an honest middle ground discourse on the

press releases).

223. See Sharp, *supra* note 8, at 150-51 (observing that “nearly everyone working on the case is a lawyer”).

224. See TIME IS RUNNING OUT, *supra* note 40, at 17.

225. See MOGHALU, *supra* note 9, at 14.

226. On the hollowness and susceptibility to appropriation of rhetoric in the human rights approach to development, see Uvin, *supra* note 23, at 10 (“Much of [the rights talk in development work] is about the quest for moral high ground: draping oneself in the mantle of human rights to cover the fat belly of the development community while avoiding challenging the status quo too much, cross-examining oneself, or questioning the international system.”). See also, WILSON, *supra* note 22, at 25 (deconstructing UN rhetoric in various programming documents, many of which exhibit “the almost complete denial of politics, at least its complex underbelly”); Prempeh, *supra* note 7.

227. Uvin, *supra* note 23, at 10.

228. Cf. Dubinsky, *supra* note 17, at 303 (discussing the need for “outward reflection” from human rights practitioners to alleviate tension caused by the growing body of equity-dependent, uneven and unilateral human rights actions based on some form of universal jurisdiction).

229. See THOMAS CAROTHERS, *Democracy and Human Rights: Policy Allies or Rivals?*, in CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION 9, 21 (2004) (discussing the failure of the democracy community to acknowledge negative legacies of U.S. efforts to support non-democratic regimes. Carothers asserts: “These negative legacies are not permanent obstacles to democracy promotion. They cannot, however, be ignored or assumed away. They will only be overcome through patient, consistent efforts to gradually replace the repositories of distrust with goodwill.”).

230. See *supra* Part III.B; in the context of the Habré trial’s potential development-related benefits for Chad, see Sharp, *supra* note 8.

Senegalese judiciary's ability to deliver on the promise of international justice.²³¹ This discourse would devote itself to identifying and publicly addressing the specific risks posed by Habré's trial to the judiciary of Senegal, such as the disproportionate executive involvement in the case. Long before the Habré affair returned to Senegal, Dustin Sharp offered the following suggestion:

The blind spots of the Habré prosecution may be symptomatic of the blind spots of the discourse and of lawyers generally. Rights advocates seem to accept the shrunken role of prosecutor, watchdog, and denouncer, without considering that a campaign against impunity might also require them to play the role of capacity-builder, teacher, and community development organizer. By acknowledging that rights advocacy and development work are more interrelated than is implied by the segregated nature of the two fields, we might become better rights advocates and better development workers. Thinking about human rights problems as hybrid development problems might make for more effective advocacy and give some grassroots legitimacy to what can often seem like a top-down exercise on the part of the international NGOs.²³²

A second component in the proposed rhetorical shift would be a redefinition of the local population in the eyes of advocates to include Senegalese citizens. As critics have observed in the context of the ICTY and the Sierra Leone Special Court, the perception of legitimacy within the local population is a "crucial factor" in the success of international criminal prosecutions.²³³ The success of the Habré trial, however, is not only contingent on perceptions of the local population of Chad, but also indirectly requires support from the "local population" of Senegal. This requirement is compounded by the strong regional relationship among former French colonies in West and Central Africa, further expanding the notion of the "local population."²³⁴ By considering the Senegalese as a local population,

231. See CAROTHERS, *supra* note 229, at 18-22 (proposing a "middle ground" on the overlap between democracy promotion and human rights).

232. Sharp, *Development and Justice*, *supra* note 8, at 177.

233. Donna E. Arzt, *The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 226, 227 (2006). See also, Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 301 (2004) ("[V]arious national communities may focus on very different factors in assessing a court's legitimacy, and these factors might, in turn, be different from those that underpin legitimacy in the eyes of various international communities standing outside a country and judging its legal process.").

234. See also, Peter Uvin, Andre Bourque & Craig Cohen, *Looking in and Looking out: Regional Solutions to Regional Problems: The Elusive Search for Security in the African Great Lakes*, 29 FLETCHER F. WORLD AFF. 67, 68-70 (Summer 2005) (advocating regional thinking in the Great Lakes context); Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 209, 210-212 (Spring 2004) (stating that the wars in Sierra Leone and Liberia in the latter half of the Twentieth Century destabilized the entire region because of the strong regional relationship of former French colonies in Western Africa).

advocates would be more receptive to perceived weaknesses of the process within Senegal.²³⁵ Two paramount concerns expressed in interviews, for example, were the fact that Habré has substantially integrated into Senegalese society, and the fact that Déby, the current President of Chad, was complicit in many of the crimes that Habré stands accused of committing.²³⁶ Thus, for the Senegalese, the international, “top down” justifications for trying Habré are not necessarily compelling or automatically accepted.²³⁷ By shifting rhetoric to account for the local perception of the Habré affair, promoters of the trial stand a better chance of meeting the expectations they raise in the name of global justice.

B. Distinguishing

A second strategy for overcoming the risks presented by the Habré affair would be to employ structural and procedural devices to distinguish the trial as an extraordinary, international endeavor. To date, the relationship between the Habré trial and other Senegalese cases has gone unexplained in the scramble to ensure that the trial could even take place.²³⁸ Now that the case has returned to Senegal, it is important to explore the contours of the relationship, and to educate the Senegalese people about how the Habré trial factors into their legal and political framework. Distinguishing the Habré trial from ordinary cases would, to some extent, shield Senegal’s courts from the indirect effects of the legitimacy deficit attending global justice, discussed in Part II. Similarly, distinguishing the trial would help to resolve the conflicting functions attributed to courts as means of achieving the goals of both international justice and international development, discussed in Part IV.

Recent developments limit available possibilities to internationalize the Habré trial structurally. The Senegalese National Assembly recently passed legislation granting ordinary courts jurisdiction to try Habré for crimes against humanity, and the African Union, lacking a competent forum, resolved to hold the trial in Senegal.²³⁹ The possibility of a hybrid court similar to the Special Court for Sierra Leone is not a realistic option, now that President Wade has rejected the proposal’s “exorbitant” price tag.²⁴⁰ To the extent possible, however, legal avenues for safeguarding the trial as an extraordinary matter should be explored.

Promoters of Habré’s trial have already foregone several opportunities for “outward reflection”²⁴¹ on the extraordinary nature of the Habré prosecution. For

235. O’Connell, *supra* note 234, at 232.

236. Interview notes on file with author.

237. *See* Arzt, *supra* note 233, at 232.

238. *See supra* Part II.A (outlining the procedural history of the case). A good illustration of the lack of attention to this point is the fact that Human Rights Watch’s last in-depth report on the Habré affair mentions judicial independence—for the first time in any of the organization’s briefing papers—in the very last paragraph. *See* TIME IS RUNNING OUT, *supra* note 40, at 20-21.

239. A.U. Dec. 3(Vii), *supra* note 68.

240. A hybrid court with judges and staff that possess an expertise in international criminal law could address many of the concerns presented here. *See* Dickinson, *supra* note 233, at 296; Moghadam, *supra* note 75.

241. Dubinsky, *supra* note 17, at 303.

example, human rights advocates, almost begrudgingly, “welcomed” Senegal’s passage of a new legislation and a constitutional amendment to allow extraterritorial and retroactive application of its laws *just* to try Habré in a Senegalese court. These are extraordinary measures. The simultaneous turn to a call for swift justice is understandable in the context of an eighteen-year-old case, but is also a missed opportunity to highlight how very different from ordinary Senegalese prosecutions the Habré trial already is. A similar argument could be made concerning the appointment of full-time judges to preside over the Habré trial.

On a procedural level, promoters of Habré’s trial have made important strides in at least two notable ways: (1) by urging Senegal to demarcate the desired scope of the trial, and (2) by attempting to assemble and apply extant procedural rules, borrowed from previous “atrocities cases.”²⁴² First, in its “Circumscribed Prosecution Strategy Based on the Evidence,” Human Rights Watch calls on Senegal to “make critical decisions as to the scope and nature of the investigation and trial.”²⁴³ While the strategy paper focuses on budgetary concerns, defining the scope of the trial would also foster a more concrete perception of the proceedings in the collective imagination of the Senegalese. Second, because a separate, internationalized tribunal is not a viable option, marshalling a body of procedural “precedent” from other domestic “atrocities cases” could also function to distinguish the Habré prosecution. In his own effort to differentiate between unified private international law and unilateral international human rights prosecutions, Professor Dubinsky advocates a “new unification initiative, an effort to identify a narrow but important category of cases involving the most grave human rights offenses – what one might call atrocities cases – and to harmonize the procedural rules applied in such cases by different national legal systems.” Continued emphasis on and adherence to identifiable procedural rules for atrocities cases provides a promising (and cost-effective) mechanism for underscoring the extraordinary character of Habré’s prosecution.

Beyond the day-to-day operation of the trial, outreach programs for both the Senegalese and the Chadian “local populations” should aim, among other things, to distinguish the Habré case from other cases strictly within the confines of the Senegalese judicial system.²⁴⁴ A further goal of outreach activity might also address the judicial role in Senegalese democracy, in order to educate the population about their own political system and efforts to reform it.²⁴⁵ Other

242. Dubinsky, *supra* note 17, at 216.

243. *Memo to Donors*, *supra* note 75, at 8.

244. An obvious example of such outreach activities is the Outreach Section of the Special Court for Sierra Leone. See, e.g., Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1091 (2005).

245. See Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 349 (2006) (“[H]ybrids can be structured to tap into domestic expertise, connect with local populations, and rebuild national judicial systems, creating a training ground for rule of law values.”)

international courts have instituted a range of outreach programs, with varying degrees of success, which could be considered in crafting programs in Senegal.²⁴⁶

VI. CONCLUSION

*La légalité disparaît chaque fois que la “Réal politic”
surgit...c'est le sens de l'histoire des nations.*²⁴⁷

The trial of Hissène Habré positions Senegal's judiciary squarely between realpolitik and ideal justice. Such a situation could mark the kind of watershed “constitutional moment” that would transform the ceremonial power of Senegal's courts today into a functionally equal judicial power tomorrow. This article cautions against optimism that such a moment could come about without sober reflection on the realities that lie in between today and tomorrow. The greatest risk of trying for a just result in Senegal is that press releases and grandiose platitudes from the right figureheads so easily obscure a manufactured, political outcome. The goal of what is presented here is not to disparage efforts to rid Senegal's courts of corruption, nor is it to advocate an end to the commendable, indefatigable efforts to prosecute Habré *anywhere*. To the contrary, the cautionary tone of this article expresses a deep belief in the futures of both democracy in Senegal and international justice—but only to the extent that these profound achievements reflect substance, dignity, and honesty. The problem with a quick fix is not that it lacks creativity and devotion, but that it may ring with the hollowness of a strongman's promise.

246. *See id.* at 372-417 (2006) (critiquing hybrid institutions to date, including outreach programs).

247. [“Principles of justice dissolve in the face of “Realpolitik” . . . this is the lesson we learn from the history of nations.”] NDOYE, *supra* note 141 at 22.