



Hissène Habré and the Senegalese Courts

A Memo for International Donors

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Introduction

Senegal has requested the support of international donors for the investigation and trial of former Chadian President, Hissène Habré, whom Senegal has agreed to prosecute at the request of the African Union (AU). This paper seeks to identify some of the critical issues of importance for potential donors of Habré's trial. It should be read together with the longer Human Rights Watch background paper from January 2007, "The Trial of Hissène Habré: Time is Running Out for the Victims."¹

The Habré case provides a golden opportunity to strike a blow against the scourge of impunity. Habré is accused of massive crimes, which are well documented in the files of his own political police. Chad supports the prosecution. The UN Committee Against Torture has enjoined Senegal to prosecute or extradite Habré. The African Union has mandated Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for a fair trial." The trial of Hissène Habré, if carried out fairly and in accordance with international standards for the rights of the accused, would be a milestone in the fight to hold perpetrators of atrocities accountable for their crimes.

The agreement by President Abdoulaye Wade of Senegal in July 2006 to try Hissène Habré was also a turning point in the 17-year campaign by Habré's victims to bring him to justice.

However, more than 17 months have passed since that agreement, and proceedings have not yet begun. The challenges lying ahead should furthermore not be underestimated. In particular, Senegal is now faced with the complex and costly task of investigating and prosecuting massive crimes committed many years ago in another country. In addition, Hissène Habré's supporters in Senegal form a powerful pressure group which has tried to prevent him from facing justice.

¹ Human Rights Watch, *Chad – The Trial of Hissène Habré: Time is Running Out for the Victims*, Number 2, January 2007, <http://www.hrw.org/background/africa/habreo107/index.htm>.

Recommendations to Participants at the Donor Conference for the Habré Trial

To Senegal

- Take the required legal measures to ensure that Hissène Habré does not leave the country (see January 2007 Human Rights Watch paper);
- Begin legal proceedings against Hissène Habré without further delay;
- Decide the scope and nature of the investigation and trial. The size of the case needs to be spelled out very early in the process, as it will govern everything that follows. Will Habré be prosecuted for *all* the alleged crimes of his regime or for a representative sampling of the gravest crimes for which there is the strongest evidentiary basis? Until a decision on the scope of the trial is made, it will be difficult to determine the size of international assistance needed;
- If a selection of specific crimes is chosen—which would seem preferable for reasons of cost and efficacy—those selected must reflect the severity and the scope of the crimes committed by the Habré regime, respecting, in particular, the crimes carried out against several of the major ethnic groups in Chad, including southerners, Chadian Arabs, Hadjerai and Zaghawas;
- Make use of the results of the four-year Belgian investigation into Habré's alleged crimes, which the Belgian authorities have offered to make available; (see January 2007 Human Rights Watch paper);
- Create a robust witness protection program (see January 2007 Human Rights Watch paper);

To International Donors

- Coordinate their efforts to support Senegal in the complex and costly task of investigating and prosecuting Hissène Habré's alleged crimes, through financial assistance and training (see January 2007 Human Rights Watch paper);

- Create an oversight mechanism to insist on measurable political commitment from Senegal, all fair trial guarantees and transparency and accountability in the use of funds;
- Fund programs to ensure the accessibility of the Habré trial to the Chadian people, who are the most interested and affected. A significant outreach program, like the one carried out by the Special Court for Sierra Leone, is needed to ensure that a trial in Dakar is accessible to the Chadian people, understood by them and stimulates their own understanding of the past and search for justice;
- Provide for the training of Senegalese investigators and judges (see January 2007 Human Rights Watch paper);
- Support independent monitoring of the trial, appeal and pretrial proceedings by Senegalese and African civil society and the African Union.

Background

Hissène Habré ruled the former French colony of Chad from 1982 until he was deposed in 1990 by current President Idriss Déby Itno and fled to Senegal. His one-party regime was marked by widespread atrocities. Habré periodically targeted various ethnic groups such as the Sara (1984), Hadjerai (1987), Chadian Arabs, and the Zaghawa (1989-90), killing and arresting group members *en masse* when he believed that their leaders posed a threat to his regime. The exact number of Habré's victims is not known. Files of Habré's political police, the DDS (Direction de la Documentation et de la Sécurité), discovered by Human Rights Watch, reveal the names of 1,208 persons who died in detention.

Hissène Habré has been living in Senegal since 1990. After his victims filed a criminal complaint, he was first indicted there in 2000, before appellate courts ruled that he could not be tried for crimes allegedly committed abroad. His victims then turned to Belgium and, after a four-year investigation, a Belgian judge in September 2005 issued an international arrest warrant charging Habré with crimes against humanity, war crimes, and torture. Pursuant to a Belgian extradition request, Senegalese authorities arrested Habré in November 2005. When a Senegalese court

refused to rule on the extradition request, the Senegalese government asked the African Union to recommend “the competent jurisdiction” to try Habré. On July 2, 2006, the AU, following the recommendation of an AU Committee of Eminent African Jurists and a ruling against Senegal by the United Nations Committee Against Torture, called on Senegal to prosecute Hissène Habré “on behalf of Africa,” and Senegalese President Abdoulaye Wade declared that his country would do so.

More detailed background can be found in Human Rights Watch’s “The Trial of Hissène Habré: Time is Running Out for the Victims.”

Developments since the African Union Recommendation

On November 2, 2006, four months after Senegal’s commitment to the AU, Senegalese government spokesman El Hadji Amadou Sall said that Senegal would revise its laws to permit Habré’s trial, and would establish a commission under the minister of justice to prepare the Habré trial. That commission began to deliberate in December under the leadership of magistrate El Hadj Malick Sow, who is also the coordinator of the Senegalese Human Rights Committee.

In February 2007, President Wade signed into law measures permitting Senegal to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when they are committed outside of Senegal. The laws also contained a provision, drawn directly from Article 15 of the International Covenant on Civil and Political Rights,² which allows charges to be brought for such acts which, at the time of their commission, were criminal under international law.³ This allows Habré to be tried for

² International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. Article 15 of the *ICCPR* states:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

³ The Law of January 31, 2007 n° 06/2007 modifying the Penal Code, in Article 431-6 para. 3, says: “Notwithstanding the provisions of article 4 of this code, a person can be tried and convicted for any act or omission set forth in this chapter [genocide, crimes against humanity, war crimes] and article 295-1 of the Penal Code [torture] which, at the time and in the place when it was committed, was criminal according to the general principles of law recognized by the community of nations,

genocide, crimes against humanity, war crimes, and torture even though these may not have been crimes under Senegalese or Chadian law at the time they were committed.

In March 2007 the working group led by Malick Sow presented its report to President Wade (the “Sow report”).⁴ The report made several key findings. In particular, it recommended that Senegal take immediate measures to assure Habré’s presence at the trial, and found that the question of *non bis in idem* (double jeopardy) did not bar Habré’s trial. It also proposed creating a new jurisdiction to try Habré, with a new building and 15 new judges paid at top salaries on United Nations scales. The working group did not hold public meetings or hearings, examine the evidence in the case, or contact the Belgian or Chadian authorities.

President Wade reportedly found the plan to create a new court—and its €66 million price tag—exorbitant, and he asked for a more reasonable proposal.⁵ In April 2007, the European Parliament invited the European Union “to encourage and assist the government of Senegal in preparing for the prompt and fair trial of Hissène Habré, in order to answer accusations of mass violations of human rights.”

In July 2007, the Senegalese Minister of Justice Cheick Tidiane Sy announced that Habré would be tried before the ordinary courts of Senegal rather than a new jurisdiction as had been proposed. After review by an auditing firm, a new budget (“The Financial Report”)⁶ of €28 million was prepared.⁷ Of this, one-third would be for the reconstruction of the abandoned Cap Manuel Courthouse.

whether or not it constituted a contravention of the law in force at the time and in the place of its commission” [« Nonobstant les dispositions de l’article 4 du présent code, tout individu peut être jugé ou condamné en raison d’actes ou d’omissions visés au présent chapitre [génocide, crimes contre l’humanité, crimes de guerre] et à l’article 295-1 du Code Pénal [torture] qui, au moment et au lieu où ils étaient commis étaient tenus pour une infraction pénale d’après les principes généraux de droit reconnus par l’ensemble des nations, qu’ils aient ou non constitué une transgression du droit en vigueur à ce moment et dans ce lieu ».]

⁴ Rapport du Groupe de Travail sur l’Affaire Hissène Habré, Ministère de la Justice de Senegal (March 2007).

⁵ “ Senegal—Proces Habré: devis exorbitant, *Jeune Afrique*, April 1-14, 2007.

⁶ Validation du Rapport Financier du Groupe de Travail sur l’Affaire Hissène Habré, Compagnie International de Conseil et d’Expertise.

⁷ The budget now attached to the Sow Report is CFA 18,337,500,000 (approximately €27,955,000). The budget used by the Financial Report is CFA 18,750,971,825 (approximately €28,585,672).

In July 2007, the President of the Swiss Confederation, Micheline Calmy-Rey, and the President of France, Nicolas Sarkozy, both announced publicly in Dakar that their countries would assist Senegal in organizing the trial.

On July 18, 2007, over one year after the AU summit, President Wade wrote to the African Union, the European Union and a number of potential donor countries—including the United States and Canada—advising them of Senegal’s plans to prosecute Habré, inviting them to a donor meeting, and asking for their support. The European Union has decided in principle to respond positively to President Wade’s request and agreed to dispatch an expert mission to Dakar. The mission will consist of Bruno Cathala, the Registrar of the ICC, and Roelof Haveman, a Dutch law professor.

Senegal called a donors meeting for October 18, but agreed to postpone it pending the arrival of the EU assessment mission. Unfortunately, that mission—originally scheduled for October—has been subject to lengthy delays because of scheduling conflicts, and is now expected to visit Dakar for the first time in late January 2008. In November 2007 it was announced that the African Union had named Robert Dossou, Benin’s former foreign minister and justice minister, as the AU envoy to the trial. Dossou had been chair of the AU Committee of Eminent African Jurists on the Habré case.

On November 29, President Wade again wrote to donors inviting them to a donors’ meeting on December 13-14. On December 7, however, the Senegalese authorities again postponed the meeting.

Comments on the Senegalese Proposal

Human Rights Watch has examined the unpublished Sow Report and the Financial Report on which the Senegalese request is based. They represent very positive steps forward, and contribute to an understanding of the challenges facing Senegal. In particular, the Sow Report found that:

- In light of article 5(2) and 6(1) of the UN Convention Against Torture, Senegal should “immediately take the administrative measures (house arrest, ban on leaving the country) to assure Hissène Habré’s presence in Senegal;”⁸
- Senegal should ask Belgium for legal assistance in accordance with article 9 of the UN Convention Against Torture to take possession of the fruits of the years of Belgian investigation;⁹
- Habré’s prosecution in Senegal is not barred by the fact that courts lacked competence to try him (2001) or extradite him (2005), as these were not decisions based on the merits of the charges against Habré;
- Training of judges in international criminal law will be necessary;
- A strong witness protection program will be necessary;
- Liaison offices in Belgium and Chad will be necessary;
- The trial must be made accessible to the Chadian people.

At the same time, the Sow Report and the Financial Report were prepared without the benefit of decisions as to the scope of the prosecution or the prosecution strategy, or of an in-depth knowledge of the facts of the case, the evidence which exists, or the work that has already been carried out by Belgian authorities.

This is readily admitted in the Financial Report, which found it difficult to propose a precise plan with so many “uncertainties,” including the number of witnesses, the accessibility of evidence, etc.

The following sections look at the three key issues fundamental to the success of any trial of Habré: prosecution scope and strategy, outreach to the Chadian population, and independent monitoring of the trial.

⁸ Article 6.1 of the Convention against Torture stipulates that “any State Party in whose territory a person alleged to have committed any [acts of torture] is present, shall take him into custody or take other legal measures to ensure his presence.”

⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987. Article 9 of the Convention against Torture says that “States Parties shall afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.”

A Circumscribed Prosecution Strategy Based on the Evidence

Senegal must make critical decisions as to the scope and nature of the investigation and trial. The size of the case needs to be spelled out very early in the process, as it will govern everything that follows.

In the Special Court for Sierra Leone (SCSL), for instance, the decision that the SCSL would prosecute only those “who bear the greatest responsibility for serious violations of international humanitarian law” and that this in effect meant that a dozen or so people would be tried, was made *prior to* the establishment of a working budget for the SCSL.

A decision to prosecute Habré for all the alleged crimes of his regime (as was done, say, in the case against Slobodon Milosovic before the International Criminal Tribunal for the former Yugoslavia) would have one implication for the length of the trial and the budget. A decision to select representative sampling of the gravest crimes for which there is the strongest evidentiary basis, as recommended by Human Rights Watch, would have a different implication. **Until a decision on the scope of the trial is made, it will be difficult to determine the size of the assistance needed.**

The Financial Report is based on an assumption that 500 victims will be called to testify, and that they will testify for several days each. While it will, of course, be important for victims to testify, this assumption betrays a misunderstanding about what will be required to prove Hissène Habré’s guilt. More important to the trial than repetitious evidence of the crimes themselves (the “crime base”) will be evidence of Hissène Habré’s own participation in and responsibility for the crimes chosen for examination.

In addition, there is very strong documentary evidence of political murders, acts of torture, etc., by the Habré regime in the documents of Habré’s political police. Among the tens of thousands of DDS documents recovered, which are now part of the Belgian judicial file, were daily lists of prisoners and of deaths in detention, interrogation reports, surveillance reports, and death certificates. The documents alone reveal the names of 1,208 persons who died and mention a total of 12,321

victims of different forms of abuse. In these files alone, Hissène Habré received 1,265 direct communications from the DDS about the status of 898 detainees.

Another important determinant of the work to be done by the Senegalese examiners to investigate Habré's crimes is the work that has *already* been done by the Belgian judicial authorities. The Belgian case-file, assembled over several years by an investigating judge and a special unit of experienced investigators who deal exclusively with international crimes, includes police reports, witness interviews, and in particular the thousands of DDS documents and the analysis of those documents.

The Belgian authorities have stated that they are ready to turn over that information to Senegalese investigators. By means of letters rogatory, the Senegalese judge can ask his or her Belgian colleague to provide the file, and the Belgian judge and the police investigators can be called as witnesses.

For these reasons, the assertion in the Sow Report, that “between Chad and Belgium principally, there are an estimated ... 20,000-40,000 witnesses and victims,” an estimate repeated in the Financial Report and finally in the invitation letter from President Wade to the donors' conference (the trial would involve “thousands of victims and witnesses, mostly living abroad”)¹⁰ seems misplaced.

Many of Habré's victims and the Chadian people would no doubt like to see all of Habré's alleged crimes brought up in court. Those whose crimes are not evoked will feel slighted. But experience now dictates that for reasons of cost and efficacy, a selection of specific crimes should be made. That selection must reflect the severity and the wide scope of the crimes committed by the Habré regime, respecting, in particular, the crimes carried out against several of the major ethnic groups in Chad.

It is suggested, that to do justice to Chad's different victims, the prosecution would need to choose specific incidents relating to at least the following crimes:

¹⁰ Letter from President Abdoulaye Wade to Reed Brody of Human Rights Watch, November 29, 2007 (“des milliers de victimes et témoins résidant pour l'essentiel à l'étranger”).

- The massacres in the south of Chad from 1982 to 1984, including *Septembre Noir* 1984
- The persecution of the Hadjerai in 1987
- The persecution of the Zaghawas in 1989-90
- The persecution of Chadian Arabs
- The mistreatment of Libyan and Chadian prisoners of war
- Systematic torture and mistreatment of detainees by the DDS

Outreach

One of the major challenges to maximising the impact of Hissène Habré's trial will be to ensure accessibility of the proceedings to the Chadian people, who are the most interested and affected. Holding Habré's trial thousands of miles away from his victims and the country which he ruled will require a significant outreach program to ensure that a trial in Dakar is accessible to them, understood by them and stimulates their own understanding of the past and search for justice.

The Special Court for Sierra Leone is implementing outreach programs to make the court accessible to the Sierra Leonean population, and may be considered an appropriate model to follow. The International Criminal Court is also developing such programs.

Outreach techniques employed by the Sierra Leone Court have included:¹¹

- The production and distribution of printed materials, including illustrated booklets, posters and other public court records;
- The holding of consultation meetings with specific groups, such as civil society groups and international nongovernmental organizations (NGOs) to channel their concerns directly to the Special Court;
- Holding targeted programs for socially disempowered groups, potentially destabilized groups, law enforcement agencies and influential civil society leaders.

¹¹ Special Court for Sierra Leone, *Special Court Outreach Report 2003-2005*, published 2007.

The Public Affairs Unit of the Registry of the Special Court also produces audio and video summaries of court proceedings. Video summaries of court proceedings are prepared twice a month, with Krio versions of the summaries being screened throughout Sierra Leone.¹² Audio summaries of court proceedings, in English and Krio, are prepared once a week, and played on ten different radio stations throughout the country, including the government broadcasting service.¹³

For the trial of Charles Taylor in the Hague, the Special Court is video-streaming proceedings from the Hague to its ordinary premises in Freetown, and is bringing West African journalists to the Netherlands to observe the court proceedings.

The Trial of Hissène Habré poses particular challenges to the implementation of a successful outreach program, not faced in Sierra Leone, however. Firstly, the trial is taking place in Senegal rather than Chad itself. Thus, court proceedings in the Habré trial will be far away from the Chadian people. Secondly, the trial of Hissène Habré is taking place in a national court and not an international tribunal and thus the court itself is not the right agency to conduct outreach, though it may be required to supervise it for reasons of coherency. It is suggested that an agency or NGO not involved in the case carry out the outreach, in cooperation with the Senegalese court. And finally, while the government of Chad is fully supportive of the trial, Chad does not present as “permissive” an environment as Sierra Leone, in the sense that conditions for a full and open discussion of transitional justice issues are not as well developed in Chad.

At the very least, arrangements should be made to:

- hold consultation meetings with civil society groups in Chad to design outreach strategy and programs;
- hold outreach training programs in Chad targeting members of specific ethnic groups;
- televise and record the court proceedings;

¹² Sierra Leone Special Court, Video Productions <http://www.sc-sl.org/video.html>, 7 September 2007.

¹³ Sierra Leone Special Court, Audio Segments <http://www.sc-sl.org/audio.html>, 7 September 2007; Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone, Accomplishments, Shortcomings, and Needed Support*, http://hrw.org/reports/2004/sierraleone0904/8.htm#_Toc81830592, September 2004.

- prepare video and audio summaries of the proceedings for broadcast in Chad;
- prepare written summaries of proceedings;
- hold screenings of proceedings and interactive dialogues in local communities in Chad;
- bring journalists and representatives of Chadian civil society, especially human rights groups, to Dakar to follow the trial;

Independent Monitoring by Senegalese and African Civil Society and the African Union

The African Union mandated “the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial.”

Human Rights Watch believes that one way to encourage a fair, thorough, and independent investigation and trial is to promote monitoring of the trial by Senegalese, Chadian, and African civil society. A Senegalese-led trial-monitoring effort will also raise awareness of the trial in Senegal and Africa in general.

The generally recognized objectives of trial observation are to:

- Encourage the tribunal to provide a fair trial. The presence of an observer at a trial indicates that the tribunal is under scrutiny and, in this way, may positively influence the tribunal’s conduct;
- Bring international attention to the proceedings; and
- Provide observer organizations with first-hand information necessary to encourage the government to provide fair trials.¹⁴

In addition, because the trial is being carried out also “on behalf of Africa” under a mandate from the African Union, it would seem imperative to have an AU monitoring effort as well, under the supervision, perhaps, of the AU envoy to the trial, Robert Dossou.

¹⁴ The International Commission of Jurists, Trial Observation Manual, <http://www.hrea.org/erc/Library/monitoring/icjo2.pdf>, June 2002.