

WAS IT A WISE DECISION FOR FORMER CHADIAN PRESIDENT HISSÈNE HABRÉ NOT TO HAVE PLEADED IMMUNITY FROM PROSECUTION AT THE EXTRAORDINARY AFRICAN CHAMBERS?

Written by *Ishmail Pamsm-Conteh*

Faculty Member, Ernest Bai Koroma University, Makeni-Sierra Leone. Faculty Member, University of Makeni. Makeni-Sierra Leone

ABSTRACT

The principle underlying the exception to prosecuting heads of state, known as, 'functional necessity', is often expressed as, '*ne impediatur legatio* or '*ne impediatur officium*'. Translated to read, 'certain state officials must be free to exercise sovereign functions abroad without any risk of interference for politically motivated reasons'. Immunity from prosecution, of heads of state, has lately been gravitated by the ruling of the International Court of Justice (ICJ), in the 'warrant case', (*Yerodia* case), in 2002. The case, though stating some exceptions, affirmed that the immunity of serving heads of state is absolute and that such individuals cannot be the subject of legal proceedings in foreign courts or arrested while travelling abroad as long as they remain in office. Under customary international law, this position is a moot one, as it excludes immunity from prosecution as defence or bar to jurisdiction for core international crimes regardless of the nature of the jurisdiction, the position of the accused, or the capacity in which the accused acted. At his trial at the Extraordinary African Chambers (EAC), former Chadian President Hissène Habré did not plead immunity from prosecution, rather he challenged the legitimacy of the Chambers. This article aims to establish that the decision not to plead immunity from prosecution was the right decision because the pleading would not have been successful.

Keywords: War Crimes, Immunity from prosecution, Extraordinary African Chamber, Customary law.

INTRODUCTION

Former President Hissène Habré of Chad was prosecuted at the Extraordinary African Chambers based in the Senegalese capital Dakar. He was charged with war crimes, torture, and crimes against humanity, arising from his eight years in power, from 1982 to 1990.ⁱ The Chambers were inaugurated in February 2013, following the agreement upon a Statute of the Chambers in January 2013.ⁱⁱ On 2 July 2013, Hissene Habré was charged with crimes against humanity, torture, and war crimes, for which he was subsequently found guilty. Habré was the first former head of state to be tried and found guilty of human rights crimes in the national courts of another state.ⁱⁱⁱ He was later convicted and sentenced to life imprisonment. On May 30, 2016, the African Union-backed Extraordinary African Chambers (EAC), supported by the African Union and the international community, convicted Habré in the first universal jurisdiction case to proceed to trial in Africa.^{iv}

President Habré did not plead immunity from prosecution, rather, he failed to recognise the legitimacy of the EAC. Unlike other heads of states, such as President Charles Taylor of Liberia at the Special Court of Sierra Leone who had pleaded such a defence. For Habré, this was a sensible decision because the contention that personal immunities do not constitute an obstacle to proceedings before an international court for the core international crimes is now settled, as it has been affirmed along different lines of reasoning, that personal immunities may not be invoked before an international criminal tribunal, not even by officials of states that are third parties to a treaty-based tribunal.

Whilst national crimes committed by heads of states may be prosecuted by national courts, this is not so, for international crimes. This is because the principle of state immunity derives its authority from the equality of sovereign states and therefore bears no relevance to international criminal tribunals, as they are not organs of a state.^v Consequent upon which, these courts have derived their mandate from the international community by way of treaty or agreement.

This article examines the context under which Hissene Habré was prosecuted, followed by the principle of immunity of leaders and other state officials, after which, the paper will conclude.

THE CONTEXT SURROUNDING THE PROSECUTION OF PRESIDENT HISSENE HABRE

On 7 June 1982, with the support from the US and France, Habré seized power, through a military coup d'état, by overthrowing President Groukouni Weddeye.^{vi} In the 1980s, the United States was pivotal in bringing Hissène Habré to power, seeing him as a stalwart defence against expansion by Libya's Muammar Qaddafi, and therefore provided critical military support to his insurgency and then to his government, even as it committed widespread and systematic human rights violations.^{vii} For nearly twenty years, Libya intervened directly in Chad's political affairs. Libya even occupied in 1973, and annexed in 1975, the Aouzou Strip, a territory in northern Chad claimed by both countries.^{viii} Soon after coming to power, Habré faced a military challenge from rivals supported by Libyan forces who had been sent to Chad by Libya's general, Muammar Gaddafi.^{ix} As the military pressure grew on him, Habré appealed for help and he got it from Washington and Paris, both eager at the time to contain General Gaddafi.^x At the time of Reagan's inauguration in January 1981, some 4,000 Libyan troops were already occupying northern Chad.^{xi}

Once he had secured his position in power, Habré put in place a brutal dictatorship that brooked no opposition. With US, French, and other international support, Habré's forces also pushed back Libyan troops in a series of military campaigns during the first six years of his reign.^{xii}

Having been in power for eight years, he was overthrown in a military coup by Idris Derby in December 1990, and he subsequently fled the country to live in Senegal, where he was granted political asylum.^{xiii} By the time he left office, the exact number of those who died during Habré's rule remained unknown. But a Truth Commission established by his successor President Idris Déby, in 1992 estimated that Habré's government was responsible for more than 40,000 deaths.^{xiv} The Commission's issued report in May 1996, concluded that Habré's

regime led to” more than 40, 000 victims, more than 80, 000 orphans, more than 30, 000 widows , more than 200,000 people left with no moral or material support as a result of his repression.^{xv}

After his reign, there was a general consensus that he should be prosecuted for his crimes, but the difficulty was which country he was to be tried. Chad had already prosecuted him in absentia and had found him guilty of crimes under Chadian law.^{xvi} Chad requested that Senegal either prosecute him in Senegal or extradite him to Chad for him to be prosecuted as Senegal was under obligation to do so.^{xvii} The matter was referred to the Committee against Torture in April 2001 by the Chad authorities to look into the matter.^{xviii} In its findings, it recommended that Senegal takes appropriate action to implement in its domestic law and comply with its obligation to extradite or prosecute President Habré .^{xix}

In a separate development, in December 2001, an application for him to be prosecuted was filed in Belgium by a group of interested persons under the Belgian universal jurisdiction Act.^{xx} There was considerable disagreement with Senegal on the issue and the matter ended up at the International Court of Justice. It ruled on 20 July 2012 that, “ the Republic of Senegal by failing to make immediate preliminary inquiry into the facts relating to the crimes allegedly committed by Mr. Habré, has breached its obligation under Article 6, paragraph 2 , of the United Nations Convention against torture and Other Cruel , Inhumane or Degrading Treatment or Punishment of 10 December 1984”^{xxi}

However, prior to that decision, Senegal had reported Habre’s case in January 2006, to the Assembly of Heads of State and Government of the African Union, which established an expert committee to advice on the situation. The ensuing report mandated Senegal to try Habré on behalf of the continent.^{xxii} Senegal subsequently amended her penal code paving the way for him to be prosecuted in that country.^{xxiii}

Habré complained to the Economic Community of West African States (ECOWAS) Community Court of Justice about the retrospective nature of the legal framework.^{xxiv} The court ruled that the new laws violated his right and also held that Senegal could legally try Habre only before an international hybrid court.^{xxv} This Judgement led the Government of Senegal

to engage in negotiations with the AU for an alternative solution. It was these negotiations which led to an agreement signed on 22 August 2012 that established the Court.^{xxvi}

The Chambers were inaugurated in February 2013, following the agreement upon a Statute of the Chambers in January 2013.^{xxvii} On July 2, 2013, President Habré was charged with crimes against humanity, torture, and war crimes, for which he was subsequently found guilty. Habré was the first former head of state to be tried and found guilty of human rights crimes in the national courts of another state. The Chamber began its operation on February 8, 2013.^{xxviii} He appeared on trial before a special court, on July 20, 2015, at the African Extraordinary Chambers established in Senegal with the support of the African Union, Belgium, France, Chad and Senegal and which was presided over by Gberdao Gustave Kam from Burkina Faso, with two Senegalese judges alongside.^{xxix} He was convicted of crimes against humanity, war crimes, and torture, including sexual slavery.^{xxx}

On appeal, the conviction was confirmed in 2017. Having been found guilty of the charges that were proffered against him, he now serves a life sentence as punishment in a prison in Senegal's capital city Dakar. As part of the judgement, 7,396 victims were awarded reparations for the crimes they suffered during Habré's 8-year rule.^{xxxi} At the time of writing this article the victims have still not yet received the compensation awarded by the EAC.

THE PRINCIPLE OF IMMUNITY OF LEADERS AND OTHER STATE OFFICIALS, UNDER CUSTOMARY INTERNATIONAL LAW

Customary international law as a component of international law refers to international obligations arising from established international practices, as opposed to obligations arising from formal treaties. An example of which is the granting of immunity for visiting heads of state. One of its sources of customary international law is international law or law of nations; defined as law applicable to states in their mutual relations and to individuals in their relations with states.^{xxxii} International law may also, under the hypothesis, be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern.^{xxxiii} To that end, international law imposes obligations on states to

prosecute those who have committed international crimes within their territory. Likewise, human rights law includes a right to a remedy or to reparation provided by the state that has violated the substantive human right.^{xxxiv}

The question of personal immunity arises particularly in the case of heads of state, which may come to play either within international courts or in national courts. Under international law, there is a distinction between official and private acts of a head of state.^{xxxv} Serving heads of state benefit from absolute immunity from the exercise of the jurisdiction of a foreign domestic court.^{xxxvi} This has been reaffirmed in *ex parte Pinochet* (No.3), as per Lord Browne Wilkinson; “This immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attaching to the person of head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state.”^{xxxvii} The predominant justification for such immunities is that they ensure the smooth conduct of international relations and, as such, they are accorded to those state officials who represent the state at the international level.^{xxxviii}

Lord Hope referred to the *jus cogens* character of the immunity enjoyed by heads of state as *ratione personae*.^{xxxix} His approach affirming the immunity of a serving head of state is endorsed by the decision of the French Court de Cassation in the *Gaddafi* case.^{xl} It must be stated that immunity will only exist for the official acts done while in office. The definition of official acts is somewhat unclear, but it is suggested that this would exclude acts done in clear violations of international law.^{xli} The matter of immunity of head of states was also confirmed in the *Congo v Belgium* case, where the International Court of Justice stated that, ‘...in international law it is firmly established that...certain holders of high ranking office in a state, such as head of state, head of government and minister of foreign affairs enjoy immunities from jurisdiction in other states, both civil and criminal.’^{xlii}

However, the *Yerodia* case of 2002, the ICJ recalled that even in the case of genocide, crimes against humanity and war crimes, courts could not exercise jurisdiction over the head of another State, even if he or she had left office. The only exception would be litigation concerning acts performed ‘in a private capacity’.^{xliii} Though the test for private capacity was not defined. It is important to draw a distinction between the *Yerodia* case and the decision in earlier case

of *R v Bartle and the Commissioner of police for the Metropolis and others, ex parte Pinochet Ugarte*^{xliv} where a majority of the House of Lords said, '[s]uch immunity is only in respect of "official" acts performed in the exercise of his functions'.^{xlv} Whilst it should be noted that both cases refer to national courts or foreign courts, they did not refer to internationally constituted courts.

The Appeals Chamber of the Special Court ruled on Taylor's Immunity of Jurisdiction as follows:

In official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.^{xlvi}

Under internationally constituted courts, it is clear that serving heads of state, and other governmental officials may be rendered to the jurisdiction of such courts, depending on their legal apparatus. For example, the Versailles Treaty of 1919 under Article 227, the Charter of the international military Tribunal, 1945(Article 7); the Statutes of the international Tribunal of Yugoslavia under Article 7 the international tribunal of Rwanda under Article 6, and the Rome Statute of the International Criminal Court 1998, under Article 28, all expressly state that individual criminal responsibility will exist irrespective of the official status, including heads of state.^{xlvii} Nonetheless, international courts have prosecuted heads of State or heads of government in their respective territories, without even the consent of the States concerned.^{xlviii}

As it is now settled matter, it is important to now consider the consequences that result from the characterisation of acts as 'an international' crime. First, they can be prosecuted retroactively; second, they can be prosecuted by courts that would not normally exercise jurisdiction; third, they impose duties upon States with respect to mutual legal assistance in the investigation, extradition and prosecution of such offences, lastly, traditional rules concerning immunity of heads of State and other senior officials are relaxed.^{xlix} It thus mean that leaders could be prosecuted for international crimes committed, during their stay in office or even afterwards, as there is no immunity for international crimes. Be it a leader, state

official or a rank-and-file soldier, there is no immunity. This may have been the considerations Hissene Habre contemplated by not pleading it at the EAC.

CONCLUSION

It is now a settled matter in international law, that there is no immunity for heads of state or top government officials to claim immunity from prosecutions when international crimes are committed. It does not really matter which country the ex-leader resides, whether in exile or still leaving in the country of origin such cannot be a bar to prosecution. Leaders like Charles Taylor of Liberia during his trial at the Special Court for Sierra Leone, pleaded this as a defence, which failed.

President Habre's was prosecuted at the EAC, based in the Senegalese capital Dakar in 2016 where he was convicted for war crimes, torture and crimes against unity. He did not raise the defence of immunity against prosecution but challenged the legality of the establishment of the Chambers. This paper offers that had he pleaded immunity from prosecution based on the reasoning of many judgements cited above under international law, it was bound to have failed.

ENDNOTES

ⁱ Roland Adjovi, 'INTRODUCTORY NOTE TO THE AGREEMENT OF THE ESTABLISHMENT OF THE EXTRAORDINARY CHAMBERS WITHIN THE SENEGALESE JUDICIAL SYSTEM BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SENEGAL AND THE AFRICAN UNION AND THE STATUTE OF THE CHAMBERS.

https://www.jstor.org/stable/10.5305/intelegamate.52.4.1020?seq=4#metadata_info_tab_contents at 1021 accessed 26 June 2021

ⁱⁱ Ibid

ⁱⁱⁱ Ibid

^{iv} (N 1) Supra

^v *Prosecutor v. Taylor*, Case No. SCSL-03-01-I, Decision on immunity from Jurisdiction, 31 May 2004, para 51.

^{vi} Human Right Watch Report ' Enabling a Dictator The United States and Chad's Hissene Habre, 1982-1990 https://www.hrw.org/report/2016/06/28/enabling-dictator/united-states-and-chads-hissene-habre-1982-1990#_ftn1 accessed 26 June 2021

^{vii} (N 1) Supra

^{viii} In 1994, the International Court of Justice awarded the strip to Chad, and Libya finally removed its troops.

^{ix} Human Rights Watch Report, ' Chad; The Victims of Hissene Habre Still Awaiting Justice' July 12, 2005 <https://www.hrw.org/report/2016/06/28/enabling-dictator/united-states-and-chads-hissene-habre-1982-1990> accessed 26 June 2021

^x (N 6) Supra

^{xi} (N 1) Supra

^{xii} (N 8) Supra

^{xiii} Mads Andenas and Thomas Weatherall ' International Court of Justice questions relating to the Obligation to Extradite or Prosecute. (Belgium v Senegal Judgement of 20 July 2005. *The International and Comparative Law Quarterly* Vol.62.No3.(July 2013), https://www.jstor.org/stable/43301586?read-now=1&refreqid=excelsior%3A7f24e1f0f9bf4fa2f574608f6627f23d&seq=1#page_scan_tab_contents

^{xiv} Commission d'Enquête Nationale du Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices*, (Paris : Éditions L'Harmattan, 1993), p. 97 (Truth Commission Report). <https://www.labaignoiredarchimede.com/livre/9782738417497-les-crimes-et-detournements-de-l-ex-president-habre-et-de-ses-complices-rapport-de-la-commission-d-enquete-nationale-du-ministere-tchadien-de-la-justice-collectif/> accessed 26 June 2021

^{xv} Ibid

^{xvi} Steve Czajkowski, ' Chad Court Sentences Ex-Dictator Habre to Death in absentia. *JURIST*.(Aug 16, 2008) <https://www.jurist.org/news/2008/08/chad-court-sentences-ex-dictator-habre/> accessed 26 June 2021

^{xvii} (N 6) Supra

^{xviii} Ibid

^{xix} Ibid

^{xx} Ibid

^{xxi} (N 10) Supra

^{xxii} See African Union [AU] Decision on the Hissene Habre Case and the African Union AU Doc .Assembly/AU/Dec/03(VI) (January 2006)

^{xxiii} (N 10) Supra

^{xxiv} Hissen Habre v Republic of Senegal Case. No. ECW/CCJ/APP/07/08. Judgement at 6,(ECOWAS Community Court of Justice Nov.10 2010. <https://www.cambridge.org/core/journals/international-legal-materials/article/abs/agreement-on-the-establishment-of-the-extraordinary-african-chambers-within-the-senegalese-judicial-system-between-the-government-of-the-republic-of-senegal-and-the-african-union-> accessed 23 June 2021

^{xxv} *ibid*

^{xxvi} Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African UANION art1(1) Aug22.2012

^{xxvii} Ibid

^{xxviii} (N 1) Supra

xxix Trial International, Hissen Habre 29.04.2016. <https://trialinternational.org/latest-post/hissene-habre/> accessed 26 June 2021

xxx Ibid

xxxi Human Rights Watch , `Ex Chad's Dictator` victims denied reparation, May 30 2021

<https://www.hrw.org/news/2021/05/30/ex-chad-dictators-victims-denied-reparations> accessed 24 June 2021

xxxii Philip C .Jessop, *A Modern Law of Nations* 17(1949), p 34

xxxiii Ibid

xxxiv Dapo Akande and Sangeeta Shah, `immunity of state officials, international crimes and foreign` domestic courts. `The European Journal of International law` Vol 21, No 4 2011 <http://www.ejil.org/pdfs/21/4/2115.pdf> accessed 25 June 2021

xxxv Draft articles on Jurisdictional immunities of the international law commission, 1991,pp24-5 and 33

xxxvi Ibid

xxxvii [2001] 1 AC.147, 201-2.

xxxviii (N 31)

xxxix [2000] 1 AC 244

xl Arrest no.1414, 14 March 2001, S. Zappala, `Do Heads of State` In Office Enjoy Immunity` from Jurisdiction for International Crimes? The *Ghaddafi* Case Before the French Court` de Cassation, at 657. 12 EJIL, 2001, <http://www.ejil.org/pdfs/21/4/2115.pdf> accessed 26 June 2021

xli (N 40) at .658

xlii International Court of Justice Reports, 2002 <https://www.icj-cij.org/en/annual-reports>, para .51, accessed 25 June 2021

xliii *Arrest Warrant of 11 April 2000(Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, para 61.

xliv [1992] 2 All ER 97 (HL)

xlvi Ibid

xlvii *Prosecutor v Taylor*, SCSL Case No. 03-01-I, Decision on Immunity from Jurisdiction, 31 May 2004 para. 45.

xlviii Malcolm N. Shaw, *International law* (`Cambridge university press) 656

xlvix *Milosevic* (IT-02054-PT) Decision on Preliminary Motions, 8 November 2001, paras 26-34; *Kambanda*,(ICTR-97-23-S), Judgement and Sentence, 4 September 1998.

xlvi William A Schabas, *The UN International Criminal Tribunals` The Former Yugoslavia, Rwanda and Sierra Leone* (First published 2006, Cambridge University Press) p.155