NOTE

THE TIME OF HUMAN JUSTICE & THE TIME OF HUMAN BEINGS: *BELGIUM V. SENEGAL* & TEMPORAL RESTRAINTS ON THE DUTY TO PROSECUTE

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I. Introduction

On a summer morning in 1987, secret police descended upon the tiny village of Bitkine in the middle of Chad.[1] They immediately rounded up a massive group of Hadjaraï minorities and spirited them away to makeshift prisons across the country.[2] Among those arrested was Godi Bani, a young man from the village.[3] Godi was bound and beaten and eventually immured with 1,000 other prisoners in a large room that formerly served as a feed store.[4] Packed in like cattle, Godi was left to sit for days on end and wait for his certain death.

The guards were perversely creative in their punishments.[5] At one point, they served the prisoners poisoned millet.[6] Ninety-three people died that day, and their bodies were left in the room to decompose for four more days.[7] The guards were more direct with other prisoners, employing techniques such as *le pot d'echappement* ("the serving of exhaust," in which a victim's mouth was placed around a car's exhaust pipe while an officer revved the engine), electrocution, severe binding treatments, and eventually summary

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1. This story was recounted as testimony before the 1992 Chadian truth commission. *See* Commission d'Enquête Nationale du Ministère Tchadien de la Justice, Les Crimes et detournements de l'ex-Président Habré et de ses complices [The Crimes and Abuses of Former President Habre and His Accomplices] 40–41 (1993) [hereinafter CENMTJ Report]. This was the final report of the truth-seeking commission established by the Chadian government after Habré's ouster in 1990.

2. *Id.* at 40.

3. *Id.*

4. *Id.* at 40–41.

5. *Id.* at 41.

6. *Id.*

7. *Id.*

execution.[8] When the prison was liberated over a year later in December 1988, Godi was one of five prisoners still alive.[9]

Godi's gruesome story is common among survivors of Hissène Habré's eight-year rule in Chad. From 1982 to 1990, Habré waged a campaign against his own countrymen to solidify his power and eliminate all political opposition.[10] Over the course of eight years, Habré oversaw the systematic arrest, detention, torture, and killing of an estimated 40,000 Chadians.[11] After his bloody ouster in 1990, Habré escaped from N'Djamena with over $6.62 million in stolen state funds and sought refuge in a posh neighborhood of Dakar, Senegal.[12] For the past thirteen years, survivors of Habré's vicious regime have fruitlessly attempted to hold the former dictator accountable for torture and crimes against humanity.[13]

After initially denying victims relief in its courts,[14] the Senegalese government sought the advice of the African Union (AU)[15] and the Economic Community of West African States (ECOWAS).[16] Meanwhile, twenty-one survivors filed claims of torture and crimes against humanity against Habré under Belgium's universal jurisdiction laws.[17] After four years of investigation, Judge Daniel Fransen

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8. *See id.* at 41–43.

9. *Id.* at 41.

10. Human Rights Watch, Chad: The Victims of Hissène Habré Still Awaiting Justice 4 (2005) [hereinafter Still Awaiting Justice].

11. *See* CENMTJ Report, *supra* note 1, at 69 (estimating 54,000 people detained by the regime and accounting for 3,806 total deaths, which was estimated as only 10% of total deaths).

12. *See* Human Rights Watch, The Trial of Hissène Habré: Time Is Running Out for Victims 4–5 (2007) [hereinafter Time Is Running Out].

13. *See id.* at 5–10.

14. *See, e.g.*, Souleymane Guengueng c. Hissène Habré, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 20, 2001, Arrêt no. 14 (Sen.) (finding Senegalese courts without requisite statutory jurisdiction to prosecute foreigners accused of committing torture outside of Senegal); Ministère Public c. Hissène Habré, Cour d'appel [CA] [regional court of appeal] Dakar, ch. d'accusation, July 4, 2000, Arrêt no. 135 (Sen.) (finding that Article 669 of Senegalese Civil Code precludes extraterritorial jurisdiction over prosecution of noncitizens).

15. *See generally* Afr. Union, *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré* (July 2, 2006), *available at* http://www.hrw.org/legacy/french/themes/CEJA_Report0506fr.pdf.

16. Affaire *Hissène Habré c. République du Sénégal*, La Cour de Justice de la Communauté Economique des Etats de l'Afrique de l'Ouest [Court of Justice of the Economic Community of West African States], ECW/CCJ/JUD/06/10 (Nov. 18, 2010) [hereinafter ECOWAS Decision] (noting Senegal should respect the past final judicial decisions of its judges and not retry Habré under new Senegalese laws in accordance with the principle of non-retroactivity of criminal law, but could instead fulfill the African Union's mandate to prosecute Habré through a special ad hoc judicial court of international character).

17. Time Is Running Out, supra note 12, at 6. These laws granted jurisdiction for certain international crimes such as torture, genocide, and crime against humanity regard-

of the Brussels District Court issued an international arrest warrant in September 2005, and the Belgian government immediately asked for Habré's extradition from Senegal.[18] For seven years, Senegal repeatedly refused to either extradite Habré to Belgium or try him in its own courts.[19] Although Senegal's national assembly amended its constitution in 2008 to incorporate provisions of the Convention Against Torture (Torture Convention)[20] into its penal code and allow for retroactive application of such provisions,[21] the government continued to balk at the opportunity to prosecute Habré.

Faced with an increasingly obstinate Senegalese government, in 2009, Belgium applied to the International Court of Justice (ICJ) to have the court clarify Senegal's legal obligations under international law.[22] For the first time in the ICJ's history, the court was asked to directly determine the extent to which countries have a binding duty to prosecute or extradite (*aut dedere aut judicare*)[23] individuals accused of grave international crimes.[24] To answer this question, Belgium asked the court to examine both a specific application of *aut dedere aut judicare* under article 7 of the Torture Convention, as well as a very broad application of the principle as it

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less of the nationality of the perpetrator, nationality of the victim, or where the crime occurred. *See* CODE PÉNAL [C.PÉN] art. 136 (Belg.).

18. See TIME IS RUNNING OUT, supra note 12, at 7.

19. *Senegal: Stop Stalling with Habré Extradition*, HUM. RTS. WATCH (Jan. 12, 2012), http://www.hrw.org/news/2012/01/12/senegal-stop-stalling-habr-extradition.

20. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (ratified by Senegal on August 21, 1986).

21. *Chronology of the Habré* Case, HUM. RTS. WATCH (Mar. 9, 2012), http://www.hrw.org/news/2012/03/09/chronology-habr-case. For more information on the Convention Against Torture (Torture Convention) and the provisions at issue in Habré's case, see Parts II.C and III.B, *infra*.

22. *See* Obligation to Prosecute or Extradite (Belg. v. Sen.), Application Instituting Proceedings, 2009 I.C.J. 139, 3 (Feb. 17) [hereinafter Application Instituting Proceedings].

23. *Aut dedere aut judicare*—extradite or prosecute—refers to the fundamental principle of international law requiring states to prosecute persons who commit serious international crimes when no other state has requested extradition. *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 4–5 (1995). The obligation arises regardless of the extraterritorial nature of the crime and regardless of the fact that the perpetrator and victims may be of alien nationality. *Id.* at 15. The concept is a modern adaptation of Grotius's concept of *aut dedere aut punier*—either extradite or punish—that incorporates the contemporary presumption of innocence. *Id.* at 4–5.

24. *See* Application Instituting Proceedings, *supra* note 22, ¶ 16.

relates to the customary international law of crimes against humanity.[25]

Finally, on July 20, 2012, more than twelve years after victims originally filed complaints in Senegalese courts, the ICJ handed down its decision, finding Senegal in violation of its duty to prosecute under the Torture Convention.[26] In its final judgment, the ICJ made a number of key findings: (1) the court only had jurisdiction over the narrower issue involving the Torture Convention and not Belgium's broader argument pertaining to the customary international law status of *aut dedere aut judicare*;[27] (2) the Torture Convention granted Belgium standing to invoke the responsibility of Senegal on behalf of victims;[28] (3) Senegal violated article 6(2) of the Torture Convention by failing to conduct an immediate investigation into allegations against Habré; and (4) Senegal violated article 7(1) of the Torture Convention by failing to institute proceedings against Habré within a reasonable time.[29] While each of these findings could produce ample scholarship in the field of international law, this Note focuses solely on the last holding because of its potential impact on the human rights field.

The concept of *aut dedere aut judicare* has received very little scrutiny over the past decade,[30] and no scholar has yet to apply a legal analysis of this important principle of international criminal law to the case of Hissène Habré. This Note addresses the legal issues presented before the ICJ in *Belgium v. Senegal* by assessing the legal status of the principle of *aut dedere aut judicare* under the Torture Convention.[31] In particular, this Note analyzes how the ICJ arrived at its conclusion that Senegal had not prosecuted Habré within a "reasonable time"[32] and the implications this holding could have

25. *See id.* ¶ 7.

26. *See* Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 44, ¶ 117 (July 20) [hereinafter ICJ Final Judgment].

27. *Id.* ¶ 55.

28. *Id.* ¶ 70.

29. *Id.* ¶ 117.

30. *See, e.g.*, Miles M. Jackson, *The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework*, 16 Tul. J. Int'l & Comp. L. 117 (2007); Bassiouni & Wise, *supra* note 23.

31. While the concept of *aut dedere aut judicare* is inexorably tied to the concept of universal jurisdiction, this Note will only cover the former. For an excellent overview of how the two concepts interrelate, see Naomi Roht-Arriaza & Menaka Fernando, *Universal Jurisdiction*, *in* Research Handbook on International Criminal Law 359 (Bartram S. Brown ed., 2011); Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law (2005).

32. ICJ Final Judgment, *supra* note 26, ¶ 114.

on other international conventions prescribing a duty to prosecute. The answer to this important question has the potential to drastically change the human rights landscape. An expansive view of the duty to prosecute could provide individuals and states another tool to prevent impunity for human rights violators[33] and further bridge the gap between the "time of human justice" and the "time of human beings."[34]

This Note argues that states can only fulfill their duty to prosecute under the Torture Convention by making good faith efforts to investigate and submit allegations of torture to their authorities without delay. Article 7 of the Torture Convention created a binding obligation on Senegal to either refer the claims of torture against Habré to competent authorities for prosecution or extradite him to another state party willing to prosecute him.[35] This duty implicitly entails a temporal obligation on states to expediently investigate and prosecute alleged torturers. This binding duty stems from both the language of the Torture Convention itself and an inherent right of victims to seek swift and effective justice.[36] Thus, the court's interpretation of a time constraint on state responsibilities should not be limited to the Torture Convention and should be extended by analogy to the duty to prosecute writ large.

Part II of this Note examines the Habré debacle in greater detail by explaining the progress of the case through Senegalese, Belgian, and international courts. Part II also surveys the legal issues before the ICJ and the current state of international legal scholarship on *aut dedere aut judicare*. Part III analyzes the status of *aut dedere aut judicare* as a binding obligation on states by first exploring its use in the Torture Convention and then assessing its interpretation by international human rights bodies. This Note analyzes the *aut judicare* element of this formulation—that is, the duty to prosecute—in light of this legal framework and applies the principles of

33. M. Cherif Bassiouni, *The Duty to Prosecute and/or Extradite:* Aut Dedere Aut Judicare, *in* 2 INTERNATIONAL CRIMINAL LAW 35, 44–45 (M. Cherif Bassiouni ed., 3d ed. 2008) [hereinafter Bassiouni, *The Duty to Prosecute and/or Extradite*].

34. ICJ Final Judgment, *supra* note 26, Separate Opinion of Judge Trindade, ¶ 147. Judge Trindade develops a lengthy analysis lamenting the vast gap between the time it takes to complete modern human rights prosecutions (the time of human justice) and the time in which victims deserve an effective remedy (the time of human beings). *See id.* ¶¶ 145–53.

35. Convention Against Torture, *supra* note 20, art. 7.

36. *See infra* Part III.B.

temporal restraints in the ICJ's *Belgium v. Senegal* decision to other duties to prosecute in international conventions.

II. Background

A. *The Habré Saga*

1. Habré's Regime

After training as a lawyer in France, Habré returned to Chad in the 1970s and took up arms against the government as a guerilla fighter.[37] By the end of the decade, Habré positioned himself as prime minister under General Félix Malloum and minister of defense during the 1979 transitional government led by Goukouni Oueddei.[38] After breaking away from the Oueddei government in 1981 and forming his own rebel group,[39] Habré gained an unlikely ally in the United States when Libyan President Muammar Qaddafi sought to join Libya and Chad as the Islamic Republic of Sahel.[40] With "massive covert support" from the United States, Habré forcibly retook the capital of N'Djamena in 1982 and installed himself as president.[41]

Immediately upon taking power, Habré began solidifying his authority by violently rooting out all political opposition.[42] Over the next eight years, Habré systematically waged war against rival factions in Chad, including the Sara and other southern ethnicities in 1984, Arabs in 1984, the Hadjaraï in 1987, and the Zaghawa in 1989.[43] Under Habré's direct supervision, the infamous Documentation and Security Directorate (DDS) arrested, indefinitely detained, or killed an estimated 54,000 political prisoners.[44] In 1992, a truth commission established by Habré's successor estimated that Habré's reign left 40,000 dead, 54,000 imprisoned, 80,000 orphaned, 30,000 widowed, and over 200,000 without financial or social support.[45]

The truth commission's report and subsequent investigations by international NGOs have revealed the deathly efficiency with which

37. *See* Martin Meredith, The Fate of Africa 352 (2005).
38. *See id.* at 353; *see also* CENMTJ Report, *supra* note 1, at 7.
39. This group was known as the Armed Forces of the North (NAF).
40. Meredith, *supra* note 37, at 354.
41. Still Awaiting Justice, *supra* note 10, at 4.
42. *See id.*; Meredith, *supra* note 37, at 354.
43. Still Awaiting Justice, *supra* note 10, at 4.
44. CENMTJ Report, *supra* note 1, at 70.
45. *Id.* at 97.

the DDS tortured and imprisoned perceived traitors.[46] The DDS operated a notorious string of secret prisons, including one located in the presidential palace and another, called "*La Piscine*," which packed prisoners into a swimming pool covered with concrete.[47] Torture was routine and even encouraged.[48] Common interrogation techniques included electric shocks, burning, extraction of fingernails, whippings, forcing the exhaust pipe of a running vehicle into the mouth of a detainee, forcing a detainee to drink water until he was rendered unconscious, and a particularly gruesome method known as "Arbatachar," or binding the victims ankles and wrists to achieve paralysis in the limbs.[49] When not being tortured, prisoners were forced to share tiny cells with up to thirty other detainees, including the bodies of those who had died in the cell.[50] In 2001, Human Rights Watch uncovered a trove of DDS documents referring to 12,321 victims, reports of 1,208 deaths in detention, and 1,265 direct communications to Habré about the deaths of 898 detainees.[51]

In December 1990, a rebel faction led by Idriss Déby overthrew Habré and his top political advisors.[52] Habré escaped to Senegal with over $6.62 million stolen from the national treasury and settled into a wealthy neighborhood in Dakar.[53] Habré now lives freely in Dakar with his Senegalese wife and children,[54] and he denies ever knowing about the DDS's torture and murders.[55]

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46. *See id.* at 19 ("The whole country was painstakingly divided into security zones, and the populace was terrorized by those bloody agents of the political police, the DDS. This sinister institution watched everything people said and did. A single word deemed 'out of place,' the smallest gesture perceived as suspect and its author's life would be forfeit.").

47. STILL AWAITING JUSTICE, *supra* note 10, at 9.

48. CENMTJ Report, *supra* note 1, at 38 ("[T]he DDS elevated torture virtually to the status of a standard procedure, and almost all detainees were subjected to it one way or another, regardless of sex or age.").

49. STILL AWAITING JUSTICE, *supra* note 10, at 8.

50. Laura Bingham, *Trying for a Just Result? The Hissene Habre Affair and Judicial Independence in Senegal*, 23 TEMP. INT'L & COMP. L.J. 77, 83 (2009).

51. *Id.* at 6–7.

52. *Id.* at 14. Déby is still the president of Chad. *See Chad: Profile*, BBC NEWS (July 12, 2012), http://www.bbc.co.uk/news/world-africa-13164688. He won elections in 1996 and 2001 and again in 2006 and 2011 after term limits were eliminated from the constitution. *See id.* He spearheaded the creation of the truth commission that "recommended prosecution in Chad of those who participated in crimes during Habré's regime." STILL AWAITING JUSTICE, *supra* note 10, at 1, 14–15.

53. *See* TIME IS RUNNING OUT, supra note 12, at 4.

54. Bingham, *supra* note 50, at 84.

55. *See Profile: Hissene Habre*, BBC NEWS (July 3, 2006), http://news.bbc.co.uk/2/hi/africa/5140818.stm.

While Habré remains free in Senegal, Chad continues to recover from Habré's regime of fear and violence. A 1992 Chadian truth commission report did not conclude with any profound statement against Habré but instead ended with a sense of bewilderment and lingering torment:

> Eight years of rule, eight years of tyranny, genocide, terror and plunder on all sides. Why so much evil, so much hatred of his own people? Was it worth the pain of struggling for a whole decade to win power, just to do that? For what ideal and to what end was Habré fighting?[56]

2. Attempts at Criminal Prosecution

a. Complaints in Senegal (2000)

Ten years after Habré left power, three victims filed a criminal complaint against him in Senegalese court based on the Torture Convention.[57] The timing of the case was no accident. The complaint came on the heels of the famous decision by the English House of Lords against Chilean president Augusto Pinochet, which found jurisdiction over Pinochet through the Torture Convention.[58] This precedent[59] was directly on point with the Habré case: Senegal had ratified the Torture Convention, outlawed torture domestically,[60] and had Habré present in the forum. On February 3, 2000, investigating judge Demba Kandji indicted Habré and placed him under house arrest.[61]

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56. CENMTJ Report, *supra* note 1, at 97.

57. *See* Procès-Verbal d'Interrogatoire de Première Comparution, Cour d'Appel de Dakar (Feb. 3, 2000), *available at* http://www.hrw.org/legacy/french/themes/habre-inculpation.html. It should also be noted that under Senegalese law, individuals can petition the criminal prosecutor to bring criminal charges against another person (*action publique*). *See* NDONGO FALL, LE DROIT PENAL AFRICAIN A TRAVERSE LE SYSTEME SÉNÉGALAIS 19, 31, 72 (2003) (citing article 77 of the Senegalese Code de Procedure Pénale). In this case, the victims brought a "*plainte avec constitution de partie civile*" (where a private party files a criminal action seeking both criminal punishment and compensation) after the prosecutor initially refused to take the case. *Id.*

58. *See* HUMAN RIGHTS WATCH, THE PINOCHET PRECEDENT: HOW VICTIMS CAN PURSUE HUMAN RIGHTS CRIMINALS ABROAD (2000) [hereinafter THE PINOCHET PRECEDENT]; *see also* Tanaz Moghadam, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissene Habre*, 39 COLUM. HUM. RTS. L. REV. 471, 499 (2008).

59. The "Pinochet precedent" represents the international law developments following a 1998 U.K. House of Lords Decision that paved the way for prosecution of former Chilean dictator Augusto Pinochet in Spain. *See* THE PINOCHET PRECEDENT, *supra* note 58.

60. Article 295-1 of the Senegalese Penal Code makes torture a crime under domestic law. CODE PÉNAL [C.PÉN.] art. 295-1 (Sen.), *available at* http://www.justice.gouv.sn/droitp/CODE%20PENAL.PDF.

61. STILL AWAITING JUSTICE, *supra* note 10, at 19.

Five months later, the *Chambre d'Accusation* (Indicting Chamber) of the court of appeals granted Habré's motion to dismiss, reversing the decision of Judge Kandji.[62] The Indicting Chamber was likely influenced by the Senegalese government's reversal of position on Habré after President Abdoulaye Wade declared publicly that Habré would never be tried in Senegal.[63] The victims appealed the decision of the appellate court to the highest court in Senegal, the *Cour de Cassation*.[64] In March 2001, the Court ruled in favor of Habré, finding that the Indicting Chamber did not have jurisdiction to try crimes committed in a foreign country by a foreign national.[65] Even though Senegal became a party to the Torture Convention in 1986, the court found that the treaty was non-self-executing, meaning that the National Assembly must take further action to fully incorporate the Convention into Senegalese law in order for the state to be bound by its terms.[66] Without explicit ratification by the national assembly, the courts of Senegal could not have jurisdiction over the crimes of a foreign national committed in a foreign country.[67]

b. Complaints in Belgium (2001)

Meanwhile, twenty-one survivors filed complaints against Habré in Belgium for genocide, crimes against humanity, and torture under that country's universal jurisdiction law.[68] After four years of investigation in Chad and forensic analysis in Belgium, a judge for the Brussels District Court issued an international arrest warrant for Habré.[69] Immediately thereafter, Belgium submitted an extradition request to Senegal so that Habré could stand trial in Brussels.[70] Senegalese authorities arrested Habré in September

62. Ministère Public c. Hissène Habré, Cour d'appel [CA] [regional court of appeal] Dakar, ch. d'accusation, Arrêt no. 135 (July 4, 2000) (Sen.).

63. *See* Bingham, *supra* note 50, at 85; STILL AWAITING JUSTICE, *supra* note 10, at 19.

64. *See* Souleymane Guengueng c. Hissène Habré, Cour de Cassation [Cass.] [supreme court for judicial matters] crim., Mar. 20, 2001, Arrêt no. 14 (Sen.).

65. *See id.*

66. *Id.*

67. *Id.*

68. *See generally* CODE PÉNAL [C.PÉN] art. 136 (Belg.). Each of the complaints was filed separately. *See, e.g.*, Plainte de Souleymane Abdoulaye Tahir (Dec. 3, 2001), *available at* http://www.hrw.org/legacy/french/themes/PlainteSouleymaneAbdoulaye.pdf. Belgium repealed its universal jurisdiction law in 2003 at the strong behest of the United States. Bingham, *supra* note 50, at 86 n.55. The Habré case, however, was "grandfathered in" because three of the victims were Belgian citizens and because significant parts of the investigation had commenced before the law was repealed. *Id.*

69. *See* TIME IS RUNNING OUT, supra note 12, at 7.

70. *See id.*

2005.[71] After the Dakar Indictment Chamber ruled that it did not have jurisdiction over the extradition request, the issue went to President Wade for decision.[72] Wade waivered on the decision to extradite Habré and instead of deciding the issue himself, he sent the case to the AU.[73]

c. African Union Decision

In response to Senegal's request, the AU established a Committee of Emanate African Jurists (CEAJ) solely to decide whether Senegal should grant Belgium's request for extradition.[74] In July 2006, the CEAJ found that "Senegal is the country best suited to try Habré as it is bound by international law to perform its obligations."[75] The Committee recommended that Senegal should simply alter its national laws to allow for a specialized prosecution of Habré rather than extradite him to Belgium.[76] Barring national prosecution in Senegal, the Committee suggested an "African Option" in which Habré would be prosecuted by Chadian courts or a special *ad hoc* regional court.[77] The following day, the AU adopted the recommendations of the CEAJ and called on Senegal to prosecute Habré "on behalf of Africa."[78]

In response to the AU summit, President Wade assured his African colleagues that Senegal would immediately begin Habré's prosecution.[79] Senegal did not, however, move as swiftly as promised. It took the National Assembly six months to adopt legislation fully incorporating the Torture Convention into the Senegalese penal code[80] and another year and a half to amend its constitution to allow retroactive application for crimes of torture.[81] On Septem-

71. *See* HUMAN RIGHTS WATCH, HISSÈNE HABRÉ AND THE SENEGALESE COURTS: A MEMO FOR INTERNATIONAL DONORS 3 (2007).

72. *See* TIME IS RUNNING OUT, supra note 12, at 7.

73. *See id.*

74. *See* Afr. Union, *supra* note 15, ¶ 1.

75. *Id.* ¶ 29.

76. *Id.* ¶ 18 ("It is therefore incumbent on Senegal in accordance with its international obligations, to take steps, not only to adapt its legislation, but also to bring Habré to trial.").

77. *See id.* ¶¶ 29, 31.

78. A.U. Dec. 127(VII), ¶ 5(ii), A.U. Doc. Assembly/AU/3 (VII) (July 1–2, 2006).

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

80. *Senegal: New Law Will Permit Habre's Trial*, HUM. RTS. WATCH (Feb. 2, 2007), http://www.hrw.org/english/docs/2007/02/02/senega15249.htm.

81. *Senegal: Government Amends Constitution to Pave Way for Hissene Habre Trial*, HUM. RTS. WATCH (July 23, 2008), http://hrw.org/english/docs/2008/07/23/senega19438.htm.

ber 16, 2008, fourteen victims filed another criminal complaint against Habré in Senegal, but the government has yet to fully exercise its new jurisdiction over the claims.[82]

d. ECOWAS Decision

Despite the legal ability to move forward with prosecution, Senegal continued to stall Habré's prosecution. At first, the government stated that it could not conduct investigations and a trial without first receiving €66 million from other countries.[83] Although it lowered the estimated cost of trial to €8.6 million,[84] Senegal also repeatedly questioned its own jurisdiction over the case and denied Belgian requests for extradition.[85] In 2010, Habré applied to the Court of Justice of ECOWAS for reconsideration of Senegal's jurisdiction over his case, alleging that Senegal's retroactive application of laws violated his human rights.[86] The ECOWAS court agreed and found that Senegal could not directly prosecute Habré.[87]

Even though the court ultimately suggested that an *ad hoc* tribunal be established for the sole purpose of trying Habré,[88] the Senegalese government and courts continued to play games with the international community. In May 2011, Senegal pulled out of negotiations at the AU meant to establish the rules for the Habré tribunal.[89] On August 18, 2011, the Dakar Court of Appeals denied Belgium's third request for extradition, because the request had not been properly filed and was not accompanied by original copies of Belgium's arrest warrant.[90] The court also noted that Senegal's own Attorney General failed to give the court a copy

82. *Senegal: Habré Trial an 'Illusion'*, HUM. RTS. WATCH (June 9, 2011), http://www.hrw.org/news/2011/06/09/senegal-habr-trial-illusion.

83. *See id.*

84. *See id.* Senegal officially agreed to begin the investigation with $11.9 million in donor contributions in November 2010. *See Senegal: Stop Stalling on Habré Extradition*, HUM. RTS. WATCH (Jan. 12, 2012), http://www.hrw.org/news/2012/01/12/senegal-stop-stalling-habr-extradition.

85. On January 10, 2012, Senegal denied the third Belgian extradition request because the arrest warrant attached to the request was not an "authentic copy." *Id.*

86. ECOWAS Decision, *supra* note 16.

87. *Id.*

88. *Id.*

89. *Senegal: Habré Trial an 'Illusion'*, *supra* note 82.

90. Ministère Public c. Habré, Cour d'appel [CA] [regional court of appeal] Dakar, ch. d'accusation, Aug. 18, 2011, Arrêt no. 133 (Sen.) [hereinafter Decision no. 133]. Under Senegalese law, all extradition requests are sent to the executive branch but are approved by the judicial branch. *See* Loi Relative de l'Extradition, No. 71-77 (Dec. 23, 1971) (Sen.).

of interrogation records for Habré as stipulated by the Penal Code.[91] On January 10, 2012, the appellate court once again declared Belgium's extradition request inadmissible because the legal paperwork it received from the Attorney General was not in order.[92]

B. Aut dedere aut judicare *in International Law*

1. *Aut dedere aut judicare* in Conventional International Law

The principle of *aut dedere aut judicare* dates back to Grotius's postulate of *aut dedere aut puniure* (duty to extradite or punish) and has been reimagined in modern scholarship to reflect the norm of presumptive innocence.[93] The principle requires a state that has territorial jurisdiction over someone suspected of committing an international crime to either take steps to prosecute him before its own courts or extradite the offender to another state prepared to try him.[94] Though states have used the duty for over two centuries with regard to domestic law,[95] the obligation was not used in international conventions covering international crimes until the early twentieth century.[96] M. Cherif Bassiouni, the most prolific proponent of *aut dedere aut judicare*, has traced the principle to 102 international conventions[97] falling into 24 different categories of international law.[98]

The numerous conventions containing the principle of *aut dedere aut judicare*, however, do not contain consistent formulations of the principle.[99] Bassiouni and Wise divide the relevant treaties into four categories: (1) "extradition treaties" based on the European Convention on Extradition of 1957,[100] in which the alternative duty to prosecute (*judicare*) is activated only if the state feels that investi-

91. Decision no. 133, *supra* note 90.

92. Ministère Public c. Habré, Cour d'appel [CA] [regional court of appeal] Dakar, ch. d'accusation, Jan. 10, 2012, Arrêt no. 7 (Sen.) [hereinafter Decision no. 7].

93. *See* M. Cherif Bassiouni, Crimes Against Humanity 270 (2011).

94. *See* Bassiouni & Wise, *supra* note 23, at 3.

95. Austria became the first nation to codify the principle into domestic law in 1803. *See* Amnesty Int'l, *Universal Jurisdiction: Questions and Answers*, AI Index IOR 53/020/2001 (Dec. 2001).

96. *See* Bassiouni & Wise, *supra* note 23, at 12 (noting that the 1929 Convention for the Suppression of Counterfeiting seems to be the first treaty incorporating the principle in its full form).

97. Bassiouni, *The Duty to Prosecute and/or Extradite*, *supra* note 33, at 41.

98. Bassiouni & Wise, *supra* note 23, at 7.

99. *See id.* at 11.

100. European Convention on Extradition of 1957 art. 1, Dec. 13, 1957, 1 E.T.S. 24.

gation is appropriate;[101] (2) the "Counterfeiting Convention formula," which allows states to deny extradition and deny prosecution based on domestic jurisdiction laws;[102] (3) the Geneva Conventions,[103] in which all parties to the conventions must submit allegations of "grave breaches" to their courts;[104] and (4) the "Hague Convention Formula," which eliminates the option of denying prosecution based on domestic jurisdictional laws.[105] The Hague Convention Formula, as the strictest codified form of *aut dedere aut judicare*, has become the model for most international conventions since 1970.[106] In fact, the Hague Convention Formula was used in article 7 of the 1984 Torture Convention, which states:

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.[107]

Despite the widespread use of *aut dedere aut judicare* in conventional international law, the principle, even in treaty law, runs into two interrelated problems. First, few states have ever explicitly exercised their rights under prosecute/extradite treaty provisions.[108] Even though states ratify the conventions, they seldom incorporate the duty to prosecute international crimes as mandatory in domestic legislation.[109] The only other time the ICJ addressed an *aut dedere aut judicare* argument was the *Lockerbie Case*, but the issue was not decisive for either the majority or dissent.[110]

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101. Bassiouni & Wise, *supra* note 23, at 11–12.

102. *See id.* at 12–13.

103. Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 46, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 74 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

104. Bassiouni & Wise, *supra* note 23, at 14–15.

105. *See id.* at 16.

106. *See id.* at 17–19 ("A version of the Hague Convention formula appears in almost every subsequent general multilateral treaty requiring the repression of international offenses.").

107. Convention Against Torture, *supra* note 20, art. 7.

108. *See* Bassiouni, *The Duty to Prosecute and/or Extradite*, *supra* note 33, at 45.

109. *See* Anja Seibert-Fohr, Prosecuting Serious Human Rights Violations 259–60 (2009).

110. *See* Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.), Provisional Measures, 1992 I.C.J. 14 (Apr. 14) [hereinafter Lockerbie Case]. In 1992, Libya brought claims against the United States and United Kingdom over interpretation of the prosecute/extradite provision of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil

There, five dissenting judges hinted that the United States and United Kingdom could not seek extradition of three suspected terrorists while the Libyan government had taken up the cases.[111] Other than in *Lockerbie*, however, no state other than Belgium has ever sought to legally enforce its rights under the principle of *aut dedere aut judicare*.[112]

The second issue with conventional iterations of the duty to prosecute or extradite is a lack of clarity regarding the duties imposed.[113] Some legal scholars argue that the obligation, in its current form, remains up to state discretion in terms of prosecution.[114] Others argue that the obligation "*aut judicare*" implies more than submitting the case to the authorities and instead requires conditions of fairness, effectiveness, and good faith.[115] This debate strikes at the heart of the controversy between Belgium and Senegal: both states recognize that they are bound by *aut dedere aut judicare* provisions of the Torture Convention, but they disagree over what constitutes a breach of those obligations.[116]

2. *Aut dedere aut judicare* in Customary International Law

Although the content of treaty-based *aut dedere aut judicare* remains a lively debate, by far the most controversial subject regarding the duty to prosecute or extradite is its status in customary international law.[117] The incorporation of *aut dedere aut judicare*

Aviation. *See* Michael Plachta, *The Lockerbie Case: The Role of the Security Council in Enforcing the Principle of* Aut Dedere Aut Judicare, 12 EUR. J. INT'L L. 125, 126–29 (2001). U.S. and U.K. courts had sought the extradition of two Libyan nationals after both states accused them of bombing Pan Am Flight 103 over Lockerbie, Scotland, which killed 259 passengers and eleven residents of Lockerbie. *Id.* at 126.

111. *See* Lockerbie Case, *supra* note 110, at 51 (Weeramantry, J., dissenting); *id.* at 38 (Bedjaoui, J., dissenting); *id.* at 72 (Ranveja, J., dissenting); *id.* at 109 (El-Josheri, J. *ad hoc*, dissenting); *id.* at 82 (Ajibola, J., dissenting) (suggesting that Libya had a "a right recognized in international law and even considered by some jurists as *jus cogens*" to prosecute the perpetrators).

112. *See generally* Application Instituting Proceedings, *supra* note 22 (Belgium's challenge to enforce rights under *aut dedere aut judicare*).

113. *See, e.g.*, SEIBERT-FOHR, *supra* note 109, at 259.

114. *See* Jackson, *supra* note 30, at 126–27 (noting that states often apply domestic jurisdiction laws rather than find jurisdiction in the conventions themselves).

115. *See* Bassiouni, *The Duty to Prosecute and/or Extradite*, *supra* note 33, at 36.

116. *See* ICJ Final Judgment, *supra* note 26, ¶ 109.

117. *See, e.g.*, BASSIOUNI & WISE, *supra* note 23, at 20 (noting that even Bassiouni and Wise disagree about whether *aut dedere aut judicare* has sufficient support in customary law); SEIBERT-FOHR, *supra* note 109, at 259 (arguing that the principle has not yet achieved customary status).

into customary international law[118] can be conceived of in either narrow or broad terms: (1) it has become a customary rule with respect only to offenses defined in particular treaties; or (2) the principle applies to an entire class of international offenses.[119] Under the narrow view of *aut dedere aut judicare*, the principle has only achieved customary status because treaties on certain topics, such as international terrorism, consistently contain prosecute/extradite provisions.[120] On the other hand, aside from Belgium, M. Cherif Bassiouni appears to be the only legal scholar to support the broader view of *aut dedere aut judicare* under customary international law.[121] Bassiouni argues that *aut dedere aut judicare* applies to all *jus cogens* crimes[122] because all states have an interest in the suppression of genocide, crimes against humanity, slavery, and torture.[123] A 2006 report by the United Nations (UN) International Law Commission recognized the potential for *aut dedere aut judicare* for *jus cogens* crimes but ultimately concluded that no consensus among states exists about its customary status.[124]

Many states and scholars believe that *aut dedere aut judicare* has not achieved customary status for all *jus cogens* norms.[125] First, the conventions against genocide and slavery do not contain duties

118. Customary international law is established by a general and consistent state practice derived from a belief by states that they are legally required to act that way (*opinion juris*). *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

119. BASSIOUNI & WISE, *supra* note 23, at 20.

120. *See* Scott M. Malzahn, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 105 (2002).

121. *See* BASSIOUNI & WISE, *supra* note 23, at 21 (even Bassiouni's co-author does not support this supposition); *see also* Bassiouni, *The Duty to Prosecute and/or Extradite*, *supra* note 33, at 36.

122. *Jus cogens* norms are peremptory norms under international law from which derogation is never permitted. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Generally accepted *jus cogens* norms include the prohibition against genocide, piracy, slavery, and torture. *Id.*

123. BASSIOUNI & WISE, *supra* note 23, at 24–25. Bassiouni bases his argument on his conception of "*civitas maxima*"—the international community as a whole.

124. *See* Special Rapporteur on the Obligation to Extradite or Prosecute, *Preliminary Rep. on the Obligation to Extradite or Prosecute (*"Aut Dedere Aut Judicare"*)*, ¶ 40, Int'l Law Comm'n, U.N. Doc. A/CN.4/571 (June 7, 2006) (by Zdzislaw Galicki).

125. For a discussion of state opposition, see Special Rapporteur on the Obligation to Extradite or Prosecute, *Fourth Rep. on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)*, Int'l Law Comm'n, U.N. Doc. A/CN.4/648, ¶ 80 (May 31, 2011) (by Zdzislaw Galicki) (noting in particular that the United States, United Kingdom, South Korea, and Israel remain opposed to the customary status of *aut dedere aut judicare*). For a discussion of scholarly opposition, *see, e.g.*, SEIBERT-FOHR, *supra* note 109, at 259 ("Taking into account the difference between the existing treaty provisions it is doubtful whether the *aut dedere aut judicare* concept is applicable to all international crimes.").

regarding prosecution similar to those in the Torture Convention.[126] Second, no convention on crimes against humanity exists, meaning that the full extent of the duty to prosecute or extradite relating to crimes against humanity must be based on consistent state practice and *opinio juris*.[127] Finally, the prohibition of *jus cogens* crimes does not imply a corresponding duty to prosecute those crimes.[128] Indeed, while several courts have found international duties to punish grave breaches of international law, no corresponding duty to extradite has been identified.[129]

3. Interpretation by International Bodies of the Duty to Prosecute

While the ICJ has never before decided what would constitute a violation of either the duty to prosecute or the duty to extradite, prior to the court's July 2012 judgment, several sources indicated that the duty to prosecute contains a good faith requirement to prosecute fairly, effectively, and in a timely manner.[130] These implicit requirements under article 7 of the Torture Convention led Brazilian Judge Cançado Trindade to conclude that Senegal violated its obligations under the Convention in the court's 2009 decision on provisional measures in *Belgium v. Senegal*.[131] Although Judge Trindade was the only justice to dissent from the majority's denial of Belgium's request for provisional measures, he was also

126. SEIBERT-FOHR, *supra* note 109, at 269; *see also* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Apr. 30, 1957, 226 U.N.T.S. 3 [hereinafter Slavery Convention].

127. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3–10 (1989). *Opinio juris* ("an opinion of law") describes an action taken by a state under the belief that it is bound by law to do so. *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15–16 (2001).

128. SEIBERT-FOHR, *supra* note 109, at 253 ("It is one thing to say that due to the *erga omnes* character of the crime every State is entitled to investigate, prosecute, and punish, or extradite those responsible, but quite another to say that there is a corresponding duty.").

129. For a general overview of such treaties, see *id.* at 176 (comparing International Convention for the Protection of All Persons from Enforced Disappearances to other human rights conventions generally).

130. *See, e.g.*, BASSIOUNI, *supra* note 93, at 271; *see also* Bassiouni, *The Duty to Prosecute and/or Extradite*, *supra* note 33, at 36; Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), U.N. GAOR, Supp. No. 30, U.N. Doc. A/9030, at 78 (Dec. 3, 1973).

131. Obligation to Prosecute or Extradite (Belg. v. Sen.), Provisional Measures, 2009 I.C.J. 139, ¶¶ 40–42 (May 28) (Trindade, J., dissenting) [hereinafter Provisional Measures].

the only judge to directly address the merits of Belgium's claim against Senegal. In his separate opinion, Trindade hinted that the court should consider an element of time in determining Senegal's compliance with the Torture Convention.[132] Trindade concluded that the principle of *aut dedere aut judicare* "forbids undue delays in the realization of justice."[133]

Judge Trindade is not alone in his belief that the duty to prosecute contains an implied element of timeliness. In fact, a number of other international bodies have interpreted human rights treaties to impliedly contain such an obligation. For instance, in *Bautista de Arellana v. Colombia* the UN Human Rights Committee interpreted "adequate and effective remedies" under article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) to mean that Colombia should expedite criminal proceedings leading to prompt prosecution.[134] Similarly, in *Banda v. Sri Lanka* and *Coronel v. Colombia*, the Human Rights Committee held that unduly prolonged and ineffective proceedings violate articles 2(3) and 7 of the ICCPR.[135] This right to expedited criminal proceedings has been found despite the ICCPR's lack of an explicit duty to prosecute, unlike the Torture Convention.[136]

Regional human rights bodies have also interpreted the duty to prosecute to include an element of timeliness. The Inter-American Court of Human Rights has interpreted the duty to punish under the American Convention on Human Rights to include timely prosecution rooted in the victim's right to due process and justice.[137] According to the court, the definition of a reasonable term is determined on the basis of the complexity of the matter, the procedural activities of the parties, and the conduct of judicial

132. *See id.* ¶ 41.

133. *Id.* ¶ 63 ("Such undue delays bring about an irreparable damage to those who seek justice in vain; furthermore, they frustrate and obstruct the fulfillment of the object and purpose of the United Nations Convention against Torture, to the point of conforming a breach of this latter.").

134. *See* Human Rights Comm., Bautista de Arellana v. Colombia, ¶ 10, U.N. Doc. CCPR/C/55/D/563/1993 (June 14, 1993).

135. *See* Human Rights Comm., Banda v. Sri Lanka, ¶ 7.4, U.N. Doc. CCPR/C/91/D/1426/2005 (June 20, 2005); Human Rights Comm., Coronel v. Colombia, ¶ 6.2, U.N. Doc. CCPR/C/76/D/778/1997 (Sept. 29, 1996).

136. *See* International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

137. *See* Paniagua Morales et. al. Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶¶ 89–94 (Mar. 8, 1998) (finding that the allegation of human rights abuses had not been handled in a diligent and effective manner); Castillo Páez Case, Reparations, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 106 (Nov. 27, 1998).

authorities.[138] Applying this standard, the Inter-American Commission on Human Rights held that a five-year delay in which a single murderer remained unpunished constituted a violation of the right of victims to have an expeditious trial.[139] The Commission stated the following:

> The inter-American system for the protection of human rights includes provision on the reasonable time within which a human rights violation case should be solved. In effect, the American Convention stipulated a series of guarantees that should be observed in every judicial investigation, to ensure the charges are substantiated within a reasonable time.[140]

Similarly, the European Court of Human Rights (ECHR) has interpreted the right to life and the prohibition against torture to require independent and effective investigation.[141] The ECHR also found that human rights conventions require the criminal investigation to be prompt and reasonably expeditious.[142] For example, in 2001 the ECHR held that seven years was too long a time between the willful mistreatment of a victim by police officers and those police officers' convictions.[143]

Based on these precedents, it is clear that international tribunals favor interpreting the duties to investigate, prosecute, and punish human rights violations in light of an element of timeliness. While the ICJ never mentioned any precedent in its Habré decision,[144] the relative uniformity among international human rights bodies is highly instructive on how the duty to prosecute should henceforth be interpreted.

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138. La Cantuta v. Peru, Merits, Reparations, and Costs, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 149 (Nov. 29, 2006).

139. Mangas v. Nicaragua, Case 11.218, Inter-Am. Comm'n H.R., Report No. 52/97, OEA/Ser.L/V/VII.98, doc. 6 rev. ¶ 135 (Feb. 18, 1998).

140. *Id.* ¶ 118; *see also* Espinoza v. Chile, Case 11.725, Inter-Am. Comm'n H.R., Report No. 133/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 90 (Nov. 19, 1999).

141. *See* Kaya v. Turkey, 2000-III Eur. Ct. H.R. 149, ¶ 107 (1998); Powell v. United Kingdom, Decision on Admissibility, 2000-V Eur. Ct. H.R. at 18 (2000).

142. *See* Selmouni v. France, 1999 Eur. Ct. H.R. 66, ¶¶ 78–79 (1999); Akhiyadova v. Russia, Eur. Ct. H.R., ¶ 77 (2008).

143. *See* McKerr v. United Kingdom, 2001-III Eur. Ct. H.R. 475, ¶ 155 (2001).

144. *See generally* ICJ Final Judgment, *supra* note 26, ¶¶ 114–17 (citing no precedent or even general principles of international law to support its conclusion that states must execute their duties under article 7(1) of the Torture Convention "without delay" and within a "reasonable time").

C. *Internationalization of the Habré Case*

1. United Nations Torture Committee

Amidst the complicated path the Habré case has taken through Senegalese, Belgian, and African courts, the case has also raised broad international legal questions. Frustrated by Senegal's lethargic response to its extradition requests, Belgium submitted the case to the UN Committee Against Torture in May 2006.[145] The Committee found that Senegal violated several of its obligations under the Torture Convention.[146] First, Senegal violated the Convention's provisions regarding national implementation by failing to fully execute the treaty twenty years after ratifying it.[147] Second, the Committee found that Senegal "cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with these obligations under the Convention."[148] Finally, the Committee ruled that Senegal had violated the principle of *aut dedere aut judicare* in article 7 of the Torture Convention—the very issue before the ICJ—by failing to submit the Habré case to the competent authorities in a timely manner.[149] While this was certainly an important victory for Habré's victims, the UN Committee's decision was not enforceable against Senegal, but left the door open for Senegal to comply with the Convention.[150]

2. The Case Before The International Court of Justice

After Senegal denied Belgium's repeated extradition requests and continued to stall Habré's prosecution in spite of the Committee Against Torture decision, Belgium submitted the case to the ICJ in 2009.[151] In its application to the ICJ, Belgium averred that Senegal was not fulfilling its conventional and customary duties to prosecute Habré.[152] Belgium claimed that the Torture Convention and customary international law create an obligation on Senegal to

145. Time Is Running Out, supra note 12, at 8.

146. *See* Comm. Against Torture, Guengueng v. Senegal, ¶¶ 9.3–9.11, U.N. Doc. CAT/C/36/D/181/2001 (May 17, 2006).

147. *Id.* ¶¶ 9.5–9.7.

148. *Id.* ¶ 9.8.

149. *Id.* ¶ 9.11.

150. *See* Convention Against Torture, *supra* note 20, arts. 17–21 (outlining the procedures of the Committee Against Torture and noting that its decisions are not mandatory on states).

151. *See* Application Instituting Proceedings, *supra* note 22, at 3.

152. *Id.* ¶ 7.

punish torture and crimes against humanity.[153] Belgium based its first claim on article 7(1) of the Torture Convention, which states that "[t]he State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."[154] The second basis for Belgium's claim was the "customary obligation to punish crimes against humanity."[155] According to Belgium, both of these legal duties follow the principle of *aut dedere aut judicare*. Senegal, on the other hand, responded that it was complying with its duties by submitting the case to the AU.[156]

In July 2012, the ICJ handed down its decision finding Senegal in breach of its duties under the Torture Convention.[157] In arriving at this conclusion, the ICJ had to make several key determinations. First, over Senegal's objections, the court found that it had jurisdiction to hear the case because the two states disagreed on the interpretation of the Torture Convention.[158] The court, however, also found that it lacked jurisdiction to consider Belgium's customary international law argument regarding *aut dedere aut judicare* and instead could only consider its claims under the Torture Convention.[159] Then moving to the alleged violations of the Torture Convention, the court first found Senegal in breach of article 6(2) of the Convention, which requires states to immediately make a preliminary inquiry into the facts of a torture allegation.[160] The court found that "[i]t is not sufficient . . . for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts."[161] Thus, Senegal breached this duty by failing to initiate even preliminary inquiries into claims against Habré in 2000 and 2008.[162]

Finally, the court found that Senegal breached its duties under article 7(1) of the Torture Convention by failing to submit Habré's

153. *Id.*
154. Convention Against Torture, *supra* note 20.
155. *See* Application Instituting Proceedings, *supra* note 22, ¶ 7.
156. *Id.* ¶ 6, at 9.
157. *See* ICJ Final Judgment, *supra* note 26, ¶ 121.
158. *Id.* ¶ 48.
159. *Id.* ¶ 55.
160. *Id.* ¶ 88.
161. *Id.* ¶ 85.
162. *Id.* ¶¶ 86–88.

case to appropriate authorities within a reasonable time.[163] The court first found that the *aut dedere aut judicare* requirement in article 7 creates an obligation to prosecute any suspected torturer within a state's territory irrespective of the existence of an extradition request.[164] The court simultaneously answered a fundamental question about *aut dedere aut judicare*: "Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State."[165] The court then held that although Belgium only ratified the Torture Convention in 1999, its claim against Senegal was proper because it alleged a breach of an international obligation after 1999—the breach itself occurred after 2000 when Senegal failed to bring Habré to justice, not when the crimes themselves were committed.[166] Lastly, the court found that although article 7 "does not contain any indication as to the time frame for performance" of the duty to prosecute, "it is necessarily implicit in the text that it must be implemented within a reasonable time."[167]

Unfortunately, other than making reference to the Convention's "object and purpose,"[168] the court never explains how it arrives at this important conclusion or what constitutes "reasonable time." Moreover, the court clearly focuses on a temporal restraint on the duty to prosecute but describes different meanings of this requirement: "reasonable time";[169] "undertake[ ] without delay";[170] "take all measures for its implementation as soon as possible."[171] Lastly, the court concluded that as a remedy, Senegal must "take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré."[172]

The case between Belgium and Senegal perfectly frames the debate over *aut dedere aut judicare* and its requirements. On the one hand, the ICJ had to decide what the duty to prosecute or extradite under the Torture Convention actually obligates a state

163. *Id.* ¶¶ 114–17.
164. *Id.* ¶ 94.
165. *Id.* ¶ 95.
166. *Id.* ¶¶ 102–05.
167. *Id.* ¶ 114.
168. *Id.*
169. *Id.*
170. *Id.* ¶ 115.
171. *Id.* ¶ 117.
172. *Id.* ¶ 121.

to do. On the other hand, the court had to determine what a breach of the duty "*aut judicare*" actually looks like. This determination was the first in its kind for the court and could establish an important precedent applicable to all conventions obligating states to prosecute or punish serious human rights violations.

III. Analysis

In its decision finding Senegal in breach of its international duty to prosecute Hissène Habré, the ICJ articulated a rule that the Torture Convention impliedly places time constraints on states' execution of their duty to prosecute.[173] The following analysis further expounds upon the court's ruling against Senegal by examining (1) how the Torture Convention contains good faith and timeliness requirements, and (2) how other similar international provisions have been interpreted to imply temporal requirements. To that end, this Note concludes that other conventions containing obligations to prosecute serious human rights violations should be interpreted in a way that obligates states to execute those duties in good faith and within a reasonable time.

A. Aut dedere aut judicare *Under the Torture Convention*

Belgium and Senegal did not disagree about Senegal's duty to prosecute Habré. Indeed, the Senegalese government indicated that it had jurisdiction over Habré under article 5 of the Convention and can properly submit him for prosecution under article 7 now that the National Assembly amended the Constitution to remove any procedural hurdles for the case.[174] Senegal did not dispute that it is bound by the principle of *aut dedere aut judicare*, but rather disputed Belgium's interpretation of what that obligation entails. Senegal asserted that it continued to abide by the principle of *aut dedere aut judicare* by referring the case to the AU and ECOWAS and by working with international donors to form a hybrid court to try Habré.[175] Belgium, on the other hand, contended that in order for Senegal to comply with article 7, it must immediately respond to Belgium's extradition requests or submit the case to its Indicting Chamber for investigation and prosecu-

173. *See id.* ¶ 114.
174. *See* Provisional Measures, *supra* note 131, ¶ 6.
175. *See* Application Instituting Proceedings, *supra* note 22, ¶ 6, at 9.

tion.[176] The ICJ mostly agreed with Belgium and adopted a strict, binary interpretation of *aut dedere aut judicare* under article 7.[177]

As stated above, what exactly article 7 and the duty to prosecute or extradite require states to do remains controversial. Some legal realists interpret *aut dedere aut judicare* as providing deference to a state's domestic decisions to prosecute.[178] This theory, however, is an incomplete representation of states' obligations under article 7. While some iterations of *aut dedere aut judicare* in conventional international law, such as in the European Convention on Extradition and the Counterfeiting Convention, allow states to unilaterally object to both extradition and prosecution, treaties following the "Hague Convention Formula" allow no such option.[179] In fact, the Committee Against Torture addressed this interpretation in its opinion on the Habré case: "[T]he State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with these obligations under the Convention."[180] The principle of *aut dedere aut judicare* as expressed in article 7 of the Torture Convention strictly limits state action to either prosecute or extradite and does not permit any deviation from these two options.[181]

An analysis of the text of the Convention, its preparatory work, and its overall object and purpose suggest that that the court correctly interpreted this dual obligation required under article 7. First, the duty to prosecute, as expressed in the Torture Convention, is a legal obligation on states independent from the duty to extradite.[182] Article 5 of the Torture Convention creates an obligation on all states parties to establish jurisdiction over torture offenses regardless of where they were committed and the nationality of the perpetrator or victim.[183]

Once a state establishes jurisdiction over an alleged perpetrator, the state must "submit the case to its competent authorities for the purpose of prosecution" or extradite him.[184] The wording of article 7 indicates that the duty to prosecute does not depend on an extradition request by a country having jurisdiction over the case.

176. *See id.* ¶ 11.
177. *See* ICJ Final Judgment, *supra* note 26, ¶¶ 92, 94.
178. *See* Jackson, *supra* note 30, at 126–27.
179. *See* Bassiouni & Wise, *supra* note 23, at 11–13.
180. Committee Against Torture, *supra* note 146, ¶ 9.8.
181. *See* ICJ Final Judgment, *supra* note 26, ¶¶ 94–95.
182. *See* Seibert-Fohr, *supra* note 109, at 160.
183. Convention Against Torture, *supra* note 20, art. 5.
184. *Id.* art. 7(1).

In fact, the *travaux préparatoires* of the Convention suggest that the drafters intended to create a duty to prosecute independent from—and not dependent on—extradition.[185] Thus, the Torture Convention's duty to prosecute is a stand-alone legal obligation: "The mere fact that the alleged torturer is not extradited, regardless of the reason, is enough to trigger the obligation to submit the case to the prosecuting authorities of the state where the perpetrator is found."[186] Indeed, this is precisely what the ICJ found in holding that the duty to prosecute imposes its own obligations on states irrespective of an extradition request.[187] In fact, the court hardly considered Senegal's continued denial of Belgium's extradition requests and instead focused exclusively on Senegal's independent fulfillment of its article 7 obligation to submit the case to "appropriate authorities."[188]

B. *Timely Prosecution Under Article 7*

Based on its finding that article 7 creates a legal obligation binding states to faithfully pursue *any* torturer within their territory, the ICJ then determined that this obligation implicitly contains an obligation to pursue torture allegations within a "reasonable time."[189] This finding correctly construes a state's legal obligations for three reasons: (1) the Torture Convention as a whole aims to prevent impunity through criminal prosecutions; (2) states must carry out their obligations under the Convention in good faith; and (3) delayed prosecutions can violate victims' rights to due process.

1. The Torture Convention as a Whole Requires Immediate and Prompt State Action

The Torture Convention should be read as imposing time constraints on states' prosecutorial processes because of the Convention's overall objective of preventing impunity and its overall emphasis on immediate state action.[190] First, article 7 should be

185. *See* Seibert-Fohr, *supra* note 109, at 160.

186. *Id.*

187. *See* ICJ Final Judgment, *supra* note 26, ¶ 167; *see also id.*, Separate Declaration by Judge Donoghue, ¶ 4 [hereinafter Separate Declaration by Judge Donoghue] ("From the text alone, it is clear that prosecution and extradition are not on equal footing. The provision obligates a State party to 'submit the case to its competent authorities for prosecution.' Extradition relieves a State party of this obligation . . . . Nonetheless, extradition is not required by this provision nor by any other provision of the Convention.").

188. *See* Separate Declaration by Judge Donoghue, *supra* note 187, ¶¶ 5–6.

189. ICJ Final Judgment, *supra* note 26, ¶ 114.

190. *See id.* ¶¶ 106–12.

read in light of the object and purpose of the entire convention.[191] The preamble to the Torture Convention states that its object is to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[192] Therefore, Senegal's obligation to "submit the case to its competent authorities for the purpose of prosecution" under article 7 should be interpreted in light of the Convention's overarching goal of preventing impunity.[193] As the UN General Assembly has previously expressed, an inherent component of measures meant to prevent impunity is the need for swift justice to victims balanced against proper protections for the accused.[194] Thus, allowing states to single-handedly stymie efforts at accountability is both theoretically and legally impermissible under article 7's use of *aut dedere aut judicare*.[195]

This objective of preventing impunity through swift legal recourse can also be explicitly found elsewhere in the Convention. For instance, article 6(2) requires states to "immediately make a preliminary inquiry into the facts" regarding torture allegations.[196] The ICJ interpreted the immediacy expressed in this provision to mean that "steps must be taken as soon as the suspect is identified in the territory of the State."[197] Because Senegal failed to open any real investigation whatsoever in 2000, after the first civil complaint against Habré, and in 2008, after constitutional amendments paved

191. *See* Vienna Convention on the Law of Treaties, *supra* note 122, art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

192. Convention Against Torture, *supra* note 20.

193. *Id.* art. 7(1); *see also* Separate Declaration by Judge Donoghue, *supra* note 187, ¶ 2 ("Taken as a whole, Articles 4 to 7 of the Convention strike a powerful blow against impunity.").

194. *See* G.A. Res. 60/147, ¶¶ 11, 25, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (guaranteeing victims of international crimes "[a]dequate, effective and prompt reparation for harm suffered").

195. This reluctance to allow states to stall proceedings, for instance, the Torture Committee has repeatedly condemned sham proceedings and *de facto* amnesties meant to immunize alleged torturers. *See, e.g.*, Rep. of the Comm. Against Torture, 23d Sess., Nov. 8–19, 1999, 24th Sess., May 1–19, 2000, U.N. Doc. A/55/44, ¶¶ 56, 59(g); GAOR, 55th Sess., Supp. No. 44 (2000) (criticizing pardons handed out in Peru); *id.* ¶¶ 65, 69(c) (calling for investigation and appropriate prosecution of alleged torturers found in Azerbaijan to prevent impunity); Comm. Against Torture, *General Comment No. 2*, U.N. Doc. CAT/G/GC/2, ¶ 5 (Jan. 24, 2008) ("[A]mnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.").

196. Convention Against Torture, *supra* note 20, art. 6(2).

197. ICJ Final Judgment, *supra* note 26, ¶ 86.

the way for his prosecution, the court concluded that Senegal had breached its international obligation *erga omnes*.[198]

In addition to the article 6(2) requirement of immediate investigation, article 12 obligates states to ensure that "competent authorities proceed to a *prompt* and impartial investigation."[199] Moreover, article 13 requires states to ensure that torture victims under their jurisdiction have the "right to complain to, and to have his case *promptly* and impartially examined by, its competent authorities."[200] These articles, taken together, demonstrate that the drafters intended the Torture Convention to require states to promptly and immediately respond to all aspects of torture allegations, including investigation and prosecution.

2. *Aut Dedere Aut Judicare* Contains an Implicit Duty of Good Faith

Another reason a time requirement can be read into article 7 is that it comports with "good faith" and due diligence requirements inherent in the obligation *aut dedere aut judicare*. This good faith obligation has been addressed in broad terms by a few scholars but never been applied through a legal analysis to the Torture Convention.[201] In recent explications of his groundbreaking work on *aut dedere aut judicare*, Bassiouni explains that the duty to prosecute is not only premised "on a state's willingness, but also on its ability, to prosecute fairly and effectively."[202] "States must act in good faith and use their legal systems in an effective way," which includes a prohibition on sham proceedings constructed to immunize an alleged torturer from extradition.[203] "States must also use their legal systems in a manner that reflects international . . . norms of procedural fairness, which in some areas, like the treatment of offenders, extend it to substantive human rights protections."[204] These implied sub-obligations under the duty to prosecute or extradite have mainly been applied in international instruments on terrorism, which are by far the most common treaties to include

198. *See id.* ¶¶ 87–88.

199. Convention Against Torture, *supra* note 20, art. 12 (emphasis added).

200. *Id.* art. 13 (emphasis added).

201. *See, e.g.*, BASSIOUNI, *supra* note 93, at 271.

202. *Id.*

203. Bassiouni, *The Duty to Prosecute and/or Extradite*, *supra* note 33, at 36.

204. *Id.*

the principle of *aut dedere aut judiciare*.[205] These conventions have historically been interpreted to include the duty of "due diligence," whereby states must act in good faith and non-negligently in the performance of their international obligations.[206]

The Committee Against Torture has explicitly endorsed the concept of good faith and due diligence under *aut dedere aut judicare*. In its 2006 decision addressing the Habré case, the Committee Against Torture interpreted article 7 in light of its object to prevent any torturer from going unpunished and found that "[t]he principle *aut dedere aut judicare* comprises the obligation to prosecute or to extradite in an efficient and fair manner."[207] Hence, the Committee Against Torture expressly adopted Bassiouni's two implicit conditions of the fulfillment of *aut dedere aut judicare*: fairness and effectiveness. These conditions, however, are not limited to the treatment of the accused; they also extend to the prosecution system as a whole and the government's response to requests for extradition.[208] Thus, the actual process by which the Senegalese government submits the Habré case for prosecution must be efficient and fair, and the government must respond to Belgium's extradition requests efficiently and fairly.

3. Temporal Restraints on Prosecutions Comport with Victims' Rights

A final reason the ICJ correctly interpreted article 7 of the Torture Convention as obligating states to submit cases to their authorities within a reasonable time stems from victims' right to justice. In international human rights law, both the accused and the victim have due process rights.[209] The victim's due process right is part

205. *See, e.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178.

206. *See* Malzahn, *supra* note 120, at 105.

207. Committee Against Torture, *supra* note 146, ¶ 7.11.

208. *See id.* The U.N. Human Rights Commission has also interpreted similar phrases such as "effective remedy" to require states to "take effective measures to ensure that . . . criminal proceedings are initiated seeking the prompt prosecution and conviction of the persons responsible" for the ill-treatment. *See* Human Rights Comm., Njaru v. Cameroon, ¶ 8, U.N. Doc. CCPR/C/89/D/1353/2005 (2007); *see also* Human Rights Comm., Saker v. Algeria, ¶ 11, U.N. Doc. CCPR/C/86/D/992/2001 (2006); Human Rights Comm., Boucherf v. Algeria, ¶ 11, U.N. Doc. CCPR/C/86/D/1196/2003 (2006).

209. *See, e.g.*, American Convention on Human Rights art. 25(1), Nov. 22, 1969, 1144 U.N.T.S. 123 ("Everyone has the right to simple and prompt resource . . . ."); ICCPR, *supra* note 136, art. 2(3); [European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, Nov. 4, 1950, 213 U.N.T.S. 222.

and parcel of the right to an effective remedy.[210] In fact, the Torture Convention expressly lays out in article 13 that states have a duty to ensure that a victim within their jurisdiction has the right to "have his case promptly and impartially examined by competent authorities."[211] These considerations led Judge Trindade to issue a lengthy separate opinion concurring in the judgment.

Judge Trindade repeatedly emphasizes the human impact that delayed proceedings have: "[W]ith the persistence of impunity in the present case . . . the *passing* of time will continue hurting people, much more than it normally does, in particular those victimized by the absence of human justice."[212] The court, according to Judge Trindade, ought to bridge the gap between the "time of human justice"—that is, how long prosecutions tend to be in reality—and the "time of human beings"—that is, the reasonable time in which victims should receive justice.[213] Indeed, undue delays in human rights prosecution could amount to a second, ongoing human rights violation for the victim: "Victims of such a grave breach of their inherent rights (as torture), who furthermore have no access to justice . . . are victims of a *continuing* violation . . . ."[214]

C. *Applying Temporal Restraints to Senegal*

Based on the above standards, the ICJ had no difficulty finding Senegal in breach of its responsibility under the Torture Convention. After the Senegalese *Cour de Cassation* ruled that it did not have jurisdiction over Habré's case and deferred the judgment to the executive branch, President Wade eschewed his authority and referred the issue to the AU.[215] Following the AU's recommendation for a domestic trial, the Senegalese National Assembly eventually amended the Code of Criminal Procedure and Constitution to finally pave the way for Habré's prosecution.[216] Unfortunately, the

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210. *See* Carmelo Soria Espinoza v. Chile, Case 11.725, Inter-Am. Comm'n H.R., Report No. 133/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 87 (Nov. 19, 1999); Arges Sequira Mangas v. Nicaragua, Case 11.218, Inter-Am. Comm'n H.R., Report No. 52/97, OEA/Ser.L/V/VII.98, doc. 6 rev. ¶ 118 (Feb. 18, 1998); Kaya v. Turkey, Eur. Ct. H.R., Judgment of 19 Feb. 1998, ¶ 107; Powell v. United Kingdom, 2000-V Eur. Ct. H.R., Decision on Admissibility, ¶ 25 (May 4, 2000).

211. Convention Against Torture, *supra* note 20, art. 13.

212. ICJ Final Judgment, *supra* note 26, Separate Opinion of Judge Trindade, ¶ 145.

213. *Id.* ¶¶ 147–48.

214. *Id.* ¶ 148 (emphasis original).

215. Time Is Running Out, supra note 12, at 7.

216. *See* Provisional Measures, *supra* note 131, ¶ 6.

questionable ECOWAS decision directed Senegal to lead an *ad hoc* tribunal to try Habré.[217]

President Wade used the ECOWAS ruling to essentially extort the international community to pay for Habré's trial. At first, Wade stated that Senegal could not conduct the trial for less than €66 million, but he agreed in November 2010 to settle for €8.6 million from international donors.[218] Once President Wade accepted this offer, the AU began forming the rules and procedures for the *ad hoc* court mandated by ECOWAS.[219]

Senegal inexplicably walked out of the AU negotiations in May 2011, however.[220] What is more, President Wade provoked an uproar from human rights groups on July 8, 2011, when he publically announced without warning that he was sending Habré back to Chad.[221] Two days later, Wade reneged his threat but the government continued to state that Senegal would not prosecute Habré.[222] For over a year, Senegal failed to return to the AU talks and did not given a clear indication that it will prosecute Habré.[223]

President Wade's government delayed the Habré trial for over three years by playing cat-and-mouse games with the international community. By walking out of negotiations in May 2011 to establish an *ad hoc* tribunal and then threatening to expel Habré back to Chad, Senegal did not fulfill the conditions of effective and fair efforts under *aut dedere aut judicare*. What is more, the court of appeals denied Belgium's extradition requests not because of the inadequacy of the requests themselves, but because the executive branch gave the court the wrong documents pursuant to Senega-

217. *See* ECOWAS Decision, *supra* note 16.

218. *Senegal: Habré Trial an 'Illusion'*, *supra* note 82.

219. *Id.*

220. *Id.*

221. *See, e.g.*, *Senegal: Stop Stalling with Habré Extradition*, *supra* note 21; *Senegal Suspends Hissene Habre's Repatriation to Chad*, BBC NEWS (July 10, 2011), http://www.bbc.co.uk/news/world-africa-14101258 (noting that UN High Commissioner for Human Rights, Navi Pillay had condemned Senegal's attempt to expel Habré to Chad).

222. Reed Brody, *Extraditing Habre: Senegal's International Obligations*, JURIST (Mar. 10, 2012), http://jurist.org/hotline/2012/03/reed-brody-habre-senegal.php.

223. It is important to note that on August 22, 2012, Senegal signed an official agreement with the African Union to establish a special court within the Senegalese justice system to try Habré. *See Senegal: New Court to Try Chad Ex-Dictator in Senegal*, HUM. RTS. WATCH (Aug. 22, 2012), http://www.hrw.org/news/2012/08/22/senegal-new-court-try-chad-ex-dictator-senegal. While this is a monumental step for both Senegal and victims of Habré's regime, this development does not change the International Court of Justice's determination that by July 2012, Senegal was still in breach of its international obligation under the Torture Convention.

lese law.[224] Thus, the Senegalese government was the primary impediment to the effort to prosecute Habré in Senegal and the effort to send him to Belgium. Senegal's actions directly contravened the purpose of article 7 and the Torture Convention as a whole because they unduly delayed and prevented the prosecution of an alleged torturer.[225]

D. *Temporal Restraints on Other Duties to Prosecute*

The ICJ's finding, that article 7's duty to prosecute contains an implicit time restriction, need not be limited to the case of Hissène Habré or even the Torture Convention. The court's holding can also be extended to other conventions that obligate states to punish or prosecute serious human rights violations. Such a finding is not without precedent, and the ICJ was not the first international body to apply temporal restraints on states' obligations under human rights treaties.

This rule parallels the interpretation of the duty to prosecute by the UN Human Rights Committee, Inter-American Court of Human Rights, Inter-American Commission on Human Rights, and the ECHR, which have held that human rights violators must be investigated and prosecuted promptly upon accusation.[226] For instance, in *McKerr*, the ECHR found that seven years of impunity violated a victim's right to due process because the accused police officers had still not been convicted for mistreatment.[227] In *Mangas v. Nicaragua*, the Inter-American Commission on Human Rights held that a five-year delay in prosecuting a murderer violated the duty to provide an effective remedy for human rights violations under the American Convention on Human Rights.[228] The UN Human Rights Committee similarly interpreted article 2(3) (the right to an effective remedy) and article 7 (prohibition on torture and cruel, inhumane, and degrading treatment) to prohibit unduly prolonged and ineffective criminal proceedings.[229] The Committee has also held that in cases of "particularly serious"

224. *See* Decision no. 133, *supra* note 90; Decision no. 7, *supra* note 92.

225. *See supra* Part III.B.1.

226. *See, e.g.*, Human Rights Comm., Banda v. Sri Lanka, ¶ 7.4, U.N. Doc. CCPR/C/91/D/1426/2005 (June 20, 2005); Paniagua Morales et. al. Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 4 (Mar. 8, 1998); Mangas v. Nicaragua, Case 11.218, Inter-Am. Comm'n H.R., Report No. 52/97, OEA/Ser.L/V/VII.98, doc. 6 rev. ¶ 118 (Feb. 18, 1998); McKerr v. United Kingdom, 2001-III Eur. Ct. H.R. 475, ¶ 155 (2001).

227. *McKerr*, 2001-III Eur. Ct. H.R. ¶ 159.

228. *See Mangas*, Report No. 52/97, OEA/Ser.L/V/VII.98, doc. 6 rev. ¶ 118–37.

229. *Banda*, U.N. Doc. CCPR/C/91/D/1426/2005, ¶ 7.4.

human rights violations, civil remedies are not enough and a state is obligated to seek criminal prosecution within a reasonable time.[230]

Based on these precedents, and especially the ICJ's decision against Senegal, other international conventions obligating states to punish serious human rights violations can and should be interpreted to mandate prosecution within a reasonable time. It is important here to note that in its *Belgium v. Senegal* decision, the ICJ essentially only interpreted the *aut judicare* half of the *aut dedere aut judicare* formula,[231] meaning its analysis could be applied to other conventions containing a duty to prosecute.

In 2008, Bassiouni calculated that of 267 international criminal law conventions containing certain penal characteristics, 102 provisions provide for prosecution and only seventy-one provisions provide for extradition.[232] Indeed several international conventions do contain the obligation to punish or prosecute crimes such as the right to life, prohibition against torture, protection of liberty and security, and the right of detainees to be treated humanely and with dignity without the corresponding duty to extradite. For instance, the Genocide Convention obligates states "to prevent and to punish" genocide through "effective penalties" and a trial before a competent tribunal.[233] The conventions on slavery, apartheid, racial discrimination, and enforced disappearances contain similar requirements that states criminally punish the human rights violations covered therein.[234] Thus, although the ICJ limited its decision in *Belgium v. Senegal* to a state's duty under the Torture Convention, the court's analysis implying a "reasonable time" requirement within the duty to prosecute can also be read into various other conventions obligating states to punish serious human rights abuses.

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230. *See* Human Rights Comm., Coronel v. Colombia, ¶ 6.2, U.N. Doc. CCPR/C/76/D/778/1997 (Sept. 29, 1996).

231. *See* Separate Declaration by Judge Donoghue, *supra* note 187, ¶ 5.

232. Bassiouni, *The Duty to Prosecute and/or Extradite*, *supra* note 33, at 41 (citing M. Cherif Bassiouni, *International Crimes: The* Rationae Materia *of International Criminal Law*, *in* 1 INTERNATIONAL CRIMINAL LAW 129 (M. Cherif Bassiouni ed., 3d ed. 2008)).

233. Genocide Convention, *supra* note 126, arts. I, V, VI.

234. *See* Slavery Convention, *supra* note 126, art. 6; International Convention on the Suppression and Punishment of the Crime of Apartheid art. IV, Nov. 30, 1973, 1051 U.N.T.S. 243; International Convention on the Elimination of All Forms of Racial Discrimination art. 4(a), Dec. 21, 1965, S. TREATY DOC. 95-18, 660 U.N.T.S. 195; International Convention for the Protection of All Persons from Enforced Disappearances arts. 7(1), 11(1), G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 16, 2005).

IV. Conclusion

Prosecution and punishment are indispensible to the effectiveness of deterrence and achieving justice and reconciliation for victims.[235] In *Belgium v. Senegal*, the ICJ had the opportunity to set far-reaching precedent to further the cause of ending impunity for serious international crimes. For some, the question of what the principle of *aut dedere aut judicare* requires states to do might seem an esoteric exercise in international legal theory. To others, the answer to this question carries real weight. The ICJ's adoption of the "reasonable time" standard implicit in the duty to prosecute could have a tremendous impact on human rights prosecutions and victims' rights.

The ICJ correctly held that Senegal breached its international obligations under article 7 of the Torture Convention by unnecessarily prolonging Hissène Habré's prosecution. Article 7 creates a binary obligation on states to either prosecute or extradite alleged torturers and does not allow any deviation.[236] This duty should be interpreted in light of the Torture Convention and article 7's broader objective of preventing impunity and holding torturers to account, wherever they may be.[237] As such, states have an obligation to fulfill their duty under article 7 faithfully and without undue delay.[238] Senegal clearly breached this implied condition by repeatedly deferring the Habré case to different international bodies and by inexplicably walking away from negotiations to form a special court to try Habré.[239] Senegal also breached its duty to fairly and effectively carry out its article 7 obligations by obstructing Belgium's extradition requests.[240] After twenty-two years of idle attempts to hold Hissène Habré accountable for organizing eight years of nationwide slaughter, the victims of Habré deserve to see him prosecuted.

This conclusion, however, is not limited to prosecutions under the Torture Convention. Numerous other human rights treaties contain explicit duties to punish or prosecute serious human rights abuses, and other international courts have constantly interpreted human rights treaties as implying a time constraint on the duty to

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235. *See* Bassiouni, *supra* note 93, at 269.

236. *See* Seibert-Fohr, *supra* note 109, at 160.

237. *See* Committee Against Torture, *supra* note 146, ¶ 9.7 ("[T]he objective of the provision being to prevent any act of torture from going unpunished.").

238. *See* Provisional Measures, *supra* note 131, ¶¶ 63–64 (Trindade, J., dissenting).

239. *See supra* Part III.C.

240. *See, e.g.*, Decision no. 7, *supra* note 92.

prosecute.[241] Thus, the ICJ's analysis of the Torture Convention ought to be extended to other conventions obligating states to punish serious human rights violations. All victims of mass atrocities deserve justice, and interpreting the duty to prosecute as including an implicit temporal requirement on state action could go a long way in bridging the gap between the time of human justice and time of human beings.

241. *See supra* Part III.D.