

# Prosecutions, Development, and Justice: The Trial of Hisssein Habré

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Sitting with a group of Chadian torture survivors, I am not sure who first mentioned the word “justice,” but the response was sharp and direct: “Since when has *justice* come all the way to Chad?” Clearly, for many torture survivors, justice was more of a punch line than a possibility. Yet, human rights practitioners the world over insist that justice, often taking the form of a prosecution, is an essential component of any response to human rights violations.<sup>1</sup> Today some of the largest human rights nongovernmental organizations (“NGOs”), including Human Rights Watch, Amnesty International, and the Lawyers Committee for Human Rights, have numerous advocates and researchers working on campaigns falling within the rubric of “international justice.” Such NGOs like to point to indicia of progress: international tribunals, though ad hoc and uneven, demonstrate an increasing willingness on the part of the international community to challenge impunity. While the International Criminal Tribunals for Yugoslavia (“ICTY”)<sup>2</sup> and Rwanda (“ICTR”)<sup>3</sup> have met with significant criticism,<sup>4</sup> the proposed Special Court

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1. The idea that “real” justice is somehow an essential precursor to peace and societal healing is most often expressed in the context of the debate about tribunals versus truth commissions. See, e.g., Reed Brody, *Justice: The First Casualty of Truth?*, NATION, Apr. 30, 2001, available at <http://www.hrw.org/editorials/2001/justice0430.htm> (last visited Oct. 19, 2002) (suggesting that while truth commissions are deserving of their achieved status and respect, they often promise more amnesty than truth and therefore should not be considered superior to prosecutions).

2. Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 192, available at <http://www.un.org/icty/basic/statut/statute.htm>.

3. Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1602, available at <http://www1.umn.edu/humanarts/peace/docs/scres955.html>.

4. See, e.g., Makau Murua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 168 (1997) (arguing, *inter alia*, that the tribunals as currently constituted “will have little or no effect on human rights violations of such enormous barbarity”); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 459 (1999) (suggesting that to be successful, a tribunal would need a closer fit between chosen means and stated ends, and calling for tribunal sponsors to articulate their goals clearly). *But see* Peter Rosenblum, *Save the Tribunals: Salvage the*

for Sierra Leone will represent a chastened and improved vehicle for transitional justice.<sup>5</sup> After a lengthy ratification campaign, the Rome Statute<sup>6</sup> has finally entered into force, meaning that the International Criminal Court ("ICC") is now a reality, despite objections from the United States. A 1993 Belgian law, amended in 1999, gives Belgian courts the authority to prosecute individuals accused of genocide, crimes against humanity, and war crimes, regardless of a crime's connection to Belgium or the accused's presence on Belgian soil.<sup>7</sup> The law also explicitly prohibits immunity, making it the world's broadest statute conferring universal jurisdiction. These events can be cast as part of a narrative of progress,<sup>8</sup> whereby a more far-reaching project seems rhetorically plausible.<sup>9</sup> International justice, it would seem, is on the march.

Amid the construction of these international institutional mechanisms, a notable phenomenon has taken place: the development of the private international criminal prosecution.<sup>10</sup> The watershed year was arguably 1998,

*Moment, A Response to Makau Mutua*, 11 TEMP. INT'L & COMP. L.J. 189, 189 (1997) (suggesting that critiques of the tribunals, and especially Mutua's, "judg[e] the tribunals on narrow grounds, without considering their overall importance to the human rights movement").

5. See generally Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (2000) (explaining the structure of the Special Court); *Developments in the Law, International Criminal Law*, 114 HARV. L. REV. 1947, 1980-81 (2001) (outlining some design innovations and hopeful gestures, including: the United Nations Secretary-General's expression of the need to inform and educate Sierra Leonean citizens about the SCSL's work; the fact that the Special Court's temporal jurisdiction is designed to put the worst atrocities in contextual perspective; and the fact that unlike its precursors, the SCSL will sit in the country in which the abuses took place and apply some national law).

6. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999, available at <http://www.un.org/law/icc/statute/romefra.htm>.

7. Loi relative à la répression des violations graves de droit international humanitaire [Law Pertaining to the Punishment of Grave Violations of International Humanitarian Law] (June 16, 1993) (amended Feb. 10, 1999) (Belg.), available at [http://www.asf.be/AssisesRwanda2/fr/fr\\_JPI\\_loi10fev99.htm](http://www.asf.be/AssisesRwanda2/fr/fr_JPI_loi10fev99.htm) (last visited Oct. 19, 2002). This law has been very controversial both inside and outside of Belgium. The Democratic Republic of the Congo challenged Belgium's assertion of jurisdiction under the law in the International Court of Justice and won on the grounds that since Abdulaye Ndombasi was still Minister of Foreign Affairs when he was indicted, he had official immunity. Case Concerning the Arrest Warrant of 11 Apr. 2000 (Demo. Rep. of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), available at <http://www.icj-cij.org/icjwww/idecisions.htm>. More importantly, The Belgium Court of Appeals recently declared a complaint against Israeli Prime Minister Ariel Sharon inadmissible, holding that a case could not proceed against a person who is not in Belgium. See Marlise Simons, *Belgium: Sharon War-Crimes Suit Dismissed*, N.Y. TIMES, June 27, 2002, at A10. If this interpretation stands, it could severely limit application of the Belgian Law.

8. See, e.g., *An African Pinochet*, N.Y. TIMES, Feb. 11, 2000, at A30 (calling the Habré prosecution "a welcome new chapter in the evolution of international criminal law"). For thoughtful criticism of this line of thinking, see Todd Howland & William Calathes, *The U.N.'s International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L. 135, 139 (1998), which maintains that "[t]he creation of an international justice system may or may not enhance respect for human rights. Too many people wrongly assume that the creation of the court will automatically bring positive results. This assumption is as wrong as it is naive."

9. See David Kennedy, *The Disciplines of International Law & Policy*, 12 LEIDEN J. INT'L LAW 9, 87 (1999).

10. The term "private international prosecution" refers to prosecutions of former heads of state and government officials that stem from the private efforts of NGOs or the victims' families. This term stands in contrast to "international tribunals" or "international prosecutions," which often have the

when a group of lawyers working on behalf of victims of military repression in Argentina and Chile persuaded Spanish judge Baltasar Garzón to seek the arrest and extradition of General Augusto Pinochet. Though Pinochet was eventually freed because he was deemed to be medically unfit to stand trial, the case is widely regarded as establishing an important precedent: that a former head of state cannot claim official immunity for torture once a country has signed on to the United Nations Convention Against Torture.<sup>11</sup>

One of the most striking aspects of the Pinochet case was that the Spanish judge claimed the authority to order Pinochet's arrest for crimes committed mostly in Chile, and mostly against Chileans.<sup>12</sup> He based his authority on the rule of "universal jurisdiction," the idea that every state has an interest in and jurisdiction over the perpetrators of certain crimes,<sup>13</sup> usually including those crimes that qualify as *jus cogens*, such as genocide, slavery, and piracy.<sup>14</sup> Though supporters will claim that the doctrine of universal jurisdiction has a long history,<sup>15</sup> until *Pinochet*, it had been a rule of international law more talked about in international legal circles and demanded by international NGOs than used in practice. Other cases have followed in *Pinochet's* wake, such as the arrest of former Chadian dictator Hisssein Habré in Dakar. Future cases along this line almost certainly will arise. Possible targets include Idi Amin, now living in Saudi Arabia; Mengistu Haile Miriam, living in Zimbabwe; and Alberto Fujimori, now living in Japan.

Only time will tell whether or not the Pinochet case will be the first in a line of precedents to endow the doctrine of universal jurisdiction with teeth. Whether or not such cases do indeed deal a blow against impunity, provid-

backing of the United Nations or nation states. The actions against Pinochet and Habré are two examples of international prosecutions.

11. *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 2 W.L.R. 827 (H.L. 1999). This is the holding of *Pinochet II* after the more expansive holding of *Pinochet I* was overturned for the appearance of bias when it was discovered that one of the judges had been a supporter of Amnesty International. For a more detailed chronology of the Pinochet case, see generally Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415 (2000). For a legal analysis of the Pinochet case, see generally J. Craig Barker, *The Future of Former Head of State Immunity after ex parte Pinochet*, 48 INT'L & COMP. L.Q. 937 (1999); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987), reprinted in 23 I.L.M. 1027 (1984) [hereinafter *Convention Against Torture*].

12. HUMAN RIGHTS WATCH, *THE PINOCHET PRECEDENT: HOW VICTIMS CAN PURSUE HUMAN RIGHTS CRIMINALS ABROAD* (Mar. 2000), available at <http://www.hrw.org/campaigns/chile98/precedent.htm> (last visited Dec. 6, 2002).

13. For a general articulation of many of the principles associated with the concept of universal jurisdiction, drawn up by a group of leading international scholars and jurists, see generally THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, available at [http://www.princeton.edu/~lapa/unive\\_jur.pdf](http://www.princeton.edu/~lapa/unive_jur.pdf) (last visited Oct. 19, 2002); Barbara Crossette, *Guidelines Issued for Trials of Rogue Leaders*, N.Y. TIMES, July 23, 2001, at A2.

14. For an interesting critique of the traditional list of *jus cogens* crimes, see generally Hilary Charlesworth and Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

15. See, e.g., Kenneth Roth, *For Justice Without Illusions*, NEWSWEEK, Nov. 2, 1998, at 26 (claiming that Judge Garzón was "operating on the basis of the same centuries-old code of conduct that traditionally allowed any nation to arrest a pirate on the high seas and try him in a national court").

ing a “wake-up call” to dictators worldwide,<sup>16</sup> is also uncertain. The narrative of progress may take a disastrous turn, making these events part of what will come to be seen as an isolated moment, a pipe dream that politics and power may be tamed by international law.

In any case, the campaign to build a stronger system of international justice is now a project that is shared by many and that is likely to continue. Institution-building will go on, focused for the time being on strengthening the ICC. At the same time, we have not seen the last private international criminal prosecution.<sup>17</sup> Because we could be at the beginning of a new trend, now is an important time to examine these prosecutions and ask some basic questions about them. What are they supposed to accomplish? Are they primarily a legal phenomenon? Do efforts to promote “international justice” necessarily entail more courts and more procedure? Could these prosecutions accomplish goals beyond setting international precedents, institutionalizing the concept of universal jurisdiction, and furthering courtroom justice? Can they be used as a vehicle of development, to strengthen communities and to help build the “rule of law?”

One of the great ironies of the Pinochet case is that, for all the talk of legal doctrines like universal jurisdiction, *jus cogens*, extradition, and sovereign immunity, the case was later justified by many in terms of the change that it brought about in Chile—namely, the extent to which it encouraged a national dialogue, enhancing awareness of human rights and thereby contributing to the rule of law.<sup>18</sup> Both the Pinochet and Habré cases carry a powerful potential for change that has been undermined by the strategic decisions of the lawyers involved with the cases, who tend to focus on building precedent and international institutions rather than on the more local benefits that these prosecutions might help to bring about.

This Article will examine the prosecution of Hissein Habré, the former president of Chad, in Dakar, Senegal, looking at the various turns that the plot has taken, the strategies employed at each turn, and what different participants in the case think their work might accomplish. While there are a number of possible goals to shoot for—developing the rule of law, promoting national unity, fostering transitional justice, and building universal jurisdiction by setting a precedent—only one of these goals, building an international precedent, has really played a central role in the strategic choices being made in the Habré case. Where additional favorable effects have

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16. Press Release, Human Rights Watch, Ex-Chad Dictator Indicted in Senegal (Feb. 3, 2000), at <http://www.hrw.org/press/2000/02/hab023.htm> (last visited Oct. 19, 2002) (referring to the Habré case as a “wake-up call” to tyrants and dictators).

17. Barbara Crossette, *Dictators Face the Pinochet Syndrome*, N.Y. TIMES, Aug. 22, 1999, § 4, at 3 (suggesting that dictators must now think twice about international travel due to the increasing possibility of Pinochet-style prosecutions).

18. For example, Diane Orentlicher, a law professor at American University, said that international involvement “expanded the space for Chilean society and institutions to confront their dark past themselves.” Quoted in David Bosco, *Dictators in the Dock*, AM. PROSPECT, Aug. 14, 2000, at 29.

arisen, they have been largely unintentional. Indeed, the way that many frame the problem of *Pinochet*-style prosecutions, as a problem of international law and of international legal precedent, blinds us to some of the most intriguing possibilities of such prosecutions. While justice may be “the first casualty of truth,”<sup>19</sup> we may have also been blinded by the pursuit of justice. These blind spots may be the result of professional bias—nearly everyone working on the case is a lawyer—and may also hint at some of the limitations of human rights discourse itself. Owing chiefly to the legalistic, rights-oriented, and court-centric bias of the lawyers leading the campaign and of human rights discourse in general, the intriguing possibilities of the criminal prosecution are often treated too narrowly and are therefore overlooked.<sup>20</sup> In fact, *Pinochet*-style prosecutions might have a broader function, playing a role in development work by building the rule of law. Human rights lawyers might wage a more effective campaign against impunity by borrowing strategies and techniques normally associated with development work, community organizing, and education.

#### I. THE PROMISES AND PROBLEMS OF INTERNATIONAL PROSECUTION

Advocates of international prosecutions have not always been modest or compromising. In the campaign against impunity, each step of progress is a step toward international justice. The cases are more than trials; they are historic events, “wake-up call[s] to tyrants and victims alike.”<sup>21</sup> According to this school of thought, there can be no truth and no peace without justice, and justice, at the least, can accomplish more than the alternatives, which include creating a truth commission or doing nothing at all. While they can act as a complement to prosecutions in the most favorable of circumstances, commissions fall short. Even at their best (South Africa being the most cited example of a good truth commission), they will never amount to more than compromise solutions. At their worst, commissions are tools exploited by abusive governments as “a soft option for avoiding justice.”<sup>22</sup>

Although they should not necessarily be preferred to purely domestic prosecutions, international prosecutions can act as a “plausible backstop when national justice fails or the perpetrator flees.”<sup>23</sup> In other words, international prosecutions are an extension of domestic criminal systems that

19. Brody, *supra* note 1.

20. A thought by David Kennedy about international lawyers in general seems applicable:

To the extent these professionals and intellectuals control the institutional, cultural, or discursive terrain through which potentially broader popular discussions, impulses, and commitments are transformed into policy, their disciplinary sensibility may narrow the range and moderate the volatility of international political initiatives. I am led to an investigation of disciplinary sensibilities, in other words, by the rather commonplace intuition that a disciplinary culture of this sort could have an effective substantive bias.

Kennedy, *supra* note 9, at 11.

21. HUMAN RIGHTS WATCH, *supra* note 12.

22. See, e.g., Brody, *supra* note 1.

23. *Id.*

kick in when domestic mechanisms fail. Just as the international crime of genocide has been described as murder writ large, the benefits of international prosecutions are essentially those of domestic criminal prosecution writ large: prevention, incapacitation, general deterrence, moral education, alternatives to vigilantism, retribution, restorative justice, and so on. Viewed in this way, the promises of international prosecution mirror the promises of domestic criminal justice.<sup>24</sup>

Some have begun to dissect the traditional justifications for criminal law and to examine them one by one in the context of international prosecutions. According to at least one writer, upon closer examination, many of the traditional justifications of criminal theory become incoherent when articulated at the international level.<sup>25</sup> Even if we accept that international prosecutions have deterrent or retributionist benefits, we might consider that “the classic justifications and goals for punishment, retribution, deterrence, rehabilitation, and incapacitation are the results of an individual nation’s developed value system and are usually only attainable, symbolically or realistically, with a multi-layered and complex criminal justice policy approach.”<sup>26</sup> In other words, because *Pinochet*-style prosecutions are not anchored in a layered domestic context, they more closely resemble shots fired into space—mere publicity or lobbying stunts—than integrated and complex responses to international crimes. Indeed, “publicizing acts alone falls far short of reaching the goals of any court system, whatever those goals may be.”<sup>27</sup>

#### A. Characterizing the Costs and Criticisms

While the criticisms come from many directions, most of the critiques and evaluations of the international justice movement engage the instruments of international justice from within the domain of legalism and legal argument. As if the parameters of the debate have been set, nearly all discussion and advocacy surrounding these *Pinochet*-style prosecutions frame the problem squarely as one of international law and enforcement.<sup>28</sup> From these restricted critiques flows a similarly restricted set of proposed solutions; a legal problem demands a legal solution.

Where people have begun to ask questions about the potential costs of *Pinochet*-style prosecutions, criticism is again usually anchored within the contours of legal systems, criminal law, and effective prosecution, and is linked to the loss of national sovereignty implicit in the idea of universal

24. See *Developments in the Law, International Criminal Law*, *supra* note 5, at 1961 n.25.

25. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39.

26. Howland & Calathes, *supra* note 8, at 150 n.55.

27. *Id.*

28. See generally Symposium, *Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 399 (2001). See also HUMAN RIGHTS WATCH, *supra* note 12 (explaining the Pinochet precedent; universal jurisdiction; crimes that give rise to universal jurisdiction; basics of extradition; statutes of limitations; and all of the legal nuts and bolts of a Pinochet-style case).

jurisdiction. One article groups the costs of international prosecutions into three categories.<sup>29</sup> The first cost is to criminal process: insofar as *Pinochet*-style prosecutions place enforcement in the hands of third-party governments, there is a danger of political abuse. As echoed in the U.S. rationale for withholding support for the ICC, the fear is that prosecutions will become politically motivated and will be directed at undeserving "good-guy" (read "U.S.") targets. The second cost concerns national political autonomy and national prosecutorial discretion, for these prosecutions may be conducted even if the country where the violations occurred has made a decision not to prosecute.<sup>30</sup> The third cost is related to international relations, since for obvious reasons these cases have the potential to create international friction.

The general worry seems to be that these are "political" trials, and there is little political accountability for this type of action. The perceived political nature or potential of these trials may lead to the view that these trials are mere kangaroo courts, the workings of a political lynch mob. This difficulty stems from the fact that even with a massive increase in resources, not all perpetrators will likely be prosecuted for past human rights violations. Consequently, the issue of selectivity, both as to country and as to the actual perpetrators within a country, will spark debate for some time. In Chad and Chile, as in Nazi Germany, thousands are responsible for the violations, but only a very few, the most visible or vulnerable, are singled out for prosecution.<sup>31</sup> And while there is no shortage of evildoers to go after in the world, the Habrés are more likely to be prosecuted, for mostly strategic reasons, than the Kissingers.<sup>32</sup> Given limited resources, one can only reach for the "low-hanging fruit." Thus, under current international law, not even the staunchest advocates of prosecution believe that Kissinger could be brought to trial.

However, while assertions of principled inaction are unconvincing ("if you cannot prosecute everyone, you should prosecute no one"), claims about the

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29. Curtis A. Bradley, *The "Pinochet Method" & Political Accountability*, 3 GREEN BAG 2d 5 (1999).

30. This concern has been forcefully stated by John Bolton, an assistant secretary of state in the Bush administration. According to Bosco, *supra* note 18, at 28–29, Bolton has "attacked these prosecutions as the machinations of a small group of elitist and politically biased human rights advocates meddling in affairs they do not fully understand." Habré ruled Chad "during a tough time in a tough neighborhood" and there is

a strong streak of paternalism at work in the prosecutions. Justice for Pinochet and Habré, in this view, must be determined by the people of their own respective countries and not by a motley collection of nongovernmental activists. Peaceful political change in Chile was the result of a national compromise: a democratically elected government for the country; immunity for Pinochet and his associates.

*Id.*

31. Mutua, *supra* note 4, at 171: "The paltry numbers of those tried and convicted at Nuremberg—twenty-two indictments and nineteen convictions—made a mockery of criminal liability for the massive killings, torture, and other barbarities committed by the Nazis." See also RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

32. For an argument that Henry Kissinger has committed war crimes deserving prosecution, see CHRISTOPHER HITCHENS, *THE TRIAL OF HENRY KISSINGER* (2001).

political nature of these trials are not specious. The perception that first-world lawyers are trying to utilize third-world dictators as test cases, and their countries as legal laboratories for doctrines that even Western courts have not accepted, must be taken seriously and tackled head-on by groups pushing for increased use of international prosecutions. One possible response to the problem of selectivity and patchwork justice has been proposed by Peter Rosenblum, who suggested that despite these limitations, international prosecutions can still achieve significant results

if they succeed in identifying and isolating the major culprits, and prosecuting at least some of them in the near term. It is enough if those who remain free are rendered international pariahs leaving open the possibility of eventual prosecutions, as happened with significant Nazi figures like Adolph Eichmann, or even Klaus Barbie, whose prosecution occurred thirty years after the end of the war.<sup>33</sup>

Clearly, the problems associated with international prosecutions do not lend themselves to a facile accounting; there is no simple way to add up the costs and benefits. We need to move beyond law to gain a better sense of how to assess international prosecutions.

### *B. Beyond Law and Legalism*

A few examinations of international justice have taken their criticisms beyond the parameters of the legal debate and have endeavored to look at the problem from a broader perspective, arguing for a broader solution. For instance, Makau Mutua argues, *inter alia*, that tribunals, prosecutions, and the like “would *only* make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems . . . . As it is, tribunals now orbit in space, suspended from political reality and removed from both the individual and national psyches of the victims as well as the victors . . . .”<sup>34</sup> As was asserted in the context of the ICTR, but which might apply equally to *Pinochet*-style prosecutions, “If the ideal is to facilitate positive social change . . . that brings about reconciliation and the respect for human rights, a system based on ill-thought-out symbolic justice or attainable mass retribution must be scrapped and replaced with a more thought-out and creative strategy . . . .”<sup>35</sup>

But what does a broader, more thought-out, and more creative strategy for *Pinochet*-style prosecutions mean? In the context of the ICTR, Todd Howland and William Calathes suggest that “an intense, creative, and sustained intervention involving the Rwandan government, civil society actors,

33. Rosenblum, *supra* note 4, at 194.

34. Mutua, *supra* note 4, at 168 (emphasis added).

35. Howland & Calathes, *supra* note 8, at 165.



UN entities, international financial institutions, and bi-lateral funding agencies will . . . be needed to address the full spectrum of human rights.”<sup>36</sup> The breadth of this list gives some indication of just how narrow the current response really is, intimating that if nothing is done above a certain threshold, prosecutions can become part of the problem rather than part of the solution. If, at the end of the day, the costs and benefits of prosecutions resulted in a net cost, one would be foolish to persist in using international prosecutions as a tool for justice. However, both Mutua and Howland seem to advance a more extreme argument, suggesting that unless you can get everything “right” from the beginning, you should do nothing at all. This approach ignores the good, even if accidental and unintended, that has come from the international justice movement. Moreover, this spectacularly broad prerequisite approach would probably be unrealistic in the context of a *Pinochet*-style prosecution, essentially creating a recipe for inaction. Until now, most prosecutions have primarily involved groups of victims, lawyers, and human rights NGOs that do not have the resources to pursue such a broad approach. Nevertheless, the strategies and techniques employed by these groups can be augmented and diversified. One area in which these prosecutions might have an impact, and from which they might draw strategy, technique, and methodology, is development work—specifically, “law and development” and building the “rule of law.”

## II. “LAW AND DEVELOPMENT,” THE “RULE OF LAW,” AND INTERNATIONAL CRIMINAL PROSECUTIONS

The function of law in the field of development has been an enduring and troubling topic of debate. Many theories have been developed to articulate linkages between “law” and “development,” and development projects that purport to exploit these linkages have experienced various waves of enthusiasm since World War II.<sup>37</sup> Through its rise, fall, and revival, the term “law

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36. *Id.* at 166.

37. For a review of types of theories, see Elliot M. Burg, *Law and Development: A Review of the Literature and a Critique of “Scholars in Self-Estrangement,”* 25 AM. J. COMP. L. 492, 498 (1977). While a historical treatment of law and development literature is beyond the scope of this Article, a broad brush-stroke timeline of law and development efforts breaks down as follows: the first wave of projects occurred at the close of World War II when the victors tried to remake the vanquished in their own image by rewriting their constitutions. See, e.g., John Maki, *The Japanese Constitutional Style*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947–67, at 8–12 (Dan Henderson ed., 1968). A second wave of enthusiasm occurred during the 1960s after decolonization, when planeloads of (mostly American) lawyers arrived in Africa and Latin America to “train problem solving legal engineers and promote a modern vision of law as an instrument of development policy along capitalist and democratic lines.” Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT’L L. REV. 1335, 1378–79 (1999). According to some accounts, law and development projects of the 1950s and 1960s often consisted of nothing more than the wholesale transplantation of Western legal codes. See, e.g., ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974). According to John H. Merryman, action in the arena of law and social change requires some coherent theory or program that is based on justifiable assumptions about the probable effects of alternative courses of action within the context of that particular society. The problem is that in third-world devel-

and development” has been used in so many ways and has taken so many forms, that reference to law and development now gives little indication as to what is meant by the term. From the introduction of new commercial laws for market economies to the strengthening of bar associations, all legal projects could conceivably fall under the heading of “law and development.”

#### A. *Building the Rule of Law: What's In, What's Out*

One dimension of law and development consists of a set of projects and reforms referred to as “building the rule of law,” many of them carried out and funded by development institutions such as the World Bank.<sup>38</sup> The concept remains a prominent concern for the development community because it is thought that economic growth, the protection of human rights, and other related projects hinge partly on the rule of law. The “rule of law” is, of course, a completely ambiguous term. A World Bank paper on the topic concluded that the term “rule of law” and related concepts—such as *état de droit*, *estado de derecho*, and *rechtsstaat*—have no fixed meaning and seem subject to permanent debate.<sup>39</sup> Hence, it may make more sense to eschew the ambiguous rhetoric of rule of law in favor of the articulation of more specific reform goals. Under this approach, only by looking at a collection of measures can one discern what “building the rule of law” means in a specific instance or to a specific person or institution. Once we begin to define “building the rule of law” as a set of projects and reform measures, an interesting question arises: which measures are being articulated by major development players like the World Bank, and which are not?<sup>40</sup> Especially key in this regard would be to determine which measures are articulated as relevant to the rule of law but nevertheless are not funded.<sup>41</sup>

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opment programs, the American actor has neither a reliable “feel” for the local situation nor an explicit theory of law and social change on which to base his proposals. His only recourse is to project what is familiar to him onto the foreign context. Thus, the U.S. law and development movement was largely a parochial expression of the American legal style. John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 480 (1977). After a period of hibernation, the fall of the Soviet Union in the late 1980s created the necessary conditions for law and development to burst onto the stage once again in a sort of law and development revival. Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.–Apr. 1998, at 95.

38. World Bank, *Building the Rule of Law, Rule of Law Assistance, Standard Measures*, at <http://www1.worldbank.org/publicsector/legal/building.htm> (last visited Sept. 6, 2002).

39. World Bank, *The Rule of Law as a Goal of Development Policy*, at <http://ww1.worldbank.org/publicsector/legal/ruleoflaw2.htm> (last visited Oct. 19, 2002).

40. The World Bank is used as an example here because of its “unmatched institutional resources and pioneering role in establishing policy frameworks designed to protect the poor and the environment and human rights. Other multilateral and bilateral financial institutions often follow the World Bank’s lead as a model for their own policies and practice.” Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 HARV. HUM. RTS. J. 227, 227 (2002).

41. See World Bank, *supra* note 38.

Measures articulated and funded	Measures articulated but not funded
<ul style="list-style-type: none"> <li>• Updating civil laws</li> <li>• Introducing new commercial laws for market economies</li> <li>• Judicial reform</li> <li>• Legislative strengthening</li> <li>• Infrastructure enhancement</li> <li>• Introducing alternative dispute resolution</li> <li>• Improving legal education</li> <li>• Underwriting legal aid clinics</li> </ul>	<ul style="list-style-type: none"> <li>• Retraining prosecutors</li> <li>• Police and prison reform</li> <li>• Bolstering public defenders</li> <li>• Strengthening bar associations</li> <li>• Stimulating public interest law reforms</li> <li>• Supporting advocacy NGOs that use law to promote social and economic goals</li> <li>• Aiding NGOs that promote judicial and legal reform</li> <li>• Training journalists to cover legal matters</li> </ul>

Regardless of the wide-ranging strategies that the World Bank includes on its list of standard measures for rule of law assistance, many have argued that the World Bank's efforts have concentrated primarily on making legal systems in developing countries more market-friendly and that this "focus on narrow, technical issues comes at the expense of more important, but arguably political questions."<sup>42</sup> Given the lack of tidy divisions, it is hard to draw any firm conclusions about the list of standard measures not funded by the World Bank. Nonetheless, in comparison with the funded reforms on this list, the unfunded reforms can be characterized as being more overtly political, more related to the vindication of rights by individuals, more supportive of advocacy by NGOs, and perhaps more threatening to host country governments. Arguably, these less technocratic, more political reforms are the reforms most likely to foster protection of civil and political rights, allowing individuals to seek redress. For example, while updating civil laws and introducing commercial codes may be necessary, giving priority to the following measures may lead to more immediate protection of a particular

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42. David G. Becker, *The Rule of Law in Latin America: A Framework for Analysis*, paper prepared for the 1997 annual meeting of the American Political Science Association, Aug. 28–31, quoted in Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, THE WORLD BANK RESEARCH OBSERVER, vol. 14, no. 1, at 4, 117–36 (Feb. 1999).

community's civil and political rights: stimulating public interest law reforms, supporting advocacy NGOs that use law to promote social and economic goals, or aiding NGOs that promote judicial and legal reform.

The fact that these types of reforms are not funded matters significantly to one who views certain aspects of the rule of law—such as promoting the protection of rights and speedy redress for wrongs—as being linked to “development.” Whether the development of legal systems in ways that enhance protection of rights actually contributes to “development” (i.e., an increase in gross domestic product) is certainly far from obvious. However, one may look to the work of Amartya Sen for insight on this question.<sup>43</sup> Sen's research on famines, for example, concludes that historically, no substantial famine has ever occurred in an independent country that enjoys basic democratic freedoms.<sup>44</sup> “Along a similar line, much new thinking on development stems from the concept of ‘sustainable livelihoods,’ which has a clear political dimension.”<sup>45</sup> It follows that the protection and vindication of rights, efforts to spur sustained legal reform to strengthen local judicial systems that protect these rights, increasing rights consciousness among the population, and ensuring citizens' ability to seek redress all bear a relation to whether or not social and economic rights, increased livelihoods, and rising gross domestic product are possible. Under Sen's theory, efforts to promote aspects of the rule of law that strengthen protection of rights are both an end in themselves—the ability to exercise basic freedoms is part of what it means to be developed in the first place—and a means to an end insofar as there seems to be a high degree of interconnectedness between civil and political freedoms and economic growth and well-being. Yet, the World Bank rarely funds such reforms.

If one studies the concept of “building the rule of law” more categorically, moving away from unpacking the concept as a series of projects and reforms, there seems to be a discernable group of projects related to the rule of law that many development organizations tend to neglect. Thomas Carothers breaks down rule of law projects and reforms into three categories.<sup>46</sup> Type one reforms concentrate on the laws themselves, and type two reforms focus on strengthening law-related institutions.<sup>47</sup> Type three reforms, which have received the least attention in spite of arguably being the most fundamental, have the deeper goal of increasing government's compliance with the law. More precisely, type three reforms seek to bridge the gap between the law on the books and the law in action, forcing governments to respect rights that might exist on paper, if not in practice.<sup>48</sup> This type of reform, however,

43. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

44. AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981).

45. Horta, *supra* note 40, at 230.

46. Carothers, *supra* note 37, at 99–100.

47. One might say that the law and development movement, especially in the 1940s, 1950s, and 1960s, has focused primarily on type one and two reforms.

48. The formal conception of rule of law (type one and two reforms) may place excessive emphasis on

is perhaps the most difficult of the three to achieve because its success depends “less on technical or institutional measures than on enlightened leadership and sweeping changes in the values and attitudes of those in power.”<sup>49</sup> This description insinuates that type three reforms are just another variety of top-down reform. However, given that judicial reform requires strong connections between the public and the actual technical reform,<sup>50</sup> “nonstate activities such as citizen-driven human rights and anti-corruption campaigns can do much to help.”<sup>51</sup> While type three reforms can be effective for the protection and vindication of rights, they comprise a category of reforms that development institutions tend to shy away from because enacting them “requires a level of interventionism, political attention, and visibility that many donor governments and organizations cannot or do not wish to apply.”<sup>52</sup> In other words, looking categorically at the spectrum of rule of law assistance, as Carothers does, again reveals a group of reforms with which development players do not wish to involve themselves.

According to Carothers, type three reforms demand “powerful tools that aid providers are only beginning to develop, especially activities that help bring pressure on the legal system from the citizenry and support whatever pockets of reform may exist within an otherwise self-interested ruling system.”<sup>53</sup> The intriguing, but overlooked, possibility of *Pinochet*-style prosecutions is that they might serve as one of these “powerful tools.” Experience with both the Pinochet and Habré trials has suggested that even when the bulk of efforts and energies focuses on the courtroom, these cases can have enormous reverberations within local legal, political, and social spheres. With their enormous catalytic and consciousness-raising potential, these cases can act as a sort of social impact litigation by providing an impetus for the creation of the political pressure needed for reform, by increasing rights consciousness, and by fostering openness in societies where these issues and traumas were virtually impossible to discuss prior to the trial.

### B. Enter Prosecutions

Some argue that reform cannot be achieved without a society-wide consensus, while others argue that the reform project can help create this consensus.<sup>54</sup> *Pinochet*-style prosecutions will probably never create a society-wide consensus; however, when coupled with a broad range of efforts on different fronts, these trials might do more to inspire the thinking necessary to create a consensus than could the top-down reform approaches that have been wit-

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the “law on the books” as opposed to the “law in action.” World Bank, *supra* note 38.

49. Carothers, *supra* note 37, at 100.

50. Waleed H. Malik, *Challenges of Forging Civil Society Partnerships for Judicial Reform*, at <http://www1.worldbank.org/publicsector/legal/venezuelapaper.doc> (last visited Oct. 8, 2002).

51. *Id.* at 100.

52. Carothers, *supra* note 37, at 105.

53. *Id.*

54. Messick, *supra* note 42.

nessed in the past. Perhaps like the tribunals in Rwanda and the former Yugoslavia, "their potential strength lies in their capacity to mobilize a new constituency."<sup>55</sup> The question is whether or not a narrow emphasis on the courtroom, on winning the trial, and on setting a legal precedent, allows one to harness and focus the social energies and tensions aroused by *Pinochet*-style prosecutions. These energies might be channeled toward some of the aspects of building the rule of law that development institutions like the World Bank have been unwilling to fund. Moreover, to maximize the benefits of international criminal prosecutions, the efforts currently expended on these trials in and around the courtroom should be combined with efforts that are often associated with "development" or "community organizing," such as the implementation of the following: training seminars with local lawyers and legal aid groups, procedures to send seed money to local organizations working to fight impunity on a local level, educational campaigns, work with the local bar association, and measures to provide materials to law schools. By pursuing a broader array of efforts, these trials could serve as a greater impetus to type three reforms. In short, *Pinochet*-style prosecutions could take part in driving the development and evolution of legal systems toward better protection of rights, helping to bridge the gap between the law on the books and the law in action and thereby enhancing conditions for development by promoting the rule of law.<sup>56</sup>

While networks of NGOs could play a very useful role in this kind of reform and development, they currently do not appear to be acting with an eye toward greater rule of law development beyond that which may flow from strengthening international legal precedent and deterrence. This approach seems odd, for even if the primary goal were solely to promote a legal doctrine like universal jurisdiction, "[t]he practice of universal jurisdiction is . . . unlikely to become significantly more regular unless sustained awareness-raising initiatives, programs of law reform and a market convergence of opinion affect domestic decisionmakers over time."<sup>57</sup> Owing to the "interventionist" or "political" bent of type three reforms,<sup>58</sup> traditional develop-

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55. Rosenblum, *supra* note 4, at 194.

56. This is not to say that a broadening of strategy would be easy for NGOs to accomplish. Efforts that include projects like distributing seed money to local organizations and the training of local lawyers and legal aid groups imply a commitment to a problem that even the biggest NGOs may be unable to sustain. The prosecution of Hissein Habré has been run on a shoestring budget. Even obtaining funds for more limited efforts aimed at moving the prosecution forward has been challenging. Moreover, an NGO might invoke expertise and specialization as reasons to leave development efforts to others. This should not, however, preclude bringing other community development organizations under the tent of NGOs working on a prosecution. The way the problem is being framed may prevent groups from considering these possible synergies. These arguments will be examined in more detail in Part III of this Article.

57. Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law*, 35 NEW ENG. L. REV. 400 (2001).

58. For example, the World Bank "is enjoined by its Articles of Agreement from interfering in the political affairs of its members, a prohibition it interprets as preventing it from supporting judicial reform unless the project is relevant to the country's economic development and to the success of the Bank's lending strategy for the country." Messick, *supra* note 42, at 119. One particular political aspect of the

ment institutions tend to ignore such reforms in relation to *Pinochet*-style prosecutions, thereby failing to reach the full potential of their role in the development field. Only by recognizing that the development dimension of international prosecutions is equally as significant as the law-centric, human rights dimension, can these institutions hope to fulfill this potential.

### C. *Human Rights and Development Discourses: Some Differences*

To some extent, the disconnect between “law and human rights” and “development” is natural. On a theoretical level, one might conceptualize what pulls forward both rights protection and development as “a ‘rope’ of multiple, interwoven strands.”<sup>59</sup> These strands include international human rights law and humanitarian law. An equally important strand is “development work” geared toward strengthening local NGOs and legal systems and their ability to foster a grassroots campaign against impunity. These strands are inextricably intertwined; to pull the rope forward, one must necessarily pull all the strands. Hence, international human rights law and development efforts should be mutually reinforcing, not in some indirect way, but in a direct, conscious way that is the product of concerted effort. In their struggles to combat impunity, rights advocates should realize that they can utilize, draw upon, and profit from arguments, strategies, and actions normally associated with capacity-building and development work.<sup>60</sup> On a practical level, however, there may be differences of perception between human rights practitioners and development workers that render collaboration or borrowing strategies problematic.

First, development work is by definition long-term and sustainable. While *Pinochet*-style cases can certainly drag on for some time, they do not come across as sustainable in a developmental sense—the objective is to produce victory at trial, not long-term reform. On a related note, while deterrence may provide an indirect future benefit, human rights discourse is not aggressively forward-looking and prophylactic. Often the claimed aspiration is to “stop the violation now” or to “punish the violators.” Development discourse, on the other hand, seems more attuned to future improvement: making lives better for tomorrow or envisioning a “world free of poverty,” as the World Bank slogan goes;<sup>61</sup> preventing future suffering, not just waiting to report on it.

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Habré and Pinochet trials that would make it very difficult for an organization like the World Bank to fund related efforts is the fact that the World Bank’s largest donor, the United States, is deeply complicit in the human rights violations in both countries.

59. Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT’L L. 121, 123 (2001).

60. Cf. Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 BUFF. HUM. RTS. L. REV. 25, 26 (1998) (arguing that “rights advocates and international financial institutions concerned with education, health care, or poverty should realize that each can, to some degree, draw on and profit from types of arguments and information typically associated with the other”).

61. World Bank, *Our Dream: A World Free of Poverty*, at <http://www.worldbank.org/ourdream> (last vis-

Secondly, human rights discourse tends to be primarily preoccupied with the "violation of private rights by public power,"<sup>62</sup> presumably what is to be remedied at trial. The focus of human rights discourse is not usually on "how well functioning the government is, but on the extent to which pre-political rights of individuals are protected, whether or not the government functions well."<sup>63</sup> Therefore, the need to consider the possibilities of systemic, prophylactic reform is less compelling, especially for problems that produce less violent and dramatic results in the short term, such as corruption.<sup>64</sup>

Thus, certain social justice issues essential to the workability of a development project may be difficult to articulate within the confines of human rights discourse. Consider, for example, the problems caused by the planned Chad-Cameroon Pipeline, the largest private-sector investment project in sub-Saharan Africa. The pipeline, if successful, promises to transport southern Chad's untapped and until now inaccessible oil reserves across Cameroon to the sea, from where the product will reach world oil markets. The revenues generated will then be used by the Chadian government to address some of the basic needs of the population, such as health and education.<sup>65</sup> The alleged massacre by the Chadian government of several hundred people in villages that opposed the project constitutes an obvious rights violation.<sup>66</sup> Other problematic aspects of the project, however, have not been so easy to capture within rights vocabulary. In traditional human rights terms, how does one articulate the following criticisms: a bad lending decision on the part of the World Bank that facilitates repression, directly or indirectly;<sup>67</sup> the complicity of an international corporation in the repression of local populations; or the general corruption that led the Chadian government to spend the first oil revenues on war helicopters instead of health and education? Attempts to articulate the rights implicated by this development project may have been problematic, perhaps because traditional rights discourse is ill-suited to cope with problems occurring at the intersection of interna-

ited Dec. 6, 2002).

62. Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 498 (1999).

63. *Id.*

64. *Id.*

65. Pressure from a coalition of international NGOs led the World Bank to insist that the Chadian government pass a law intended to ensure transparent management of oil revenues. Under the law, the majority of the oil revenues is supposed to be allocated to health and education sector improvements. A legal study conducted by the Harvard Law School Clinical Program suggests that the law is seriously flawed. Briefing Paper, Harvard Law School Human Rights Clinical Program, *Managing Oil Revenues in Chad: Legal Deficiencies and Institutional Weaknesses* (Oct. 1999) (on file with author).

66. Human rights organizations have reported at least 200 extra-judicial killings in the oil-producing region. See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998: CHAD 70 (1999); U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997: CHAD 69-70 (1998).

67. For an attempt to do just that, see Horta, *supra* note 40. See also Genoveva Hernández Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197 (2001).



tional lending institutions, corporations, and national development policy—not to mention that non-state actors are not generally held to human rights law. In a similar vein, the exercise of rights discourse may obscure the development opportunities implicit in more traditional legal projects such as *Pinochet*-style prosecutions.

A third contrast between development and rights discourse flows from differences in the approach to a given problem. Development activists tend to take a practical approach, tinkering with different strategies until they formulate an effective solution. For instance, if import-export substitution does not achieve the desired results, a development worker might then try a structural adjustment program. Rights practitioners, however, generally shy away from this approach because their trade lies in universal absolutes and first principles: today's approach must be consistent with past practice and precedent. Where the development approach to the problem of impunity might lean toward contextualism—advocating a truth commission here, prosecutions there, and sustained grassroots linkages, training, and capacity-building everywhere—the human rights “justice” approach might seek theoretical consistency and demand immediate justice in the form of prosecutions everywhere. On that note, one of the potential costs of integrating development sensibilities into the advocacy efforts surrounding *Pinochet*-style prosecutions and international justice in general would be rhetorical. That is, bringing development thinking to the table makes less tenable an absolutist opposition to truth commissions or to any form of “soft justice” that does not involve a courtroom and a sentence.

How does one reconcile these two approaches in the case of a campaign against impunity that may call for both? Human rights discourse may be looked upon as a hegemonic discourse of emancipation, as advocates increasingly couch issues of social justice in rights terms in order to attract attention on the world stage.<sup>68</sup>

To many, the potential of prosecutions to promote respect for and vindication of human rights is unquestionable.<sup>69</sup> However, as has been noted in the context of international tribunals, “observers have failed to note that prosecutions for past human rights violations—in and of themselves—may not be sufficient to improve the human rights situation. To achieve this requires a clear link between the prosecutions and a strategy to improve the human rights situation of the country.”<sup>70</sup> The reluctance to be forward-looking and prophylactic prevents human rights practitioners from implementing this common-sense realization. As Howland puts it, “[T]he human rights movement has begun to diversify its methods to effect change. While there

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68. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

69. Todd Howland, *Learning to Make Proactive Human Rights Interventions Effective: The Carter Center and Ethiopia's Office of the Special Prosecutor*, 18 WIS. INT'L L.J. 407, 415 (2000).

70. *Id.* at 408 n.3.

is a growing trend among human rights organizations . . . to use proactive means to improve the human rights situation, such efforts are still relatively rare, and even more rarely examined.”<sup>71</sup> Howland observes a “growing recognition of the limits of the methods traditionally employed by human rights organizations, and some human rights organizations are beginning to become involved in work traditionally considered development or relief oriented.”<sup>72</sup> Extension of this trend to *Pinochet*-style prosecutions is necessary if the trials are most able to serve their intended purpose of combating impunity.

### III. CASE STUDY: THE PROSECUTION OF HISSEIN HABRÉ

In looking at a potential *Pinochet*-style prosecution, a strategic decision-maker might see a number of possible goals: building the rule of law, promoting national unity, fostering transitional justice, and strengthening the principle of universal jurisdiction. Of these, only building the *Pinochet* precedent has played a central role in the strategic choices that have been made in the Habré case. Experience suggests that to succeed in even this single goal, a tremendous amount of effort is required at many levels, only one of which is legal and court-centered. Other areas include domestic and international politics, local and international civil society, and grassroots work with victims and their families. In complicated ways, and to different actors, the Habré case both has and has not been about a courtroom victory; unexpected turns in the plot have required ad hoc departures from traditional legal strategy on many occasions, making politics and lobbying, as well as a limited amount of local capacity-building, at times more important than any legal argument. What unites most of the actions taken in Chad is that they have been an instrumental, strategic means of moving the trial forward in Senegal (and later on, in Belgium). In the end, popular opinion in Chad will be the real yardstick of success in this case. But as with *Pinochet*, the great irony of the Habré case is that its most important results—fostering a national dialogue, building the rule of law, and strengthening civil society—have all been adventitious.

The extraordinarily context-specific events and surprising political twists of the Habré case could not likely be reproduced elsewhere. Nonetheless, looking at this story in detail may generate awareness about what kind of efforts are working effectively. Moreover, such analysis may allow one to explore the question of how things would have been different if this case had been conceptualized as integrated development and legal advocacy from the beginning. How would development discourse change the nature of responsibilities, strategies, goals, and outcomes? What exactly would it mean concretely to think of *Pinochet*-style prosecutions as a tool both of development

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71. *Id.* at 407.

72. *Id.* at 412.

and international human rights law? Most importantly, examining the Habré case in some detail may reveal strategies that might be used in future prosecutions of this sort to make a meaningful, sustained mark on the countries where prosecutions are held and from which the victims come.

### A. *Hissein Habré, the Desert Fox*

The Republic of Chad is a relatively large, sparsely populated nation located just north of the African continent's center. Mostly desert and uninhabitable, Chad was, until recently, known for very little besides sand and poverty. Even in colonial times, Chad was considered to be a Sahelian backwater, isolated from the rest of the French colonial empire.<sup>73</sup> Chad was the last French territory in Africa to be occupied, developed, and given a civilian government.<sup>74</sup> It has made its meager, post-colonial living off of cotton, migrant labor, and foreign aid. The impossible product of colonial border drawing, cobbling together Chad's largely Muslim north and its largely Christian south has produced a political powder keg.<sup>75</sup> Chad's post-independence history has been regularly punctuated by civil wars and coups d'état.<sup>76</sup> Two events have recently yanked Chad out of its isolation: as previously mentioned, the construction of an oil pipeline that will be the single largest private-sector investment in sub-Saharan Africa,<sup>77</sup> and attempts to prosecute Chad's former president, Hissein Habré, for torture and crimes against humanity.

Habré, who served as president of Chad from 1982 to 1990, came to power as he left it—in a bloody coup. His eight-year reign was marked by paranoia, clanism, severe political repression, and genocide.<sup>78</sup> While no one is sure of the facts, the truth commission appointed after Habré's fall to investigate his crimes estimated that he is responsible for the torture and death of 40,000 individuals.<sup>79</sup> Some of these victims were simply massacred

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73. See MARIO JOAQUIM AZEVEDO & EMMANUEL U. NNADOZIE, *CHAD: A NATION IN SEARCH OF ITS FUTURE*, at 1 (Westview Press 1998):

Long labeled the Cinderella of the French Empire, Chad was an accidental creation of explorers, military adventurers, intrepid frontiersmen, and rugged administrators, who, left alone, tried to make the best out of isolation . . . even the French, who created Chad, showed little interest in their colony compared with other equatorial African territories . . . .

74. *Id.* at 18.

75. *Id.*:

[T]he French attempted to unite peoples of widely disparate cultural, geographic, economic, social and political backgrounds: Muslims, traditionalists, and Christian; nomads, agriculturalists, herders, and permanent pilgrims . . . . In its brief forty-year formal colonial presence in Chad, however, France found it impossible to create a unified colony out of so diverse a population. As late as 1960, on the very eve of political emancipation, the potential for national conflict was apparent.

76. See generally MARIO JOAQUIM AZEVEDO, *ROOTS OF VIOLENCE: A HISTORY OF WAR IN CHAD* (Gordon & Breach 1998).

77. See generally Uriz, *supra* note 67; Horta, *supra* note 40.

78. See AMNESTY INTERNATIONAL, *CHAD: THE HABRÉ LEGACY*, AFR 20/004/2001 (2002).

79. NATIONAL TRUTH COMMISSION, *THE CHADIAN MINISTRY OF JUSTICE, LES CRIMES ET DÉTOURNEMENTS DE L'EX-PRÉSIDENT HABRÉ ET DE SES COMPLICES* 97 (L'Harmattan 1993).

in their villages after Habré chose a genocidal response to his suspicion that a particular ethnic group opposed him; most died of torture and starvation in the prisons of Habré's secret police, the Directorate of Documentation and Security ("DDS").<sup>80</sup> All of these offenses were carried out with the training and support of both France and the United States.<sup>81</sup> American counselors visited the DDS on a regular basis and helped to train intelligence agents, even sending some back to the United States for special training. In the end, however, even U.S. support and training could not prevent the coup—which was led by Idriss Deby, one of Habré's former lieutenants and Chad's current president—that culminated in Habré's fall and his flight to Senegal, where he has lived ever since. The truth commission called for the immediate arrest and prosecution of Habré and all others responsible for genocide and crimes against humanity. Given that many high-ranking officers in the Deby government, as well as Deby himself, were complicit in Habré's crimes, it is not surprising that extradition from Senegal was never pursued.<sup>82</sup>

### B. *Hunting the Desert Fox*

In Senegal, Habré tried to reinvent himself by putting away the desert fatigues and donning the garb of a pious and grandfatherly Muslim cleric. Exiled to Senegal, he sought to lead a peaceful life among the Senegalese upper class, forgotten by history and the world. However, an interesting, almost accidental confluence of factors would serve to bring Habré within the crosshairs of an international NGO swarm. Since his fall, survivors of his detention camps and victims of his security forces had sought to document Habré's crimes in the hope that he would one day be brought to justice. Over the years, patient and fastidious men like Zakaria Fadoul Khidir, a linguistics professor with a Ph.D. from the Sorbonne, and Souleyman Guengueng, a government functionary who spent two years in Habré's prisons working with the torture victims association created by survivors of Habré's

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80. See AMNESTY INTERNATIONAL, CHAD, NEVER AGAIN?: KILLINGS CONTINUE INTO THE 1990S (1993); AMNESTY INTERNATIONAL, CHAD, A COUNTRY UNDER THE ARBITRARY RULE OF THE SECURITY FORCES WITH THE TACIT CONSENT OF OTHER COUNTRIES (1996). Habré periodically targeted various ethnic groups such as the Sara (1984), Hadjerai (1987), and the Zaghawa (1989), killing and arresting their members en masse when he believed one of their leaders posed a threat to the regime. Most arrests, torture, and executions were carried out by Habré's political police, the DDS, which, according to the truth commission, carried out "all the dirty deeds such as arrest, torture, assassinations, and large-scale massacres." NATIONAL TRUTH COMMISSION, *supra* note 79, at 24.

81. See generally SAM C. NOLUTSHUNGU, LIMITS OF ANARCHY: INTERVENTION AND STATE FORMATION IN CHAD (University Press of Virginia 1996); BOB WOODWARD, VEIL: THE SECRET WARS OF THE CIA 1981–1987, at 97 (1987); René Lemarchand, *The Crisis in Chad*, in AFRICAN CRISIS AREAS AND U.S. FOREIGN POLICY 239 (Gerald J. Bender et al. eds., 1985); AZEVEDO & NNADOZIE, *supra* note 73, at 130–31 (noting that U.S. aid earmarked as a response to "Libyan expansionism" increased throughout the 1980s, providing Habré with most of the weapons needed that France would not make available; the United States was even allowed to train some six or seven hundred anti-Libyan contras in Chad).

82. The Chadian government did initiate a successful lawsuit in Senegal to recover the airplane in which Habré fled, suggesting that Senegal would have been receptive to an extradition request.

prisons, documented 792 instances of Habré's brutality.<sup>83</sup> Due to political conditions in Chad and a lack of resources, their work gathered dust.

In the wake of the Pinochet trial, however, human rights activists and victims had begun to scan the globe for another ex-dictator to bring to justice. While there was no shortage of candidates to choose from, not all of them were accessible. Idi Amin, for example, was safe in Saudi Arabia, where officials claimed that Bedouin hospitality prevented them from following Britain's or Spain's lead. Habré was vulnerable for a number of reasons: Senegalese courts were reputed to be independent; Senegal was signatory to most international human rights instruments, including the United Nations Convention Against Torture; and a truth commission had already documented many of Habré's crimes.

In the summer of 1999, members of Chadian human rights NGOs such as Delphine Djiraibe of the ATPDH (l'Association Tchadienne Pour la Promotion des Droits de l'Homme, a leading Chadian human rights organization), Reed Brody of Human Rights Watch, and Peter Rosenblum of Harvard Law School's Human Rights Program, discussed the idea of trying to bring a prosecution in Senegal under the United Nations Convention Against Torture. Perceiving Senegal as more open to the rule of law than other African nations, the team decided to assess seriously the interest in and means for a prosecution of Habré.<sup>84</sup> Working in secret because of fears that Habré's former supporters in Chad would tip Habré off and thereby allow him time to flee Senegal, two students from Harvard, Genoveva Hernandez and Nicolas Seutin, arranged with Souleyman Guengueng and the torture victims association to copy all of their files and take them out of the country. These files were then used as the basis for a "civil party complaint" against Habré in Senegal, a hybrid creation of the French courts that permits a civil suit to be joined with a criminal investigation. International human rights groups quietly formed a coalition of Senegalese lawyers to represent the victims. Seven victims joined the initial complaint.<sup>85</sup>

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83. Béchir Ben Yahmed, *Un dictateur face à la justice*, JEUNE AFRIQUE L'INTELLIGENT [J.A.I.], Feb. 15–21, 2000, at 23.

84. For an example of talk of pre-decision Senegalese exceptionalism, see Albert Bourgi, Editorial, *Vers l'indépendance du pouvoir judiciaire*, J.A.I., Feb. 15–21, 2000, at 24. See also Chikeluba Kenechuku, *Senegalese court throws out case against Chadian dictator*, ASSOC. PRESS NEWSWIREs, July 4, 2000 (claiming that "[u]ntil Wade was elected in March, ousting incumbent President Abdou Diouf, Senegal's courts were the most respected in Africa"); Reed Brody, *The Prosecution of Hisssein Habré—An "African Pinochet"*, 35 NEW ENG. L. REV. 321, 323 (2001) (asserting that "Senegal's democratic tradition, its relatively independent judiciary, and its leadership role on international rights issues made a successful prosecution conceivable").

85. The groups involved in the case are the ATPDH, the Rally for the Defense of Human Rights, the Association for the Promotion of Fundamental Liberties in Chad, the Chadian League for Human Rights, the Chadian Association for Political Crimes and Repression, the National Organization for Human Rights (of Senegal), the London-based Interights, the International Federation of Human Rights Leagues, the French organization Agir Ensemble pour les Droits de l'Homme, and Human Rights Watch, which acted as the principle motor for the case.

This coalition had to overcome great reluctance. The world may have forgotten Habré; however, his victims had not, and he still cast a long shadow over Chad. While Habré had fallen from power nearly ten years earlier, any discussion of his reign was still taboo. Much of the fear flowed from the fact that many of Habré's former high-ranking officers were still in power throughout Chad, sometimes the very men who had tortured the victims who brought suit.<sup>86</sup> As Mahamat Hassan,<sup>87</sup> a victim who had been shot and left for dead by Habré's men, has said,

I could choose to testify, but you will go home, the international human rights groups will lose interest in the case, and I will be left here with my former torturers who walk down the streets freely. An assassin's bullet could come from anywhere. I will never even see the face of my attacker. What will be my protection? It is better to leave justice and judgment to God.<sup>88</sup>

Even Chadians who were not detained still live in fear. At a conference held in N'djamena during the summer of 2000 about the Pinochet and Habré trials, Habré was only discussed obliquely. Fear of reprisals was tangible, for Habré's torture methods were well known. The methods included sending electric shocks to the genitals and blinding prisoners by spraying insecticide into their eyes. Some techniques were so well known that they acquired a vocabulary all their own, such as the *arbatachar*, where a prisoner's arms and legs are tied behind the back, sometimes resulting in permanent loss of motor function, and *la diète noire*, which consists of death by starvation.<sup>89</sup> In a century with no dearth of gruesome feats, it is hard to rank a man like Habré. Along with the likes of Idi Amin, Mobutu Sese Seko, and Sekou Touré, surely he is a top contender for the macabre honor of the twentieth century's bloodiest African dictator.

### C. The Trial

The initial complaint filed in Dakar may not have been enough to prove crimes against humanity or complicity in torture, but it was enough to convince a Senegalese *juge d'instruction* (examining magistrate), Demba Kandji, to restrict Habré's movements and carry out further investigation. The bat-

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86. Representatives for international NGOs received only a small taste of the extent to which these men can complicate things when they were forced to get their Chadian visa extensions from Mahamat Djibrine, also known as "El-Djonto," one of the former heads of the DDS and now the head of Deby's immigration service. One representative, Olivier Bercault, was nearly deported and was forced to live in hiding for several days until the minister of the interior intervened on his behalf, forcing El-Djonto to grant him a visa.

87. A photograph of Mahamat Hassan showing the wound that nearly killed him is found in NATIONAL TRUTH COMMISSION, *supra* note 79, at 142.

88. Interview with Mahamat Hassan in N'djamena, Chad (July 2000).

89. For a detailed catalogue, see AMNESTY INTERNATIONAL, *supra* note 78; NATIONAL TRUTH COMMISSION, *supra* note 79, at 97.

tle in and out of the courts had begun. Habré immediately began to wage battle the old-fashioned way: by spreading his francs as widely as possible, putting the idea of Senegalese exceptionalism to the test. His plan was to gain acquittal by *baksheesh*. After reportedly receiving enormous sums of Habré's money, sections of a once prosecution-friendly Senegalese press began to tilt in favor of Habré, alleging that he was the victim of a French-American plot.<sup>90</sup>

Abdoul Diouf, the former president of Senegal, had seemed supportive of, and the state prosecutor had given his formal approval to, the prosecution of Habré. On the eve of filing the complaint, various human rights NGOs and the plaintiffs met with the Senegalese minister of justice, who assured them that there would be no political interference.<sup>91</sup> However, the tone of the executive branch began to change after the Senegalese elections and the transfer of power to a new president, Abdoulaye Wade. This about-face, represented most dramatically by the sudden change in position of the state prosecutor,<sup>92</sup> coincided with the appointment of Habré's lawyer, Madické Niang, as special advisor to the president.<sup>93</sup> When the Senegalese bar association threatened to suspend Niang's membership because of the incompatibility of this public function with his role as defense attorney, Wade responded with a semantic sleight of hand: he altered Niang's title to "paid judicial consultant to the government."<sup>94</sup> Soon after, the state prosecutor adopted a position that favored Habré on all counts. Despite these setbacks, the victims and their lawyers remained hopeful, placing a great deal of faith in the much-vaunted independence of the Senegalese judiciary.

On July 4, 2000, after numerous postponements,<sup>95</sup> the Senegalese *Chambre d'Accusation*, the criminal appeals court, responded to Habré's request for dismissal of the complaint. Many argued that a dismissal would constitute a refusal to enforce the Convention Against Torture, which Senegal had signed in 1986 and ratified in 1987.<sup>96</sup> Under this interpretation, the convention is austere and inflexible in its simplicity. *Aut dedere, aut punire*: either you extradite or you punish. To the surprise of many, the Senegalese court dismissed the complaint and freed Habré, claiming a lack of jurisdiction. This raised suspicions of intervention by the executive.<sup>97</sup> Only four days be-

90. Brody, *supra* note 84, at 327.

91. *Id.* at 325.

92. *Décision de la Chambre d'Accusation de la Cour d'Appel*, LE SUD QUOTIDIEN (Sen.), July 6, 2000.

93. Brigitte Breuillac, *La justice sénégalaise annule l'inculpation d'Hissein Habré pour "complicité d'actes de torture"*, LE MONDE, July 6, 2000.

94. Brody, *supra* note 84, at 328 n.27.

95. Integrated Regional Information Networks, *Senegal: Court postpones decision on Hissein Habré trial*, AFRICA NEWSWIRE NETWORK, May 18, 2000 (on file with author).

96. Press Release, Human Rights Watch, *Senegal Actions on Ex-Chad Dictator Deplored* (July 4, 2000), available at <http://www.hrw.org/justice/habre> (last visited Oct. 19, 2002).

97. Press Release, *Federation Internationale des Ligues des Droits de l'Homme, Affaire Hissein Habré Sénégal: repris en main du judiciaire par l'exécutif* (July 4, 2000). See also *La Justice Renonce Hissein Habré*, AGENCE FRANCE PRESSE [A.F.P.], July 4, 2000.

fore the decision, President Wade and the minister of justice had held an unscheduled meeting in which they decided to transfer both the examining magistrate and the head of the *Chambre d'Accusation*.<sup>98</sup> Many observers believed that the Chadian government was secretly relieved by this decision.<sup>99</sup>

Following defeat in the Senegalese courts, victims and local NGOs made efforts to prosecute the former torturers in Chad. The real target of the international NGOs, on the other hand, appeared to be Habré; to do additional work in Chad would have been to lessen the chances of winning the Chadian government's eventual cooperation, which would be crucial to a future prosecution of Habré. Because it was widely known that President Deby and other government officials had participated in Habré's atrocities, the international NGOs feared that attempts to launch prosecutions in Chad would motivate the Chadian government to distance itself from the entire affair. To the victims, local accountability—seeing their former torturers stand trial—was as important as prosecuting Habré, so they pressed on. The results of these efforts, however, possess a surreal quality. The courts initially declared that the court system was unfit to try the case because the truth commission constituted by President Deby after Habré's fall had called for the establishment of a special court with exclusive jurisdiction over matters like the victims' suit.<sup>100</sup> However, this special court was never established. Bringing the situation to a stalemate, a later court ruled that this special court was unconstitutional and therefore *could not exist*.<sup>101</sup> This outcome was not surprising, as few judges in Chad are willing to risk their lives and careers on such a case. Indeed, the efforts to prosecute the former heads of Habré's secret police purportedly spurred an assassination attempt on the Chadian lawyer for the victims.<sup>102</sup>

#### D. After the Gold Rush

While attempts to prosecute Habré had always involved efforts in the media and on the political front in addition to efforts in the courts,<sup>103</sup> the

98. Breuillac, *supra* note 93. See also Press Release, Commission Internationale des Juristes, Communiqué de Presse (July 6, 2000) (voicing "extreme concern over political maneuverings in Senegal that led to the dismissal of charges of torture") (on file with author).

99. See *Arret des poursuites contre Habré: surprise des autorités tchadiennes*, A.F.P., July 4, 2000 (where the Chadian government expressed a timid "surprise" at the results). See also Tidiane Dioh, *Affaire Habré: le dossier s'alourdit*, J.A.I., Nov. 20–26, 2001, at 42.

100. T.P.I. N'Djamena, Premier Cabinet d'Instruction, Nov. 23, 2000, Ordonnance aux fins d'incompétence du Juge d'Instruction du Premier Cabinet Kodjmana Suitigal, available at <http://www.hrw.org/french/themes/habre-ordonnance.html> (last visited Oct. 19, 2002).

101. Cons. Const. Chad, Apr. 6, 2001, No. 002/PCC/SG/001, available at <http://www.hrw.org/french/themes/habre-decisionduconseil.html> (last visited Oct. 19, 2002).

102. Dioh, *supra* note 99, at 44. Jacqueline Moudeina received extensive treatment in Paris after having been the victim of a grenade. She has recently won a prestigious human rights award for her courage and determination. Press Release, Human Rights Watch, Lawyer for Victims of Ex-Chad Dictator Honored (Jan. 17, 2002), available at <http://www.hrw.org/africa/chad.php> (last visited Oct. 19, 2002).

103. An appeal was taken to the Senegalese Cour de Cassation, which, as expected, affirmed the dis-



campaign that followed legal defeat in Senegal focused almost exclusively on the court of public opinion: articles and editorials published in the *New York Times*,<sup>104</sup> as well as letters written to Dato Param Cumaraswamy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, and to Sir Nigel Rodley, the Special Rapporteur on Torture, both of whom made a rare joint public expression of their concern to the government of Senegal.<sup>105</sup> Eventually, Human Rights Watch helped the victims to bring a complaint before the Convention Against Torture Committee. The complaint met with some success but was eventually considered incompatible with continuing efforts to see Habré extradited to a third country. The mounting criticism did finally produce results, though not the precise results the NGOs may have desired. President Wade, seemingly incredulous that the case had carried on as long as it had and tired of the criticism generated by the NGO swarm, asked Habré to leave the country.<sup>106</sup>

If Habré had managed to make his way to a place like Zimbabwe or Iraq, his victims probably would have reached the end of the line, at least in terms of prosecuting Habré himself.<sup>107</sup> But then came an extraordinary intervention: United Nations Secretary-General Kofi Annan himself asked President Wade not to permit Habré to leave the country.<sup>108</sup> Some observers consider Annan's action to have raised some challenging questions about the rights of the accused. After all, Habré is effectively under house arrest with no criminal charges pending against him.

To the NGOs, however, Annan's intervention was nothing short of a *deus ex machina*. While the international NGOs had always preferred to see Habré tried in an African court for political and symbolic reasons, Belgium's expansive, if controversial, jurisdiction laws make that country's courts their best hope for justice. Following deposition of a complaint in Belgium,<sup>109</sup> Judge Daniel Franssen went to Chad in February 2002 to conduct a criminal investigation as part of a "Rogatory Commission." An enormous lobbying effort, spearheaded by local Chadian NGOs, preceded Franssen's visit in an attempt to encourage the Chadian government to cooperate in the investigation. Interestingly enough, the victims were evidently more than happy

missal of the complaint for want of jurisdiction.

104. See, e.g., Norimitsu Onishi, *He Bore Up Under Torture. Now He Bears Witness*, N.Y. TIMES, Mar. 31, 2001, at A3 (telling the personal story of one of the key victims, with the intention of keeping interest in the case alive notwithstanding the defeat in the Senegalese courts). See also Editorial, *Justice Denied in Senegal*, N.Y. TIMES, July 21, 2000, at A18 (criticizing Senegal's decision not to try Hissein Habré for human rights abuses).

105. See Press Release, United Nations, United Nations Rights Experts Express Concern Over Dismissal of Charges Against Hissein Habré (Aug. 2, 2000) (on file with Human Rights Watch).

106. Tidiane Diop, *Affaire Habré: le début de la fin?*, J.A.I., Oct. 16–22, 2001, at 98.

107. In the fall of 2001, Habré did in fact request to leave the country. Abdou Latif Coulibaly, *L'Enver Habré*, LE SUD QUOTIDIEN (Sen.), Oct. 9, 2001.

108. Press Release, Human Rights Watch, Human Rights Watch se félicite de la position du président sénégalais sur l'affaire Habré (Sept. 27, 2001), available at <http://www.hrw.org/french/press/2001/habre0927.htm> (last visited Oct. 19, 2002); Diop, *supra* note 106, at 98.

109. Diop, *supra* note 99, at 42.

about the possibility of moving the case to Belgium, citing European judges' relatively independent nature, which stems from their higher salaries.<sup>110</sup> As of October 2002, however, the possibility of an eventual trial in Belgium has been placed in doubt by the Brussels Court of Appeals' restrictive interpretation of Belgium's universal jurisdiction statute. Under this interpretation, the statute will permit no investigation to be opened in Belgium for war crimes, crimes against humanity, or genocide unless the suspect is found in the country.<sup>111</sup>

Over the last three years the Habré case has required an extraordinary amount of time and money from a broad array of NGOs, students, professors, and the victims. This effort has probably involved more political lobbying than legal maneuvering. While much of this activity was seemingly made necessary by the political intervention of the Senegalese executive, one should keep in mind that even the Pinochet case in Britain involved substantial efforts on the political and media fronts. All efforts were directed at one thing: building the "Pinochet precedent."<sup>112</sup> Many of the tactics employed in that case are unavailable to the majority of the world's torture victims, victims not fortunate enough to have attracted the attention of an international organization like Human Rights Watch or Amnesty International. Even for these NGOs—the biggest human rights NGOs in the world—a case like the prosecution of Habré demands so many resources that neither can be the driving force behind concurrent *Pinochet*-style prosecutions, which will have to be approached one at a time. These cases will be worth their tremendous costs only if they can manage to leave a lasting impression, producing some kind of sustained reform or change. Given limited resources, such prosecutions must be carried out as efficiently as possible; ultimately, these prosecutions must avoid achieving only a hollow courtroom victory—a precedent of international law merely to be discussed in law reviews and built upon in later cases—while the situation in Chad, for example, remains essentially unchanged. If efforts are made to link legal and political maneuvering with related educational, developmental, and reform efforts, international prosecutions might provide the impetus for a sustained grassroots movement against impunity in Chad. Otherwise, once the inter-

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110. Interview with Zakaria Fadoul Khidir, in *Temps Présent: La Traque des Dictateurs* (Télévision Suisse Romande television broadcast, June 7, 2001) (on file with Human Rights Watch).

111. The Belgium Court of Appeals declared a complaint against Israeli Prime Minister Ariel Sharon "inadmissible," holding that a case could not proceed against a person who is not in Belgium. See Marlise Simons, *Belgium: Sharon War-Crimes Suit Dismissed*, N.Y. TIMES, June 27, 2002, at A10. However, the Belgian Appeals Court decision to halt the Sharon case on June 26, 2002 may not be the end of the matter. There is a joint initiative by national and international human rights organizations and members of the Belgian Parliament and government to save and strengthen Belgium's law of universal jurisdiction via a proposed interpretative law that would essentially roll back the Court of Appeals' interpretation. The interpretative law could come up for a vote in October 2002. See Press Release, The Middle East Research and Information Project, Universal Jurisdiction: Still Trying to Try Sharon (July 30, 2002), available at <http://merip.org/pins/pin102.html> (last visited Oct. 19, 2002).

112. HUMAN RIGHTS WATCH, *supra* note 12.

national NGOs have either achieved their precedent, run out of money, or lost interest, Chad's victims will be left behind to question whether symbolic justice is worth its steep price.

#### *E. Rethinking Strategy, Questioning Responsibility*

What difference would it have made if the Habré case had been conceptualized as necessitating integrated development and legal advocacy from the beginning? This hybrid style of advocacy certainly would have changed the way human rights lawyers think and work at the local level. Prosecutions like Habré's raise several questions about the moral obligations of a large, Western, international NGO that wishes to play a catalytic role in getting a prosecution started. Defense lawyers for Habré in Senegal accused the international NGOs of trying to use Senegal as a sort of legal laboratory for doctrines like universal jurisdiction that most Western countries do not themselves recognize. While this accusation may be somewhat exaggerated, there is probably some truth to it. At the very least, an observer might understandably come to see the international NGOs as parachuting into Chad, stirring up the local situation, and then stealing away with their international precedent, leaving the victims and roused former torturers to sort out their differences.

Notably, Souleyman Guengueng and his victims association "had been compiling information on Habré for years before the Harvard students came knocking on his door."<sup>113</sup> Hoping to grab hold of Chad's low-hanging fruit, the international NGOs stepped in and helped to empower an already existing group. However, an adventitious alignment of interests with respect to a particular case does not mean that an international NGO does not have some obligation to Chadian society at large. As an analogy (albeit less than perfect), one might think of the debate about the responsibilities of Western medical research firms toward the impoverished African countries where their AIDS research is performed.<sup>114</sup> Do the international human rights NGOs have a similar responsibility to the communities in which present and future prosecutions are brought? If an international human rights organization is going to get involved in the Chadian judicial system, does the organization have obligations to Chadian society at large? Should it make efforts to strengthen the local bar association, to provide materials to law schools, and to bring some of the lawyers on fellowships to receive additional training, so that the improvement of the Chadian justice system would continue after the organization pulls out?

A development approach would require a more sustained, long-term strategy. NGOs might begin their work by linking to as many local groups

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113. Bosco, *supra* note 18, at 29.

114. See, e.g., Marcia Angell, *Investigators' Responsibilities for Human Subjects in Developing Countries*, 342 *NEW ENG. J. MED.* 967 (2000).

as possible to create an umbrella coalition. The coalition would not consist exclusively of human rights NGOs and would seek to promote the involvement of a broad cross-section of civil society: human rights NGOs, educational and developmental NGOs, churches, unions, and so on. Funding might be obtained and used as seed money for worthy synergistic efforts in local civil society; marches, rallies, media campaigns, outreach, and leafleting in local languages can serve to explain the case and the cause and to increase political pressure. A development approach would also include attempts to get consistent funding in order to sustain efforts for years after the conclusion of the main prosecution. Moreover, a development approach would send the message that even though the trial may be in Senegal, the case is fundamentally about Chad and Chadians. Actions taken in Chad should not be a strategic means to move the trial forward in Senegal; the trial is important, but bringing about change in Chad is a key measure of success, too.

To be fair to all those who have worked on the Habré case, the results achieved so far have been extraordinary. The political and legal maneuvering has been creative, even brilliant. The international NGOs have done much to strengthen local NGOs and to build local capacity to fight against impunity and for rule of law. In addition, the international NGOs have succeeded in acquiring funds for the once moribund torture victims association and have received a grant, which was distributed among the local human rights NGOs. This has allowed the parties involved to proceed with the work of preparing for an eventual trial and to undertake some limited consciousness-raising efforts in Chad (consisting primarily of a few editorials in the local papers). Despite its limited scope, this work is groundbreaking.

There are many plausible arguments against a hybrid advocacy strategy. For instance, an international human rights NGO might object that these hybrid efforts, while laudable, are very expensive; funds, even for the trial alone, are hard to come by. While scarcity of funds may explain a deficiency in the magnitude and depth of an organization's efforts, claiming resource scarcity is also an easy excuse for NGOs to keep themselves out of the messy business of development. Inherently court-centric in their focus, lawyers are easily tempted to spend available funds on a given trial, maintaining that there is not enough money to pursue projects outside of the courtroom. If these same lawyers believed that a broader method of advocacy was important, however, they would find a way to spread out their funds or would simply seek more funds. After all, building a broader coalition by bringing educational and developmental NGOs under the tent could even widen and improve fundraising and other efforts.

Another argument for a more restricted mandate can be articulated as follows: because the trial itself will act as a catalyst for reform in society and will have spillover effects that will help to reinforce the rule of law, nothing needs to be done beyond the trial. In other words, besides spouting the typical legal arguments touching on the ways in which the deterrent effects of

international prosecutions contribute to strengthening the rule of law, one might argue that the case itself will create so much energy that it will serve an educational purpose for the entire community. By means of bringing violations to the surface and publicizing the extent of the atrocities and the perpetrators' identities, victims will be more aware of and more likely to exercise their rights. Experience with the victims and with the local NGOs suggests that the publicity and momentum of the Habré trial have indeed created spillover effects. The trial has created a space for the NGOs to act with greater freedom and boldness, and ordinary Chadians have begun to discuss what was once a taboo subject. But the fact that the trial has served as a catalyst for stronger rule of law and for rights consciousness does not mean that the trial has captured all of the possible gains. One could argue that the trial's apparent spillover effects have been largely accidental or might have been achieved by other means. Much of the local NGOs' newfound capacity for increasingly vigorous action, for instance, may instead derive from the experience of having the international spotlight on Chad in relation to its construction of a transnational oil pipeline. In other words, this new space for advocating reform and the rule of law may be coincidental and have only a tenuous relation to the trial. Because of the extraordinarily context-specific nature of *Pinochet*-style prosecutions, these positive externalities are unlikely to be reproduced unless decision-makers consciously try to bring them about.

While a legal victory is undoubtedly important, lawyers can become so absorbed in that one element that they forget how much more effective advocacy can be. The international NGOs have a self-appointed mission to combat impunity, not Habré *per se*. As the *de facto* leader of an international coalition, Human Rights Watch would not be out of line to use its international weight and its local presence to inspire a more comprehensive and sustainable campaign against impunity within Chad, a campaign that would mix the techniques of international law and the courtroom (trials, press releases, and reporting) with techniques related to development and "building the rule of law" (training seminars, disbursement of seed money to different groups, educational campaigns, work with local bar associations, and the provision of materials to law schools). Of course, this work must be carried out by the local NGOs. Human Rights Watch should never foist the above agenda upon them, but as a leader, it should act as catalyst and, hopefully, as collaborator in an expansive campaign with the local NGOs.

Mutua was only half right. He stated that tribunals and the like would *only* make sense in the context of an overall solution to the foundational problems that unleashed the Chadian genocides in the first place.<sup>115</sup> The suggestion is that unless activists can do everything right from the beginning, they should do nothing. Even in their current narrow application and

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115. Mutua, *supra* note 4, at 168.

with their defects, however, *Pinochet*-style prosecutions carry enormous emancipatory possibilities, perhaps most importantly the possibility of strengthening local civil society and building the rule of law. Working as a kind of powerful medicine, the international prosecution is significant to the victims in Chad, who feel that through it they have been given their day in court.<sup>116</sup> Mutua's assertion could be better read as suggesting that international justice would make *more* sense in the context of a broader, more comprehensive approach, an approach that is still possible despite the tight resource and personnel constraints of the groups currently working on international justice.

On the whole, attempting to utilize Habré's prosecution as both a tool of development and a tool of international human rights law would not be easy. Practitioners would be called to step across disciplinary and discursive lines, combining strategies that may be unfamiliar. Despite the difficulties, these efforts must be undertaken if we are to make real the promise and potential of international prosecution.

#### IV. THE FUTURE

The potential of international prosecution as a catalytic device should not be overstated. Obviously, international prosecutions alone are not going to spur a rule of law revival. They are but tools with intriguing possibilities because of the local and worldwide attention they inevitably draw. They have serious limitations, and there are, as yet, few examples to study. With all of their unexpected turns and upsets, both the Habré and Pinochet cases demonstrate that there can be no guidebook to international prosecutions. Each case will demand a broad array of context-specific tactics. But, if we are indeed witnessing the birth of a new trend, and if there are many prosecutions still to come, now is perhaps the best time to look at which tactics are being used and which are being left out. In this way, we can discover what techniques are generally useful in combating impunity and whether professional and field-related biases are limiting the range of tactics available to us.

Much has been made of the ways in which the World Bank's blind spots lead to human rights problems and the actual worsening of a given political situation.<sup>117</sup> But criticism is relatively sparse with respect to how we frame certain human rights problems in ways that might create blind spots and might thereby lead to lost opportunities, sometimes even exacerbating a given situation by promoting the status quo. In the case of Chad, a narrow view of strategic goals might indeed culminate in the creation of a legal

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116. See, e.g., Interview with Souleyman Guengueng, in *Temps Présent: La Traque des Dictateurs*, *supra* note 110 (explaining that the day the victims were able to depose their complaint in Dakar, he was "mad with joy;" that at that moment, by that very act, he felt bigger than Hissein Habré, a man who, in Guengueng's words, had crushed entire tribes).

117. See Uriz, *supra* note 67; Horta, *supra* note 40.

precedent. At the same time, this narrowness is costly, providing the current government of Chad with a means to dodge accountability by shifting blame to Habré while many who are equally culpable remain in power.

It seems natural for human rights advocates, versed in a vocabulary of rights, to focus on the legal and on the political. Freedom from torture, indefinite detention, and the like are classical civil and political rights that the discourse articulates most powerfully. Not surprisingly, then, a group of human rights lawyers working within this discourse and on these types of problems might overlook the possibility of pursuing a broader, hybrid array of tactics borrowed from development, education, and community organizing. The blind spots of the Habré prosecution may be symptomatic of the blind spots of the discourse and of lawyers generally. Rights advocates seem to accept the shrunken role of prosecutor, watchdog, and denouncer, without considering that a campaign against impunity might also require them to play the role of capacity-builder, teacher, and community development organizer. By acknowledging that rights advocacy and development work are more interrelated than is implied by the segregated nature of the two fields, we might become better rights advocates and better development workers. Thinking about human rights problems as hybrid development problems might make for more effective advocacy and give some grassroots legitimacy to what can often seem like a top-down exercise on the part of the international NGOs. In addition, a law and development approach can spur the formation of new tools to combat impunity.