

Comments

Justice for Chad: The Next Chapter in the Vindication of Human Rights

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I. INTRODUCTION

The sores of civil war and the ethnic cleansing between various tribal groups have long plagued the continent of Africa.¹ The country of Chad has been no exception to this sad reality.² In 1979, a civil war within the borders of this particular region ended;³ however, it did not take long for the bloodshed to resume.⁴ Only two short years later, then Defense Minister Hissene Habré overthrew the national unity government and began a campaign of widespread repression.⁵ This repression was largely characterized by nothing short of the ethnic cleansing of all groups, with the exception of the Goranes and their allies.⁶ After the people of Chad endured eight long years of torture and killings, Habré was eventually overthrown from his position of power by one of his former generals, Idriss Deby, who ousted Habré from his reign of terror with the aid of Libyan forces.⁷ It was Idriss Deby who established the Commission of Inquiry into the Crimes and Misappropriations, Committed by Ex-President Habré, His Accomplices and/or Accessories (“the Commission of Inquiry”) to investigate the nature and full extent of Habré’s dealings.⁸

The investigative findings of the Commission of Inquiry are overwhelming; according to the investigation, from the period of 1982 to 1990, “[t]he Commission of Inquiry counted no less than 3,780 dead.”⁹ This statistic does not include the death of twenty-six foreigners.¹⁰ These numbers should give us all great pause; unfortunately, the statistics only get worse. The Commission of Inquiry further found that 54,000 political prisoners were detained during the same period.¹¹ Even still, the Commission of Inquiry was careful to note that these figures constitute only a modest indicator as to the scope of the calamity, while in reality “[t]he Commission [of Inquiry] estimates in fact that the work it has done covers no more than 10 percent of everything that has happened.”¹² As

1. See generally Anup Shah, *Conflicts in Africa—Introduction*, GLOBAL ISSUES, <http://www.globalissues.org/article/84/conflicts-in-africa-introduction> (last updated May 12, 2010).

2. See generally *Chad Profile*, BRITISH BROADCASTING CHANNEL NEWS, (July 3, 2013, 6:40 AM), <http://www.bbc.co.uk/news/world-africa-13164690>.

3. See generally *Chad: Report of the Commission of Inquiry Into the Crimes and Misappropriations, Committed by Ex-President Habré, His Accomplices and/or Accessories*, in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, LAWS, RULINGS, AND REPORTS 51, 52 (Neil J. Kritz ed., 1995) [hereinafter *Chad*].

4. *Id.*

5. See *id.* at 58-61.

6. *Id.* at 92.

7. *Id.* at 53, 92.

8. *Id.* at 53.

9. See generally *id.* at 80.

10. *Id.*

11. *Id.* at 81.

12. *Id.* at 80.

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one might assume, these findings have spurred a series of litigation against Hissene Habré.¹³

Despite all the evidence of Hissene Habré's crimes against humanity, an underlying procedural issue has presented itself.¹⁴ The issue is whether Habré may be prosecuted for his actions despite the fact that no such crimes for those same actions were codified under national law at the time they were committed.¹⁵ This procedural issue is best resolved by considering both international law¹⁶ as well as some of the underlying principles of natural law theory.¹⁷ It is the position of this Comment that relevant international law, set against the background of natural law theory, holds that independent sovereign nations should be able to prosecute the most egregious of human rights offenses despite a procedural *ex post facto* issue.

While the *ex post facto* "issue" in the particular case of Hissene Habré has garnished a lot of attention as of late,¹⁸ it is perhaps important to note that the application of the *ex post facto* doctrine is far from an infrequent incident in the context of international law.¹⁹ Quite to the contrary, the application of the *ex post facto* doctrine has served to be a serious problem for the international community for quite some time.²⁰ Most notably, the problem became quite serious in as early as 1945 when members of the Nazi regime were prosecuted for various war crimes in Nuremberg, Germany.²¹ On this world stage, the international community was forced to grapple with how to hold some of the most sinister officials in the modern era accountable for crimes that did not exist.²² Surely enough, the prosecution of Hissene Habré is a true test for how the international community will address the pervasive *ex post facto* problem.

Section II of this Comment begins by discussing the *ex post facto* issue as discussed by the International Court of Justice ("ICJ") and the Economic Community of West African States ("ECOWAS") Court of Justice in the suits

13. See *Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS WATCH (Aug. 2, 2003), <http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>.

14. See generally Jan Arno Hessbruegge, *ECOWAS Court Judgment in Habré v. Senegal Complicates Prosecution in the Name of Africa*, 15 AM. SOC'Y OF INT'L L. 1 (Feb. 3, 2010), <http://www.asil.org/insights/volume/15/issue/4/ecowas-court-judgment-habr%C3%A9-v-senegal-complicates-prosecution-name-africa>.

15. *Id.* at 2-3.

16. See *infra* Part III.

17. See *infra* Parts V.A, VI.B.

18. See Miša Zgonec-Rožej, *African Union Tribunal Opens to Try Chad's Habre*, CHATHAM HOUSE (Feb. 11, 2013), <http://www.chathamhouse.org/media/comment/view/189331>.

19. See generally Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

20. See generally *id.*

21. See generally Charles Wyzanski, *Nuremberg: A Fair Trial, A Dangerous Precedent*, THE ATLANTIC, (Apr. 1, 1946, 12:00 PM), http://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/?single_page=true.

22. See generally *id.*

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brought against Habré.²³ This section will further detail the specific underlying issue of this Comment, which examines the context in which Hissene Habré should be prosecuted for his actions.²⁴ Section III will discuss the role that international law plays in the issue.²⁵ Section IV will sample a few international cases related to the focus of this Comment.²⁶ Section V will consider two competing legal theories, natural law theory and legal positivism, and how each theory either legitimizes or competes with the thesis of this Comment.²⁷ In turn, Section VI of this Comment will argue that principles of international law and natural law theory support the conclusion that the option to prosecute Habré within the Senegalese court system should have been preserved, and the creation of the *ad hoc* tribunal is necessary.²⁸ Finally, Section VII of this Comment will conclude with a word on why the *ex post facto* issue is important for the international community, and what implications this particular case will have for similar inquiries in the context of international criminal law.²⁹

II. THE EX POST FACTO PROBLEM VS. HUMAN RIGHTS

A. *Litigation in the International Court of Justice*

In 2005, many victims of Habré’s alleged crimes against humanity brought suit in Belgium under its laws that provide for universal jurisdiction³⁰ over international crimes committed abroad.³¹ In that same year, and in consideration of the allegations of war crimes and crimes against humanity, a Belgian judge issued an arrest warrant for Habré.³² Soon after, Belgium directly filed a case with the ICJ in which it demanded either the extradition or prosecution of Habré in accordance with Belgium’s own obligation under the Convention Against Torture (“CAT”).³³ In July of 2012, the ICJ found that by failing to submit the case of Habré to its competent authorities, Senegal had breached its obligation under article 7, paragraph 1 of CAT.³⁴ The Court further held that, “the Republic

23. See *infra* Parts II.A-C.

24. See *infra* Part II.C.

25. See *infra* Parts III.A-D.

26. See *infra* Parts IV.A-B.

27. See *infra* Parts V.A-B.

28. See *infra* Parts VI.A-B.

29. See *infra* Part VII.

30. See *Belgium: Universal Jurisdiction Law Repealed*, *supra* note 13 (Belgium’s 1993 universal jurisdiction law permitted victims to file complaints in Belgium for atrocities committed abroad. Although the law was repealed in 2003, some cases that were already being investigated by Belgian courts, including Habré’s, were allowed to continue).

31. Hessbruegge, *supra* note 14.

32. *Id.*

33. *Id.*

34. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Press Release ¶5

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of Senegal, must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution if it does not extradite him.”³⁵ It was this ruling that led to the next chapter of litigation for Hissene Habré, which would take place at the ECOWAS Court of Justice.³⁶

B. Litigation in the ECOWAS Court of Justice

In October of 2008, Habré filed a case with the ECOWAS Court of Justice in order to seek relief from a prosecution by the Senegalese government in accordance with a mandate issued by the African Union.³⁷ While litigating his case with the ECOWAS Court of Justice, Habré argued that at the time the alleged international crimes were committed, Senegal did not have the necessary laws to assert jurisdiction over him.³⁸ Habré’s argument was based on a provision of the International Covenant of Civil and Political Rights (“ICCPR”).³⁹ Article 15 of the covenant provides, “[n]o one shall be held guilty of any criminal offense on account of any act or omission, which did not constitute a criminal offense, under national or international law, at the time it was committed.”⁴⁰

Upon consideration of the argument presented by Habré, the ECOWAS Court concluded that international custom requires international tribunals to try international crimes, while national courts only have jurisdiction over crimes that have already been codified under national law.⁴¹ The court reasoned that, “if the factual basis of the intention to try the applicant did not constitute criminal acts under national law of Senegal . . . they are under the international law obligation as such.”⁴² The ECOWAS Court made clear that the mandate issued by the African Union must be implemented in accordance with international custom and any other endeavor by Senegal outside this framework would violate the principle of non-retroactivity of criminal law.⁴³ Moreover, any such action would additionally desecrate the stand against impunity.⁴⁴

(July 20, 2012), available at <http://www.icj-cij.org/docket/files/144/17084.pdf>.

35. *Id.* at ¶ 6.

36. Hessbruegge, *supra* note 14.

37. *Id.*

38. *Id.*

39. *Id.*

40. International Covenant on Civil and Political Rights art. 15, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

41. See Hissène Habré v. Senegal, ECW/CCJ/JUD/06/10, ¶ 58 (Ct. of Justice of the Economic Community of States of West Africa 2010), available at <http://www.asser.nl/upload/documents/20120419T034816-Habre%20Ecowa%202010.pdf>.

42. *Id.*

43. *Id.*

44. *Id.*

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C. Recent Moves by Senegal in Compliance with the ECOWAS Decision

After the 2010 judgment issued by the ECOWAS Court, Senegal and the African Union have faced the challenge of establishing an *ad hoc* special tribunal.⁴⁵ The initial effort has been met with much success; a joint effort by international donors has resulted in total contributions of nearly \$12 million.⁴⁶ While the funding of the special tribunal has been successful, continued efforts between Senegal and the African Union will be necessary to finalize the tribunal's structure.⁴⁷ Tentatively, the tribunal's structure is designed to include four chambers: accusation, instruction, session, and appeals.⁴⁸

Despite the initial success of setting up the *ad hoc* tribunal, there has been mounting pressure by the African Union to complete the process as quickly as possible.⁴⁹ It has been over twenty years since Habré's destructive reign over the people of Chad, and the survivors are anxious for their day in court.⁵⁰ Assuming the establishment of the tribunal continues with little resistance, the people of Chad should take solace in the fact that Habré's prosecution will stay in Africa through the promulgation of the *ad hoc tribunal* in Senegal, rather than being moved to a foreign location that has little to no link to Habré's victims.⁵¹

III. INTERNATIONAL LEGAL AUTHORITIES

A. Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment

In this case, one of the relevant primary sources of international law is CAT.⁵² This law is most applicable to Habré's case because it speaks directly to the offense of torture and other related transgressions.⁵³ Senegal became a signatory to CAT on February 4, 1985, and it was ratified in Senegal on August

45. Christopher Tansey, *Bringing Hissène Habré to Justice: Senegal to Create a Special Tribunal in Compliance with ECOWAS Court Judgment*, HUMAN RIGHTS BRIEF (Apr. 25, 2011), <http://hrbrief.org/2011/04/bringing-hissene-habre-to-justice-senegal-to-create-a-special-tribunal-in-compliance-with-ecowas-court-judgment/>.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See generally Senegal Tribunal to Try Hissene Habre*, SUDAN VISION DAILY (Sept. 2, 2013), <http://news.sudanvisiondaily.com/details.html?rsnpid=219239> (emphasizing the long wait of victims hoping for litigation to continue).

51. Tansey, *supra* note 45.

52. *See Hessbruegge, supra* note 14.

53. Mary Penrose, *It's Good to be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 COLUM. J. TRANSNAT'L L. 193, 207 (2000).

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21, 1986.⁵⁴ The law has several provisions that have particular force in the instant case. Part one, article four of the law provides:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.⁵⁵

This provision essentially requires that each signatory to CAT take proactive measures to codify acts of torture under its criminal law.⁵⁶ However, article seven of part one is even more pertinent to Habre's case, paragraph one stipulates:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.⁵⁷

As noted above, this particular provision under CAT is what concerned the ICJ.⁵⁸ Under the Convention, a signatory country must either extradite or prosecute.⁵⁹ This is precisely what the ICJ held,⁶⁰ and it is within this legal framework that the ECOWAS Court held that Habré must be charged.⁶¹

B. Universal Declaration of Human Rights

An additional source of international law to be discussed is the Universal Declaration of Human Rights ("UDHR").⁶² The UDHR was proclaimed by the United Nations General Assembly⁶³ in Paris on December 10, 1948.⁶⁴ The

54. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbll., June 26, 1987, 1465 U.N.T.S. 24841 [hereinafter CAT].

55. *Id.* at art. 4(1).

56. *See id.*

57. *Id.* at art. 7(1).

58. *See supra* Part II.

59. *See* CAT, *supra* note 55, at arts. 5, 7.

60. Hessbruegge, *supra* note 14.

61. *See generally* *Hissène Habré*, *supra* note 41.

62. Universal Declaration of Human Rights, UDHR, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> [hereinafter UDHR].

63. The General Assembly is the main deliberative, policymaking, and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter of the United Nations. *About the General Assembly*, GEN. ASSEMBLY OF THE UNITED NATIONS, <http://www.un.org/en/ga/about/index.shtml> (last visited Nov. 9, 2013).

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UDHR is truly a milestone document in the history of human rights as it sets out, for the first time, several fundamental human rights to be universally recognized and protected.⁶⁵ In particular, Article 11, subsection 2 provides,

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.⁶⁶

It is this same language the ECOWAS Court found problematic when holding Senegal itself could not prosecute Habré under its domestic law.⁶⁷

C. International Covenant of Civil and Political Rights

Another source of international law that must be addressed is the ICCPR.⁶⁸ Article 15, subsection 1 states, “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”⁶⁹ This provision looks substantially similar to Article 11, subsection 2, of the UDHR.⁷⁰ In fact, it seems the only real difference is that the ICCPR replaces the term “penal offence” with “criminal offence.”⁷¹ That being said, there is a critical difference within the text of Article 15, subsection 2. This provision states, “[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”⁷² The second paragraph specifically provides that the first paragraph does not prevent an act to be tried that was criminal under the general principles recognized by the community of nations.⁷³ The distinction in

64. *The Universal Declaration of Human Rights, History of the Document*, UNITED NATIONS, <http://www.un.org/en/documents/udhr/history.shtml> (last visited Mar. 27, 2014).

65. See generally UDHR, *supra* note 62.

66. *Id.* at art. 11(2).

67. William Schabas, *Bizarre Ruling on Non-Retroactivity From the ECOWAS Court*, PHD STUDIES IN HUMAN RIGHTS (Dec. 4, 2010, 11:26 AM), <http://humanrightsdoctorate.blogspot.com/2010/12/bizarre-ruling-on-non-retroactivity.html>.

68. ICCPR, *supra* note 40, art. 15(1).

69. *Id.*

70. *Cf.* UDHR, *supra* note 62, at art. 11(2).

71. ICCPR, *supra* note 40, at art. 15(1).

72. *Id.* at art. 15(2).

73. *Id.*

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the text between the UDHR and the ICCPR is important and will be discussed in greater detail in upcoming sections.⁷⁴

D. The Rome Statute

A final source of international law relevant to the case of Hissene Habré is what is known as the Rome Statute of the International Criminal Court (“Rome Statute”).⁷⁵ In July of 1998, a conference was held among some 160 States to establish the first treaty-based permanent International Criminal Court (“ICC”).⁷⁶ The treaty adopted at this conference is what serves as the basis of the Rome Statute.⁷⁷ Within the Rome Statute, crimes falling within the ICC’s jurisdiction are listed along with rules of procedure that allow states to cooperate with the ICC.⁷⁸ Several of the relevant crimes listed in Rome Statute include: genocide, crimes against humanity, war crimes, and crimes of aggression.⁷⁹ The codification of these crimes in the Rome Statute was negotiated on the basis of a draft for the statute submitted by the Preparatory Committee on the Establishment of an International Criminal Court.⁸⁰ The International Law Commission originally prepared this same draft.⁸¹ One of the essential ideals promulgated by the International Law Commission is that responsibility for international crimes must be recognized.⁸² It was this central ideal that ultimately led to the establishment of the ICC.⁸³ Although the Rome Statute did not become effective until July of 2002,⁸⁴ and Hissene Habré’s reign of terror lasted from roughly 1981 through 1989,⁸⁵ the general principles recognized by the International Law Commission and the ICC are worth acknowledging. Wide-ranging communities of states have recognized that crimes such as genocide, crimes against humanity, and war crimes need to be enforced.⁸⁶ This important

74. *See infra* Part VI.A.

75. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

76. *What is the Rome Statute?*, THE INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx (last visited Nov. 9, 2013).

77. *Id.*

78. *Id.*

79. *See generally* Rome Statute, *supra* note 75.

80. Laura Barnett, *The International Criminal Court: History and Role*, PARLIAMENT OF CANADA, (Nov. 4, 2008), <http://www.parl.gc.ca/content/lop/researchpublications/prb0211-e.htm>.

81. *Id.*

82. *See Introduction: Origin and Background of the Development and Codification of International Law*, INTERNATIONAL LAW COMMISSION, <http://legal.un.org/ilc/ilcintro.htm> (last visited Jan. 7, 2014).

83. *Id.*

84. Rome Statute, *supra* note 75.

85. *Chad*, *supra* note 3, at 90; Hessbruegge, *supra* note 14.

86. Rome Statute, *supra* note 75, at pmbl.

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international recognition must be considered as the international community processes Habré's responsibility.

IV. CASES IN INTERNATIONAL LAW

A. *The Nuremberg Trials*

The Nuremberg trials held at the Palace of Justice in Germany circa 1944, may be considered one of the earliest instances in which war criminals were prosecuted in the face of the principle of non-retroactivity.⁸⁷ At this proceeding, “[t]wenty-four major political and military leaders of Nazi Germany” were indicted for various offenses including crimes against humanity, aggressive war, and war crimes.⁸⁸ Also, over a hundred additional defendants were tried before the United States Nuremberg Military tribunals.⁸⁹ These individuals, from many walks of German society, were represented in a series of twelve separate trials known as the “Subsequent Nuremberg Proceedings.”⁹⁰

A hallmark of the Nuremberg proceedings is that trial judges based many of the charges not on any rule of domestic law, since none existed, but instead on the basis of international rule.⁹¹ Valentina Spiga explains, “[i]n so doing, the Nuremberg International Military Tribunal adopted the doctrine of substantive justice as opposed to that of strict legality: that is, even in the absence of a clear rule banning conduct as criminal, acts that seriously harm society should not go unpunished.”⁹² The connection between this assertion promulgated by the Nuremberg Court and Article 15(2) of the ICCPR is no coincidence.⁹³ As Spiga continues to explain, “[t]herefore, the *occasio legis*⁹⁴ of these exceptions was most probably the intention to support, *ex post*, what had already been asserted in Nuremberg.”⁹⁵ The history of the proceedings held in Nuremberg,⁹⁶ when read in conjunction with Article 15(2) of the ICCPR,⁹⁷ provides support for the proposition that there are some crimes recognized by the international

87. Valentina Spiga, *Non-Retroactivity of Criminal Law*, 9 J. INT'L CRIM. JUST. 5, 11 (Mar. 2011).

88. *Nuremberg Trials*, MILITARY LEGAL RESOURCES (July 16, 2010), http://loc.gov/rr/frd/Military_Law/Nuremberg_trials.html.

89. *Id.*

90. *Id.*

91. Spiga, *supra* note 87, at 11.

92. *Id.*

93. *Id.* at 7; ICCPR, *supra* note 40, at art. 15(2).

94. ERNEST BRUNCKEN, *SCIENCE OF LEGAL METHOD* 59 (Fred B. Rothman et al. eds., 1st ed. 1969) (*Occasio legis: Latin*; external circumstances causing the making of the rule).

95. Spiga, *supra* note 87, at 12.

96. *Id.*

97. UDHR, *supra* note 62, at art. 15(2).

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community that should not go unpunished because of the presence of an *ex post facto* issue.⁹⁸

B. The Special Court for Sierra Leone

Having looked at the issue of non-retroactivity of criminal law from a historical perspective, it is also helpful to consider a more recent case. As discussed above, the ECOWAS Court made clear that Habré could only be punished for violations against international law through the proceedings of an *ad hoc* international tribunal to be established in Senegal.⁹⁹ This decision serves as a contrast to the recent prosecution against former Liberian President Charles Taylor.¹⁰⁰ Taylor was convicted in April of 2012 of eleven charges,¹⁰¹ including acts of terror, rape, and the conscription of child soldiers during the course of the 1991-2002 civil war within Liberia.¹⁰² Additionally, Taylor was convicted for aiding and abetting rebels who committed war crimes and crimes against humanity in nearby Sierra Leone.¹⁰³

The prosecution of Taylor serves as a unique chapter in international law in one important way; Taylor was the first African head of state to be convicted by an international court.¹⁰⁴ The proceedings brought against Taylor were done through The Special Court for Sierra Leone (“SCSL”) in The Hague.¹⁰⁵ The SCSL was established jointly by the government of Sierra Leone and the United Nations.¹⁰⁶ The SCSL mandate is specifically to try individuals like Taylor, who are alleged to have committed violations of international humanitarian and Sierra Leonean law.¹⁰⁷

While one might initially recognize the similarities between the SCSL and the *ad hoc* international tribunal mandated by the ECOWAS Court of Justice, there are also important differences between the two courts. Most importantly, the tribunal set up to prosecute Habré has been established within Africa on Senegalese soil.¹⁰⁸ This is an important distinction because the SCSL lost much of its legitimacy by prosecuting Taylor in The Hague, as opposed to its normal

98. Spiga, *supra* note 87, at 10.

99. Hissène Habré, *supra* note 41, at 61.

100. Tansey, *supra* note 45.

101. *Ex-Liberia Leader Charles Taylor's 50-year Sentence for War Crimes Sticks as He Loses Appeal*, CBS NEWS (Sept. 26, 2013, 9:03AM), <http://www.cbsnews.com/news/ex-liberia-leader-charles-taylors-50-year-sentence-for-war-crimes-sticks-as-he-loses-appeal/>.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *The Special Court for Sierra Leone: Home*, THE SPECIAL COURT FOR SIERRA LEONE, <http://www.scs-l.org> (last visited Oct. 15, 2013).

107. *Id.*

108. Tansey, *supra* note 45.

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location in Freetown.¹⁰⁹ Contrastingly, Senegal's decision to host an *ad hoc* tribunal keeps Habré's prosecution within Africa rather than moving it to a distant forum like The Hague.¹¹⁰ This is a noteworthy distinction since moving the forum abroad would likely disrupt any real connection to survivors and the families of those who have passed.¹¹¹ The difference between the two forums highlights an important finding: true justice in the prosecution of international crimes is best served in closest proximity to those who have fallen victim to the crimes.¹¹²

Although there are important differences between the SCSL in The Hague and the *ad hoc* tribunal established to prosecute Habré, there are also significant similarities. One important similarity is the necessity of raising funds on an international scale.¹¹³ As noted earlier, the joint effort by a number of international donors has resulted in total contributions of nearly \$12 million for the establishment of the *ad hoc* tribunal in Senegal.¹¹⁴ Funding the SCSL has not been a *de minimus* experience either.¹¹⁵ The operation of the SCSL has required voluntary contributions of some forty different nation-states throughout the world.¹¹⁶ The most significant of these donations have come from Canada, the Netherlands, Nigeria, the United Kingdom, and the United States.¹¹⁷ The United Nations also contributed funding through subventions in 2004, 2011, and 2012.¹¹⁸

The reality that both the SCSL and the *ad hoc* tribunal in Senegal have been incredibly expensive should not be ignored. The expense that these particular tribunals mandate delays the effective administration of justice and fails to utilize available resources.¹¹⁹ Proponents of these tribunals argue the tribunals can ensure regional security,¹²⁰ or may be the only viable alternative in the face of

109. *Id.*

110. *Id.*

111. *Id.*

112. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 734 (2003).

113. *Compare Senegal: Hissene Habré Court Opens*, HUMAN RIGHTS WATCH (Feb. 8, 2013), <http://www.hrw.org/news/2013/02/08/senegal-hissene-habre-court-opens> (listing Chad, the European Union, the Netherlands, the African Union, the United States, Germany, Belgium, France and Luxembourg as international donors), with *The Special Court for Sierra Leone: Home*, *supra* note 106 (reporting that contributions have been made from over 40 different states from around the world).

114. Tansey, *supra* note 45.

115. *The Special Court for Sierra Leone: Home*, *supra* note 106.

116. *Id.*

117. *Id.*

118. *Id.*

119. See generally Celina Schocken, *The Special Court for Sierra Leone Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002).

120. See *Prosecutor vs. Charles Ghankay Taylor*, THE SPECIAL COURT FOR SIERRA LEONE, <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx> (last visited Nov. 9, 2013) ("Due to concerns about regional security should the trial be held in Sierra Leone, the Special Court arranged

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legitimate procedural issues.¹²¹ But, prosecution under the framework of the national court system is much more cost effective in light of the considerable expense needed to run the *ad hoc* tribunal.¹²²

V. COMPETING LEGAL THEORIES

A. *Natural Law Theory*

In addition to looking at international statutory law and other similar international law cases, natural law theory serves as another basis for concluding that retroactivity does not require Habré to be prosecuted through the means of an *ad hoc* international tribunal. In order to understand the basic principles of natural law theory, the inquiry must start with the teachings of Thomas Aquinas, who is credited with founding the framework of the theory.¹²³ In his celebrated work *Summa Theologiae*, Aquinas defined “law” as, “nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”¹²⁴ It is from this basic definition that the theory of natural law arises.¹²⁵

According to natural law theorists, the basis of natural law theory lies within the first clause of Aquinas’s definition.¹²⁶ The focus of the definition is the understanding that law is nothing more than an extension of reason.¹²⁷ For Aquinas, the law must be a rational standard of conduct.¹²⁸ Without the basis of reason there can be no law, and law not founded upon the principles of reason is no law at all.¹²⁹

In addition to the premise that law is founded upon reason, natural law theory rests upon another assumption: there are fundamental principles of law that can be found through nature.¹³⁰ These same fundamental principles serve as the basis by which man may judge not only what is right but what ought to govern his own

for the trial to be held at The Hague in the Netherlands”).

121. See generally Hessbruegge, *supra* note 14 (discussing the prohibition to retroactively assert jurisdiction over international crimes).

122. See *supra* Part II.C.

123. See generally THOMAS AQUINAS, *SUMMA THEOLOGICA* (Benziger Bros. ed. 1947) (1911).

124. *Id.* at 1332.

125. John Finnis, *Natural Law Theories*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/fall2011/entries/natural-law-theories/> (last updated July 25, 2011).

126. Mark C. Murphy et al., *Natural Law Theory*, THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 15, 16 (Martin P. Golding & William A. Edmundson eds., 2005) [hereinafter THE BLACKWELL GUIDE].

127. *Id.* at 16.

128. *Id.* at 18.

129. *Id.* at 19.

130. William O. Einwechter, *Natural Law: A Summary and Critique*, DARASH PRESS (Sept. 30, 2012), <http://darashpress.com/articles/natural-law-summary-and-critique>.

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actions.¹³¹ How are we to discover these fundamental principles? The answer is straightforward. The principles of the natural or inherent law that exist through nature are discoverable by the employ of the right use of reason.¹³² These inherent principles exist and apply to mankind at all times and without concern for the circumstance.¹³³ Finally, natural law theory stands for the proposition that once we have discovered the principles of law in nature, law codified by the state or government is authoritative only in so far as it is derivative from these principles of law in nature.¹³⁴ Thus, natural law theory focuses its inquiry on what the application of reason reveals about the place of humanity within its natural origin, rather than on what states have codified into law.¹³⁵

The natural law theory has been met with some criticism.¹³⁶ One of the primary criticisms of natural law theory is that many things, which are in one sense unnatural, are not considered by many people to be unethical.¹³⁷ Examples include an assortment of medical technologies, including vaccinations and chemotherapy.¹³⁸ By the same logic, critics also identify some things, which are in a sense natural, but are believed by many to be unethical.¹³⁹ Some examples in this regard include the feelings of revenge or prejudice.¹⁴⁰ Another prevalent criticism often advanced by those who oppose the natural law theory is that men do not know, nor can they agree upon the content of natural law.¹⁴¹ Despite the fact that natural law theory has been around for hundreds of years, humanity cannot agree upon a detailed codification of the laws of nature.¹⁴² While this argument is valid to a certain extent, it is difficult for the critic of natural law theory to maintain that there is not any agreed upon understanding of the laws of nature.¹⁴³ natural law proponents respond that certain actions, including torture and genocide, are in reality, commonly recognized laws of human nature.¹⁴⁴

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Finnis, *supra* note 125.

136. See HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* 181-82 (2d ed. 1994).

137. *Natural Law Theory*, VILLANOVA UNIVERSITY, <http://www83.homepage.villanova.edu/richard.jacobs/MPA%208300/theories/natural%20law.html> (last visited Feb. 15, 2013).

138. *Id.*

139. *Id.*

140. *Id.*

141. Einwechter, *supra* note 130.

142. *Id.*

143. See generally Finnis, *supra* note 125.

144. See generally *id.*

*Global Business & Development Law Journal / Vol. 27**B. Legal Positivism*

Legal positivism is often cited as a foil to natural law theory.¹⁴⁵ The jurisprudence of legal positivism proposes that the only legitimate sources of the law are those expressly enacted, adopted, or recognized by a governmental entity through its executive, legislative or judicial bodies.¹⁴⁶ By requiring the law to be written,¹⁴⁷ legal positivist theory ensures members of society will be explicitly placed on notice as to their rights, and the legal obligations the state demands from them.¹⁴⁸ Furthermore, legal positivism asserts that societies have developed legal systems that depend largely on certain structures of governance, and not on the extent to which it satisfies notions of democracy, the rule of law, and various ideals of justice.¹⁴⁹

One of the hallmarks of legal positivism is what is known as the separability thesis.¹⁵⁰ Generally speaking, “the separability thesis asserts that law and morality are conceptually distinct.”¹⁵¹ While some scholars read this to mean that the definition of law must be entirely free from notions of morality,¹⁵² other scholars have taken a less exclusive approach to the issue.¹⁵³ Herbert Lionel Adolphus Hart, taking on the latter view, once described the separability thesis by stating, “the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.”¹⁵⁴ Although the separability thesis maintains that there are moral constraints on legal validity, “it still implies the existence of a possible legal system in which there are no moral constraints on legal validity.”¹⁵⁵

The application of legal positivism has also been met with robust criticism.¹⁵⁶ One of the most cited criticisms of the legal positivist theory is that it fails to give morality its due consideration.¹⁵⁷ Critics assert:

A theory that insists on the facticity of law seems to contribute little to our understanding that law has important functions in making human life

145. Leslie Green, *Legal Positivism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 3, 2003), <http://plato.stanford.edu/entries/legal-positivism/>.

146. *Id.*

147. Kenneth Einar Himma, *Legal Positivism*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY: A PEER REVIEWED ACADEMIC RESOURCE, <http://www.iep.utm.edu/legalpos/#H2> (last updated June 28, 2005).

148. Green, *supra* note 145.

149. *Id.*

150. Himma, *supra* note 147.

151. *Id.*

152. *Id.*

153. *See generally* Hart, *supra* note 136.

154. *Id.* at 185-86.

155. Himma, *supra* note 147.

156. *See generally* Finnis, *supra* note 125.

157. Green, *supra* note 145.

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go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralized. Accordingly, positivism's critics maintain that the most important features of law are not to be found in its source-based character, but in law's capacity to advance the common good, to secure human rights, or to govern with integrity.¹⁵⁸

In other words, the critics of legal positivism cite the separability thesis and its fundamental implications as the source of the issue.¹⁵⁹ The critics maintain that any legal construction necessarily depends, to some extent, on a notion of morality.¹⁶⁰

The conflicts between natural law theory and legal positivism are clear. Under the former, whether or not an act is a wrong, and thus punishable by the law, depends upon the employment of reason to deduce binding rules of moral behavior.¹⁶¹ Under the latter, whether or not an act is a punishable wrong depends not on what the human condition says about the morality of the act, but rather what a particular legal enactment says is a punishable wrong.¹⁶² Unlike the legal positivist theory, natural law is less concerned with what the law itself says or whether it exists in codified form, and is instead focused on what our common human nature recognizes as a just or unjust act.¹⁶³ Natural law theory is an active inquiry, asking whether or not the action is right or wrong.¹⁶⁴ In contrast, positivist theory employs a passive inquiry by focusing on the extent to which the law is systemically valid. In other words, whether or not it is part of the legal system.¹⁶⁵

The application of either one of these theories can produce strikingly different results as to whether or not individuals should be prosecuted based on a retroactive theory of guilt.¹⁶⁶ For example, it is evident that natural law provided some foundation for the prosecution of Nazi leaders and offenders of the Holocaust, but in the same context legal positivists face a unique difficulty in that these same offenders were merely following the law as a product of the relevant political system.¹⁶⁷ While legal positivism certainly has its merits in certain

158. *Id.*

159. *See generally* Finnis, *supra* note 125.

160. *See generally id.*

161. Mark Murphy, *The Natural Law Tradition in Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/win2011/entries/natural-law-ethics> (last updated Sept. 27, 2011).

162. Green, *supra* note 145.

163. Murphy, *supra* note 161.

164. *Id.*

165. Green, *supra* note 145.

166. *Legal Positivists Theory*, PENNSYLVANIA STATE UNIVERSITY, COLLEGE OF LIBERAL ARTS, <http://elearning.la.psu.edu/crim-soc467/lesson-3/legal-positivist-theory> (last visited Nov. 9, 2013).

167. *See generally* DAVID FRIEDRICH, *LAW IN OUR LIVES: AN INTRODUCTION* 78-83 (Dawn VanDercreek et al. eds., 2nd ed. 2001).

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circumstances, it is the position of this Comment that a strict adherence to legal positivism at all times can be a dangerous practice often resulting in grave injustices to the human race.¹⁶⁸ Legal positivism emasculates the social function of the law by preventing it from serving human needs.¹⁶⁹ A law removed from human need and human nature has no place in our society. This Comment assumes the application of a natural law perspective because, “the most important features of law are not to be found in its source-based character, but in law’s capacity to advance the common good, to secure human rights, or to govern with integrity.”¹⁷⁰

VI. SOLUTIONS

A. *From the Perspective of International Law*

Despite the ruling of the ECOWAS Court, the option to prosecute Habré within the Senegalese court system should have been preserved, and the creation of the *ad hoc* international tribunal is all but necessary. As stated previously, Article 15, paragraph 2 of the ICCPR is plainly worded;¹⁷¹ the provision explicitly requires only that the crime committed be a criminal offense under national or international law at the time it was committed.¹⁷² Surely the drafters of the provision must have included the reference to “international law” for a reason. It seems evident that the only reason to include this language would be to ensure that an individual could not escape punishment for an international crime simply by noting that the crime charged was not punishable under the national law at the time the act was committed.¹⁷³

Some may argue that the basic rationale for having a prohibition of retroactive criminal laws is to give the perpetrator proper notice that their action(s) constitutes a crime.¹⁷⁴ This is undoubtedly a noble and just rationale; indeed, the notion that one may be charged for a criminal act in which there is no possible way to know the act is criminal offends our sense of justice.¹⁷⁵ That being said, we must remember that Habré was acting as a head of state during the commission of his offenses.¹⁷⁶ Acting in the head of state capacity necessarily implies correspondence with foreign nations, and at least a basic awareness of

168. *Id.* at 80.

169. *Legal Positivism Theory*, *supra* note 166. *See generally* Green, *supra* note 145.

170. Green, *supra* note 145.

171. *See* ICCPR, *supra* note 40, at art. 15(2).

172. *Id.*

173. Hessbruegge, *supra* note 14.

174. *Id.*

175. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 340 (2005).

176. *Chad*, *supra* note 3, at 51-54.

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international law and custom. To say that Habré was not put on notice of the fact his actions were criminal is an assertion which cannot be supported. The actions of Habré were quintessentially criminal.¹⁷⁷ In the history of the human race, little else has been more sinister than the ethnic cleansing and torture of other human beings.¹⁷⁸ When crimes of this nature are committed, notice that the action is wrong necessarily accompanies the act.¹⁷⁹ As Jan Hessbruegge explains, “[t]he rationale behind the prohibition of retroactive criminal laws is to put the perpetrator on notice that his or her action constitutes a crime, but this is already served if the perpetrator could have known that he or she was committing what is recognized as a crime on the international plane.”¹⁸⁰ Hessbruegge applies a “could have known” standard to the notice issue, which is a relatively low burden to satisfy.¹⁸¹ This standard is easily met when applied to a former head of state.

An additional argument, often made in favor of the prohibition of retroactive criminal laws, is that Article 15, paragraph 2 of the ICCPR is a subsidiary means of interpretation.¹⁸² It has been said, “[t]his provision appears as a sort of fallback option. . . to be relied upon when neither national law nor treaty or customary international law rules criminalize certain conduct.”¹⁸³ To begin, let it suffice to say that this is not the issue with respect to Habré’s case. As has been identified above, the ICCPR does criminalize much of Habré’s conduct.¹⁸⁴ But, the question still remains as to whether Article 15, paragraph 2 should be limited to instances where international law does not criminalize the conduct.¹⁸⁵ The circumstance suggested by this interpretation of Article 15, paragraph 2 is a situation where there is no international law on the issue, but where the act is criminal according to general principles of law.¹⁸⁶ It is argued that “the principle of legality is hardly reconcilable with the criminalization of certain conduct only on the basis of general principles of law.”¹⁸⁷ While this argument makes sense within the context of lesser offenses, the same should be said of a crime that is of such a grave nature as torture and a campaign of ethnic cleansing. Article 15, paragraph 2 was included for a reason, to provide a safeguard to punish acts which are so heinous that it would offend our sense of humanity to let them go unpunished.¹⁸⁸

177. *See generally id.*

178. *See* Sverre Varvin, *Genocide and Ethnic Cleansing: Psychoanalytic and Social-Psychological Viewpoints*, 18 SCAND. PSYCHOANAL. R. 192, 192-210 (1995).

179. Hessbruegge, *supra* note 14.

180. *Id.*

181. *Id.*

182. Spiga, *supra* note 87, at 5.

183. *Id.*

184. ICCPR, *supra* note 40, at art. 15(1).

185. Spiga, *supra* note 87, at 9-11.

186. *See generally id.*

187. *Id.* at 13-14.

188. *See generally* Christian Tomuschat, *International Covenant on Civil and Political Rights*, UNITED

*Global Business & Development Law Journal / Vol. 27**B. From the Perspective of Natural Law Theory*

The application of natural law theory stands for the proposition that, irrespective of the ECOWAS Court ruling, Habré could have been prosecuted within the current Senegalese legal system. As a result, the employ of an international *ad hoc* tribunal hosted in Senegal, although consistent with the ECOWAS Court ruling, is all but necessary. To summarize, one of the essential claims of natural law theory is that it “is based on the belief that certain principles of law are inherent in the very nature of things and that men can discern these by means of reason.”¹⁸⁹

Let us again recall the extent and capacity of the crimes against humanity that Habré is alleged to have committed. As outlined by The Commission of Inquiry, it was determined that no less than 3,780 people were killed as a direct result of the ethnic cleansing campaign brought on by Habré’s reign of terror.¹⁹⁰ It is difficult to even conceive of an act more heinous than one defined by a mission to exterminate those of a particular race or tribe.¹⁹¹ Murder based on a hatred of a specific group clearly finds itself in violation of the natural law theory.¹⁹² As explained by Aquinas,

Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain; but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.¹⁹³

As outlined above, Aquinas argues that certain injurious acts such as murder are violative of an inherent understanding of right and wrong within all of us.¹⁹⁴ Aquinas maintains that it is basic reason common to all mankind that such actions are unjust and are qualified as an inherent wrong.¹⁹⁵ Accordingly, by this line of reasoning, acts of genocide are inconsistent with the basic tenants of natural law theory.¹⁹⁶

NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <http://legal.un.org/avl/ha/iccpr/iccpr.html> (last visited Mar. 22, 2014).

189. Einwechter, *supra* note 130.

190. *Chad*, *supra* note 3, at 80.

191. See *Varvin*, *supra* note 179, at 192-95.

192. AQUINAS, *supra* note 123, at 1363.

193. *Id.*

194. See generally *id.*

195. See generally *id.*

196. See generally *id.*

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Having concluded that acts of ethnic cleansing are determined by reason to be in violation of natural law, the next question is whether a theory of natural law justifies prosecuting Habré under the current Senegalese legal system for a crime that was not codified when committed. The answer to this question is that such an action is entirely within the scope of the natural law theory.¹⁹⁷ As is concluded above, the principles of law, as they exist in nature, apply to everyone at all times and in all circumstances.¹⁹⁸ This is necessarily the case as the entire essence of natural law theory is dependent upon the reasonable conclusion of what is right, as held in common by humanity.¹⁹⁹ Furthermore, natural law theory stands for the proposition that man-made laws are only just so long as they stem from the principles of law in nature.²⁰⁰ The assumption of this claim is that principles of law exist prior to their codification.

In the particular case at issue, ethnic cleansing unquestionably violates principles of law as they exist in nature. Hence, the fact that an act was committed before a specific codification was established, in a specific location, at a specific time does not change the quality or the character of the act. The act of ethnic cleansing is an inherent wrong that does and has existed in perpetuity.²⁰¹ Therefore, natural law theory supports the proposition that Habré could well be prosecuted for his crimes against humanity under the framework of the Senegalese legal system even despite the procedural *ex post facto* issue presented.²⁰²

VII. CONCLUSION

What is the fundamental aim of any legal system if not justice? To where do the victims of terror and ethnic cleansing turn when procedure stands in the way of their vindication? Are there no worse crimes than these? Such are the questions that this Comment has had the occasion to address. The inquiry as to whether Habré may be prosecuted for his actions despite the fact that no such crimes for those same actions were codified under national law at the time they were committed²⁰³ is not an easy question to confront. It is true the ECOWAS Court was left with only two options, both of which ran the risk of setting the worse of two precedents.²⁰⁴ On the one hand, a ruling allowing Senegal to prosecute within the bounds of its national court system might have affirmed a

197. See generally Murphy, *supra* note 161.

198. Einwechter, *supra* note 130.

199. *Id.*

200. *Id.*

201. See Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72 FOREIGN AFF. 110, 110-21 (1993).

202. See generally Murphy, *supra* note 161.

203. Hessbruegge, *supra* note 14.

204. Tansey, *supra* note 45.

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kind of universal jurisdiction in Africa, potentially allowing for the future prosecution of similar crimes.²⁰⁵ Indeed such a ruling might have been possible had the ECOWAS Court given more clout to the second paragraph of Article 15 of the ICCPR,²⁰⁶ which pays tribute to the Natural Law legal philosophy.²⁰⁷ Alternatively, the ECOWAS Court chose instead to set a precedent that on occasion would require African nations to establish a completely separate system, which would depend entirely on international funding, even if only a single individual were to stand trial.²⁰⁸ Which precedent is the better of the two?

This Comment stands for the proposition that independent sovereign nations should be able to prosecute the most egregious of human rights violations despite the principle of non-retroactivity. This proposition is supported directly by international statutory law.²⁰⁹ Additionally, this same proposition champions the principles of natural law legal theory.²¹⁰ Natural law theory was not chosen because it was convenient to do so. Rather this legal theory was chosen because it is the most consistent with the universal truth that the freedom of life is the quintessence of our existence.²¹¹ A rule of law inconsistent with such a notion, as was issued by the ECOWAS Court, delays justice, wastes resources, and misses the most perfect opportunity to send a message to political leaders who continue to reduce the value of life to its ethnic origins.

205. *Id.*

206. ICCPR, *supra* note 41, at art. 15(2).

207. THE BLACKWELL GUIDE, *supra* note 126.

208. Tansey, *supra* note 45.

209. *See supra* Part III.

210. *See supra* Part VI.B.

211. *See generally*, Finnis, *supra* note 125.