Complementarity at the Regional Level

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Patryk Labuda has written an excellent book about the challenges and limitations of complementarity in achieving “genuine” investigations and prosecutions at the national level. He compares the experience of the International Criminal Court (ICC) with its jurisdictional regime giving preference to national investigations and prosecutions, to the experience of other international courts that had primacy over domestic proceedings. Specifically, he explores the interplay between international and domestic authorities in the ICC situation of the Democratic Republic of the Congo (DRC), the International Criminal Tribunal for Rwanda (ICTR) in Rwanda, and the Special Court for Sierra Leone (SCSL) in Sierra Leone. Despite the absence of the complementarity principle in their statutes, he finds that the ICTR and SCSL’s limitations in enforcement powers and mandate, as well as time and resources, affected national efforts to pursue individuals over whom the internationals could have exercised jurisdiction.

I am very familiar with Labuda’s country situations from my service as the Chief of Prosecutions at the ICTR, the Prosecutor at the SCSL, and later as the US Ambassador at Large for Global Criminal Justice (where I prioritized justice in the DRC and made 15 country visits). Labuda is correct that the leaders of each territorial state prioritized the preservation of their own political power and effectively immunized anyone close to them from prosecution.

Labuda describes the domestic prosecution strategy in Rwanda as one of “zero impunity.” This was accomplished with a gacaca process outside the formal justice system that sought to judge every person allegedly responsible for the genocide of the Tutsi. But while doing so Rwandan authorities obstructed every effort to achieve accountability for what the late Alison Des Forges described to be the targeted killing of about 30,000 Hutus by the Tutsi-led Rwanda Patriotic Force. The gacaca process itself expanded from one to expedite justice for the majority of the 100,000+ Hutu suspects held in Rwanda’s prisons, to one that dealt with more than one million suspects, effectively marginalizing a large part of the Hutu population. But even survivors of the genocide criticized the gacaca in prioritizing political ends over victims’ wellbeing through early releases that required them to live among the killers of their families.

The DRC is certainly the best example of what Labuda describes as “unintended diversionary complementarity.” Leaders did call on many occasions for the creation of “mixed chambers” that could have prosecuted high-level actors on all sides, but consistently prevented it from happening. Instead there were trials of low level actors in military courts that relied almost exclusively on external financial support. Even the progress that western countries demanded against the famous “FARDC 5,” a general, three colonels, and major accused of sexual violence, can be attributed to the list having excluded any person with friends in high places.

As Labuda acknowledges, the SCSL distinguished itself by prosecuting high level actors on both sides of the Sierra Leone civil war. However, victim/survivors were most critical of the process in failing to enable justice beyond the cases of the 13 individuals charged at SCSL particularly as to local commanders responsible for horrific crimes against hundreds of victims. Most legal experts thought that the Lome Amnesty of 1999, which the SCSL judges invalidated as to crimes charged at the SCSL, could also have been invalidated for international crimes prosecuted in domestic courts. However, attorneys general of both political parties who held power in postwar SCSL refused to try. This was most apparent when national authorities allowed the departure of Ibrahim Bah, alleged to be a major accomplice of Charles Taylor and the RUF, when Bah was charged in a victim-led private prosecution in 2013. The excuse was that SCSL had delivered justice, and it was time to move on. Some victims saw this as the SCSL having given a pass to local leaders to avoid the political ramifications of further trials.

Labuda's three country situations reminded me of my experience with another international court, the Extraordinary African Chambers (EAC) in Senegal. In this situation, it was possible to achieve justice in a way that was more victim-centered, in part because the recruited external allies were able overcome some of the resistance from domestic leaders. The EAC was created to investigate and prosecute Hissène Habré, the former President of Chad (1982-1990) in the country where he had fled (with all the funds in the national treasury) after his overthrow in a coup d'état. The National Truth Commission in Chad had implicated Habré in the torture and murder of thousands of his citizens. Two of his surviving victims, Souleymane Guengang and Jacqueline Modeina, led a global campaign for more than two decades to bring Habré to justice for his crimes, as described wonderfully in the Reed Brody's *To Catch a Dictator*. It was this leadership by victims combined with effective international pressure that delivered more independent justice that was possible in Labuda's three country situations.

The pursuit of Habré could be seen as very similar to efforts to bring alleged perpetrators of international crimes to trial in the courts of third states, based on universal jurisdiction with the nexus of the suspects' "presence in" the territory of the prosecuting state. But it was very challenging to develop the will and capacity to judge Habré in Senegal, as seen in the 2001 decision of Senegal's *Cour de Cassation* that dismissed the initial process on the grounds that Senegal did not have jurisdiction over crimes committed in Chad in the 1980s, and by the continuing resistance of Senegalese President Abdoulaye Wade to the prosecution of Habré (Brody, pp. 53-54, 158-162). As Reed Brody recounted his book, these obstacles were largely overcome by an African Union (AU) Summit in directing Senegal to try Habré "on behalf of Africa," by a Belgian UJ prosecution of Habré and Belgium's subsequent success in achieving an International Court of Justice (ICJ) decision ordering Senegal to "try or extradite" Habré, and most importantly through Wade's electoral defeat by Macky Sall in the 2012 election, and the latter's appointment of Aminata Touré, as Minister of Justice (Brody, pp. 165-167).

But there was also a legal obstacle in that the Court of the Economic Community of West African States (ECOWAS) ruled in November 2010 that Senegal could not

apply its 2007 statute (passed after the direction from the AU Summit) to try him for acts in the 1980s on the grounds that this would violate the principle of "non-retroactivity" under Article 7.2 of the African Charter (Brody, pp. 152-153). The solution to this was "internationalization light" – the negotiation of an agreement between the AU and Senegal that provided that the presiding judges at trial and appeal would be non-Senegalese Africans, while the other judges would all be sitting Senegalese magistrates, but with their appointment formalized by the AU President. Given the precedent of all the *ad hoc* courts created after the fact, this allowed the negotiated court, under the name "Extraordinary African Chambers" (EAC), to apply customary international law in effect at the time of the alleged crimes. The statute was silent on the question of primacy vis-à-vis Chad but did allow the EAC to decide whom to investigate and prosecute for the most serious crimes.

Chad was led after 1990 (until 2021) by Idriss Déby, who had overthrown Habré after service as his military chief. Déby strongly supported the prosecution of Habré and was happy to have him judged in Senegal. Chad made the largest financial contribution to the EAC (which was funded by voluntary state contributions that from all donors totaled about US $10 million), and when the EAC arrested Habré in July 2013, Deby declared a paid national holiday in Chad. The EAC and Chad entered into a cooperation agreement which provided for investigations in Chad and the transfer of witnesses and evidence to the EAC, but significantly not for extradition of suspects. Four investigative missions were successfully undertaken by the EAC's examining magistrates.

However, it soon became known that the EAC Prosecutor, Mbacke Fall, was interested in suspects beyond Habré, and he eventually sought the arrest and transfer of five of them, in particular **Saleh Younous,** a former director of the Habré's political police, the Documentation and Security Directorate, and **Mahamat Djibrine,** also known as "El Djonto," one of the "most feared torturers in Chad," according to the National Truth Commission. This was strongly opposed by Chadian authorities and relations with the EAC deteriorated as a fifth (and hopefully last) investigative mission was delayed. Interestingly, the EAC appeared to have a "complementarity" effect in Chad, as authorities brought to life a moribund investigation of other suspects that had been moribund that had been requested by the victims in 2000, and ordered 21 of these suspects to stand trial, including Younous and Djibrine.

As a former international prosecutor, I respected Fall's decision to take a "situation-driven" approach to the crimes in Chad. However, the EAC was different in that was created to allow the trial of what was essentially a universal jurisdiction case, and such cases are almost undertaken to investigate and prosecute a single suspect that is accessible to the court. Fall's position threatened a "train wreck" as he had announced that it was not possible to sever the other suspects' case from Habré's because the facts were inseparable, and while he could attempt to proceed *in absentia* as to the other suspects, there was a serious question whether such a trial could be held if the absence of the suspects was beyond their control. Even if they were eventually transferred, or charged *in absentia*, this would certainly extend the time and resources necessary for the proceedings with the serious risk that they could not be concluded before the budget was exhausted. And I knew from my

efforts with the international donors that there was “zero will” to provide additional contributions.

I decided to do what I could to break the impasse. On 13-14 October 2014, I managed to reach N’Djamena, when I was diverted from the Central African Republic because of the sudden outbreak of widespread violence in Bangui. I met first with Jacqueline Modeina and Delphine Djiraibi together with other victims and survivors. They were taking a “wait-and-see” but hopeful approach to the Chadian prosecution of the 21 suspects. They wanted to confront the perpetrators and have their evidence heard, but if they could fully participate in the Chadian trial, they could accept the EAC going forward with Habré alone rather than waiting for other suspects in Dakar. I spoke with Chad’s Minister of Justice who was adamant about no extraditions given the absence of a provision allowing for it in the cooperation agreement. I met with the new prosecutor who pointed to the dossier on the 21 suspects, stacked to height of two feet and said that he would be ready to go to trial on 14 November 2014.

I next added a six-hour stop in Dakar on my way from Washington to Rwanda on 3 November to meet with my friend, Sidiki Kaba, the former President of the *Fédération internationale des ligues des droits de l’homme*, whom Sall had appointed as Foreign Minister. Sidiki had a surprise for me – an immediate meeting with President Macky Sall himself. I cannot reveal confidential conversations with President Sall, but the message I delivered was made clear when I appeared together with Kaba outside the President’s office before television cameras and large crowd of journalists I recall congratulating President Sall on his leadership for justice in opening the way for Habré to be brought to trial in Senegal. When asked about the other suspects, I said that Habré could be tried in Dakar and others in N’Djamena. On the way back to the airport, I was accompanied by the excellent journalist, Momar Dieng, who in the past had been very proficient in correcting my imperfect French to convey my precise meaning. His full interview appeared in Dakar’s *Enquete* newspaper on 5 November.

Dieng quoted me (as I here translate):

> “The Foreign Minister [Mr. Kaba] told me that we must follow the text [of the agreement] and there is no article…for the transfer of persons to prosecute. The EAC has the legal jurisdiction to judge everyone, but the eventual question is the availability of persons. It is very important to avoid a delay in the process….”.
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> “I think that it is very difficult to transfer [the two suspects] from Chad to Dakar. This is why I think that the preferable solution now is to organize a good trial there for the two Chadians, and a good trial here for persons resident in Senegal, but that is only Habré.”
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> “We await a trial before a court of justice in N’Djamena of the two suspects among the 21 persons implicated in the crimes of torture and murder during the administration of President Habré.”

> “In international law, it is possible to try responsible persons in The Hague…and in the processes of other countries…. It is not possible try everyone in one system.”
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> “Here one finds *complementarity* like at the International Criminal Court. Habré has been in Senegal for more than 20 years, and it is important to try him here, according to international norms, in an international court as directed by the African Union. In my opinion, it is not necessary to judge all the persons implicated in the Habré dossier here in Senegal.”
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> “I believe that it is possible that the trial of Hissène Habré will open in the month of May 2015.”

A few days later, I saw EAC Prosecutor Mbacke Fall at an international conference. He very courteously asked me if I was working against him. I responded that I was trying to create the conditions for his success.

On 14 November the trial of 21 suspects, including Younous and Djibrine, began in N’Djamena. Reed Brody arrived at the trial during its second week and wrote that what struck him most “was the experience of seeing in the flesh defendants whose names I had heard over and over [including those] who had thrown Souleymane in jail…and tried to kill Jacqueline” (Brody, p.180). He saw hundreds crowding daily into the auditorium, where the trial was held and where Jacqueline Modeina led the team representing the victims whose direct testimony was heard and where the court orchestrated confrontation between the victims and defendants and between the defendants. Brody found it “far from ideal” but noted moments of “high emotion and catharsis,” and observed that “for the victims, who had waited 24 years, it was a chance to turn the tables on the men who had ruled over them as obscene gods” (Brody, p.182).

On 15 March 2015, the Chadian court convicted 20 of the 21 suspects, and sentenced five of them (including Younous) to life in prison. As Brody reported, “a stunned silence as the verdict was read out soon gave way to whopping and cheering,” and he concluded, “it was huge victory” (Brody, p.184).

With all its imperfections, this case achieved something that had not been accomplished in the domestic prosecutions in the country situations described by Patryk Labuda in DRC, Rwanda, or Sierra Leone. Powerful men, some only recently in service to the current government, had been held to account. Yes, there was some of Labuda’s “unintended diversionary complementarity” in that the top leader was spared and there was an incomplete investigation of the crimes. But still a very strong message was sent to those who might follow the orders of leaders to engage in torture and murder that their eventual “reward” may be trial and punishment.

As the trial proceeded in Chad, the EAC judges concluded their investigation and indicted Habré alone on 13 February 2015. On 6 April the African Union appointed Judge Gbardao Gustave Kam of Burkina Faso, a former colleague from the ICTR, to preside at trial. I was in the courtroom in Dakar on 20 July 2015, two months after I

predicted, for the commencement of trial and to see Habré brought in unwillingly to face his victims.

After a challenging trial and appeal, Habré was convicted of torture, war crimes and crimes against humanity, sentenced to life imprisonment and ordered to pay restitution of $150 million to his victims. I was back in the courtroom in Dakar for the decision on Habré's appeal on 27 April 2017, more than 26 years after his overthrow in Chad. His case remains the best example of how the most powerful persons can be brought to justice, internationally and nationally, when there is initially no judicial system with the jurisdiction, will or capacity to hold them to account.

If more international and national justice was possible for the crimes of Habré regime than for similar crimes committed in the country situations analysed by Patryk Labuda, it is a tribute to both the victims and survivors, both as to the strength of their evidence that they marshaled and the ways in which they empowered themselves and built alliances in their long campaign for justice. As Naomi Roht-Arriaza wrote her in book "The Pinochet Effect", the case against Habré like those against former Chilean President Pinochet, and former Guatemalan President Rios Montt, "opened possibilities, precisely because they seemed decentralized, less controllable by state interests, more, if you will, acts of imagination" (Roht-Arriaza, p. 204).
