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## The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity

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**KEYWORDS** Extraordinary African Chamber; Hissène Habré; International Criminal Justice; Pinochet

### I. Introduction

When Hissène Habré was at the height of his powers in Chad in the 1980s, it would have been difficult for him to imagine that he would be the center of an historic human rights case some thirty years later.<sup>1</sup> But on 30 May 2016, Habré became the first former head of state to be convicted for crimes against humanity before the domestic courts of another country.<sup>2</sup> The judgment is therefore the first successful application of the Pinochet precedent,<sup>3</sup> and a landmark international criminal law decision that many hope will inspire similar prosecutions elsewhere.<sup>4</sup> Moreover, victims were also awarded substantial reparations by the court on 29 July 2016.<sup>5</sup>

Habré was tried and convicted by the Extraordinary African Chambers (EAC) in Senegal, an internationalised criminal court created under the auspices of the African Union (AU).<sup>6</sup> The involvement of the AU in bringing Habré to justice also means that Habré is the first person to be tried under an African international criminal justice mechanism. This legal development article will (1) look back at the victim driven efforts that led to the prosecution of Habré, (2) examine the historic judgement, and finally (3) briefly explore whether the EAC model could be employed elsewhere.

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<sup>1</sup>For a general introduction and history of the Habré regime in Chad see M Azevedo and E Nnadozie, *Chad: A Nation in Search of Its Future and The Roots of Violence* (Nations of the Modern World: Westview Press, 1997); Sam C. Nolutshungu, *Limits of Anarchy: Intervention and State Formation in Chad* (Carter G. Woodson Institute Series in Back Studies, University Press of Virginia, 1996); J Burr and R Collins, *Africa's Thirty Years' War: Chad-libya-the Sudan, 1963–1993* (Westview Press, 1999). The author would like to thank Professor Jo Stigen and fellow PhD Candidates Anna Andersson, Stian Øby Johansen and Sondre Trop Helmersen for their valuable feedback on earlier versions of this article.

<sup>2</sup>Prosecutor c. Habré, 'Jugement', Chambre Africaine Extraordinaire D'Assises (30 May 2016) ('Habré Judgement'), <[www.forumchambresafricaines.org/docs/JugementCAEd'Assises\\_Penal&Civil\\_.pdf](http://www.forumchambresafricaines.org/docs/JugementCAEd'Assises_Penal&Civil_.pdf)> this and all websites were last accessed 8 August 2016.

<sup>3</sup>I Sansani, 'The Pinochet Precedence in Africa: Prosecution of Hissène Habré' (2001) 8 Human Rights Brief 1.

<sup>4</sup>J Burke, 'Hissène Habré Trial Provides Model for International Justice', *The Guardian* (London, 30 May 2016) <<https://www.theguardian.com/world/2016/may/30/hissene-habre-trial-provides-model-for-international-justice>>.

<sup>5</sup>Prosecutor c. Habré 'Décision Civil' Chambre Africaine Extraordinaire D'Assises (29 July 2016) ('Reparations Judgment') also available as an annex at the end of the judgment: [http://www.forumchambresafricaines.org/docs/JugementCAEd'Assises\\_Penal&Civil\\_.pdf](http://www.forumchambresafricaines.org/docs/JugementCAEd'Assises_Penal&Civil_.pdf)

<sup>6</sup>For an authoritative analysis of the EAC see S Williams, 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?' (2013) 11 JICJ 1139.

## II. A Twenty-Six-Year Trek to Justice

Bringing Habré to justice has taken almost three decades and is remarkable for the number of national, regional and international actors who have been involved with the case at one point or another. The hunt for justice started in 1990, when Habré was ousted from power in Chad and fled to Senegal.<sup>7</sup>

Habré ruled Chad from 1982 to 1990, with a regime marked by its extensive use of torture, which led to Habré being labelled the “Pinochet of Africa”.<sup>8</sup> Shortly after he was deposed, the new government in Chad created a truth and reconciliation commission to examine the extent of the crimes committed during his regime.<sup>9</sup> The report estimated that approximately 40,000 persons were killed and another 200,000 tortured by the Directorate of Documentation and Security (DDS) under Habré’s leadership.<sup>10</sup> The commission recommended the prosecution of those responsible for these crimes,<sup>11</sup> but with Habré in Senegal, the possibility of a trial in Chad stalled.

### II.i The Importance of Pinochet

The legal breakthrough that paved the way for Habré, came in 1999 with the House of Lords ruling on head of state immunity in the Pinochet case.<sup>12</sup> Pinochet had travelled to the UK in order to seek medical treatment, but found himself indicted by a Spanish court for torture and other offences, while he was still in London. The Spanish court was invoking universal jurisdiction to prosecute Pinochet for crimes that he was alleged to have committed while head of state in Argentina.<sup>13</sup> Universal jurisdiction

refers to a form of jurisdiction in international law which grants the court of any state, the ability to bring proceedings with respects to certain (internationally defined) crimes, without regard to the location of the crime, the nationality of the offender, or the nationality of the victim.<sup>14</sup>

This form of jurisdiction thus enables domestic courts to prosecute persons for specific treaty based international crimes that have been committed outside of their territory.

However, invoking universal jurisdiction against a former head of state had never been done before. The extradition of Pinochet therefore also raised the question of whether he, as a former head of state, still enjoyed immunity from the domestic courts of a foreign state

<sup>7</sup>For a comprehensive profile of the case and Habré see M Bronner, ‘Our Man in Africa’, *Foreign Policy Magazine* (Washington DC, 20 July 2015) <<http://foreignpolicy.com/2014/01/24/our-man-in-africa/>>.

<sup>8</sup>Augusto Pinochet ruled Chile from 1973 until 1990, and the Pinochet regime was also known for its notorious use of torture and forced disappearance of political opponents: for more on Habré’s nickname, see BBC ‘Profile: Chad’s Hissene Habré’ (30 May 2016) <<http://www.bbc.com/news/world-africa-18927845>>

<sup>9</sup>Commissions of Inquiry, ‘Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories’, 7 May 1992 reprinted in N J Kritz (ed), *Transitional Justice How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (USIP Press Books, 1995) 51–93.

<sup>10</sup>*ibid* 91–92.

<sup>11</sup>*ibid* 93.

<sup>12</sup>House of Lords, *Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellant), Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen’s Bench Division) (No 3)*, Judgment of 24 March 1999, reported as *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

<sup>13</sup>For more on the Spanish efforts to prosecute General Pinochet see N Roht-Arriaza, ‘The Pinochet Precedent and Universal Jurisdiction’ (2001) 35 *New England L Rev* 311.

<sup>14</sup>RB Baker, ‘Universal Jurisdiction and the Case of Belgium: A Critical Assessment’ (2009) 16 *J Intl & CL* 141, 142.

like Spain.<sup>15</sup> While the reasoning of the Lords differed in trying to answer this question,<sup>16</sup> a majority ruled that Pinochet no longer had immunity from prosecution for an international crime like torture and could be extradited to Spain.<sup>17</sup> The holding was groundbreaking in that it showed that it could be possible to prosecute former head of states for international crimes, on the basis of universal jurisdiction, in the domestic courts of other nations. But in the end, Pinochet was deemed too sick to stand trial, and was consequently never extradited to Spain.<sup>18</sup>

## ***II.ii Attempted Prosecution in the Domestic Courts of Senegal***

But where Pinochet escaped prosecution, victim groups in Chad were inspired by the ruling and contacted lawyers at Human Rights Watch (HRW) to see if the precedent could be used to prosecute Habré.<sup>19</sup> At this point in time, the Rome Statute had just been adopted, but given that the International Criminal Court (ICC) does not have retro-active jurisdiction, it would not have been possible to bring Habré before this new court.<sup>20</sup> Reed Brody, a lawyer at HRW, therefore worked with the victim groups to prepare a case that could invoke the Pinochet-precedent and be brought before the domestic courts of Senegal. Together with NGOs and researchers, Brody and the victim groups travelled to Chad and collected vital victim testimony, documentation from Habré's torture centres and other evidence that could be used in a trial against him. In early 2000 the groups filed a complaint with the Dakar Regional Court together with the evidence and documentation that they had collected.<sup>21</sup> After hearing testimony from the victims, a Senegalese judge indicted Habré on counts of torture on 3 February 2000, and also opened an investigation into crimes against humanity.<sup>22</sup>

The victory was short-lived. In July 2000, the Indicting Chamber of Dakar's Court of Appeals vacated the charges, on the grounds that 'Senegalese courts do not have competence over acts of torture committed by a foreigner outside of Senegalese territory'.<sup>23</sup> This ruling however, was both at odds with the Pinochet precedent, as well as Senegal's obligations under articles 5 to 7 of the Convention against Torture (CAT),<sup>24</sup> which obliges states to either prosecute or extradite a person within their territory who is suspected of having committed acts of torture.<sup>25</sup> The decision was also widely criticised for having

<sup>15</sup>Serving heads of state normally enjoy full immunity from the domestic courts of other states, but in 1999 the status of the immunity of former heads of states was still 'unclear': see C Warbrick and others, '1. The Future of Former Head of State Immunity after ex Parte Pinochet' (1999) 48 Intl & Comp LQ 937, 938.

<sup>16</sup>ibid 937.

<sup>17</sup>Pinochet 3 (n 12) 203.

<sup>18</sup>M Beyers, 'The Law and Politics of the Pinochet Case' (2000) 10 *Duke Journal of Comparative & International Law* 415, 437–38.

<sup>19</sup>R Brody, 'The Prosecution of Hissene Habre – An African Pinochet' (2000–2001) 35 *New ER LR* 321.

<sup>20</sup>The ICC only has jurisdiction to prosecute cases that have occurred after the Rome Statute came into force on the 1 July 2002, Rome Statute of the International Criminal Court (17 July 1998) UN Doc. A/CONF.183/9, art 11(1).

<sup>21</sup>For more details of the complaint that was filed, as well as the evidence collected see Brody (n 19), 324–26.

<sup>22</sup>Sansani (n 3) 3.

<sup>23</sup>As translated into English in Brody (n 19) 331.

<sup>24</sup>Senegal had ratified CAT in 1986, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 UNGA Res 39/46, entered into force 26 June 1987).

<sup>25</sup>ibid arts 5–7.

been rendered by a judiciary under political pressure,<sup>26</sup> but was nevertheless upheld on appeal by the highest court in Senegal: the Court of Cassation.<sup>27</sup>

Following the dismissal of charges, the President of Senegal asked Habré to leave the country. But before Habré was able to flee, HRW and victims groups brought the case before the UN Committee against Torture, arguing that Senegal was in breach of their obligations under CAT by not prosecuting him.<sup>28</sup> The Committee responded by requesting that Senegal keep Habré within their territory until a solution could be reached.<sup>29</sup> This marked the start of a ten-year stalemate as to who would have the jurisdiction and ability to try Habré.

### **II.iii Creating a Justice Mechanism**

After the Senegalese courts withdrew their indictment, victims attempted to have the case heard in Belgium, due to the generous nature of Belgian universal jurisdiction legislation.<sup>30</sup> After years of investigation, a Belgian judge eventually issued an international arrest warrant against Habré in 2005.<sup>31</sup> Yet, Senegalese courts once again refused the case on the basis of a perceived lack of jurisdiction.<sup>32</sup> This led Senegal to send the case to the AU, requesting assistance from the union in determining which jurisdiction was ‘competent to try this matter’.<sup>33</sup>

The AU created a ‘Committee of Eminent African Jurists’ to consider the question, and issued a decision in July 2006 concluding that the Habré case fell ‘within the competence of the African Union’; the AU then mandated ‘Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial’.<sup>34</sup> Around the same time as the AU decision, the UN Committee against Torture also issued a decision against Senegal, concluding that the latter was in fact in breach of both article 5 and 7 of CAT by refusing to prosecute or extradite Habré to Belgium.<sup>35</sup> Consequently, the Committee called on Senegal to implement national legislation that would enable them to either comply with Belgium’s extradition request or try Habré themselves.<sup>36</sup> Senegal complied with the request and amended their laws, so that it would be able to exercise universal jurisdiction over international crimes like torture.<sup>37</sup>

At this point in time, one would reasonably expect the prosecution of the former dictator to finally move forward, but Habré invoked one final legal avenue: the Court of Justice of the Economic Community of West African States (ECOWAS). Habré petitioned the ECOWAS Court, arguing that the new Senegalese legislation ‘violated the principle of non-retroactivity of criminal law’ (*nullum crimen sine lege*) by trying him for crimes

<sup>26</sup>A Solomon, ‘Politics of Prosecutions under the Convention Against Torture’ (2001) 2 Chicago J Intl L 309, 310; L Bingham, ‘Trying for a Just Result: The Hissène Habré Affair and Judicial Independence in Senegal’ (2009) 23 Temple Intl & CLJ 77, 85–86.

<sup>27</sup>V Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré’ (2011) 9 JICJ 5, 6.

<sup>28</sup>Human Rights Watch (HRW), ‘The Trial of Hissène Habré: Time is Running Out for the Victims’ (Report) (January 2007) 5–6.

<sup>29</sup>ibid 6.

<sup>30</sup>See Baker (n 14).

<sup>31</sup>Bingham (n 26) 86.

<sup>32</sup>ibid.

<sup>33</sup>HRW (n 28) 7.

<sup>34</sup>African Union ‘Decision on the Hissène Habré Case and the African Union’ Doc Assembly/AU/Dec. 127 (VII) (July 2006).

<sup>35</sup>Committee against Torture, ‘Decisions of the Committee Against Torture under Art. 22 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment’ (17 May 2006) UN Doc CAT/C/36/D/181/2001, paras 9.6–9.12.

<sup>36</sup>ibid para 10.

<sup>37</sup>Spiga (n 27) 6–7.

that were committed long before the new laws had come into effect.<sup>38</sup> In a judgment from November 2010, that has since been criticised for its questionable legal analysis,<sup>39</sup> the Court found that trying Habré before Senegalese courts under the new legislation would indeed be a retroactive application of law.<sup>40</sup> Nevertheless, the ECOWAS Court did find that Habré could still be tried, so long as he was prosecuted before some kind of *ad hoc* court of ‘an international character’.<sup>41</sup>

On this basis, Senegal and the AU started to explore options for a justice mechanism that would be in line with the ECOWAS judgment. The pressure to come to such an agreement increased in 2012, when the International Courts of Justice (ICJ) ruled that Senegal was in breach of their obligations under CAT.<sup>42</sup> Like the Committee against Torture, the ICJ unanimously found that Senegal were under an obligation to either prosecute or extradite Habré ‘without further delay’.<sup>43</sup>

### III. The Structure of the EAC and Trial of Habré

Senegal consequently signed an agreement with the AU on the 22 August 2012 for the creation of a new African Chambers which would be situated within the courts of Senegal.<sup>44</sup> In keeping with the ECOWAS judgement, the agreement shows that the chambers would be international in character, yet be embedded ‘within the current Senegalese judicial system’, and apply both international law as well as the ordinary Senegalese penal code.<sup>45</sup> The EAC can therefore be classified as an “internationalised” court, similar to the ones created under UN administration in East Timor and Kosovo.<sup>46</sup> The hallmark of “internationalised” criminal courts is, as the name suggests, that international elements are introduced into the domestic court system.

Internationalised criminal courts therefore stand in contrast to the “pure” international criminal tribunals that were created in Rwanda and Yugoslavia in the 1990’s (the ICTR and ICTY).<sup>47</sup> These ‘ad hoc’ courts were created as independent institutions, entirely separated from the domestic court systems, and applied only international law.<sup>48</sup> Yet they proved to be expensive and inefficient institutions, taking decades to complete their prosecutions, and were also physically far removed from the criminal acts that they were set to adjudicate.<sup>49</sup> Based on this criticism many concluded that ‘[a]s mechanism for dealing with justice in post-conflict societies, they [the ICTY and ICTR] exemplify an approach that is no longer politically or financially viable’.<sup>50</sup> Consequently, one

<sup>38</sup>ibid 9.

<sup>39</sup>This critique is thoroughly presented by Spiga (n 27).

<sup>40</sup>Hissen Habré c. République du Sénégal (Judgement) ECW/CCJ/JUD/06/10 ECOWAS Court (18 November 2010) para 58.

<sup>41</sup>... *fair juger dans le cadre strict d'une procédure spécial ad hoc à caractère international*: ibid para 61.

<sup>42</sup>Questions Concerning the Obligation to Prosecute or Extradite (*Belgium v Senegal*) (Judgement) [2012] ICJ Rep 422.

<sup>43</sup>ibid 463.

<sup>44</sup>Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System (22 August 2012) ('EAC Agreement').

<sup>45</sup>ibid art 1(1)–(4).

<sup>46</sup>For more on the courts in Kosovo and East Timor see D Shrager, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions' in C Romano and others (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP, 2004) 32–34.

<sup>47</sup>For more on the difference between international, hybrid and internationalised criminal courts see S Williams, *Hybrid and Internationalised Criminal Tribunals* (Studies in International & Comparative Criminal Law, Hart, 2012) 187.

<sup>48</sup>For more on the ICTY and ICTR see A Casesse, *International Criminal Law* (3rd edn OUP, 2013) 258–261.

<sup>49</sup>Neither the ICTY or ICTR were located in Rwanda or a former Yugoslavian state: ibid 265; see also R Zacklin, 'The Failings of Ad Hoc International Tribunals' (2004) 2 JICJ 541.

<sup>50</sup>Zacklin (n 49) 545.

created new models of international justice mechanisms that brought international criminal prosecution back down to the domestic sphere through “internationalised” or “mixed” courts.

### *III.i A New Type of Internationalised Criminal Court*

Since then, a wide variety of internationalised criminal courts have been created using different models.<sup>51</sup> But even in this diverse landscape, the model of the EAC stands out. When compared to other internationalised criminal courts, the structure of the EAC contains a minimal amount of international elements, so much so that it ‘places the EAC at the limit of the category of internationalized criminal tribunal, and closer to situations in which national institutions receive assistance, finance, and training [from international bodies], but are not considered to be internationalized’.<sup>52</sup>

The EAC is thus a “minimalist” internationalised criminal court, and the main international elements of this model are found in (1) its application of international law, (2) its being governed by a special statute, and (3) through its inclusion of judges appointed by the AU.<sup>53</sup> The subject-matter jurisdiction of the EAC is specified in article 4 of the statute, and gives the court jurisdiction over war crimes, crimes against humanity, genocide and torture.<sup>54</sup> The statute likewise gives primacy to the international law enshrined within it.<sup>55</sup> Yet, the statute also gives domestic Senegalese law an important role in the proceedings, by stipulating that for ‘cases not provided for in this Statute’ Senegalese procedural and substantive law will apply.<sup>56</sup>

Aside from the statute and application of international law, the most visible international element of the EAC is the inclusion of two judges appointed by the AU. Both the presidents of the Trial Chamber and the Appeals Chamber are to be ‘non-Senegalese judges from another African Union Member State’.<sup>57</sup> While the president of the two chambers might be from the AU, they are not in the majority, as they will be presiding together with two Senegalese judges.<sup>58</sup> The EAC has no other international staff in its prosecuting organs or acting as investigating judges.<sup>59</sup> This is quite a light usage of international staff when compared with other internationalised courts, where one often had a majority of international judges, as well as international prosecution and administrative staff.<sup>60</sup>

Another feature which makes the EAC unique, is its grounding in universal instead of territorial jurisdiction. So far, internationalised criminal courts have all relied upon territorial jurisdiction as their main jurisdictional basis, and have been located within the

<sup>51</sup>For an introduction to the different tribunals that have been created see Shrags (n 46).

<sup>52</sup>Williams, ‘The Extraordinary African Chambers’ (n 6), 1147.

<sup>53</sup>See Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1998 (22 August 2012), as translated and printed in 52 AJIL 1028 (‘EAC Statute’).

<sup>54</sup>*ibid* art 4.

<sup>55</sup>*ibid* art 16(1).

<sup>56</sup>*ibid* arts 16(2), 17(1).

<sup>57</sup>*ibid* art 11(3)–(4).

<sup>58</sup>*ibid*.

<sup>59</sup>It is worth noting that articles 11 and 12 shows that both the Senegalese judges and prosecutors are to be nominated by Senegal, but formally appointed by the AU.

<sup>60</sup>Shrags (n 46).



territory of the crimes that they have adjudicated.<sup>61</sup> The jurisdiction of the EAC, however, is over international crimes ‘committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990’.<sup>62</sup> This means that the EAC is not only located outside of the territory in which the crimes have been committed, but that it is also exclusively based on universal jurisdiction. This is the first time a court has been constructed on such a basis in international criminal law.<sup>63</sup> It is also worth noting that the personal jurisdiction of the EAC is broader than just Habré. The court has jurisdiction over all persons who were the ‘most responsible’ for the crimes committed in Chad.<sup>64</sup> Whether other persons will be tried by the EAC remains to be seen.

Finally, the EAC is structured so that there is a separate African chamber within each of Dakar’s ordinary judicial chambers (see Figure 1).<sup>65</sup>

### III.ii The Judgement

The investigating judges of the EAC’s Indicting Chamber charged Habré with crimes against humanity, torture and war crimes, in a nearly 200-page-long indictment issued on 13 February 2015.<sup>66</sup> The trial then opened on 20 July 2015 and lasted for approximately eight months, with the trial chamber sitting for fifty-six days of hearings.<sup>67</sup> During that time ninety-three witnesses testified before the court, and the impactful testimony of rape victims led to the judges amending the charges against Habré so that they also included ‘sexual and gender-based violence’.<sup>68</sup> The trial closed on 11 February 2016 and the judges spent a little over three months writing the judgement.

The judgment was pronounced on 30 May 2016, and the former dictator was found guilty of (1) the crimes against humanity of rape, sexual slavery, murder, summary execution and inhuman acts, (2) torture and (3) the war crimes of murder, torture, inhumane treatment, unlawful detention and cruel treatment. Habré was acquitted of the war crime of illegal transfer. The chamber sentenced him to life in prison.<sup>69</sup> Both the sentence and judgment are historic because seventeen years after the Pinochet decision, Habré is the first former head of state to be convicted by the domestic courts of another country for crimes against humanity and torture. He is likewise the first person to be prosecuted by an African justice mechanism. The judgement is also notable for its focus on sexual violence, and for the fact that it found Habré to be guilty of personally having committed acts of rape, following testimony from a victim who described how she had been raped four

<sup>61</sup>Williams, ‘The Extraordinary African Chambers’ (n 6), 1151.

<sup>62</sup>EAC Statute (n 53) art 3(1).

<sup>63</sup>For more on universal jurisdiction and international criminal courts, see Williams, ‘The Extraordinary African Chambers’ (n 6) 1151.

<sup>64</sup>EAC Statute (n 53) art 3(1).

<sup>65</sup>*ibid* art 11.

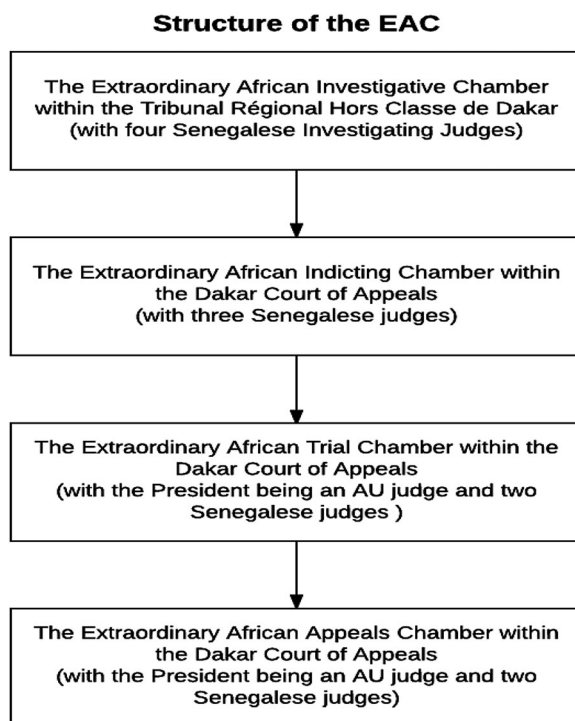
<sup>66</sup>Prosecutor c. Habré, ‘Ordonnance de Non-Lieu Partiel, De Mise en Accusation et de Renvoi Devant la Chambre Africaine Extraordinaire D’Assises’, Chambre Africaine d’Instruction (13 February 2105), <[http://www.chambresafraicaines.org/pdf/OrdonnanceRenvoi\\_CAE\\_13022015.pdf](http://www.chambresafraicaines.org/pdf/OrdonnanceRenvoi_CAE_13022015.pdf)>

<sup>67</sup>For more facts from the case see HRW, ‘Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal’ (3 May 2016) <<https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>>

<sup>68</sup>K Seelinger, ‘The Landmark Trial Against Dictator Hissène Habré’, *Foreign Affairs* (New York, 16 June 2016) <<https://www.foreignaffairs.com/articles/chad/2016-06-16/landmark-trial-against-dictator-hiss-ne-habre>>

<sup>69</sup>Habré Judgement (n 2) 536.





**Figure 1.** Structure of the Extraordinary African Chambers

times by the former dictator.<sup>70</sup> HRW believes it to be the first time that a head of state has been personally charged and convicted for acts of rape that took place while he was in office.<sup>71</sup>

On 29 July 2016 Habré was also ordered to pay a substantial sum in reparations to his victims by the same chamber.<sup>72</sup> The reparations judgement recognised claims from thousands of victims and divided them into categories of indirect and direct victims.<sup>73</sup> According to the judgment, indirect victims are all set to receive ten million CFA each<sup>74</sup> which is approximately 16,912 USD. Direct victims meanwhile, were divided into two subcategories: (1) victims of sexual slavery and rape will receive twenty million CFA (33,823 USD) and (2) victims mistreated as prisoners of war, arbitrary detention or torture were awarded fifteen million CFA each (25,367 USD).<sup>75</sup> At the same time, the chamber rejected the claim of collective reparations that had been advanced by the civil parties, and along with it a demand that the state of Chad be held financially responsible for any reparations that could not be paid by Habré.<sup>76</sup> Although the EAC had previously

<sup>70</sup>Seelinger (n 68).

<sup>71</sup>R Maclean, 'Chad's Hissène Habré found guilty of crimes against humanity' *Guardian* (London, 30 May 2016) <[www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal](http://www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal)>

<sup>72</sup>See Reparations Judgment (n 5).

<sup>73</sup>*ibid* para 55.

<sup>74</sup>*ibid* para 82.

<sup>75</sup>*ibid*.

<sup>76</sup>*ibid* para 71.

ceased the assets of the former dictator, it seems unlikely that they will be sufficient to cover the sizable reparations to this many victims.<sup>77</sup>

At the time of writing, Habré had appealed the judgment, and a spokesperson for the EAC has estimated that the appeal will take approximately seven months.<sup>78</sup> As such, neither the sentence, nor the judgment is final.

#### IV: Replicability of the EAC Model

The EAC model presents a new mechanism in the toolbox of international justice, but it remains to be seen whether a tribunal of this specific nature can be used in the future. As has been shown, both the statute and structure of the EAC was tailored specifically to address the Habré situation, and was presumably influenced significantly by the ECOWAS judgement.<sup>79</sup> The EAC will be dismantled once it has completed its prosecutions, and may therefore not be used again. But, following the pronouncement of the trial judgment, commentators have been hopeful that the EAC will provide a model for international justice in the region and elsewhere.<sup>80</sup>

First, it is conceivable that the EAC model could be used again in Africa. Recent years have seen a growing tension between the AU and ICC over what the former sees as an unjust focus on African cases by the court.<sup>81</sup> At the time of writing, the AU was considering a Kenyan proposal that would see its member states withdraw from the ICC *en masse*, rejecting the jurisdiction of the ICC in favour of dealing with atrocity crimes through a regional mechanism.<sup>82</sup> However, the AU seems to be “dragging its feet” on creating the international criminal law chambers within the African Court of Justice and Human Rights, that can take the place of the ICC as a regional African criminal court.<sup>83</sup> The AU adopted the Malabo protocol to create this chamber in 2014, but little has been done to make it operational.<sup>84</sup> Moreover, the proposed chamber has been heavily criticised for the immunity it will be granting to both sitting heads of states and other ‘senior state officials’.<sup>85</sup> This immunity weakens both the legitimacy of the new chamber, and its ability to prosecute international crimes. In light of its absence, internationalised courts modelled after the EAC could still be an important mechanism to prosecute pending, as well as older cases of atrocity crimes in Africa, while the region waits for the international criminal chamber of the African Court of Justice to be created.

<sup>77</sup>R Maclean, ‘Hissène Habré ordered to pay millions for crimes against humanity in Chad’ *Guardian* (London, 29 July 2016) <[www.theguardian.com/global-development/2016/jul/29/hissene-habre-compensation-90m-crimes-against-humanity-chad](http://www.theguardian.com/global-development/2016/jul/29/hissene-habre-compensation-90m-crimes-against-humanity-chad)>

<sup>78</sup>Reuters, ‘Chad’s former leader Habre appeals conviction for atrocities’ (11 June 2016) <<http://af.reuters.com/article/chadNews/idAFL8N1930CV>>

<sup>79</sup>Williams, ‘The Extraordinary African Chambers’ (n 6), 1149.

<sup>80</sup>Burke (n 4); S Ettaba, ‘Hissene Habre trial brings momentum for African justice on continent’, *China Post* (Taiwan, 3 June 2016) <<http://www.chinapost.com.tw/commentary/afp/2016/06/03/468137/p2/Hissene-Habre.htm>>

<sup>81</sup>For more on the conflict between the AU and ICC see B Chigara and C Nwankwo, “‘To be or not to be?’ The African Union and its Member States Parties’ Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)’ (2016) 33 NJHR 243; S Høgestøl, ‘Er Den internasjonale straffedomstolen afrikafientlig? Konflikt-selektivitet og internasjonale straffedomstoler’ (2016) 74 Internasjonal Politikk 1.

<sup>82</sup>A France-Presse, ‘African Union members back Kenyan plan to leave ICC’, *Guardian* (London, 1 February 2016) <<http://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court>>

<sup>83</sup>Ettaba (n 80).

<sup>84</sup>For more on the proposed chamber see M du Plessis and N Fritz, ‘A (New) New Regional International Criminal Court For Africa?’, *iLawyerblog* (1 October 2014) <<http://ilawyerblog.com/new-new-regional-international-criminal-court-africa/>>

<sup>85</sup>Art 23 of the new statute: for more see Amnesty International, ‘Malabo Protocol: Legal and Institutional Implications of the Merged and expanded African Court’ (Report) (22 January 2016) AI Index AFR 01/3063/2016, 26.

Second, the minimalist nature of the EAC could conceivably see a similar type of court be employed in other regions as well. The combination of minimal international elements, regional involvement and grounding in universal jurisdiction, could make the EAC model an efficient way of filling the impunity gaps left by the ICC, as well as it being an alternative regional justice mechanism that would bring prosecutions closer to home. The ICC is, as mentioned, time-barred from prosecuting cases that occurred prior to 2002, and not all states have become members of the court. This means that there are cases of international crimes that fall outside the jurisdictional reach of the ICC. In such cases, the EAC model could provide a way of closing this impunity gap. While Williams is correct in her assertion that the EAC 'is a political compromise and a solution to a particular impunity problem [Habr ], rather than a carefully constructed model for transitional justice';<sup>86</sup> it nevertheless opens another avenue for seeking justice that has not been possible before. The combination of infusing a domestic court system with some international elements and trials based on universal jurisdiction, could make the EAC model a relatively easy, efficient and cost-effective way for a regional body (like ASEAN, OAS and the League of Arab States) to prosecute atrocity crimes.

In situations where the domestic court system is unable to prosecute international crimes, an EAC-style internationalised court could be set up by a regional body, within the domestic courts of another country in the region. This would bring the trial closer to victims, give regional bodies more ownership over their international justice mechanisms, while also ensuring that the prosecutions are conducted before well-functioning courts. Early analysis of the Habr  trial have underscored that it seems to have been executed in a low cost, speedy manner, while still adhering to international fair trial rights.<sup>87</sup> This is notable when compared to the very costly and time consuming trials that have become the norm at international criminal courts.

## V. Conclusion

As the EAC presents a new type of mechanism, more research will be needed to fully evaluate this minimalist model of an internationalised criminal court. But even if the EAC is not replicated in the future, the process of bringing Habr  to justice should still serve as an important source of inspiration for the victims of other regimes; and the Habr  judgement is by all accounts set to become an important precedence for international criminal justice in the region.

Habr 's conviction is also a singular victory for victim-driven justice efforts. Without his victims' collection of evidence, testimony and relentless fight for justice, it is unlikely that the case would ever have made it to trial. By utilising a wide variety of regional and international actors, his victims and the lawyers who supported them, have forged a new path for how to end impunity and bring former heads of state to justice for egregious human rights breaches. As Reed Brody from HRW pronounced following the announcement of the judgement: 'Today will be carved into history as the day that a band of unrelenting survivors brought their dictator to justice.'<sup>88</sup>

<sup>86</sup>Williams, 'The Extraordinary African Chambers' (n 6), 1159.

<sup>87</sup>K Carlson, 'The Trial of Hiss ne Habr ' *IntLawGrrls* (24 May 2016) <<https://ilg2.org/2016/05/24/the-trial-of-hissene-habre/>>

<sup>88</sup>Quoted in E Rugiririza, 'Habr  Gets Life Sentence in Historic Judgment' *Justiceinfo.net* (30 May 2015) <[www.justiceinfo.net/en/component/k2/27541.html](http://www.justiceinfo.net/en/component/k2/27541.html)>