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## **Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm**

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## **CHAPTER 4. REGIONAL HYBRIDITY: THE EAC AND THE KSCSPO**

### **Introduction**

As I have established in the previous chapter, there are two strands of regional complementarity. This chapter focuses on the assistance driven strand, using the EAC and KSCSPO as case studies. I examine how effective this strand of complementarity has been in practice. Secondly, I identify some of the lessons that we can draw from these newly emerging practices. In the chapter, I do an extensive discussion of the Extraordinary African Chambers (EAC) within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990, otherwise known as Hissène Habré court, and a brief discussion on the Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSCSPO). The two tribunals are discussed as examples of the first model of regionalism. This is the assistance driven or the domestic mechanism dependent model. The focus on the EAC and KSCSPO is understandable. They are the only two criminal tribunals to have been created under the auspices of regional organizations – the AU and the EU. The EAC has completed its mandate while the KSCSPO continues to function. I project that regional bodies may continue to establish similar tribunals to try international crimes within their region. If that were to be the case, the EAC and the KSCSPO offer some guiding light on how such practices may be improved. In the first part, I begin the chapter with a full discussion on the background to the establishment of the EAC. I also discuss the agreement, statute, jurisdiction as well as crimes covered in the statute. Additionally, I carry out an analysis on the place of complementarity, through a discussion of the legacy and impact of the tribunal. I arrive at the conclusion that the perceived success of the EAC may yet inspire the prosecution of perpetrators of international crimes, especially from the African continent, using the same model. Regional efforts at crimes prosecution, as seen in the EAC, could promote the central idea behind the notion of regional complementarity. In the second part, I carry out similar discussion on the KSCSPO. I show that the two tribunals are examples of my first model of regionalism – the assistance driven and domestic dependent model of ICL regionalism.

## 1. Historical background on regional enforcement of ICL

The trend towards the enforcement of international criminal law through regional means has its roots in common regional efforts against transnational crimes. It has been previously utilized or proposed in the maintenance of international peace and security, in line with Article 52(1) of the UN Charter.<sup>1</sup> It provides that '[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security...' There are multiple instances where regional organizations have taken steps, including military actions, to enforce compliance with international norms under this Charter provision. NATO in Kosovo<sup>2</sup> and the ECOWAS in Liberia<sup>3</sup> are classic examples.<sup>4</sup> Regional attempts at criminalizing and prosecuting money laundering are another example of enforcement of transnational crimes through regional means. The Council of Europe,<sup>5</sup> the Organization of American States<sup>6</sup> as well as the African Union<sup>7</sup> all have legal and/or institutional frameworks for the crime of money laundering.<sup>8</sup> A third example is piracy on the high seas, which has been described as the 'oldest international crime'.<sup>9</sup> There are existing regional arrangements for maritime security.<sup>10</sup> International fisheries law, media and intellectual piracy as well as international environmental law are other examples of enforcement of international law through

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<sup>1</sup> W. Burke-White 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration (2003) 38 *Texas International Law Journal* 732.

<sup>2</sup> For an analysis of NATO's involvement in Kosovo, see M. E. O'Connell 'The UN, NATO, and International Law after Kosovo' (2000) 22 *Human Rights Quarterly* 1, 57-89.

<sup>3</sup> For the roles played by ECOWAS in Liberia, see generally C.E. Adibe 'The Liberian Conflict and the ECOWAS-UN Partnership' in Weiss T.G. (eds) *Beyond UN Subcontracting International Political Economy Series* (Palgrave Macmillan 1998)

<sup>4</sup> *Ibid.*

<sup>5</sup> The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990). Article 6 of the Convention specifically deals with laundering offences.

<sup>6</sup> 'The Organization of American States (OAS), through the Inter-American Drug Abuse Control Commission (CICAD) ... devotes efforts to strengthen the capacities of law enforcement agencies, bank regulators, financial intelligence units (FIUs), specialized public prosecutors, the judiciary, and other agencies involved in money laundering control and terrorism financing detection, investigation, and prosecution throughout the Americas.' See <https://www.state.gov/j/inl/rls/nrcrpt/2015/vol2/239468.htm>.

<sup>7</sup> Article 28I Bis of the Malabo Protocol makes money laundering a crime.

<sup>8</sup> W. Burke-White (n. 1).

<sup>9</sup> See M. Scharf and M. Taylor 'A Contemporary Approach to the Oldest International Crime' (2017) 38 *Utrecht Journal of International and European Law* 84. It is noteworthy that the Malabo Protocol criminalizes piracy in Article 28F.

<sup>10</sup> See for example D. Fantaye *Regional Approaches to Maritime Security in the Horn of Africa* (Friedrich-Ebert-Stiftung 2014).

regional mechanisms.<sup>11</sup> Also, there have been regional cooperation in relation to the crime of terrorism. These developments often reflect regional priorities as Europe,<sup>12</sup> Africa,<sup>13</sup> Central Asia,<sup>14</sup> the League of Arab States, comprising of member states from the Middle East, Gulf and North Africa states<sup>15</sup> as well as South East Asia<sup>16</sup> all have mechanisms and frameworks for dealing with terrorism.<sup>17</sup> These examples all share two important elements. The first is that the legal problems they intend to solve are of particular regional concern and, secondly, regional mechanisms are better suited to enforce compliance and punish violations.<sup>18</sup> The significance of this is that, in a comparative sense, regional enforcement was put forward as a better response for addressing these categories of crime. The next sub-section therefore briefly examines ICL developments in specific regions namely Europe, the Latin American and the Caribbean, South East Asia and concludes with a more robust discussion on specific tribunals in Africa and Europe.

## 2. ICL development in specific regions

Bodies that have hitherto been remotely concerned with international criminal law are beginning to get increasingly concerned about it and consequently involved with its work. Support for its expansion has come from unlikely quarters. For example, regional bodies have taken a special

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<sup>11</sup> Burke-White (n. 1) 733.

<sup>12</sup> 'In 2005, the European Council adopted the EU counter-terrorism strategy to fight terrorism globally and make Europe safer. The strategy's four pillars are to prevent, protect, pursue and respond.' See <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/eu-strategy/> - accessed 20 May 2023].

<sup>13</sup> The AU specifically notes that its regional efforts to prevent and combat terrorism have a long history. The continental legislative framework in this regard is the 1999 OAU Convention on the Prevention and Combating of Terrorism adopted by the 35th Ordinary Session of the OAU Summit, held in Algiers, Algeria, in July 1999.

<sup>14</sup> The UN is spearheading 'an initiative to assist Central Asian States to devise a regional Plan of Action to implement the UN Global Counter-Terrorism Strategy.' See 'Implementing the United Nations Global Counter-Terrorism Strategy in Central Asia Concept Paper [available at [The UN Global Counter-Terrorism Strategy \(unmissions.org\)](https://www.unmissions.org) – accessed on 21 March 2024].

<sup>15</sup> In 1998, the LAS adopted the Arab Convention for the Suppression of Terrorism.

<sup>16</sup> The ASEAN has adopted a Convention on Counter-terrorism whose objective is to 'provide for the framework for regional cooperation to counter, prevent and suppress terrorism in all its forms and manifestations and to deepen cooperation among law enforcement agencies and relevant authorities of the Parties in countering terrorism.' See ASEAN Convention on Counter Terrorism, April 1998.

<sup>17</sup> See generally A. Du Plessis 'A snapshot of international criminal justice cooperation against terrorism since 9/11' in L. van den Herik & N. Schrijver (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 29-67.

<sup>18</sup> C. Jalloh 'The Place of the African Criminal Court in the Prosecution of Serious Crimes in Africa' in Jalloh C and Ors (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Developments and Challenges* (Cambridge University Press 2019) 295.

interest in the growth of ICL, and in some ways, they have helped to chart a course for it. Regional human rights courts have also performed quasi-criminal functions.<sup>19</sup>

The European Union has especially been involved in the project of international criminal justice, through its commitments and the continuous support it offers.<sup>20</sup> For example, all the 27 EU member states are state parties to the ICC Statute. It was also the first regional organization to sign an agreement on cooperation and assistance with the ICC, as far back as 2006.<sup>21</sup> Additionally, more than any other region, it funds the activities of the ICC and other criminal justice initiatives around the globe. Some of the biggest financial contributors to the ICC have been France, Germany and the United Kingdom.<sup>22</sup> The European Council has enacted several legal instruments to strengthen cooperation and assistance initiatives at the national level. This is in addition to the Council of Europe's decision on assistance to the ICC in 2011.<sup>23</sup> The EU established a European Public Prosecutor's Office (EPPO) in relation to financial crimes. Crimes within the jurisdiction of the EPPO include cross border VAT and other types of fraud, corruption that affects EU's financial interests, money laundering and organized crimes, as well as misappropriation of EU funds.<sup>24</sup> The EPPO functions as a supranational entity, under the jurisdiction of national courts of member states.<sup>25</sup> The establishment of the EPPO has contributed to efforts aimed at moving the EU from cooperation to integration.<sup>26</sup> It also foreshadows the idea behind states within a region, cooperating on issues that concern them as a bloc of states. The European Arrest Warrant (EAW) is another development in regional criminal justice system. It pushes European integration into

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<sup>19</sup> A.V. Huneus 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1.

<sup>20</sup> On the EU and ICL, see J. Wouters & S. Basu 'The Creation of a Global Criminal Justice System: The European Union and the International Criminal Court' in C. Ryngaert (ed) *The Effectiveness of International Criminal Justice* (Intersentia 2009) 117-140.

<sup>21</sup> ICC-PRES/01-01-06 Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, 10 April 2006.

<sup>22</sup> See for example, status of contributions as at 31 December 2018 in ICC-ASP, 'Financial statements of the International Criminal Court for the year ended 31 December 2018' ICC-ASP/18/12, 42.

<sup>23</sup> Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP.

<sup>24</sup> EPPO 'Mission and Tasks' [available at <https://www.eppo.europa.eu/en/mission-and-tasks> - accessed 12 May 2022].

<sup>25</sup> V. Mitsilegas 'European prosecution between cooperation and integration: The European Public Prosecutor's Office and the rule of law' (2021) 22 *Maastricht Journal of European and Comparative Law* 2, 263.

<sup>26</sup> *Ibid*, 262.

realms that were once unthinkable.<sup>27</sup> It allows a country within the EU to issue a warrant of arrest which is binding and executable in all member states. An author has argued that the EAW could serve as an additional tool for prosecuting ICC crimes.<sup>28</sup> The earlier adoption of the Framework Decision on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters also adds to a growing list of regional initiatives towards strengthening criminal justice within the EU.<sup>29</sup> The EEW was replaced with the European Investigation Order.<sup>30</sup> There is a high degree of economic, social, political and industrial integration among EU member states. This may explain why there seem to be some real movements towards judicial and legal cooperation in the realm of regional criminal law.<sup>31</sup>

In terms of actual attempts at prosecuting international crimes through regional efforts, the EU agreed with the Kosovo authorities to establish the Kosovo Specialist Chambers and Specialist Prosecutors Office (KSC-SPO) after a 2011 report of the Council of Europe Parliamentary Assembly.<sup>32</sup> Cimiotta concludes that the establishment of the KSC-SPO ‘represents a regional variation of mixed criminal tribunals.’<sup>33</sup> The developments in the EU could suggest that the region is opened to the idea of establishing mechanisms that could address international and transnational crimes.

In Africa, through the Malabo Protocol, the AU has proposed to add international criminal jurisdiction to the African Court of Justice and Human Rights (ACJHR).<sup>34</sup> This remains the clearest indication that regional mechanisms may embrace international crimes prosecution. At a

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<sup>27</sup> C. Kaunert ‘Without the Power of Purse or Sword’: The European Arrest Warrant and the Role of the Commission’ (2007) 29 *European Integration* 4, 388.

<sup>28</sup> L. Vierucci ‘The European Arrest Warrant: An Additional Tool for Prosecuting ICC Crimes’ (2004) 2 *JICJ* 275–285.

<sup>29</sup> On the Evidence Warrant, see P. De Hert, K. Weis and N. Cloosen ‘The Framework Decision of 18 December 2008 – A Critical Assessment’ (2009) 1 *New Journal of European Criminal Law* 55–78.

<sup>30</sup> See Directive 2014/41/EU of The European Parliament and of The Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

<sup>31</sup> Relevant provision from the Treaty on Functioning of the EU (TFEU) includes article 82(1).

<sup>32</sup> See generally R. Muharremi ‘The Concept of Hybrid Courts Revisited: The Case of the Kosovo Specialist Chambers’ (2018) 18 *International Criminal Law Review* 4.

<sup>33</sup> E. Cimiotta ‘The Specialist Chambers and the Specialist Prosecutor’s Office in Kosovo: The ‘Regionalization’ of International Criminal Justice in Context’ (2016) 14 *Journal of International Criminal Justice* 1, 53–72.

<sup>34</sup> M. Du Plessis ‘Implications of the AU decision to give the African Court jurisdiction over international crimes’ (2012) *ISS Paper* 235. See also L. van den Herik and E. van Sliedregt ‘International Criminal Law and the Malabo Protocol About Scholarly Reception, Rebellion and Role Models’ (2017) *Grotius Center Working Paper Series* 2017/066-ICL.

sub-regional level, state parties to the East African Court of Justice have also discussed the possibility of extending the jurisdiction of the court to try crimes against humanity.<sup>35</sup> We have seen a readiness to use domestic courts to prosecute international crimes. Many African countries already have international crimes provisions in their domestic laws. This suggests that non-ratification of the Rome Statute is not equal to a reluctance to prosecute conducts amounting to international crimes.<sup>36</sup> Out of 55 African countries surveyed in a report, only 19 do not have international crimes provisions within their domestic laws, with as many as 22 having laws that criminalized the three Rome Statute crimes of genocide, war crimes and crimes against humanity. Others have provisions that criminalized one or more of the three Rome Statute crimes and this is irrespective of whether or not they have ratified the Rome Statute.<sup>37</sup>

There are strong but scattered moves toward regional integration in Africa. Currently, the AU recognizes eight regional economic communities.<sup>38</sup> While the continent has prioritized the project of economic integration for several decades now, cooperation in respect of international and transnational crimes has been slower. One primary motivation for these moves towards economic integration appears to be Africa's past economic situation. These economic communities were established to engender cooperation so as to address the economic challenges on the continent. It is therefore unsurprising that the earlier focus within the African region was to address the pressing need for economic prosperity. In my view, this, in addition to other factors that I have discussed in Chapter 1, may have accounted for the slow development of integration in the area of international criminal justice. There appeared to have been an urgent need to first address the economic challenges that were common to most countries in the continent. With the existence of several economic communities and the development in the area of human rights law, the continent appears to be ready to construct a regional criminal mechanism. One noticeable trend on the continent is the desire to collaborate on issues that generally affect many of the member states. It

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<sup>35</sup> Chimp Reports, 'East African Courts to Hear Crimes Against Humanity' 29 April 2013 [available at <https://chimpreports.com/9681-east-african-court-to-hear-crimes-against-humanity/> - accessed 6 February 2024].

<sup>36</sup> C. Meinicke 'Domestic prosecution of International Crimes – Africa', 15 May 2019.

<sup>37</sup> *Ibid.*

<sup>38</sup> African Union 'Regional Economic Communities (RECs) [available at <https://au.int/en/organs/reccs> - accessed 9 February 2024].

is therefore understandable that a problem of transnational crimes has begun to make the project of a regional criminal tribunal a necessity.

The Caribbean region has a Caribbean Court of Justice which was established in 2001. According to the agreement establishing the court, ‘an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal of a Contracting Party in any civil or criminal matter.’<sup>39</sup> This appellate criminal jurisdiction appears to be the first in a regional court. The criminal jurisdiction has been less used, compared to the civil jurisdiction.<sup>40</sup> In 2016, the Inter-American Commission signed a Memorandum of Understanding with the ICC to engender a new regime of cooperation and support between the two institutions.<sup>41</sup> The Commission consists of member states from Latin America and the Caribbean countries.

Beyond cooperation between the Inter-American Court on Human Rights (IACtHR) and the ICC, there have also been calls for the creation of a regional criminal court – the Latin American Court Against Organized Crime (the COPLA Initiative).<sup>42</sup> These calls have largely been made by coalition of civil societies and political organisations in Latin America, chief of which are the South American Coalition for the International Criminal Court and *Democracia Global*.<sup>43</sup> A number of reasons have been given for this campaign. One is the need to advance regional integration which is facing a stalemate and backward trend.<sup>44</sup> Secondly, the activities of violent criminal organisations engaging in drugs, arms and human trafficking across borders in the region

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<sup>39</sup> Article XXV (4) of the Agreement Establishing the Caribbean Court of Justice, 14 February 2001.

<sup>40</sup> A.N. Maharajh ‘The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean’s First Independent and Interdependent Court’ (2014) 47 *Cornell International Law Journal* 747.

<sup>41</sup> ICC Press Release: ICC and Inter American Court Sign MOU at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1191>.

<sup>42</sup> COPLA is the Spanish acronym for the Latin American and Caribbean Criminal Court Against Transnational Organized Crime. See ‘The “Cienfuegos Affair” and the Proposal for a New Regional Transnational Criminal Court in Latin America (COPLA)’, *Opinio Juris*, 16 July 2021 [available at <http://opiniojuris.org/2021/07/16/the-cienfuegos-affair-and-the-proposal-for-a-new-regional-transnational-criminal-court-in-latin-america-copla/> - accessed 7 February 2024]. See also WFM, ‘COPLA Campaign’, [available at <https://www.wfm-igp.org/campaign/copla-campaign/> - accessed 7 February 2024]

<sup>43</sup> COPLA [available at <https://www.coalicioncopla.org/> - accessed 7 February 2024].

<sup>44</sup> The Federalist Debate, F. A. Iglesias ‘A Regional Criminal Court Against Transnational Organized Crime’ (2014) 1 [available at <https://www.federalist-debate.org/archive/year-xxxiv-number-3-november-2021/borderless-debate/the-latin-american-criminal-court-an-approach-for-regional-integration-against-transnational-organized-crime> - accessed 8 February 2024].

have necessitated the need to devise approaches that take regional peculiarities into account.<sup>45</sup> The region continues to witness proliferations of extremely violent criminal gangs. It is also one of the most violent regions in the world.<sup>46</sup> Thirdly, the inability of governments in the region to effectively deal with transnational crimes makes a regional court a viable alternative. National security mechanisms are increasingly becoming inadequate to address the challenges posed by these organized groups.<sup>47</sup> The governments and people of Latin America share a common problem of insecurity that continuously defy national efforts. The pervasiveness of the security challenges has assumed a regional dimension. As observed,

The problem of organized transnational crime is not national, but regional. Therefore, regional problems require regional policies. And regional policies require regional institutions in order to overcome succumbing to the inefficiency and arbitrariness of power imbalances between states, or at the mercy of inability of local powers.<sup>48</sup>

The proposed court will operate as a ‘transnational criminal court.’<sup>49</sup> It may draw membership from all Latin American and Caribbean countries. It will apply among other instruments, the United Nations Convention against Transnational Organized Crime (Palermo Convention) and its three supplementary Protocols. It is also proposed to complement domestic laws and have jurisdiction over seven transnational crimes, including drugs and human trafficking, money laundering and transnational bribery.<sup>50</sup> While the campaign for its establishment continues, what is of importance is that the prevalence of organized transnational crimes, over which the ICC may

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<sup>45</sup> For thoughts on the effects of drug trafficking and the attendant violence in Latin America, see Corporación Andina de Fomento CAF, Development Bank of Latin America ‘Towards a safer Latin America: A new perspective to prevent and control crime’ (2014) 137-165.

<sup>46</sup> COPLA, ‘Latin American Criminal Court Against Transnational Organised Crime’ [available at [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/dlat/dv/07\\_copla\\_abstractnov2016/07\\_copla\\_abstractnov2016en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dlat/dv/07_copla_abstractnov2016/07_copla_abstractnov2016en.pdf) - accessed 8 February 2024].

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 2.

<sup>49</sup> R. Currie & J. Leon ‘Copla: A Transnational Criminal Court for Latin America and the Caribbean’ (2019) 88 *Nordic Journal of International Law* 592.

<sup>50</sup> WFM Canada ‘The proposal for a Latin American and Caribbean Criminal Court against Transnational Organized Crime reaches the United Nations General Assembly (December 2017)’ [available at <http://www.wfmcanada.org/2018/01/proposal-latin-american-caribbean-criminal-court-transnational-organized-crime-reaches-united-nations-general-assembly-december-2017/> - accessed 8 February 2024].

not have jurisdiction is one of the reasons that have necessitated the call for a regional criminal court in the Latin American region. Government Ministers of MERCOSUR- an economic and political bloc consisting of some countries in Latin America, have adopted a declaration that commits their governments to formally study the feasibility of establishing such a regional court.<sup>51</sup> It is yet to be seen how the court, if it is ever established, will operate in practical terms. However, regionalism will continue to be an attractive alternative where regions are confronted with common transnational challenges that have defied national efforts, as it is the case in Latin America. The inter-American region has faced similar transnational crimes issues across member states. It is also the region with the most developed transitional justice jurisprudence by its regional human rights court.<sup>52</sup> It is not therefore surprising that earlier cooperation efforts have centered around addressing joint problems of organised crimes.<sup>53</sup> As with the African region, the Latin American region also confronted pressing challenges which required a common front.

It has been argued that the Southeast Asian region is generally reluctant towards embracing the ICC.<sup>54</sup> Certain facts may support this assertion. As of today, only two states in the region – Cambodia and Bangladesh are parties to the ICC Statute. Philippines pulled out of the ICC in 2018.<sup>55</sup> In 2019, Malaysia backtracked on its earlier accession to the Rome Statute.<sup>56</sup> Three hybrid criminal tribunals have been established in the region.<sup>57</sup> None of the three was established through the actions or support of the regional body: the Association of Southeast Asian Nations (ASEAN). The three tribunals are the Special Panels for Serious Crimes (SPSC) in Timor-Leste, which

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<sup>51</sup> WFM Canada ‘COPLA Update Regional governments agree to study proposed criminal court’ [available at <http://www.wfmcanada.org/2018/07/copla-update-regional-governments-agree-study-proposed-criminal-court/> - accessed 8 February 2024].

<sup>52</sup> See generally E. M. Ceia ‘The Contributions of the Inter-American Court of Human Rights to the Development of Transitional Justice’ (2015) 14 *The Law and Practice of International Courts and Tribunals* 3, 457-475.

<sup>53</sup> R. van Ellis ‘*Transnational Organized Crime in Latin America and the Caribbean: From Evolving Threats and Responses to Integrated, Adaptive Solutions*’ (Lexington Books 2018) 6.

<sup>54</sup> On this reluctance and possible reasons for it, see S. Freeland ‘International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime’ (2013) 11 *Journal of International Criminal Justice* 5. See also Takemura H ‘The Asian Region and the International Criminal Court’ in Nakanishi Y. (ed) *Contemporary Issues in Human Rights Law* (Springer 2018) 107-125.

<sup>55</sup> ICC ‘Situation in the Republic of Philippines’ [available at, <https://www.icc-cpi.int/philippines> - accessed 7 February 2024].

<sup>56</sup> Coalition for the International Criminal Court, ‘Malaysia backtracks on accession to the Rome Statute’ 12 April 2019.

<sup>57</sup> L. Schuldt ‘Southeast Asian Hesitation: ASEAN Countries and the International Criminal Court’ (2015) 16 *German Law Journal* 1, 77.

concluded its assignment in 2006,<sup>58</sup> and the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Crimes Tribunal-1, Bangladesh.<sup>59</sup>

From the foregoing, it appears that there has not been significant development in relation to regionalization of international criminal justice within the Southeast Asian region. However, like most regions, the ASEAN also recognized the need for a common front in order to address transnational crimes that are peculiar to that region. For this reason, the regional body adopted the 1997 ASEAN Declaration on Transnational Crimes.<sup>60</sup> The Declaration significantly notes that ‘the continuity of existing global framework against transnational crime rests on consolidated regional action in the institutional and operational spheres.’<sup>61</sup> The Declaration identified six transnational crimes as capable of disrupting regional stability and development. The six crimes are ‘terrorism, illicit drug trafficking, arms smuggling, money laundering, traffic in persons and piracy.’<sup>62</sup> The African region has already proposed the creation of a regional court to prosecute these same crimes. The ASEAN region may set up a regional court for the purposes of prosecuting these crimes. In any case, paragraph 1 of the Declaration already states that the regional body has resolved to ‘strengthen the commitment of Member Countries to cooperate at the regional level in combating the transnational crime.’<sup>63</sup>

In essence, the development in every region is driven by the challenges that are peculiar to those regions. This is partly the idea that regional complementarity champions — the need to develop context-specific solutions to impunity. States acting under the auspices of regional organizations may continue to embrace and actively participate in the project of international criminal justice as seen from ongoing efforts across different regions.

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<sup>58</sup> On the Special Panels, see S. Katzenstein ‘Hybrid Tribunals: Searching for Justice in East Timor’ (2003) 16 *Harvard Human Rights Journal* 245-278.

<sup>59</sup> S. Linton ‘Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation’ (2010) 21 *Criminal Law Forum* 2, 191-311.

<sup>60</sup> The 1997 ASEAN Declaration on Transnational Crimes, 20 December 1997.

<sup>61</sup> Preamble to the Declaration.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

Historically, since the days of the International Military Tribunal after the WWII, international crimes prosecutions have largely occurred at a supranational level.<sup>64</sup> More recently, states have utilized their domestic jurisdictions - through activating universal and extra-territorial jurisdiction<sup>65</sup> and establishing mixed tribunals - for the same purposes.<sup>66</sup> These two enforcement mechanisms have inherent benefits and drawbacks.<sup>67</sup> To remedy the drawbacks, Burke-White has argued that ‘regional enforcement would be situated at a unique midpoint ... balancing the benefits and dangers of both....’<sup>68</sup> Bruch calls it the ‘best of both worlds’ approach.<sup>69</sup> In this chapter, I approach the regional system, not only as one that sits in-between the two worlds, but as an independent and integral part of a global architecture of justice. This is what has begun to emerge, first in the AU’s support for the creation of a tribunal to try the former President of Chad, and subsequently, in the establishment of the Criminal Chamber in the African Court.

### 3. The Extraordinary African Chambers (EAC)

The EAC was created in Senegal, through an agreement with the AU, in order to try international crimes committed in Chad between 7 June 1982 and 1 December 1990. Many reports from NGOs already contain exhaustive details of crimes committed by the government of Hissène Habré in that period.<sup>70</sup> The relevance of the EAC derives from the idea that many have described its establishment and perceived ‘success’ as an example of ‘an African solution to an African problem.’<sup>71</sup> As a transitional justice mechanism, it was ‘simultaneously international, regional and

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<sup>64</sup> See also J. N. Maogoto ‘The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction’ in M. Bergsmo & Ors (eds) *Historical Origins of International Criminal Law* (Torkel Opsahl Academic E-Publisher 2014) 171-193.

<sup>65</sup> For an understanding of the principle of universal jurisdiction, see R. O’Keefe ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice* 3, 735-760.

<sup>66</sup> W. Burke-White ‘Regionalization of International Criminal Law Enforcement: A Preliminary Exploration’ (2003) 38 *Texas International Law Journal* 732.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> E. M. Bruch ‘Hybrid Courts: Examining hybridity through a post-colonial lens’ (2010) 28 *Boston University International Law Journal* 1 at 38.

<sup>70</sup> For examples of such reports, see Human Rights Watch, ‘Chad: The Victims of Hissène Habré Still Awaiting Justice’, 12 July 2005. See also Amnesty International ‘Chad: The Habre Legacy’, 15 October 2001. Human Rights Data Analysis Group, R. Silva, J. Klingner, and S Weikart, ‘State Coordinated Violence in Chad under Hissène Habré: A Statistical Analysis of Reported Prison Mortality in Chad’s DDS Prisons and Command Responsibility of Hissène Habré, 1982-1990, 3 February 2010.

<sup>71</sup> For example, see S. Williams ‘The Extraordinary African Chambers in the Senegalese Courts an African Solution to an African Problem?’ (2013) 11 *JICJ* 1139-1160. See also African Union ‘Report of the Committee of Eminent

local<sup>72</sup> in nature. It also stands as a unique example of attempts at regionalizing international criminal justice. The trials and the Chambers that conducted them signaled many ‘firsts’ in African and wider international criminal justice system. It was the first time that the African Union (AU) had established a criminal tribunal to try international crimes. It was also the first time a former African head of state had been tried before a court in another African country. Thirdly, it was the first time that a universal jurisdiction case had proceeded to trial in Africa.<sup>73</sup> Lastly, it was the first time that an African war criminal had been convicted on African soil.<sup>74</sup> It may be too early to write about the far-reaching impact and the legacy of the trials, but even at this early stage, there are already scholars who hold pessimistic views about the importance of the trial.<sup>75</sup> Irrespective of what anyone thinks, the trials marked an important milestone in the development of ICL in Africa,<sup>76</sup> and it was a precursor to Africa’s decision to establish an international criminal chamber in its regional court.

### 3.1. Background to the establishment of the EAC

The events leading to the prosecution and eventual conviction of Habré in 2016 started in 1992. Habré had been deposed in 1990 and his successor had taken power in Chad. The latter established the Chadian National Commission of Inquiry. The mandate of the Commission was to ‘investigate illegal detentions, assassinations, disappearances, torture, mistreatment, other attacks on the physical and mental integrity of persons; all violations of human rights, illicit narcotics trafficking and embezzlement of state funds between 1982 and 1990.’<sup>77</sup> Similar to the ‘future’ Malabo

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African Jurists on the Case of Hissène Habré’ at [https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA\\_Repor0506.pdf](https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf) where the Committee stated in paragraph 22 that ‘[I]t considered the establishment of an ad hoc tribunal as another good opportunity for an African solution to be found.’

<sup>72</sup> T. Bouwknecht ‘Beyond ‘African Solutions to African Problems’ at the Extraordinary African Chambers and ‘Distant Justice’ at the International Criminal Court’ (2019) 0 *JICJ* 1.

<sup>73</sup> M. Kersten ‘The Trial of Hissène Habré and What it Could Mean for Justice in Africa’ [available at <https://justiceinconflict.org/2018/03/27/the-trial-of-hissene-habre-and-what-it-could-mean-for-justice-in-africa/> - accessed 4 March 2023].

<sup>74</sup> C. Hicks, *The Trial of Hissène Habré: How the People of Chad Brought a Tyrant to Justice* (ZED Books 2018).

<sup>75</sup> See for example Konstantinos D. Magliveras ‘Fighting Impunity Unsuccessfully in Africa: A Critique of the African Union’s Handling of the Hissène Habré Affair’ (2014) 22 *Afr. J. Int’l & Comp. L.* 420-447.

<sup>76</sup> See generally S. Weill and others (eds) *The President on Trial: Prosecuting Hissène Habré* (Oxford University Press 2020).

<sup>77</sup> United States Institute of Peace, Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories: Investigation of Crimes Against the Physical and Mental Integrity of Persons and their Possessions, 7 May 1992.

Protocol, ‘the crime jurisdiction’ of the Commission contained a wide range of ‘core’ and ‘transnational crimes.’ The Commission issued a report dated 7 May 1992.<sup>78</sup> In it, the Commission found that Habré’s government was responsible for an estimated 40,000 deaths. The Commission also recommended the establishment of an independent judiciary, a reform of the security forces, timely creation of a National Human Rights Commission and prosecutions as well as symbolic reparations.<sup>79</sup> It was only in January 2000, that some Chadian nationals, through the support of a coalition named the International Committee for the Fair Trial of Hissène Habré, filed criminal charges against Hissène Habré at a Dakar court. In February, a Senegalese judge indicted Habré for crimes against humanity and torture. He was subsequently placed under house arrest.<sup>80</sup> The Senegalese Appellate Court however quashed the indictment and dismissed the case. The Court of Appeal held that although the state of Senegal had ratified the UN Convention Against Torture, the state had yet to domesticate it and as such, could not try crimes committed abroad.<sup>81</sup> In essence, the court held that Habré could not stand trials in Senegal for crimes committed elsewhere. In March 2001, the Court of Cassation also upheld the position of the Appellate Court. Prior to this time, Habré had been released from detention, but his respite was short-lived, as a Belgian court had been approached by Chadians and Belgians of Chadian origin.<sup>82</sup> The Belgian court indicted Habré on the same charges as those filed before the Senegalese court. The court issued an international warrant of arrest against Habré.<sup>83</sup> The state of Belgium followed up with an extradition request to Senegal in November 2005. There were other extradition requests from Belgium to Senegal.<sup>84</sup>

It is significant that the Senegalese Appeals Court refused to grant the extradition request from Belgium, but instead, upheld the argument that Habré should enjoy immunity for acts committed in the discharge of his duty, in his capacity as head of state. The Appeal Court purported to have

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> R. Brody ‘Bringing a Dictator to Justice: The Case of Hissène Habré’ (2015) 13 *JICJ* 209-217.

<sup>81</sup> For a fuller understanding of the case, see R. Brody, ‘The Prosecution of Hissène Habré: An “African Pinochet”’, (2001) 35 *New England Law Review* 321-345.

<sup>82</sup> Human Rights Watch ‘Ex-Chad Dictator Indicted in Belgium: Hissène Habré to Face Extradition to Belgium for Human Rights Atrocities’ 29 September 2005.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

upheld jurisdictional immunity of a head of state, pursuant to customary international law.<sup>85</sup> Another significant development on the extradition request was the decision of the UN Committee Against Torture, in respect of a communication filed before it in 2001. The decision was issued on 17 May 2006. The Committee held *inter alia* that ‘by refusing to comply with the extradition request from Belgium, the State party has again failed to perform its obligations under article 7 of the Convention Against Torture.’<sup>86</sup>

In summary, Senegal refused to accede to the demands from Belgium, but instead, approached the AU for assistance. The AU in response to Senegal adopted a decision mandating its chairperson to constitute a committee of eminent African jurists to study and present options on what to do.<sup>87</sup> The committee reported that it took the following benchmarks into consideration while carrying out its assignment: (a) Adherence to the principles of total rejection of impunity; (b) Adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings; (c) Jurisdiction over the alleged crimes for which Mr. Habré should be tried; (d) Efficiency in terms of cost and time trial (e) Accessibility to the trial by alleged victims as well as witnesses; (f) Priority of an African mechanism.<sup>88</sup>

The benchmarks considered by the Committee and the proposals made suggested that the AU was beginning to take seriously the issue of impunity and the need to address it on the continent. This was to fulfil the first benchmark: total rejection of impunity. The second benchmark became necessary, considering that Habré had alleged that he would not get a fair trial in Chad if he was extradited. The AU was interested in allaying those fears, while showing to the international community that it has the capacity to put one of its own on trial. On the third benchmark, Habré had also argued that the Senegalese courts had no jurisdiction over the crimes that he was alleged

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<sup>85</sup> See extracts of the decision at ‘L’avis de la Cour d’appel de Dakar sur la demande d’extradition de Hissène Habré (extraits)’ [available at [http://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9\\_Cour\\_Appel\\_Avis\\_Extradition\\_25-11-2005\(Extraits\).pdf](http://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9_Cour_Appel_Avis_Extradition_25-11-2005(Extraits).pdf) – accessed 9 February 2024]. On immunities of heads of state and its place in the Hissene Habré case, see P. Gaeta ‘*Ratione Materiae* Immunities of Former Heads of State and International Crimes: The Hissène Habré Case’ (2003) 1 *Journal of International Criminal Justice* 1 186-196.

<sup>86</sup> See UN Doc CAT/C/36/D/181/2001, decision on Communication No. 181/2001 Suleymane Guengueng *et al.* (represented by counsel) v Senegal.

<sup>87</sup> See African Union ‘Report of the Committee of Eminent African Jurists on the Case of Hissene Habré’ at [https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA\\_Repor0506.pdf](https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf).

<sup>88</sup> *Ibid* at 1.

to have committed. Of course, the Senegalese courts had earlier agreed with him and had quashed his indictment. The AU was willing to balance these concerns with the need to mete out justice for international crimes. On the fourth benchmark, Senegal, and indeed the government of Abdoulaye Wade, had reportedly found the proposal to try Habré at a cost of 66 million Euro too exorbitant.<sup>89</sup> There was a need to explore the possibility of circumventing these difficulties in order not to derail the trial. Moreover, it had become clear that there are inherent challenges in securing witnesses to testify to crimes which occurred in a different country from which the trials are taking place. The fifth benchmark was aimed at addressing this particular challenge. Lastly, the AU saw a Habre trial as an opportunity to show the international community that it could indeed provide African solutions to African problems, hence the last benchmark.

The committee eventually made three proposals as to the appropriate court before which Hissène Habré could be validly tried. The first option was to try him before the domestic court in Senegal, given the country's obligation under the Convention against Torture. The second option was a trial by any African country that is a party to the Convention against Torture, employing the principle of universal jurisdiction. The last option was to establish an *ad hoc* tribunal sitting in any African country for the trial.<sup>90</sup> It was also in relation to these discussions that the committee then suggested that Africa could establish an independent mechanism to bridge the impunity gap.<sup>91</sup>

After receiving the report of the jurists, the AU decided that Senegal could try Habré, acting in the interest of the AU and on behalf of Africa.<sup>92</sup> To demonstrate its willingness to leave no stone unturned in the trial, the AU leadership urged Senegal to put in place all fair trials guarantee.<sup>93</sup> It

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<sup>89</sup> Human Rights Watch 'Hissène Habré and the Senegalese Courts A Memo for International Donors' at <https://www.hrw.org/legacy/backgrounder/africa/habre1207/habre1207web.pdf> at 5.

<sup>90</sup> *Ibid*, paragraphs 27-33.

<sup>91</sup> *Ibid*, paragraphs 34-35.

<sup>92</sup> This point is important as it was obvious from the beginning that the AU was striving to show the world that it is capable of proffering solutions to the problems that confront the continent. See generally AU Doc Assembly/AU/Dec.111(VII) Decisions and Declarations at Decision on the Hissène Habré Case and the African Union: Doc. Assembly/AU/3 (VII), paragraph 5(ii).

<sup>93</sup> *Ibid*.

requested cooperation from all African countries<sup>94</sup> while committing itself to the effective conduct of the trial.<sup>95</sup> Additionally, it enjoined the international community to help with resources.<sup>96</sup>

The AU decision and the subsequent agreement between the AU and Senegal for the establishment of the EAC, took into consideration, the report of the eminent jurists, the UN Convention Against Torture which Senegal had ratified in 1986, as well as the decisions from ECOWAS<sup>97</sup> and the ICJ,<sup>98</sup> as parts of the motivation and basis for establishing the EAC. As noted elsewhere, the creation of the EAC resulted from Senegal's efforts at reconciling rules, agreements and decisions emanating from diverse international law sources.<sup>99</sup>

In response to the AU decision, and in order to give effect to complementarity under the Rome Statute,<sup>100</sup> Senegal implemented some reforms in order to be able to legally prosecute Hissène Habré. Some of the reforms included the addition of genocide, crimes against humanity, war crimes and torture to its penal code. It also amended the country's code of criminal procedure,<sup>101</sup> which the Chambers relied upon, alongside its application of substantive international criminal

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<sup>94</sup> *Ibid*, paragraph 5(iv).

<sup>95</sup> *Ibid*, paragraph 5(iii).

<sup>96</sup> *Ibid*, paragraph 5(v).

<sup>97</sup> In *Habre v Senegal*, case ECW/CCJ/JUD/06/10 before the Court of Justice of the Economic Community of States of West Africa (ECOWAS), the court ruled that Senegal could not try Hissène Habré before its courts, on the basis of non-retroactivity of criminal law. It however enjoins Senegal to establish an ad hoc tribunal for this purpose, since the acts in question already constitute crimes which are prohibited by international law at the time of commission. See generally Hissène Habré v. Republic of Senegal at <http://www.internationalcrimesdatabase.org/Case/220>.

<sup>98</sup> In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Belgium had argued before the ICJ that Senegal's failure to prosecute or extradite Mr Habre for crimes committed during his time as head of state violated Article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and customary international law (See Memorial of the Kingdom of Belgium, 1 July 2010). On the other hand, Senegal argued that it is not in violation of the CAT as its actions show that it is fulfilling its obligations under the CAT. (See Senegal's Counter-Memorial at <https://www.icj-cij.org/files/case-related/144/16931.pdf>). In its decision, the ICJ finds that 'the Republic of Senegal, by failing to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, has breached its obligation under Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.' (See International Court Of Justice 'Reports of Judgments, Advisory Opinions and Orders Questions Relating to the Obligation to Prosecute or Extradite (Belgium V. Senegal) Judgment of 20 July 2012.

<sup>99</sup> E. Cimiotta 'The First Steps of the Extraordinary African Chambers: A New Mixed Criminal Tribunal?' (2015) 13 *JICJ* 185.

<sup>100</sup> M. Niang 'The Senegalese Legal Framework for the Prosecution of International Crimes' (2009) 7 *Journal of International Criminal Justice* 5, 1047–1062 at 1047.

<sup>101</sup> See V. Spiga 'Non-retroactivity of Criminal Law: A New Chapter in the Hissene Habre Saga' (2011) 9 *JICJ* 5-23 at 17.

law. According to Brody, this was a compromise that was born out of necessity.<sup>102</sup> Senegal also concluded and signed a cooperation agreement with Chad.<sup>103</sup> The cooperation agreement underscored the importance of innovation in international criminal justice. Additionally, this instance also reveals the catalytic roles that regional efforts may play in helping countries to fulfill their obligations under the Rome Statute. The trial eventually commenced in 2015 and conviction was entered in 2016. The appeals judgment was rendered in 2017.<sup>104</sup> Overall, the Hissène Habré affair reveal one thing: Africa and its leaders have been involved in the project of regionalizing international criminal justice.

### **3.2. Establishment, Structure, Jurisdiction and Crimes**

The EAC was established as a result of a bilateral agreement between a regional organization and a member state. The EAC however differs from other existing hybrid tribunals. Its establishment marked the first time that such a tribunal would be established under the auspices of a regional organization. The previous tribunals had been established under the auspices of the UN. It is also the first time such a tribunal would be established in one country for the purpose of prosecuting the ex-leader of another country, for the host country's failure to prosecute or extradite. But these are perhaps the only points of divergence. Like other tribunals, its lifespan was already determined from its establishment. It was, like all others before it, established to be a temporal tribunal with limited function. This was also reiterated in article 37 of the statute where it provides that 'the EAC shall be dissolved automatically once all judgments have been pronounced.'

On structure, article 2 of the Statute of the EAC provides that 'Extraordinary African Chambers are hereby established within the judicial system of the Republic of Senegal, as follows: a) a Pre-Trial Chamber within the Dakar Special Regional Court; b) an Indictment Chamber at the Dakar Court of Appeals; c) a Trial Chamber at the Dakar Court of Appeals; and d) an Appeals Chamber at the Dakar Court of Appeals.' An Indictment Chamber was one of the four chambers in the EAC.

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<sup>102</sup> R. Brody Updated Edition After the Final April 2017 Verdict, *Victims Bring a Dictator to Justice: The Case of Hissène Habré* (Bread for the World 2017) 33.

<sup>103</sup> 'Accord de coopération judiciaire entre la République du Senegal et la République du Tchad pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1 décembre 1990', 3 May 2013 at <http://forumchambresafricaines.org/docs/AccordCooperationJudiciaireSenegalTchad.pdf>.

<sup>104</sup> Amnesty International 'Chad: Hissène Habré Appeal Ruling Closes Dark Chapter for Victims', 27 April 2017.

This is due to the inquisitorial procedural model of the civil law systems of Senegal.<sup>105</sup> As noted by the ICTY's Trial Chamber, '[I]n many civil law systems, indictments are subject to judicial scrutiny by the investigating judge before the trial.'<sup>106</sup> This is the reason why its duties, according to article 31(1) (b) of the EAC Statute is to '...examine and rule on any appeals [from the Pre-Trial chamber] lodged pursuant to the Senegalese Code of Criminal Procedure.' As an 'appellate court' for the Pre-Trial chamber, it performs similar functions as the Trials Chambers of the ICTY. Article 19 of the ICTY Statute provides that it is the duty of the judge of the Trial Chamber to either confirm or dismiss indictment. Its role is also somewhat similar to the roles performed by the Appeals Chamber of the ICC. It however appears that there are some significant differences between the roles performed by the Appeal Chambers in both institutions. The Appeals Chamber in line with article 25 of the EAC Statute 'shall hear appeals from persons convicted by the Trial Chamber.' This implies that the EAC's Appeal Chamber will only entertain appeals from substantive decision from the Trial Chamber, while preliminary appeals from the decision of the Pre-Trial Chamber would have been dealt with by the Indictment Chamber. The situation is slightly different in the ICC because it does not have an Indictment Chamber and all appeals, including those on preliminary issues are heard at the Appeals Chamber. The decisions of both the Indictment Chamber and the Appeal Chambers of the EAC are therefore final and not subject to appeal. Highlighting these procedural differences is necessary in order to establish that diverse procedural policies may be adopted by different tribunals, as long as the overall goal is the dissemination of justice. It also fits into the proposition of this work: the idea that different routes can be taken in order to promote the overarching goals of the Rome Statute, and one of such routes is the prosecution of crimes through a regional tribunal.

On jurisdiction, article 3(1) & (2) of the Statute of the EAC provides as follows:

- 1) The Extraordinary African Chambers shall prosecute and try the person(s) most responsible for crimes and serious violations of international law, customary

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<sup>105</sup> On the inquisitorial procedural model, see S. Vasiliev 'Trial Process at the ECCC: The Rise and fall of the Inquisitorial Paradigm in International Criminal Law' in S. Meisenberg & I. Stegmiller (eds) *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Springer 2016) 390-432.

<sup>106</sup> *Prosecutor V. Milan Kovacevic*, Decision on Prosecutor's Request to File an Amended Indictment, Decision Dated 5 March 1998, para. 10.

international law and international conventions ratified by Chad, committed on the territory of Chad during the period from 7 June 1982 to 1 December 1990.

- 2) The Extraordinary African Chambers may choose to prosecute the most serious crimes within their jurisdiction

This provision has a number of implications. First, the Statute reveals an intention to prosecute *the person or persons* most responsible for crimes during Habré's regime, but ultimately, only Habré was prosecuted. In 2013, the chief prosecutor had sought the indictment of five other suspects who were officials in Habré's government. For various reasons, this did not happen and thus, only Habré was tried and convicted.<sup>107</sup> This 'politics of a singular focus on individualized criminal accountability'<sup>108</sup> is connected with ICL's desire to punish suspects who are most responsible for crimes. It is also an admission of the limit of international criminal law to punish all perpetrators of crimes, owing to many supervening factors. Secondly, it was obvious that the overwhelming desire of the victims of Habré's crimes was to see the head of government himself punished for the crimes perpetrated by his agents. All the activities leading to the eventual setting up of the EAC were centered upon and spurred on by the desire to bring a former head of state to justice. It was believed that this may have a greater deterrent effect on would-be-perpetrators, even if they are heads of state. The import is that the trials were meant to establish that crimes that have attained the status of *jus cogens* should not go unpunished, irrespective of who the perpetrators are, or even their location.

Article 4 of the Statute gives the EAC power to try the crimes of genocide, crimes against humanity, war crimes and torture. Article 5 to 8 outline the elements of each crime. One observation is that the crime of torture appears as a separate crime in article 8, but also as part of war crimes in article 7(2) and crimes against humanity in article 6(g). There is no explanation for this repetition, but it is probable that the drafters of the statute were willing to underscore the *jus*

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<sup>107</sup> Human Rights Watch, 'Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal', 3 May 2016.

<sup>108</sup> See K.J. Bluen 'Justice, But Only for Some: The trial of Hissene Habre' *Justice in Conflict*, 30 July 2015 [available at <https://justiceinconflict.org/2015/07/30/justice-but-only-for-some-the-trial-of-hissene-habre/> - accessed 9 February 2024].

*cogens* nature of torture,<sup>109</sup> given the overwhelming evidence that Hissène Habré had employed torture as a weapon against his victims. This was also echoed in the ICJ decision on Habre, where the court submitted that ‘the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).’<sup>110</sup> Unlike other international crimes which largely depend on goodwill of interested states for them to be prosecuted, torture is one crime where states have established an obligation to either prosecute or extradite suspects who are located within their territories, as per article 7 of the Convention against Torture (CAT).<sup>111</sup>

It is also observed that the crimes in the statute are similar to the crimes in the Rome Statute, with the exception of a few differences relating to definition and elements of crime.<sup>112</sup> As such, unlike other hybrid tribunals, the EAC does not have jurisdiction over ‘domestic crimes’, but over purely international crimes. However, unlike the ICC, the jurisdiction of the EAC, according to article 9, is not subject to any statutory limitations. Additionally, article 10(3) provides that ‘[T]he official position of an accused, whether as Head of State or Government, or as a responsible government official, shall not relieve him or her of criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.’ The inclusion of this provision appears to have marked a radical departure from the well-known AU’s stance on immunity for heads of states and governments, in line with customary international law. The AU’s position was again, recently re-emphasized, in its ‘Amicus Brief Submission in the Hashemite Kingdom of Jordan’s Appeal Against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir’, dated 13 July 2018. In its submission, the AU argued that ‘the rule that, under international law, heads of State enjoy immunity *ratione personae* from foreign criminal jurisdiction, is virtually uncontested.’<sup>113</sup>

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<sup>109</sup> On the *jus cogens* nature of the crime of torture, see Erika de Wet ‘The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law’ (2004) 15 *EJIL* 97-121. See also the Report of the International Law Commission, Sixty-sixth session, (5 May–6 June and 7 July–8 August 2014).

<sup>110</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, para. 99.

<sup>111</sup> K. Neldjingaye, The Trial of Hissène Habré in Senegal and its Contribution to International Criminal Law’ in C. Murungu and J. Biegon (eds) *Prosecuting International Crimes in Africa* (Pretoria University Law Report 2011) 193.

<sup>112</sup> For thoughts on the differences, see M. Niang ‘The Senegalese Legal Framework for the Prosecution of International Crimes’ (2009) 7 *Journal of International Criminal Justice* 5,1047–1062.

<sup>113</sup> See ICC Doc: ICC-02/05-01/09 OA2 The African Union’s Submission in the ‘Hashemite Kingdom of Jordan’s Appeal Against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir’, para. 11.

Thus, that it temporarily departed from its widely known position could not have been unconnected to the overwhelming pressure that had been exerted on Senegal and the wider continent, on the need to see Habré brought to justice. In essence, this one-off approach to the implementation of international criminal justice, albeit defective, had served, in certain respects, the goal of closing the impunity gap. Also, the drafters of the EAC statute were aware that this specific instrument was targeted at a former head of state who does not enjoy immunity after office. This is consistent with the AU's formulation of the immunity clause in the Malabo Protocol. As will be shown in the next chapter, the AU position in this statute is therefore consistent with what was reflected in the Malabo Protocol. It maintains immunity for sitting head of state and government, while they are in office.

### 3.3. Legal status of the EAC

There have been some debates on the actual legal status of the EAC.<sup>114</sup> It has been fondly called 'a "local" international criminal tribunal',<sup>115</sup> and 'a "minimalist" internationalized criminal court'.<sup>116</sup> Sarah Williams acknowledges the EAC's description as a hybrid or internationalized court. She notes that the original idea behind hybrid tribunals is to evolve "a mechanism that avoids the weaknesses of 'purely' international and domestic prosecutions."<sup>117</sup> She further notes that the perceived benefits of the hybrid model include capacity building and increased penetration of international norms into the domestic system, while enhancing independence, impartiality and legitimacy, as a result of the participation of the UN (or other international organizations) in such tribunals.<sup>118</sup> Some of the defining features of this type of tribunals are: performance of a criminal judicial function; temporal or transitional nature of the tribunal; the possibility or actual participation of international judges working alongside national judges, added to the possibility or

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<sup>114</sup> For examples, see E. Cimiotta 'The First Steps of the Extraordinary African Chambers: A New Mixed Criminal Tribunal?' (2015) 13 *JICJ* 1. See also S. Williams 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?' (2013) 11 *JICJ* 1139-1160.

<sup>115</sup> K. B. Carlson 'Trying Hissène Habré 'On Behalf of Africa: Remaking Hybrid International Criminal Justice at the Chambres Africaines Extraordinaires' in J. Nicholson (ed) *Strengthening the Validity of International Criminal Tribunals* (BRILL 2018) 345.

<sup>116</sup> S. A. E. Høgestøl (2016) The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity (2016) 34 *Nordic Journal of Human Rights* 3, 147-156.

<sup>117</sup> S. Williams 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?' (2013) 11 *JICJ* 1144.

<sup>118</sup> *Ibid.*

actual international involvement in other organs of the tribunal; full or partial international financing of the tribunal; mixture of international and national elements in the material jurisdiction of the tribunal; and lastly, the involvement of another party apart from the affected state.<sup>119</sup> The EAC meets five of these features. It is therefore “best characterized as an *internationalized criminal tribunal*, which are ‘essentially domestic institutions but with significant participation from other states or from international organisations.’”<sup>120</sup>

Schabas agrees with the classification of the EAC as an internationalized tribunal. He submits that ‘[T]he Chambers are international not only by virtue of the crimes that they prosecute but also because of the involvement of the President of the Commission of the African Union in the appointment of judges and at least one of the judges is to be a national of another African State.’<sup>121</sup> Emanuele Cimiotta however disagrees with Schabas and Williams. He argues that the view that the EAC is an international tribunal is not persuasive.<sup>122</sup> He explains that it is necessary to examine the legal nature of the EAC in order to be able to properly classify it. He criticized the view that the EAC is an internationalised tribunal because the view fails to consider where the legal consequences of the activity of the EAC take place, and for not considering the relationship between the EAC and the persons subject to its jurisdiction.<sup>123</sup> He submits that the EAC is a Senegalese organ and its activity belongs to Senegal. He supports this position with the reasoning that where the Statute of the EAC evinces a lacuna, Senegalese laws are resorted to as per articles 12, 15, 16, 18 and 26 of the Statute, which generally emphasize the Senegalese character of the EAC. He concludes that the points he raised ‘reflect the national rather than the international character of the EAC.’<sup>124</sup>

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<sup>119</sup> *Ibid*; see also C. Stahn ‘The Geometry of Transitional Justice: Choices of Institutional Design’ (2005) 18 *Leiden Journal of International Law* 425-466.

<sup>120</sup> S. Williams (n. 114) 1144.

<sup>121</sup> W. Schabas ‘Senegal’s Chambres africaines extraordinaires to judge Habré’, *PhD Studies in Human Rights Blogpost*, 5 February 2013 [available at <https://humanrightsdoctorate.blogspot.com/2013/02/senegals-chambres-africaines.html> - accessed 12 May 2023]

<sup>122</sup> E. Cimiotta ‘The First Steps of the Extraordinary African Chambers: A New Mixed Criminal Tribunal?’ (2015) 13 *JICJ* 1, 189.

<sup>123</sup> *Ibid*.

<sup>124</sup> *Ibid*, 191.

From the foregoing, it seems that the consensus is that the EAC possesses some features distinguishing it from other internationalised tribunals. In this regard, it is a court whose background is fully regional and unrelated to the United Nations' (UN) post-conflict peace building activities.<sup>125</sup> The tribunals forming part of the UN post-conflict peace-building architecture share certain features which are absent in the EAC. Some examples of this kind of tribunals include the Extraordinary Chambers in the Court of Cambodia, the Special Panels of the Dili District Court and the Special Criminal Court in Central African Republic. All these tribunals are located in the countries where the crimes are committed. They were created by collaboration between the UN and national governments, in response to particular internal armed conflict.<sup>126</sup> But the EAC is an AU initiative. It is not strictly in response to particular internal armed conflict, although its jurisdiction is limited to crimes committed within a specific period of time in the political history of Chad. The EAC is also not a pure international tribunal like the ICTY or the ICTR. Those were created as independent tribunals and were fully separated from the domestic systems of the countries in whose territories the crimes were committed. They also only applied international law. The EAC on the other hand was created to be 'embedded within the current Senegalese judicial system' and applied the Senegalese penal code, alongside international law.

These difference notwithstanding, the EAC shares certain similar features with other 'internationalized' criminal tribunals under the auspices of the UN. These features include: composition of national and international judges, as well as application of both domestic and international law. The EAC had no other international staff in the prosecution or other organs.<sup>127</sup> It had minimal content of international elements and was more of a court that received financial and technical assistance form international bodies.<sup>128</sup> The international elements were limited to its application of international law, its governance by a special statute and the presence of international judges appointed by the AU.<sup>129</sup> The EAC had jurisdiction to try international crimes, although, those had been grafted and included in the Senegalese penal code. The statute granted primacy to the EAC and provided in article 16 that 'for those cases not provided for in this statute,

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<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, 179.

<sup>127</sup> See generally article 12 of the EAC Statute on the office of the prosecutor.

<sup>128</sup> See S. Williams (n. 114) 1147.

<sup>129</sup> Høgestøl (n. 116) 152.

the Chambers shall apply Senegalese law.’ The presidents of the EAC’s Trial and Appeal Chambers were non-Senegalese from other AU member states.<sup>130</sup>

Thus, the limited international content of the EAC puts the tribunal in a different class from other chambers. This unique status has proved to be a necessary innovation in order to finally arrive at the goal of serving justice for breach of international crimes, albeit by the domestic legal system of a member state, spurred on by decisions and agreement from regional and sub-regional bodies, *to wit*, the ECOWAS decision and the AU decision/agreement.

### **3.4. Legitimacy of the EAC Tribunal**

During the lifespan of the EAC, there were debates on the legitimacy of the tribunal, especially because the only defendant – Hissène Habré — had refused to accept the tribunal’s jurisdiction over him and consequently refused to appear before it.<sup>131</sup> The private counsel retained by the defendant also refused to participate in the pre-trial stage of the proceedings. The case then went into full trial, solely on the evidence adduced by the prosecution. At the beginning of the trial stage of the proceedings, Mr Habre who has refused to appear, was forcefully brought to court, prompting protests from Senegalese lawyers who argued that his rights had been breached by the tribunal’s order to forcefully produce him in court.<sup>132</sup> The tribunal also appointed lawyers for the defendant. Mr Habre’s refusal to accept the tribunal’s legitimacy and the subsequent appointment of lawyers by the tribunal led to a 45-day delay in the commencement of the proceedings. The newly appointed lawyers needed time to study the bulky case files. The delays had varying impacts on the different actors in the proceeding. For the lawyers to the defendants, 45 days were too short to study and understand the case; for the victims who had waited for many years for Habre to be brought to justice, justice delayed was justice denied and for the tribunal itself, that was existing on a limited time and budget, the delays could have adverse effects on its ability to complete its assignment within the allotted time.<sup>133</sup>

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<sup>130</sup> See generally article 11 of the EAC Statute on composition of the EAC and appointment of judges.

<sup>131</sup> International Bar Association ‘Legal Representation, Fairness and Access to Justice in Hybrid Tribunals and Specialised Chambers’ (2018), 59-60.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

### 3.5. Complementarity and the EAC

The EAC Statute and Agreement had no complementarity provisions similar to Article 17 (1) of the ICC Statute. However, there is a provision on *ne bis in idem* (the rule against double jeopardy). *Ne bis in idem* functions to aid complementarity in many ways. As noted by the OTP of the ICC in its submissions to the Appeals Chamber, *ne bis in idem* and the concepts of admissibility jointly serve to implement the principle of complementarity.<sup>134</sup> Article 19 of the EAC Statute replicates almost completely, the exact provisions of article 20 of the Rome Statute. The purpose of that provision is to avoid duplicity and ensure that no defendant is tried twice for the same conduct. It helps to smoothen relationships between different courts or tribunals that are given to similar or overlapping roles. It was important to have included this provision, considering that in 2007, a working group led by Malick Sow, had submitted a report to the effect that *ne bis in idem* would not bar Habré from trials.<sup>135</sup> This was a reaction to concerns that Mr. Habré could raise such defense, given, for example, that at the time the report was being submitted, there was an ongoing trial in Chad, for which he was eventually sentenced to death in absentia.

During the trial itself, the judges of the EAC did not have an opportunity to make pronouncements on *ne bis in idem*, in relation to Mr. Habré. But if a situation arose where there was a need to pronounce on it, how would the Chamber have resolved this legal question?

As has been shown, the EAC is a Chamber within the Senegalese court system, however with limited international elements. The agreement establishing the EAC remained binding on Senegal and the AU, who are the two parties to the agreement. On the other hand, the statute operates to ‘implement the decision of the AU concerning the Republic of Senegal’s prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990, in accordance with Senegal’s international commitments.’<sup>136</sup> Thus, while the agreement governs activities between these two parties, the Statute applies to implement the decision in the agreement, for the

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<sup>134</sup> ICC-OTP, Doc: ICC-01/11-01/11 ‘Corrigendum to Prosecution Response to the “Document in Support of the Government of Libya’s Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi”’ dated 23 July 2013, page 26 at para. 55.

<sup>135</sup> See Rapport du Groupe de Travail sur l’Affaire Hissène Habré, Ministère de la Justice (March 2007), referenced in Human Rights Watch ‘Hissène Habré and the Senegalese Courts: A Memo for International Donors’ December 2007.

<sup>136</sup> See Article 1 of the EAC Statute.

purposes of prosecuting person(s) whose conducts fall within the jurisdiction of the statute, irrespective of location, status or nationality, on the basis of universal jurisdiction.

Flowing from this, the appropriate interpretation of article 19(2) of the EAC Statute, which provides that '[N]o person shall be tried by another court...', is that another court would legally refer to another Senegalese court, considering that the Statute and the Agreement basically operate as Senegalese instruments and are thus binding on Senegal. It is inconceivable that Senegal or any other state would make a law that would bar other states from actions that would not be illegal for them to take, under international law. Therefore, Chad or any other state cannot be precluded from bringing charges against Habre on the basis of *ne bis in idem* provisions of the EAC statute.

To find further support for this interpretation of the *ne bis in idem* provisions of the EAC, I draw inspiration from similar provisions in the statute of similar tribunals: The Special Tribunal for Lebanon (STL) and the Special Court for Sierra Leone (SCSL). Article 5(1) of the STL statute and article 9(1) of the SCSL statute similarly provide that '[N]o person shall be tried before a national court of Lebanon/Sierra Leone for acts for which he or she has already been tried by the Special Tribunal/Court.' While it is clear that article 4 of the STL statute and article 8 of the SCSL statute have expressly provided that the tribunal/court shall have concurrent jurisdiction with the national courts in the two countries, and the EAC statute does not contain similar provision, the other similarities between the STL and SCSL on one hand, and the EAC on the other hand, strongly support the argument that their provisions on *ne bis in idem* may be interpreted in the same way. The ambiguity in the EAC statute might have been a product of ambiguous drafting that resulted from careless replication of the provisions of the Rome Statute.

The EAC statute lacked an admissibility provision similar to article 17(1) of the Rome Statute. There may be many reasons for this, chief of which could be because, unlike the Rome Statute which shares jurisdiction over crimes with national mechanisms, the EAC statute served as an *ad hoc* instrument that shares no jurisdiction with any other mechanism outside Senegalese judicial system. As such, it was not envisaged that there would be a clash of jurisdiction, which was the reason for an admissibility provision in the Rome Statute. Overall, the EAC statute only contained one leg of the complementarity provisions in the Rome Statute: the issue of *ne bis in idem*. The other part was absent for the reasons suggested above.

### 3.6. The Habré trial and the lessons learned

Tribunals start their work long before their first trials are commenced. In the same way, the legacy of a tribunal will continue to be seen and felt, long after its closure. While the concept of legacy could mean different things to different people, as it could lend itself to a broad range of interpretations,<sup>137</sup> the idea of legacy that is conceptualized here refers to the general contributions that the EAC has made or may yet make to ICL. It may be too early to speak of its legacies and contributions to ICL in definite and conclusive terms. For decades to come, efforts to quantify the EAC's legacies will continue, in the same manner that the Nuremberg and Tokyo trials still offer lessons for the present, and perhaps, the future. This work does not preempt what the future analysis will be, but it offers some preliminary thoughts on what the trials have contributed to ICL and the potentials for instruction and guidance that are inherent in some of its practices.

First, the EAC is a court based in Senegal but dealing with crimes committed in Chad. For this reason, its success was heavily reliant on the cooperation it could get from Chad, being the domicile of most of the witnesses.<sup>138</sup> To operationalize this, the two countries needed to conclude a cooperation agreement, which they did in May 2013. The lesson here is the need for cooperation between stakeholders for the success of crimes prosecution. A criminal tribunal is as strong and effective as the support it gets from states, especially states connected to the trials.

Secondly, there are instances where a universal institution like the ICC does not have jurisdiction to try certain conducts. One example is where the crimes to be tried happened before 2002, when the Rome Statute came into force. The statute does not have retroactive capacity. Hence, in instances where the ICC cannot or does not have jurisdiction, employing a similar model as the Habré chambers will further help to fulfill the goals of the Rome Statute. Recall that article 9 of the EAC Statute specifically provides that '[T]he crimes within the jurisdiction of the EAC shall not be subject to any statutory limitations.'

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<sup>137</sup> S. Vasiliev 'Trial Process at the ECCC: The Rise and fall of the Inquisitorial Paradigm in International Criminal Law' in S. Meisenberg & I. Stegmiller (eds) *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Springer 2016) 391.

<sup>138</sup> C. Sperfeldt 'The trial against Hissène Habré: networked justice and reparations at the Extraordinary African Chambers' (2017) 21 *The International Journal of Human Rights* 9, 1247.

Thirdly, the minimalist nature of international elements and involvement may yet make the EAC or similar model an attractive model for international crimes prosecution in Africa. The EAC model has the capacity to stretch backwards, farther than the reach of even the ICC or a similar court created within the African court.

Fourthly, the establishment of the EAC became a necessity as a result of the inability of the domestic systems to prosecute Habré. The failure of the domestic system in Chad to prosecute Habré was partly because of his absence in the country. The failure in Senegal was as a result of the legal impossibilities that the decisions from the Senegalese courts had placed on the efforts to prosecute him. Thus, the EAC model became an attractive alternative where the domestic systems are unable to prosecute.

Fifthly, as noted by Kersten and Ainley, one of the most enduring legacies of the EAC is the success of its outreach program.<sup>139</sup> This is important because justice must not only be done but must also be seen to have been done. The EAC externalized its outreach program to a consortium of NGOs from Chad, Senegal and Belgium.<sup>140</sup> This partly accounted for its effectiveness. One of the biggest challenges with the ICC and indeed, many international criminal tribunals, especially those sited outside of the location of crimes, is the idea that the justice it metes out is foreign to the affected communities. This aspect can be effectively handled where a robust program of outreach has been put in place by the tribunal itself. What the EAC taught us in this regard is that outsourcing outreach to local or community-based networks, wholly or in a consortium, may improve visibility of the tribunal while conferring a measure of acceptance on it from victims and affected communities. As posited by Kersten and Ainley, and I agree, the success of the outreach program of the EAC was a major determinant in the overall perception of the success of the work of the EAC.<sup>141</sup>

Sixthly, the roles played by civil societies to ensure that the trial took place are significant. When civil societies collaborate with victim-networks, it increases the likelihood of getting justice for victims. Civils societies and victims-networks that were involved in the advocacy to bring Habré

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<sup>139</sup> M. Kersten and K. Ainley, 'Hybridization - A Spectrum of Creative Possibilities' in S. Weill and ors. *The Habré Trial and Beyond: New Models of Prosecuting International Crime?* (Oxford University Press 2020), 267-281.

<sup>140</sup> Brody (n. 102) 18.

<sup>141</sup> *Ibid* at 6.

to justice included the Chadian Association of Victims of Crimes and Political Repression (AVCRP), International Federation for Human Rights (FIDH), the Chadian Association for the Promotion and Defence of Human Rights (ATPDH), Human Rights Watch (HRW), the Dakar-based African Assembly for the Defence of Human Rights (RADDHO), among others. The pressures mounted by these organizations helped to ensure accountability.

Furthermore, the role that the sub-regional human rights court played in bringing Habré to justice is significant. As shown above, it was the ECOWAS court that first pronounced that Habré could only be tried by ‘an *ad hoc* special tribunal of an international character.’ Human rights bodies have always played some roles in the application of international criminal law.<sup>142</sup> Again, one of the outcomes of the involvement of CSOs was in reducing the impact that hosting the trials in a country far removed from the scenes of crimes could have had on the perception of legitimacy of the trial. These CSOs launched many initiatives and also creatively used new technologies to bring the trials home to Chadians. Twitter, YouTube and other Websites were creatively engaged as all the sessions of the trials were posted on these platforms. The CSOs and the EAC also ensured that there were debates, public screening of the trial and other outreach activities with locals across the country.<sup>143</sup>

Lastly, the impact of the Habré trials has continued to reflect itself in the Senegalese and the Chadian judiciaries and legal systems. Representatives of the victims had opportunities to not only appear at an international stage, but also to learn from experienced international criminal lawyers.<sup>144</sup> In the words of the Chadian Justice Minister, the trial ‘has had a significant impact on our understanding of the role of justice. It’s made us realize that courts can be independent, and no one is above the law.’<sup>145</sup> In Senegal, the impact was much more direct and visible. As noted earlier, Senegal amended its laws in order to be able to carry out the trials. Part of the amendment was to accommodate retroactive application of criminal law and universal jurisdiction.<sup>146</sup> The next

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<sup>142</sup> M. Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’ (2018) 34 *Utrecht Journal of International and European Law* 2, 161–184.

<sup>143</sup> South African Institute of International Affairs, ‘The Hissène Habré trial: a triumph for victims and civil society’ [available at <https://saiia.org.za/research/the-hissene-habre-trial-triumph-over-opposition-oblivion-and-distance-for-the-victims-and-civil-society/> - accessed 12 February 2024].

<sup>144</sup> C. Hicks *The Trial of Hissene Habre: How the People of Chad Brought a Tyrant to Justice* (ZED Books 2018) at 140.

<sup>145</sup> *Ibid*, 141.

<sup>146</sup> *Ibid* at 142.

section of this chapter now turns to an analysis of how the Habre trials promoted the ideas behind the notion of regional complementarity that this work promotes.

### **3.7. Promoting regional complementarity**

There are at least four different ways in which the establishment of the EAC supports the notion of regional complementarity that this work promotes.

One of the motivations for regional complementarity is the understanding that the ICC cannot realistically be available and capable of prosecuting all cases of international crimes that this vast globe may experience, especially with its limited budget. The EAC model may be an attractive alternative. There is no doubt that the Habré trials has set a precedent and may continue to encourage prosecution of international crimes at the regional level. The trials may spur regions to look inwards and create tailor made approaches to crimes prosecution at a regional level. This is more so because the EAC model may afford states the channel to prosecute crimes that the ICC may not have the jurisdiction to try. Examples include crimes that have been committed prior to 2002 when the ICC statute entered into force.<sup>147</sup> Many regions, including the African and the South American regions are crying for justice for egregious human rights violation and international crimes. To address these concerns, the EAC model presents alternative for justice. Secondly, this notion of regional complementarity implies that all efforts –including regional efforts- must be channeled towards closing the impunity gap, thereby fulfilling the overall goal of the ICC. The EAC model may encourage states, as it did to Senegal, to put in place measures to ensure that they live up to their commitments under the Rome Statute. A case in point were the legal measures by Senegal in order to facilitate the trials. It was rightly observed that ‘[T]he EAC were a last-minute creature of necessity’.<sup>148</sup> This suggests that a creative world of opportunities is available for regions in their bid to regionalize international criminal justice. The EAC may have moved the world closer to less impunity. Thirdly, this idea promotes regional and local ownership of initiatives geared towards international crimes prosecution. One of the major arguments against the ICC is the idea that the justice it portends to dispense is western-styled and too removed from

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<sup>147</sup> P. Fabricius Now to make this extraordinary court, ordinary’ *Institute for Security Studies Today*, 11 February 2016 [available at <https://issafrica.org/iss-today/now-to-make-this-extraordinary-court-ordinary> - accessed 11 February 2024].

<sup>148</sup> Brody (n. 102) 32.

the people that it purports to serve. At least, this is one of the arguments from African leaders and their apologists. An EAC model has the potential to reverse this argument. In a sense, when a state adopts the EAC approach, perhaps through the support of a region, there is a greater tendency for an increased perception, which contributes to the credibility of the tribunal. In addition to this, this approach helps a region to claim ownership of the process and outcome of the tribunal. Lastly, the thought that regional courts can complement the ICC in a regime of robust collaboration and cooperation is no longer strange. In January 2018, the ICC itself convened a judicial seminar titled ‘Complementarity and Cooperation of Courts in an Interconnected Global Justice System’.<sup>149</sup> This was primarily because the ICC itself has begun to envisage that a more effective court would require the cooperation and collaboration of national as well as regional courts. In relation to the themes of this dissertation, the seminar touched on many interesting topics including ‘the role of regional courts’ as well as the relationship/convergence of criminal courts and human rights courts. The topics addressed at this seminar reveals that the ICC is now more concerned about the inevitable roles that regional courts will begin to play in the subject of international criminal justice, particularly using regional human rights courts. What remains to be seen is how these relationships will be operationalized and arranged in a manner that reduces friction and jurisdictional clashes.

#### **4. The Kosovo Specialist Chambers and Specialist Prosecutor’s Office (KSCSPO)**

##### **4.1. Background and Establishment**

This tribunal started operation in 2017. It was set up in 2015 to prosecute crimes against humanity, war crimes and other crimes under Kosovo national law, in respect of allegations contained in a Council of Europe (CoE) report.<sup>150</sup> While it was set up by Kosovo, it is a tribunal with a strong link to regional international organizations – the CoE and the EU. The tribunal was set up by a law

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<sup>149</sup> ICC, Judicial Seminar: Complementarity and Cooperation of Courts in an Interconnected Global Justice System, International Criminal Court (ICC), 18 January 2018, The Hague, Netherlands. Welcoming remarks by Judge Silvia Fernández de Gurmendi, ICC President.

<sup>150</sup> Council of Europe Document 12462 of 7 January 2011, ‘Council of Europe Parliamentary Assembly Report on Inhuman treatment of people and illicit trafficking in human organs in Kosovo.

adopted by the Assembly of the Republic of Kosovo.<sup>151</sup> The allegations were that serious international crimes were committed in Kosovo between 1 January 1998 and 31 December 2000. The Assembly also amended the Kosovo National Constitution to accommodate the establishment of the KSCSPO as part of the Kosovo domestic judicial system.<sup>152</sup> The CoE had urged Kosovo to start serious investigation to find the truth about specific allegations,<sup>153</sup> and to cooperate with the EU Rule of Law Mission in Kosovo (EULEX).<sup>154</sup> It was thus the CoE that kick started the process of establishing the KSCSPO by requesting all CoE members to judicially cooperate on ongoing and future war crimes investigation.<sup>155</sup> The EU also played a role in the establishment of the KSCSPO. The Kosovo authorities had exchanged letters with the EU. An international agreement then arose out of the exchange of letters.<sup>156</sup>

#### **4.2. Legal status, structure and composition**

Stahn had argued that the legal nature of the KSCSPO is disputed. One view is that the tribunal was created by the international act of exchanging letters between the EU and the Kosovo authorities. The other is the view taken by Kosovo's Constitutional Court that the KSCSPO are part of the legal order of Kosovo but internationalized.<sup>157</sup> Cimiotta had referred to it as a 'regional mixed criminal tribunal.'<sup>158</sup> Williams calls the KSCSPO 'clearly internationalized institutions.'<sup>159</sup> Stahn refers to it as 'mixed domestic regional Chambers.'<sup>160</sup> Whatever the view, one undeniable fact is that the KSCSPO was established as a result of the actions of regional organizations, just like the Extraordinary African Chambers. Their establishment further extends the regionalization of international criminal justice, which has become inevitable. The KSCSPO consists of three distinct organs – the Chambers, the Registry and an independent Prosecutor's Office.<sup>161</sup> The composition presents a new category of hybrids as it is only staffed with foreign judges and

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<sup>151</sup> 'Law on Specialist Chambers and Specialist Prosecutors Office'. Law No.05/L-053, 31 August 2015.

<sup>152</sup> 'Amendment of the Constitution of the Republic of Kosovo' No.05 -D- 139, 3 August 2015.

<sup>153</sup> CoE Report, para. 19.5.3.

<sup>154</sup> CoE Report, para 19.5.1.

<sup>155</sup> CoE Report, 1.

<sup>156</sup> E. Cimiotta 'The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo: The 'Regionalization' of International Criminal Justice in Context' (2016) 14 *JICJ* pg. 56.

<sup>157</sup> C. Stahn *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 206-207.

<sup>158</sup> Cimiotta (n. 156) 60.

<sup>159</sup> S. Williams 'The Specialist Chambers of Kosovo: The Limits of Internationalization?' (2016) 14 *JICJ* 27.

<sup>160</sup> Stahn (n. 157) 207

<sup>161</sup> (n. 151).

personnel.<sup>162</sup> It has shown that it may not always be essential to include local staff in a hybrid tribunal before it can be called such.<sup>163</sup>

### 4.3. Jurisdiction, Crimes and Applicable laws

Articles 6-10 of Law No.05/L-053 stipulate the subject-matter, temporal, territorial, personal and concurrent jurisdictions of the KSCSPO. The law contains similar extensive provisions as the Rome Statute, on war crimes and crimes against humanity. It however does not contain genocide and the crime of aggression. The Tribunal applies customary international law and Kosovo national criminal law, where the latter complies with the former. Article 15 also contains reference to specific and general national criminal laws in Kosovo. Thus, while the KSCSPO is similar to other hybrids in the application of national and international laws, it differs from others in the strict composition of international judges. One obvious challenge raised by this, is the suitability of international judges applying local laws that they are not familiar with. Also, some have described the jurisdiction of the KSCSPO as a ‘contested jurisdiction’ in that it only focuses on allegations of crimes by former Kosovo Liberation Army (KLA) members.<sup>164</sup> Others described the justice it dispenses as ‘mono ethnic justice for victors.’<sup>165</sup>

### 4.4. Perception of legitimacy

Among ethnic Albanians, the KSCSPO’s mandate to only prosecute crimes allegedly committed by the KLA appears unfair.<sup>166</sup> Unlike the Nuremberg trials, for example, this is novel in that it concentrates on accountability of the ‘victors’ in the conflict, as against the ‘vanquished’.<sup>167</sup> The fact that the Kosovar authorities only caved in to international pressures has also not enhanced local legitimacy of the tribunal.<sup>168</sup> Other reason is that the tribunal is sited far away in the Hague

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<sup>162</sup> R. Muharremi ‘The Kosovo Specialist Chambers and Specialist Prosecutor’s Office’ (2016) 76 *ZaöRV* 967.

<sup>163</sup> Williams (n. 159) 35.

<sup>164</sup> A. Mucaj ‘The Kosovo Specialist Chambers and Specialist Prosecutor’s Office Paradox’ (2021) 21 *International Criminal Law Review* 380.

<sup>165</sup> M. Holvoet ‘Introducing the Special Issue ‘Critical Perspectives on the Law and Politics of the Kosovo Specialist Chambers and the Specialist Prosecutor’s Office’ (2020) 20 *International Criminal Law Review* 3.

<sup>166</sup> G. Visoka ‘Assessing the potential impact of the Kosovo Specialist Court’ (PAX 2017) 1-48.

<sup>167</sup> Stahn (n. 157) 207.

<sup>168</sup> A. Trigo ‘The Kosovo Specialist Chambers: In Need of Local Legitimacy’, *Opinio Juris*, 8 July 2020 [available at <https://opiniojuris.org/2020/06/08/the-kosovo-specialist-chambers-in-need-of-local-legitimacy/> - accessed 12 February 2024)].

and is also officiated by foreign judges and officials who are appointed by the EU. This presents a difference from other hybrids that have been considered in Chapter 3 of this work. The Tribunal has just started its assignment and it has only confirmed indictments in a few cases. The Tribunal has also recently issued two judgments. The trial judgment for the Salih Mustafa case was issued on 16 December 2022 while the appeal judgement was issued on 14 December 2023. In the Pjetër Shala case, the trial judgement was pronounced on 16 July 2024.<sup>169</sup>

One of the key lessons that has already come out of the KSCSPO is the need for a tribunal to focus on all sides on the conflict, and not on one side. Also, the KSCSPO could learn from the EAC's outreach efforts to bridge the physical distance between the location of crimes and the venue of the tribunals. These efforts may help to enhance its acceptance by the locals.

#### **4.5. How KSCSPO promotes regional complementarity**

As explained, regional complementarity could imply efforts geared towards the prosecution of international crimes by a region. This is irrespective of the unwillingness on the part of the national authorities to cooperate with the region. In relation to the KSCSPO, the Kosovar authorities had limited political will and were initially unwilling to cooperate with the EU on the establishment of the Tribunal. However, regional and international pressures were mounted and the national authorities eventually accepted the establishment of the Tribunal.<sup>170</sup> This is a victory for regional efforts to prosecute international crimes. Although the KSCSPO is not a regional tribunal, it is to some extent a regional organisation's project. The cost of the court is borne by the EU as part of its Common Foreign and Security Policy.<sup>171</sup> There are different levels of cooperative relations between the KSCSPO and the EU. For example, there is a 'Working Arrangement establishing cooperative relations between the KSCSPO and the European Union Agency for law Enforcement

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<sup>169</sup> See 'Cases' at <https://www.scp-ks.org/en/cases>. (Accessed on 20 September 2021).

<sup>170</sup> Muharremi (n. 162) 968.

<sup>171</sup> European Commission, Helping international justice to thrive: support to Kosovo Specialist Chambers and EUAM Ukraine, 17 July 2023.

Cooperation (EUROPOL).<sup>172</sup> This is one example of the support that the EU as a regional organization gives to the KSCSPO, among others.

## Conclusion

In this chapter, I have considered the practice of regional complementarity in the contexts of the EAC and the KSCSPO. I show that regionalism in ICL is inevitable. One reason for this is that the turn to regionalism in ICL is not novel. It is rooted in UN Charter's provisions on states' responsibility to take joint actions within a regional arrangement to ensure global peace and security. I establish that complementarity between the Habré tribunal and the ICC is not a discussion that is worth entertaining, considering that the tribunal has concluded its assignment. The Law on the establishment of the KSCSPO did not consider any possible relationship between the tribunal and the ICC. This is probably because there is no overlap of temporal jurisdiction between the two courts. I also examine the place of precedent in inspiring developments in ICL. Evidence shows that the Pinochet case in which a Spanish court exercised universal jurisdiction to try the former Chilean dictator, was a major inspiration for the agitations that finally led to the prosecution of Habré.<sup>173</sup> The Habré case has been called 'the first successful application of the Pinochet precedent.'<sup>174</sup> In the same manner, the 'success' of the Habré case may yet inspire the prosecution of perpetrators of international crimes, in the same way that the Pinochet case trans-regionally influenced the Habré trial. The place of precedent in law cannot be underestimated. As noted by a commentator, when the Appeal Chambers of the ICC overturned the conviction of Jean-Pierre Bemba for crimes against humanity and war crimes by the Trial Chamber in June 2018, it stood in stark contrast to the Hissène Habré conviction which was confirmed on appeal, thus showing that 'Africa can indeed successfully prosecute the most serious of international crimes.'<sup>175</sup> In the KSCSPO, we have already seen the indictment of Kosovo's former president, who had to step down in 2020, in order to face charges.<sup>176</sup> The EAC and KSCSPO have thus shown the

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<sup>172</sup> 'Working Arrangement establishing cooperative relations between the KSCSPO and the European Union Agency for law Enforcement Cooperation (EUROPOL)' (2020).

<sup>173</sup> Høgestøl (n. 116).

<sup>174</sup> I. Sansani, 'The Pinochet Precedence in Africa: Prosecution of Hissène Habré' (2001) 8 *Human Rights Brief* 1.

<sup>175</sup> M. Nel 'Can a regional court be a viable alternative to the ICC in Africa?' *The Conversation* (6 August 2018), [available at <https://theconversation.com/can-a-regional-court-be-a-viable-alternative-to-the-icc-in-africa-100788> - accessed 12 February 2024].

<sup>176</sup> Mucaj (n. 164) 387.

capacity and potential of regionally-backed criminal tribunals in bringing the most senior political officers to trial for crimes committed by them or under their watch. In the EAC, we see how advocacy mounted by victims-network groups and civil society organizations within the continent contributed to the establishment of the tribunal and the success of the trial. In the KSCSPO, I have shown how the regional organization mounted pressure on the Kosovar authorities, despite the latter's initial reluctance. All these underscores the importance of multi-faceted approach in bringing justice to victims of international crimes. For the EAC, I have shown the role that the sub-regional human rights court played. It was the ECOWAS court that first ruled that Senegal could try Habré in an *ad hoc* tribunal established for that purpose. This shows that regional and sub-regional human rights mechanisms may be able to play more role in the regionalization of ICL. I have also shown that in the context of the assistance driven strand of regionalism, regional organizations are active in supporting ICL through the establishment of tribunals in the domestic system of member-states. This is to be distinguished from the other strand where regional organization moves towards full regionalism. The next chapter will consider this second strand of regionalism.