Extraordinary African Chambers in the Senegalese Courts: A Regional Mechanism Enforcing International Criminal Justice

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I. INTRODUCTION

When the International Criminal Court (ICC) was created, there were very high hopes that its establishment would lead to the "end of impunity."[1] Some writers even hailed the Court "as something of a panacea for international ills."[2] Africa, in particular, was said to be instrumental in the

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1. ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 585 (3d ed. 2014).
2. *Id.*

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creation and establishment of the Court since a large number of the State Parties came from this region.[3] With the creation of the ICC, a permanent court which could enforce international criminal justice was finally established, one with jurisdiction to prosecute the most heinous crimes of genocide, war crimes, and crimes against humanity.[4] However, the promising image of the ICC did not last long. Several controversies plagued the Court, particularly its alleged bias towards Africa.

In July 2012, the International Court of Justice (ICJ) issued a ruling mandating Senegal to either prosecute or extradite Hissène Habré, the former president of Chad, for the alleged commission of torture, war crimes, and crimes against humanity.[5] Prior to this decision, Belgium sought Habré's extradition.[6] However, Senegal maintained that it had no jurisdiction to act on the request; instead, it referred the case to the African Union (AU).[7] In a decision promulgated in July 2006, the African Assembly observed that "the crimes of which [ ] Habré is accused of fall within the competence of the [AU,]"[8] and mandated the Republic of Senegal to prosecute him "on behalf of Africa[.]"[9] In line with this mandate, the Extraordinary African Chambers

3. The International Criminal Court reports that out of the 124 signatories to the Rome Statute, 34 came from Africa. Incidentally, Africa is the biggest regional block. International Criminal Court, The State Parties to the Rome Statute, *available at* https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last accessed Oct. 31, 2016).

4. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

5. Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 462, ¶ 122 (July 20).

6. Human Rights Watch, Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal, *available at* https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal (last accessed Oct. 31, 2016) [hereinafter HRW, Q&A].

7. *Questions Concerning the Obligation to Prosecute or Extradite*, 2012 I.C.J. at 461, ¶ 122.

8. Decision sur le Procès d'Hissène Habré et l'Union africaine, Assembly/AU/Dec.127 (VII) 1, 1 (July 1-2, 2006) [hereinafter Decision on Hissène Habré].

9. *Id.*

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(EAC) in the Senegalese Courts designated to prosecute Habré was established.[10]

At first glance, the AU's decision appears to be an offshoot of the tension between this organization and the ICC, with the former blocking the latter from further interfering in the affairs of its Member States. The creation of the EAC can be seen as a complete disregard of anything foreign, thereby straining further the relations between the AU and the ICC. However, a deeper analysis of the competence, work, and rules of the EAC may reveal otherwise. Hence, this Article aims to answer the question of whether regionalized enforcement mechanisms in Africa have detrimental, or perhaps, positive effects in trying to achieve the goals of international criminal justice within the region. In answering this question, this Article will focus on the EAC as Africa's first attempt to make use of a regionalized approach to international criminal justice.

II. THE EXTRAORDINARY AFRICAN CHAMBER

From 1982 until 1990, Habré ruled as president of Chad with the backing of the United States (U.S.).[11] After he was deposed, he sought asylum in Senegal.[12] With the assistance of non-governmental organizations (NGOs) such as the Human Rights Watch, the victims of Habré's regime were able to uncover documents revealing human rights violations.[13] In January 2000, the victims, with the assistance of NGOs, filed a case against Habré in Dakar on the basis of alleged violations of the Convention against Torture (CAT).[14] Initially, a judge of the lower court of Senegal indicted Habré.[15]

10. HRW, Q&A, *supra* note 6.

11. *See* Michael Bronner, *Our Man in Africa*, FOREIGN POLICY, Jan. 24, 2014, *available at* http://foreignpolicy.com/2014/01/24/our-man-in-africa (last accessed Oct. 31, 2016).

12. Boston University African Studies Center West African Research Association, The Extraordinary African Chambers & the Trial of Hissene Habre, *available at* http://www.bu.edu/wara/2014/04/29/the-extraordinary-african-exchange (last accessed Oct. 31, 2016).

13. Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, Vol. 17, No. 10 (A) 5 (July 2005) [hereinafter Victims of Hissène Habré].

14. *Id.* at 18. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

15. Victims of Hissène Habré, *supra* note 13, at 19.

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However, the victims' victory was short-lived, as the Senegalese appellate court overturned the ruling on the ground of lack of jurisdiction of the courts of Senegal to hear the case.[16] The ruling was grounded on the fact that the United Nations (U.N.) CAT,[17] which was the basis of the indictment, had not yet been transformed into national law in Senegal.[18] Moreover, the Senegalese *Cour d'appel* stated that the acts were committed abroad; hence, Senegal had no jurisdiction to act on the complaints.[19]

In a sudden turn of events, the victims filed the case against Habré in Belgium.[20] At one point, the case appeared to have reached a dead end, when the ICJ ruled against Belgium's exercise of universal jurisdiction in the Arrest Warrant case.[21] The ICJ even suggested that heads of States, such as Habré, enjoyed immunity for public acts they committed while they were in office.[22] But through the efforts of the victims, Belgium continued its investigation.[23] In 2005, it sought Habré's extradition.[24] Senegal, however, refused, on the basis of an alleged lack of jurisdiction to act on the request, and further referred the case to the AU.[25] The latter, in turn, mandated Senegal to prosecute Habré "on behalf of Africa[.]"[26] Senegal's newly-elected head of State, President Abdoulaye Wade, argued that his country

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16. Reed Brody, *The Prosecution of Hissène Habré — An "African Pinochet"*, 35 NEW ENG. L. REV. 321, 330 (2001).
17. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 14.
18. Brody, *supra* note 16.
19. Decision of the Indictment Chamber of Dakar, Arrêt n' 135 du 04-07-200, Cour d'appel de Dakar [Court of Appeals of Dakar] Apr. 12, 2000, *available at* https://www.hrw.org/legacy/french/themes/habre-decision.html (Sen.) (last accessed Oct. 31, 2016).
20. Victims of Hissène Habré, *supra* note 13.
21. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).
22. *Id.* at 24, ¶¶ 29-30, 58, & 70-71.
23. Victims of Hissène Habré, *supra* note 13.
24. *Id.*
25. *See* Human Rights Watch, No Decision on Extradition of Ex-Chad Dictator, *available at* https://www.hrw.org/news/2005/11/25/no-decision-extradition-ex-chad-dictator (last accessed Oct. 31, 2016).
26. Decision On Hissène Habré, *supra* note 8, at 1.

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needed to amend its current laws to include extraterritorial jurisdiction[27] in order for its courts be able to prosecute Habré.[28] Moreover, the former stated that Senegal needed funding to proceed with the prosecution.[29]

The negotiations for the budget and the issue of jurisdiction caused further delays. Finally, in 2010, the Court of Justice of the Economic Community of West African States ruled that the prosecution can be done through a "special *ad hoc* procedure of an international character."[30] Unfortunately, the Senegalese delegation's withdrawal from the negotiations relating to the creation of a court that would prosecute Habré once again halted the tribunal's establishment.[31]

In 2012, following the ICJ's finding that Senegal breached its obligations under the U.N. CAT for its failure to either prosecute or extradite Habré,[32] negotiations between AU and Senegal were renewed, and culminated with the establishment of the EAC.[33]

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27. The amendments would have violated the legality principle considering that at the time the acts complained of occurred, Senegal had no jurisdiction to take cognizance of the crimes allegedly committed by Habré. *See* Habré v. Senegal, Arrêt No: ECW/CCJ/JUD/06/10 (Community Court of Justice - ECOWAS, Nov. 18, 2010), *available at* http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2010/HISSEIN_HABRE_v_REPUBLIQUE_DU_SENEGAL.pdf (last accessed Oct. 31, 2016).
28. *See* HRW, Q&A, *supra* note 6.
29. *Id.*
30. *Habré*, Arrêt No: ECW/CCJ/JUD/06/10, ¶ 61. The Court held —

    > le mandat reçu par le Sénégal de l'Union Africaine, lui confère plutôt une mission de conception et de suggestion de toutes modalités propres à poursuivre et à faire juger dans le cadre stricte d'une procédure spéciale ad hoc à caractère international telle que pratiquée en droit international par toutes les nations civilisées.

    Id.
31. *See* Human Rights Watch, Senegal: Habré Trial an 'Illusion', *available at* https://www.hrw.org/news/2011/06/09/senegal-habre-trial-illusion (last accessed Oct. 31, 2016).
32. *Questions Concerning the Obligation to Prosecute or Extradite*, 2012 I.C.J. at 461, ¶ 121.
33. HRW, Q&A, *supra* note 6.

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A. Domestic and International Components of the Extraordinary African Chambers

The EAC is a hybrid court — international in character,[34] yet established within the Senegalese judicial system.[35] The prosecutor and all the judges of the tribunal are nominated by the Senegalese Minister of Justice and appointed by the AU.[36] Article 16 of the Statute of the Extraordinary African Chambers (Statute) states that in all cases not provided for in the Rules as spelled out in the Statute, the Senegalese law, specifically its Rules of Procedure, shall be applied by the Chambers.[37] Similar to the Rome Statute, the Chambers have jurisdiction over the following crimes: genocide, crimes against humanity, and war crimes.[38] In addition, the EAC exercises jurisdiction over the crime of torture, which is considered a stand-alone crime, as well as constitutive acts in the crimes against humanity or war crimes.[39]

As a prosecution or completion strategy, the EAC will only prosecute those persons who are most responsible for the crimes as enumerated in the Statute, and those who committed "serious violations of international law,

34. Mandiaye Niang, *The Senegalese Legal Framework for the Prosecution of International Crimes*, 7 J. INT'L CRIM. JUST. 1047, 1054 (2009).

35. Accord entre le gouvernement de la République du Sénégal et l'Union Africaine sur la creation des Chambres africaines extraordinaires au sein des jurisdictions sénégalaises [Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of the Extraordinary Chambers in African Senegalese Jurisdictions], Sen.-AU, art. 2, Aug. 22, 2012, *available at* http://www.chambresafricaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf (last accessed Oct. 31, 2016) [hereinafter Agreement between Senegal & AU].

36. *See* Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 Juin 1982 au 1er Décembre 1990 [Statute of the Extraordinary African Chambers within the Senegalese Judicial System for the Prosecution of International Crimes Committed on the Territory of the Republic of Chad During the Period from 7 June 1982 to 1 December 1990], arts. 11 & 12, *available at* https://www.hrw.org/fr/news/2013/01/30/statut-des-chambres-africaines-extraordinaires (last accessed Oct. 31, 2016) (Sen.) [hereinafter Statute of the EAC].

37. *Id.* art. 16.

38. *Id.* art. 4.

39. *Id.* art. 4 & 8.

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customary international law[,] and international conventions ratified by Chad."[40] This mirrors the completion strategies of the ICC and other *ad hoc* tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY)[41] and the International Criminal Tribunal for the Rwanda (ICTR).[42]

The similarities do not end here. Like the ICTY and the ICTR, the Statute requires its prosecutors to possess high moral character, impartiality, and integrity.[43] Other similarities with the ICTR and ICTY Statute include the enumeration of the rights of the accused,[44] provisions reflecting the principle of *ne bis in idem*,[45] and the power of the prosecutor to initiate prosecutions *proprio motu*.[46]

With respect to the victims, the Statute mirrors the provision creating a trust fund for victims (TFV) which is a distinct feature of the Rome

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40. *Id.* art. 3. It reads that "[t]he [EAC] shall prosecute and try the person [or persons] most responsible for crimes and serious violations of international law, customary 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." *Id.*

41. *See* U.N. International Criminal Tribunal for the Former Yugoslavia, Completion Strategy, *available at* http://www.icty.org/en/about/tribunal/completion-strategy (last accessed Oct. 31, 2016).

42. *See* U.N. Security Council, *Letter dated 15 May 2015 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council*, U.N. Doc. S/2015/340 (May 15, 2015).

43. *Compare* Statute of the EAC, *supra* note 36, art. 12, *with* U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, art. 16 (4), U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute] & S.C. Res. 955, art. 15, U.N. Doc. S/Res/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

44. *Compare* Statute of the EAC, *supra* note 36, art. 21, *with* ICTY Statute, *supra* note 43, arts. 20 & 21.

45. Statute of the EAC, *supra* note 36, art. 19. The maxim *ne bis in idem* refers to "[t]he principle that a person should not be prosecuted more than once for the same criminal conduct." Gerard Conway, *Ne Bis in Idem in International Law*, 2 INT'L CRIM. L. REV. 217, 217 (2003).

46. *Compare* Statute of the EAC, *supra* note 36, art. 17, *with* ICTY Statute, *supra* note 43, arts. 17 & 18.

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Statute.[47] The TFV under the ICC and the EAC fulfills two mandates: (1) implementation of court-ordered reparation awards, and (2) assistance to victims through physical, material, and psychological rehabilitation.[48]

Unlike a truly international court, the EAC enjoys the benefits of being able to apply local laws in areas where the Statute is lacking.[49] For example, in terms of enforcement of decisions and court orders, the EAC is not dependent on State cooperation, but rather, on the Senegalese local police.[50] This fact was highlighted when Habré was arrested by local Senegalese police forces under the direction of the Chambers.[51] The EAC further operates like a domestic court in terms of evidence collection and powers conferred on the Office of the Prosecutor,[52] both of which are based on the Senegalese Code of Penal Procedure.[53]

Another distinctive feature of the EAC relates to the rights afforded to the victims, which are comparable to that of the ICC. Like the ICC, victims are given the right to reparations done through TFV,[54] as discussed earlier. They are likewise given the right to protection under the auspices of the Senegalese government during the entire proceedings.[55] This protective feature differs from international tribunals such as the ICC; the latter does not have its own police force, rendering victim protection difficult.[56]

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47. *Compare* Statute of the EAC, *supra* note 36, art. 27 (2), *with* Rome Statute, *supra* note 4, art. 79.

48. ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW 400 (2015) & Coalition for the International Criminal Court, Trust Fund for Victims, *available at* http://www.iccnow.org/?mod=trustfund (last accessed Oct. 31, 2016).

49. Statute of the EAC, *supra* note 36, art. 16 (2).

50. *See* Statute of the EAC, *supra* note 36. The Statute of the EAC is silent as to the power of enforcement of decisions and court orders. Consequently, the Senegalese Code of Penal is applicable. CODE OF PENAL PROCEDURE (Sen.).

51. *See* Brusil Miranda Metou, Sénégal: Arrestation et détention d'Hissène Habré, Sentinel, *available at* http://pre.sentinelle-droit-international.fr/bulletins/a2013/20130707_bull_355/bulletin_sentinelle_355.php (last accessed Oct. 31, 2016).

52. *See* Statute of the EAC, *supra* note 36, arts. 12, 17 (1), & 22.

53. CODE OF PENAL PROCEDURE (Sen.).

54. Statute of the EAC, *supra* note 36, art. 27 (2).

55. *Id.* art. 34.

56. *See* Rome Statute, *supra* note 4, art. 103.

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While both the ICC and the EAC afford victims the right to participation, the latter provides a better system of participation since it allows the formation of civil parties at any stage of the proceeding.[57] In a study made by the University of California, Berkeley School of Law[58] in relation to the participation of victims in the ICC, it was reported that victims found it very important that their experiences and stories would be heard.[59] As a matter of fact, mere completion of forms in the Court gave them the hope that their experiences would help build the case against the accused and bring justice to them and other victims.[60] The report further notes that, "[m]any observers now view victim participation as essential to the legitimacy and effectiveness of international criminal proceedings."[61] Hence, it is found that the rights to reparation, protection, and most importantly, participation on the part of the victims, have great impact on their perception of and trust in the international criminal justice.[62] The protection of these rights prevents feelings of alienation and apathy, as felt by victims against other *ad hoc* tribunals such as the ICTR and ICTY.[63]

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57. *Id.* art. 14 (1).

58. *See* Stephen Smith Cody, et al. The Victim's Court?: A Study of 622 Victim Participants at the International Criminal Court (Report by the Human Rights Center of the University of California, Berkeley School of Law), *available at* https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf (last accessed Oct. 31, 2016).

59. *Id.* at 44.

60. *Id.* at 42-43 & 63-64.

61. *Id.* at 12.

62. War Crimes Research Office, Washington College of Law, Victim Participation Before the International Criminal Court (International Criminal Court Legal Analysis and Education Project) 12, *available at* https://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf (last accessed Oct. 31, 2016).

63. *Id.* The research states —

> While the *ad hoc* criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right, nor are victims able to request compensation in proceedings before the tribunals.
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> . . .

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In assessing the EAC on the basis of its constitutive Statute, it can be argued that the EAC secures the benefits of both domestic and international tribunals, while avoiding each of their weaknesses. Although the EAC has features similar to international or internationalized tribunals, as discussed previously, it is nonetheless a Senegalese organ, one which operates on the basis of Senegalese law in cases not provided for by the Statute. Hence, the support of State apparatuses such as police and enforcement forces is available to the Court — a feature that is utterly missing in the ICC, and often considered its weakness.[64] Unlike a purely domestic court where bias and corruption can exist, the EAC has an international, or at least, a regional focus, ensuring that the judges and the prosecutors will exercise integrity and impartiality in all their actions.[65]

Internationalized tribunals like the Extraordinary Chambers in the Courts of Cambodia,[66] the Special Court for Sierra Leone,[67] the Special Tribunal for Lebanon,[68] and other existing hybrid courts deal with crimes committed in the Court's own territory.[69] The EAC, however, covers crimes committed in Chad, not in Senegal, where the crimes are

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> These failures, critics say, have led to a disconnect between the work of the *ad hoc* tribunals and the lives of those who suffered most from the atrocities that these institutions were designed to address.

Id.

64. *See* Rome Statute, *supra* note 4, art. 103.
65. Statute of the EAC, *supra* note 36, arts. 11 (5) & 12 (2).
66. Agreement Between the U.N. and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, Cambodia-U.N., June 6, 2003, 2329 U.N.T.S. 117 (entered into force Apr. 29, 2005) [hereinafter Statute of the ECCC].
67. Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., Jan. 16, 2002, 2178 U.N.T.S. 137 (entered into force Apr. 12, 2002) [hereinafter Statute of the SCSL].
68. Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Leb.-U.N., Feb. 6, 2007, 2461 U.N.T.S. 257 (entered into force June 10, 2007) [hereinafter Statute of the STL].
69. Statute of the ECCC, *supra* note 66, art. 2 (1); Statute of the SCSL, *supra* note 67, art. 1 (1); & Statute of the STL, *supra* note 68, art. 1 (1).

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prosecuted.[70] Hence, Senegal, in this case, is exercising universal jurisdiction on the basis of an Agreement and Statute created by virtue of a mandate issued by the AU.[71]

The EAC owes its life and existence to the Agreement between the AU and Senegal. The AU, as a regional organization, exercised its powers to intervene in the sovereign affairs of its members, in order to fight impunity prevalent in the region.[72] This was the aim hoped to be achieved when the AU entered into an Agreement with Senegal.[73] In turn, by virtue of the Agreement between the AU and Senegal, a regional mechanism with universal jurisdiction and the capacity of enforcing international criminal justice was created.[74] The AU has made it very clear that the case of Habré is an African concern.[75] Hence, the EAC is the first tribunal that truly reflects a regional ownership of an issue, one that necessitates active regional involvement. The effects of this regional ownership and involvement will be discussed later in the Article.

III. EXTRAORDINARY AFRICAN CHAMBERS AS A REGIONAL MECHANISM ENFORCING INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

International criminal justice "intends to establish accountability for individual perpetrators and thereby end the impunity of those who would

70. Statute of the EAC, *supra* note 36, art. 3 (1).

71. HRW, Q&A, *supra* note 6.

72. Constitutive Act of the African Union art. 4 (h), July 11, 2000, 2158 U.N.T.S. 3 (entered into force May 26, 2001) [hereinafter Constitutive Act of the AU]. It provides the "the right of the Union to intervene in a [M]ember State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide[,] and crimes against humanity." *Id.*

73. *See* Agreement between Senegal & AU, *supra* note 35.

74. The AU has vehemently opposed the manner by which the principle of universal jurisdiction has been used by non-African States and even the ICC against African States. It must be emphasized, however, that the AU does not dismiss the utility of universal jurisdiction, provided that it is not abused, and utilized in line with international law and in order to fight impunity. *See generally* Constitutive Act of the AU, *supra* note 72.

75. *See* AU Decision on Hissène Habré, *supra* note 8, ¶ 5 (ii).

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otherwise evade justice for massive global crimes."[76] It also does not only have retributive and crime-preventing effects, but more than that, it should also contribute to the reconciliation of victims and their access to justice.[77] Mark Findlay stresses that translating justice, more specifically to victims of international crimes, is very problematic, and has not been achieved by international tribunals such as the ICC.[78]

The history of international criminal justice in Africa predates the creation of the EAC, the ICC, and even other *ad hoc* tribunals. An example would be the courts of Sierra Leone, which were created by treaties in order to prevent the crime of slavery, and to punish slave traders.[79] Jenny S. Martinez notes that the "Sierra Leone courts led in terms of the number of slaves freed[,]"[80] compared to more powerful States such as the U.S. and United Kingdom.[81] At present, international criminal justice in Africa has been pursued mainly through the ICC, the ICTR, and the SCSL.[82] Despite these historical and significant developments, however, there have been criticisms of how international criminal justice is applied in Africa.[83]

A. An African Solution to an African Dilemma

Currently, the African States, through the AU, stress their commitment to fighting impunity and enforcing international criminal justice within the region.[84] Article 4 (h) of the Constitutive Act of the AU highlights "the right of the [AU] to intervene in a [M]ember State pursuant to a decision of

76. Mark Findlay, *Enunciating Genocide: Crime, Rights and Impact of Judicial Intervention, in* THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 309 (Dawn L. Rothe, et al. eds., 2013).

77. *Id.*

78. *Id.*

79. JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 79 (2012).

80. *Id.*

81. *Id.*

82. Lydia Apori Nkansah, *International Criminal Justice in Africa: Some Emerging Dynamics*, 4 J. POL. & L. 74, 75 (2011).

83. ICC Forum, Is the International Criminal Court (ICC) targeting Africa inappropriately?, *available at* http://iccforum.com/africa (last accessed Oct. 31, 2016).

84. *See* Constitutive Act of the AU, *supra* note 72, pmbl.

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the Assembly in respect of grave circumstances, namely: war crimes, genocide[,] and crimes against humanity[.]"[85] The creation of the EAC is a clear reflection of such an intervention on the part of the AU to ensure that impunity within the region will be effectively prosecuted.

The backing of the AU in the creation of the EAC places the latter in a more legitimate position in the eyes of Africans compared to other *ad hoc* tribunals such as the ICTR.[86] Compared to a "western"-imposed foreign tribunal, mechanisms such as the EAC, which are composed of judges and prosecutors selected by the AU[87] and have more of an understanding of the tradition, culture, and state of the African continent, bring the tribunal closer to the people who matter — the Africans. The EAC, then, is an African court dealing with African issues that occurred within the African territory. Its existence serves as evidence that international criminal justice can be enforced exclusively within the auspices and control of the African States.

B. Notable Features of the Extraordinary African Chambers as a Regional Mechanism Enforcing International Criminal Justice

As highlighted above, victim participation in the EAC Statute, which is not emphasized in other *ad hoc* tribunals, can achieve one of the more difficult goals of international criminal justice — access to justice among victims.[88] Researchers such as Robert Folger, Tom R. Tyler, and Steven L. Blader have concluded that "the extent to which participants feel they have a 'voice' in the proceedings are major influences [ ] on [the] extent of [their] satisfaction that justice was done."[89] The ICC mirrors this finding in its

85. *Id.* art. 4 (h).

86. The ICTR was created through a UN Security Council Resolution. Its judges and prosecutors were appointed by the UN General Assembly. The ICTR never prosecuted any member of the Rwandan Patriotic Front. Hence, its legitimacy is questionable in the eyes of the Rwandans. In a way, the ICTR did not meet the expectations of justice of the Rwandans and Africans in general. *See* Edwin Musoni, *ICTR Betrayed Rwanda, Justice minister tells UN*, NEW TIMES, Apr. 12, 2013, *available at* http://www.newtimes.co.rw/section/article/2013-04-12/64786 (last accessed Oct. 31, 2016).

87. *See* Statute of the EAC, *supra* note 36, arts. 11 & 12 (1).

88. *Id.* art. 14.

89. Smith Cody, et al., *supra* note 58, at 14 (citing Robert Folger, *Distributive and Procedural Justice: Combined Impact of Voice and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHO. 108-19 (1977) & Steven L. Blader & Tom

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report, which concluded that giving the victims an opportunity to be part of the proceedings can bolster their confidence in the justice process, and can make the work of the Court more relevant to them.[90] Hence, the right to participation of victims under the EAC, which expands the right provided for in the Rome Statute, can greatly impact international criminal justice and its image as perceived by the victims in Africa.

Moreover, the EAC Statute provides that the "proceedings [ ] shall be filmed and recorded, under the supervision of the Chief Prosecutor, for broadcasting purposes."[91] Broadcasting the proceedings both on public radio and television in Chad ensures that its citizens will know what transpires in the proceedings. It will also ensure that they will not feel disconnected from them. As a matter of fact, the Human Rights Watch is of the opinion that filming the entire proceeding is necessary in ensuring "that the trial is meaningful to, and understood by, the people of Chad, and helps [ ] build the rule of law in both Chad and Senegal."[92] Taking into consideration

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R. Tyler, *How Can Theories of Organizational Justice Explain the Impact of Fairness?*, *in* HANDBOOK OF ORGANIZATIONAL JUSTICE 329-54 (Jerald Greenberg & Jason A. Colquitt eds., 2005)).

90. International Criminal Court Assembly of States Parties, *Report of the Court on the Strategy in Relation to Victims*, ¶ 44, ICC-ASP/8/45 (Nov. 10, 2009). The report notes that the Court's objective is to "ensure that the victims are able to fully exercise their right to participate in ICC proceedings, in a manner that is sensitive to their rights and interests and consistent with the rights of the Defen[s]e and the need to ensure a fair trial." *Id.* ¶ 43. In highlighting the importance of this objective, the report further states that —

> By providing victims with an opportunity to articulate their views and concerns, enabling them to be part of the justice process[,] and by ensuring that consideration is given to their suffering, it is hoped that they will have confidence in the justice process and view it as relevant to their day to day existence rather than as remote, technical[,] and irrelevant. It is recognized that victim participation will contribute to the justice process at the Court and will make the proceedings more sensitive to victims.

Id. ¶ 44.

91. Statute of the EAC, *supra* note 36, art. 36. Its official English translation reads — "The proceedings of the [EAC] shall be filmed and recorded, under the supervision of the Chief Prosecutor, for broadcasting purposes, except as necessary for the protection of witnesses and other participants." *Id.*

92. HRW, Q&A, *supra* note 6.

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access to information and the right to participation on the part of the victims, the EAC has promising potential in ensuring that the people of Africa, or more specifically, the citizens of Chad, can feel that justice is truly being served.

It also worth noting that international criminal justice, as observed by scholars, is intertwined with African politics.[93] There are a number of cases that would prove the political nature of international criminal justice enforcement in Africa:

(1) The protection provided by the West African leadership to Charles G. Taylor when he was indicted for war crimes by the SCSL;[94]

(2) The indictment of Omar Hassan Ahmad al-Bashir by the ICC which has been met with a strong resistance by the Sudanese government and the AU;[95] and

(3) The lack of indictments and investigations on Paul Kagame supporters simply because they were the controlling force in Rwanda at the time of the ICTR trials.[96]

In all these cases, the issue of politics is tightly linked to the enforcement of international criminal justice. Hence, a regionalized application of criminal justice wherein the political needs of the people and the country in question are taken into account and, perhaps, better understood, becomes more imperative especially when peace and stability of the nation is at stake.

More importantly, the regional exercise of international criminal justice, specifically in the context of Africa, prevents the perception of western imposition and the possibility of evasion of jurisdiction by some African States by not ratifying the Rome Statute. With the active commitment of the AU in ending impunity in the region as well as its use of regional

93. *See* Nkansah, *supra* note 82, at 76. Lydia Apori Nkansah quotes Andreas O'Shea who observed that "[*ad hoc*] tribunals ... are political creations [ ] and are not created out of a need for justice alone, but also for a political need and by virtue of political decision taken by politicians in political circumstances[.]" *Id.* at 76-77 (citing Andreas O'Shea, *Ad hoc tribunals in Africa: A wealth of experience but a scarcity of funds*, 12 AFR. SEC. REV. 17, 18 (2003)).

94. *Id.* at 77.

95. *Id.*

96. *Id.*

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mechanisms such as the EAC, perpetrators of international crimes can no longer hide behind the protective mantle of the non-ratification of the Rome Statute, or wield their influence in the U.N. Security Council to avoid prosecution.[97]

In terms of enforcing orders, the EAC can rely on the domestic police powers of Senegal. More importantly, given the strong backing of the AU on the EAC, it can be expected that the AU will play a role in ensuring that the decision and orders of the Chambers are respected and followed. This is a sharp contrast to decisions of other *ad hoc* tribunals and even the ICC, where enforcement is highly dependent on the cooperation of oft-reluctant States.[98]

Lastly, regional mechanisms such as the EAC are more cost-efficient since it is built *within* an existing judicial system. With an existing budget of fewer than eight million euros,[99] the EAC did not need to invest in structures anymore that would have no use upon termination of the Court's work.[100]

IV. AFRICAN REGIONAL MECHANISMS AND THE INTERNATIONAL CRIMINAL COURT

Scholars highlight the fact that the AU has become increasingly "opposed" to the brand of international criminal justice which the ICC and other

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97. HRW, Q&A, *supra* note 6.

98. *See* Rome Statute, *supra* note 4, arts. 103, 105-109, & 111 & Maryam Jamshidi, The enforcement gap: How the International Criminal Court failed in Darfur, *available at* http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html (last accessed Oct. 31, 2016).

99. International Federation for Human Rights, Senegal: Hissène Habré Court Opens Extraordinary African Chambers to Try Former Chadian Dictator, *available at* https://www.fidh.org/en/issues/litigation/litigation-against-individuals/hissene-habre-case/Senegal-Hissene-Habre-Court-Opens-12873 (last accessed Oct. 31, 2016).

100. *Contra* Rachel Keer & Jessica Licoln, The Special Court for Sierra Leone: Outreach, Legacy and Impact (An Unpublished Final Report for King's College, London) 29, *available at* https://kclpure.kcl.ac.uk/portal/files/5381822/slfinalreport.pdf (last accessed Oct. 31, 2016). The report states that the SCSL invested on buildings and structures that have no use after the work of the Court. Given that the Court was only temporary, the investment in its structures seemed too extravagant and useless. *Id.*

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internationalized tribunals represent.[101] It was even hypothesized that the decision to limit the international elements of the EAC was influenced by "the desire to block the exercise of jurisdiction by the [ICC]."[102] Taking this into account, is there really an existing incompatibility between regional mechanisms such as the EAC and the ICC, such that the operation of the former has a detrimental effect on the work of the latter? The Author answers this question in the negative.

First, the ICC, although an international tribunal, has limited jurisdiction as provided for in the Rome Statute. Hence, international crimes committed before the Rome Statute was entered into force, or those crimes committed in the territory of non-State Parties, cannot be prosecuted by the ICC.[103] This lacuna can be filled up by African regional mechanisms under the auspices of the AU which "can find legitimate means of becoming involved in the prosecution of serious violations of international law [that is] ongoing in one of its Member States."[104]

It is further argued that regional mechanisms can assist in closing the "impunity gap." The ICC does not have the exclusive responsibility of prosecuting perpetuators of international crimes. At the same time, domestic courts may not always have the capacity to ensure impartial prosecutions, especially of very powerful persons who once ruled these nations. Hence, regional mechanisms can play an important role in unloading the ICC of cases, and at the same time ensuring that impunity will not go unpunished.

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101. Dire Tladi, *The African Union and the International Criminal Court: The battle for the soul of international law*, 34 S. AFR. Y.B. INT'L L. 57, 69 (2009).

102. Several legal scholars have extensively discussed the strained relationship between Africa and the ICC. *See* Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*, 34 J. INT'L CRIM. JUST. 1139, 1148 (2013) & Kurt Mills, *Bashir is dividing us: African and the International Criminal Court*, 34 HUM. RTS. Q. 404 (2012).

103. Rome Statute, *supra* note 4, art. 12. It is to be noted that there is a narrow exception to this general rule — that the U.N. Security Council itself makes the recommendation to the ICC. *Id.* art. 13.

104. Mbacké Fall, *The Extraordinary African Chambers: The Case of Hissène Habré, in* AFRICA AND THE INTERNATIONAL CRIMINAL COURT 129 (Gerhard Werle, et al. eds., 2014). Fall argues that the AU can compel its Member States to actually cooperate or it can create an *ad hoc* court to fight impunity within the region. *Id.*

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Moreover, strengthening African regional mechanisms, which can allow effective prosecutions, may trigger the "complementarity principle"[105] and "exclude ICC 'interference'"[106] in the region.[107] Hence, Africa's efforts should not focus on opposing the ICC but rather into ensuring that there exists genuine prosecution of perpetrators of international crimes within the African region. As highlighted by the ICC Prosecutor Shamila Batohi, each State has the "duty [ ] to exercise its criminal jurisdiction over those responsible for international crimes."[108] Hence, the primary responsibility for investigating and prosecuting these crimes rests on the national courts.[109] If these courts are found "unable or unwilling"[110] to partake in such a responsibility, it is only then that the ICC can exercise its jurisdiction.[111] Moreover, it is also the duty of regional organizations, such as the AU, to ensure that their Member States do not leave impunity unpunished.[112] The AU can do this by establishing regional mechanisms such as the EAC that can carry out the burden of prosecution.

Lastly, regional mechanisms present a "choice" among Africans on how to deal with an African problem. Rather than the imposition of a foreign tribunal that is out of the citizens' and the victims' reach, regional mechanisms can be a more favorable alternative. They also more adequately reflect the culture, tradition, politics, and sentiments of their people. The fact that the judges and prosecutors are chosen by the AU can also bolster these mechanisms' legitimacy in the eyes of Africans. However, the independence and impartiality of these regional mechanisms must be guaranteed; hence,

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105. Shamila Batohi, *Africa and the International Criminal Court: A Prosecutor's Perspective*, *in* AFRICA AND THE INTERNATIONAL CRIMINAL COURT 53 (Gerhard Werle, et al. eds., 2014).

106. *Id.* at 52.

107. The ICC's Preamble emphasizes that the courts shall be complementary to national criminal jurisdictions; Article 17 of the Rome Statute provides that, if a case is already being investigated or prosecuted by a State which has jurisdiction, it shall be inadmissible before the ICC. Rome Statute, *supra* note 4, pmbl. & art. 17.

108. Batohi, *supra* note 105, at 52.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* Constitutive Act of the AU, *supra* note 72, pmbl.

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there is a need for the AU to double its efforts in strengthening mechanisms such as the EAC.

V. CONCLUSION

The EAC is Africa's first attempt in enforcing international criminal justice through a regional mechanism set up not through the auspices of foreign organizations, but rather, by the AU itself. The EAC then presents an African solution to crimes that were committed in African soil.

There is a need to end and fight impunity all over the world. Each State has the primary responsibility to undertake this burden. However, in cases where the State is unable to partake in this responsibility, the burden should not automatically shift to the ICC, considering that regional organizations can play an active role in ensuring that international criminal justice is enforced. An analysis of the EAC shows that there is great promise in regional international justice enforcement mechanisms, as they can unburden the ICC of its load. At the same time, they can take over cases from domestic jurisdictions that have no capacity or are unwilling to prosecute. This helps close the impunity gap and ensure more effective and impartial prosecutions.

More importantly, regional mechanisms such as the EAC can bring justice to those who matter — the citizens and the victims. It is very important that they are given the right to participate and to be informed of the proceedings. Participation and proper dissemination of information can prevent feelings of alienation and apathy amongst the victims which render enforcement of international criminal justice useless, and sometimes inutile.

International tribunals do not have the monopoly in the enforcement of international criminal justice. Regional mechanisms such as the EAC, which combine existing justice systems with international elements, have very promising potential in ensuring that the goals of international criminal justice are achieved in an efficient and cost-effective way. The EAC has just started its work. However, it already successfully bridges the gap between the AU and the ICC, while closing the impunity gap existing within the region.

More can be said about the EAC after the Habré trial culminates. But for now, it is important to take advantage of regional mechanisms in the enforcement of international criminal justice in Africa, considering their strong potential and their complementarity with tribunals such as the ICC in ending impunity in the region.

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