

Chapter 8

The Extraordinary African Chambers: The Case of *Hissène Habré*

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8.1 Introduction

It is not hard to trace the history of the case of *Hissène Habré*, the former president of Chad from 1982 to 1990. One needs only visit the websites of the big human rights NGOs, such as Human Rights Watch,¹ to find detailed information about

The views expressed in this chapter are not necessarily those of the Extraordinary Chambers in the Courts of Senegal.

¹ For more details, see: <http://www.hrw.org/habre-case> (all internet sources in this chapter were accessed on 18 March 2014).

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him and the various attempts to bring him to justice until he was finally arrested and brought before the Extraordinary African Chambers.² For this reason, this chapter will focus on the law and procedures applied by the Extraordinary African Chambers. Then it examines the extent to which the creation of the Chambers by the African Union may serve as an alternative model to the International Criminal Court for trying Africans accused of serious violations of international law.

8.2 The Law and Procedures Applied by the Extraordinary African Chambers

Following the ruling by the International Court of Justice of 20 July 2012,³ that Senegal must prosecute or extradite *Habré*, Senegal and the African Union signed an agreement on 22 August 2012 creating the Extraordinary African Chambers within the courts of Senegal.⁴

The Statute of the Chambers included as an annex to the agreement is comprised of 37 Articles. It is titled “Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed by Chad between 7 June 1982 and 1 December 1990.”⁵

Four chambers were created:⁶

- One Investigative Chamber within the *Tribunal Régional Hors Classe de Dakar* composed of four investigative judges and two alternate investigative judges. The Investigative Chamber is responsible for investigating the ‘*Habré* affair’ and its decisions may be appealed.
- One Indicting Chamber within the Dakar Court of Appeals before which the acts of the Investigative Chamber may be challenged. The Indicting Chamber is composed of three judges and one alternate judge. The judges of the Indicting Chamber convene and rule on all appeals lodged, and its decisions are final and unappealable.

² Statute of the Extraordinary African Chambers, unofficial translation to English available at <http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>. The website of the Extraordinary African Chambers is available at <http://www.chambresafriaines.org/>.

³ *Belgium v. Senegal*, ICJ, judgment of 20 July 2012 (Questions relating to the obligation to prosecute or extradite).

⁴ Accord entre le gouvernement de la République du Sénégal et l’Union africaine sur la création des Chambres africaines extraordinaires au sein des juridictions sénégalaises, August 22, 2012. See also, Human Rights Watch 2012.

⁵ Statute of the Extraordinary African Chambers, unofficial translation by Human Rights Watch, available at <http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>. For the official text in French, see: http://www.chambresafriaines.org/pdf/Projet%20Statut%20chambres%20africaines_tel%20que%20Finalis+%C2%AE%2024%20Juillet%202012.pdf.

⁶ Article 11 of the Statute of the Extraordinary African Chambers.

- One Trial Chamber within the Dakar Court of Appeals responsible for trying those persons indicted by the Investigative Chamber. The Trial Chamber is composed of three judges and two alternate judges, and is presided over by a non-Senegalese judge from another African Union Member State.
- One Appeals Chamber attached to the Dakar Court of Appeals, whose decisions are final and unappealable. The Appeals Chamber is composed of three judges and two alternate judges, and is presided over by a non-Senegalese judge from another African Union Member State.

All judges are nominated by the African Union.⁷

For reasons linked to the safeguarding of the presumption of innocence, only the Investigative and Indicting Chambers have as yet been set up. The Trial Chamber will be set up once the investigative phase has been completed and a committal order is issued and the case is referred to the Trial Chamber. The Appeals Chamber will be set up when and if an appeal has been lodged against the decision rendered in the first instance by the Trial Chamber.

The Office of the Prosecutor for the Extraordinary African Chambers is represented by the Chief Prosecutor nominated by the African Union, along with his three deputy prosecutors.⁸ The Office of the Prosecutor is the only body that may initiate prosecutions and may do so until the end of the entire procedure, which is expected to last 27 months, including an investigative phase lasting 15 months, the trial lasting seven months and an appeal lasting five months.

The Registry is composed of one or several clerks who will assist the Extraordinary African Chambers and whose duties are determined pursuant to the Senegalese Code of Criminal Procedure.⁹ The clerks are nominated by the Minister of Justice of Senegal.¹⁰

The Administrator of the Chambers is nominated by the Minister of Justice of Senegal and is responsible for the non-judicial aspects of the administration and the servicing of the Extraordinary African Chambers.¹¹ The Administrator is also responsible for the Chambers' public relations with the international community and enters into agreements to carry out the outreach program activities and to raise public awareness both in Africa and globally about the work of the Extraordinary African Chambers.¹² The Administrator is also responsible for directing and assisting the witnesses and victims who appear before the Chambers, in addition to providing for the necessary measures and arrangements to ensure their protection and security.¹³

⁷ *Idem.*

⁸ *Ibid.*, Article 12.

⁹ *Ibid.*, Article 13(1).

¹⁰ *Ibid.*, Article 13.

¹¹ See generally, *ibid.*, Article 15.

¹² *Ibid.*, Article 15(3).

¹³ *Ibid.*, Article 15(4).

8.2.1 *The Applicable Law*

According to Article 16 of the Statute, the Extraordinary African Chambers apply the Statute, and for those cases not provided for in the Statute, the Chambers apply Senegalese law.

8.2.1.1 The Statute

The Statute defines the jurisdiction of the Chambers:

- Jurisdiction *ratione loci*: the Chambers have jurisdiction over crimes committed in the territory of Chad.¹⁴
- Jurisdiction *ratione temporis*: the Chambers have jurisdiction over crimes committed during the period from 7 June 1982 and 1 December 1990.¹⁵
- Jurisdiction *ratione materiae*: The Chambers have subject matter jurisdiction over four types of crimes defined in Articles 5–8 of the Statute: the crime of genocide, crimes against humanity, war crimes and torture.¹⁶
- According to Article 24, the Chambers may impose a penalty of imprisonment for 30 years or more, or a term of life imprisonment, when justified by the extreme gravity of the crimes and the individual circumstances of the convicted person.
- In addition to imprisonment, the Chambers may order a fine under the criteria provided for in Senegalese law, and the forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of third parties acting in good faith.¹⁷
- Torture is listed as a stand-alone crime in addition to being included among the acts that may constitute a crime against humanity or war crime.¹⁸
- The Chambers also have jurisdiction to try persons who have committed grave breaches of Common Article 3 of the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Armed Conflicts and of the Second Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977.¹⁹

The Statute also defines the prosecution strategy, both in terms of which persons and which crimes are targeted.

¹⁴ Ibid., Article 3.

¹⁵ Idem.

¹⁶ Ibid., Articles 4–8.

¹⁷ Ibid., Article 24(2).

¹⁸ See, *ibid.*, Articles 4 and 8.

¹⁹ Ibid., Article 7(2).

- The Chambers have the power to 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 in the territory of Chad during the period from 7 June 1982 to 1 December 1990.²⁰
- Within this frame, the Chief Prosecutor initiated an investigation pursuant to Article 17(4) of the Statute which states that “the Prosecutor may initiate investigations *proprio motu* or on the basis of information obtained from any source, particularly from governments, international organizations and non-governmental organizations, or on the basis of complaints filed by victims notwithstanding their place of domicile”.
- The work of the Prosecution has been facilitated by cooperation with the Belgian judicial authorities, who agreed to a visit by the Prosecution to Belgium and transmitted the files of their still open case against *Habré*;²¹ as well as other information and evidence gathered by such international organizations as Human Rights Watch and Amnesty International.²² During a mission to Chad, we visited former detention centers and the sites of mass graves.²³
- This preliminary investigative work allowed the Prosecution to gather the serious and corroborative evidence it needed to demand the indictment of *Hissène Habré*, *Saleh Younouss*, *Mahamat Djibrine*, *Guihini Koreï*, *Abakar Torbo* and *Zakaria Berdeï* as those alleged to be most responsible for grave violations of international law committed in Chad between 7 June 1982–1 December 1990.²⁴

The Extraordinary African Chambers may choose to prosecute the most serious crimes within their jurisdiction.²⁵

- *Hissène Habré* was charged with crimes against humanity, war crimes and torture,²⁶ while the others are being investigated for torture and crimes against humanity.

²⁰ Ibid., Article 3.

²¹ See “Mission Parquet général en Belgique” from the Extraordinary African Chambers, 12 June, 2013, <http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/496-mission-parquet-general-en-belgique.html>.

²² See for example Human Rights Watch 2013b.

²³ See “Mission Parquet general au TCHAD” from the Extraordinary African Chamber, 12 June, 2013, <http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/495-mission-parquet-general-au-tchad.html>.

²⁴ See “Communiqué de presse du 11 novembre 2013” from the Extraordinary African Chambers, 11 November, 2013, <http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqué-de-presse/551-communiqué-de-presse-du-11-novembre-2013.html>.

²⁵ Article 3(2) of the Statute of the Extraordinary African Chambers.

²⁶ See “Communiqué de Presse du Mardi 02 Juillet 2013” from the Extraordinary African Chambers, 13 August, 2013, <http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/505-communiqu%C3%A9-de-presse-du-mardi-02-juillet-2013.html>.

- Arrest warrants were issued against all five, and *Habré* has been held in detention since 2 July 2013,²⁷ after being kept in police custody for 48 hours.²⁸
- Two are currently being held in detention in Chad within the frame of a domestic procedure and are expected to be transferred to the Extraordinary African Chambers pursuant to the judicial cooperation agreement between Chad and Senegal provided for in the Statute of the Chambers.²⁹
- Because the investigative phase is subject to confidentiality and in full respect of the rights of the defense, the work of the Investigative Chambers is not presently subject to disclosure.

8.2.1.2 Senegalese Law

The Chambers may only apply Senegalese law subsidiarily in those cases not provided for in the Statute.³⁰ “Senegalese law” refers to the Senegalese Code of Criminal Procedure, general principles and all international conventions ratified by Senegal.

8.2.2 *The Procedures Applied by the Extraordinary African Chambers*

Pursuant to Article 17(1) of the Statute, “the Extraordinary African Chambers shall apply, in the first place, [the] Statute, and, for those cases not provided for in [the] Statute, the Code of Senegalese Criminal Procedure”.

²⁷ Human Rights Watch 2013a.

²⁸ See “Interpellation de *Habré*” from the Extraordinary African Chambers 2013; AFP, “Sénégal: première nuit en garde à vue pour *Hissène Habré*”, 1 July, 2013, <http://www.jeuneafrique.com/actu/20130701T110258Z20130701T110250Z/>.

²⁹ A number of former agents of the “Documentation and Security Directorate” (a secret police force) have been arrested in Chad since April 2013, pursuant to criminal complaints for torture, murder, and “disappearance”, filed by victims in October 2000. See, e.g. Radio France Internationale, “Tchad: ‘El Djonto’, tortionnaire sous le régime d’*Hissène Habré*, a été arrêté”, 15 May, 2013, www.bbc.co.uk/afrique/region/2013/05/130515_chad_tchad_arrest_habre.shtml; Radio France Internationale, “Tchad: trois personnalités du régime *Habré* arrêtées”, 5 July, 2013, <http://www.rfi.fr/afrique/20130705-tchad-trois-personnalites-regime-habre-arretees>.

³⁰ Article 16(2) of the Statute of the Extraordinary African Chambers.

8.2.2.1 The Code of Senegalese Criminal Procedure to Fill in the Absence of Special Rules of Procedure and Evidence

The ad hoc international criminal tribunals and the International Criminal Court adopted special rules of procedure and evidence regarding the admission of evidence, the conduct of investigations and trial proceedings.

In contrast, the Extraordinary African Chambers apply the rules of the Senegalese Code of Criminal Procedure.³¹ This is because the Chambers are not an ad hoc international criminal tribunal, but an internationalized tribunal located *within* the courts of Senegal, which were created by an international agreement.

- In this way, the Office of the Prosecutor carries out prosecutions with the powers as provided for by the Senegalese Code of Criminal Procedure;³²
- the duties of the Registry are determined pursuant to the Senegalese Code;³³ and
- the manner in which the investigation and hearings are carried out is governed by the Senegalese Code of Criminal Procedure.³⁴

8.2.2.2 The Senegalese Code of Criminal Procedure and the Provisions of the Statute Together Guarantee a Fair Trial

It is important to remember that Senegalese procedure is based on the Romano-Germanic inquisitorial legal system, and not the Anglo-Saxon adversarial system, which more closely resembles that of the international criminal tribunals.

In the Romano-Germanic system, the judges do not play the role of an arbiter. Rather,—take for example the investigative judges—they are investigators who take all measures deemed useful to uncover the truth, investigating and examining both incriminating and exonerating evidence.

The same can be said for the President of the Trial Chamber, who is responsible for the proper conduct of the hearings and oral proceedings, and who decides when the prosecution, civil parties and defence shall speak, with the defence always having the last word.

The underlying principles of criminal law are always respected, from the investigation phase to the proceedings before the courts. These apply to the four main actors in the proceedings: the prosecution, the accused, the victims and the judges.

³¹ *Ibid.*, Article 17(1).

³² *Ibid.*, Article 12(3).

³³ *Ibid.*, Article 13(1).

³⁴ *Ibid.*, Article 22.

8.2.2.2.1 The Prosecution: The Rules Governing Prosecution

- Structure: The Office of the Prosecutor is represented by the Chief Prosecutor or his or her deputy prosecutors.³⁵ The requirements of impartiality and integrity required by Article 12 of the Statute mirror Article 16 of the ICTY Statute and Article 15 of the ICTR Statute.
- Independence: The Office of the Prosecutor has no relationship or link to the Ministry of Justice or the African Union.³⁶ It receives no instructions from them and does not report to them.
- Exclusive Power to Initiate Prosecutions: The Office of the Prosecutor is the only body that may initiate prosecutions, and may do so by initiating investigations *proprio motu* or on the basis of information obtained from any source. The relevant Article 17 of the Statute mirrors Article 18 of the ICTY Statute and Article 17 of the ICTR Statute.
- The Office of the Prosecutor also has certain powers as provided by the Senegalese Code of Criminal Procedure.³⁷

8.2.2.2.2 The Rights of the Accused in the Proceedings

Article 21 of the Statute lists the rights of the accused, and mirrors Article 21 of the ICTY Statute and Article 20 of the ICTR Statute. The “accused” means not only the person before the court, but also anyone who has been charged with crimes and serious violations of international law.

The investigative phase is confidential and the rights of the defence feature prominently in the process.

- The accused has a right to counsel of his or her own choosing and cannot be forced to appear without his attorney or if his counsel has not been duly summoned.³⁸
- While in detention, the accused has a right at all stages of the proceedings to provisional release.³⁹ The Chamber must issue a decision within five days of receiving the response of the Prosecution, which must be submitted within ten days of receiving the request.
- If the accused believes that a mistake has been made in the investigation, he or she has—pursuant to Article 165 of the Senegalese Code of Criminal Procedure—a right to file a motion requesting that the decision be reversed.
- The accused has the right to a fair and speedy trial.⁴⁰

³⁵ *Ibid.*, Article 12(1).

³⁶ *Ibid.*, Article 12(2).

³⁷ *Ibid.*, Article 17(1).

³⁸ *Ibid.*, Article 21(4)(b).

³⁹ Article 130 of the Senegalese Code of Criminal Procedure.

⁴⁰ Article 21(4)(c) of the Statute of the Extraordinary African Chambers.

- The sentence shall be in writing and must state the reasons on which it is based, as per Article 23 of the Statute, which mirrors Article 23 of the ICTR Statute.
- The accused has a right to appeal orders issued by the investigating judges (as per the Senegalese Code of Criminal Procedure) as well as the decisions of the Chambers on the grounds recognized by most jurisdictions, such as: procedural errors; an error concerning a material question of law invalidating the decision, including an error relating to the Chamber's exercise of jurisdiction; and an error of fact which has occasioned a miscarriage of justice.⁴¹

The Statute also gives the Appeals Judges the capacity to draw upon the jurisprudence of international criminal courts and tribunals.⁴²

The Statute also specifies that all prison sentences shall be served in accordance with international standards.⁴³

8.2.2.2.3 The Victims

- **The Formation of Civil Parties:** As per Article 14 of the Statute, Civil Parties may be formed at any stage during the investigative phase by submitting a request in writing to the Registry, either by a victim or by his or her beneficiary. Victims may choose to form groups and may decide to be represented by a joint representative of their choice. The exact legal personality of these groups is not laid out in the Statute in detail. If a group of victims does not have the means to pay a joint representative, it may request assistance from the Administrator who shall rule on the request.
- **Right to Reparations:** The Extraordinary African Chambers may order that a reparations award in the form of compensation be made to a Trust Fund established for the benefit of the victims.⁴⁴ The Trust Fund shall be financed by voluntary contributions from foreign governments, international institutions, NGOs, or other interested persons or States.⁴⁵ The approach of the Extraordinary African Chambers is original in that reparations are open to all victims, individually or collectively, whether or not they participated in the proceedings before the Chambers.⁴⁶
- **Right to Protection:** The victims have a right to protection that is equal to that of witnesses and experts. The Government of Senegal is responsible for ensuring the protection of all parties and witnesses to the trial for the entire duration of the proceedings.⁴⁷

⁴¹ *Ibid.*, Article 25.

⁴² *Ibid.*, Article 25(3).

⁴³ *Ibid.*, Article 26(2).

⁴⁴ *Ibid.*, Article 27(2).

⁴⁵ *Ibid.*, Article 28(1).

⁴⁶ *Ibid.*, Article 28(2).

⁴⁷ *Ibid.*, Articles 34 and 35.

8.2.2.2.4 The Judge

The functions of investigation and trial are kept separate in the Extraordinary African Chambers.⁴⁸ The investigation may end with the dismissal of the case stating the reasons in fact and in law, a committal order, or a decision (in the case of an appeal referring the case to the Trial Chamber). The Trial Chamber is presided over by a non-Senegalese judge from another African Union Member State, two judges of Senegalese nationality and two alternate judges of Senegalese nationality.⁴⁹

Hearings shall be held in public and questions concerning the manner in which they are carried out shall be governed by the Senegalese Code of Criminal Procedure.⁵⁰

The trial court is governed by Articles 218 and 367-13 of the Senegalese Code of Criminal Procedure.

Specific provisions also govern the taking of evidence,⁵¹ the appearance of the accused before the court,⁵² the taking of witness testimonies,⁵³ civil parties and the role and responsibilities of the Office of the Prosecutor.⁵⁴

Pursuant to Article 290 of the Senegalese Code of Criminal Procedure, the President is responsible for the proper conduct of hearings and oral proceedings. He can take all reasonable measures to ensure the dignity of the hearings, and must remain impartial.

The Chamber makes a ruling first on the prosecution, and then the civil parties, and finally on all the points raised by the defence.

The Trial Chamber will impose a sentence in the form of a judgment and shall state the reasons on which it is based so that it may be appealed to the Appeals Chamber.⁵⁵ The Trial Chamber shall be presided over by a non-Senegalese judge from another African Union Member State, two judges of Senegalese nationality and two alternate judges of Senegalese nationality.⁵⁶

The judgment may be challenged on appeal within 15 days by all parties to the trial:⁵⁷ the accused, the prosecution and the civil parties with respect to their civil interests, on the following grounds:⁵⁸

⁴⁸ *Ibid.*, Article 2.

⁴⁹ *Ibid.*, Article 11(3).

⁵⁰ *Ibid.*, Article 22.

⁵¹ Articles 305 et seq. of the Senegalese Code of Criminal Procedure.

⁵² *Ibid.*, Articles 298 et seq.

⁵³ *Ibid.*, Articles 291 et seq. and 305 et seq.

⁵⁴ *Ibid.*, Articles 23 et seq.

⁵⁵ *Ibid.*, Article 23(2).

⁵⁶ *Ibid.*, Article 11(3).

⁵⁷ *Ibid.*, Article 367-6.

⁵⁸ *Ibid.*, Article 25(1).

- Procedural error;
- An error concerning a material question of law invalidating the decision, including an error relating to the Chambers' exercise of jurisdiction;
- An error of fact which has occasioned a miscarriage of justice.

The judgments rendered by the Appeals Chamber are final and unappealable,⁵⁹ as compared to normal criminal cases falling under the Senegalese Code of Criminal Procedure, which may be appealed to the *Cour de Cassation*.

8.3 The Extraordinary African Chambers: An Alternative to the International Criminal Court?

Before addressing the current debate on relations between Africa and the International Criminal Court with regard to the ongoing proceedings against certain Heads of State on the continent, it is useful to stress the key distinction between international crimes committed before and after the entry into force of the Treaty of Rome, as well as crimes committed in states which are Party to the Rome Statute as opposed to those which are not.

8.3.1 *International Crimes Committed Before the Entry into Force of the Rome Statute: The Example of the Extraordinary African Chambers and Their International Legitimacy*

There is a difference between an international criminal tribunal and an *internationalized* tribunal. An *international criminal tribunal* is created by the Security Council under Chapter VII of the UN Charter. Examples include the ICTY⁶⁰ and the ICTR.⁶¹ The second type, an *internationalized tribunal*, includes special or hybrid courts. These tribunals may be created by an agreement between a State or States and the United Nations, and are part of national judicial systems, while integrating international norms into their structure and set-up.⁶²

⁵⁹ *Ibid.*, Article 25(4).

⁶⁰ United Nations Security Council, Resolution 827 (1993), 25 May, 1993, S/RES/827 (1993).

⁶¹ United Nations Security Council, Resolution 955 (1994), 8 November, 1994, S/RES/955 (1994).

⁶² This is the case, for example, for the Extraordinary Chambers in the Courts of Cambodia, established as part of an agreement between Cambodia and the United Nations, or the Special Court for Sierra Leone, which was set up by the government of Sierra Leone and the United Nations.

The authority of the African Union to create an ad hoc tribunal finds its legal basis in the Constitutive Act of the African Union and customary international law.

8.3.1.1 The Constitutive Act of the African Union

As has been underscored by the Group of African Experts, the authority of the African Union to create special courts is derived from the power of the Assembly as defined in Articles 3(h), 4(h)&(o), 9(1)(d) and 5(1)(d) of the Constitutive Act of the African Union.⁶³ The Extraordinary African Chambers constitute the first internationalized tribunal ever established by agreement between the African Union and an AU Member State.

It is thus that on 1 and 2 July 2006, the Assembly of Heads of State and Government of the African Union mandated the Republic of Senegal to prosecute and ensure that *Hissène Habré* is tried on behalf of Africa by a competent Senegalese court with guarantees for fair trial.⁶⁴ By the decision of the Assembly/AU/DEC.401(XVII) adopted on 31 January 2012, the Assembly of Heads of State and Government requested the Commission of the African Union and the Republic of Senegal to consider the practical modalities as well as the legal and financial implications of the prosecution of international crimes committed on the territory of Chad during the period from 7 June 1982 to 1 December 1990.⁶⁵ On 22 August 2012, Senegal and the African Union, represented by the President of the Commission, signed an agreement creating the Extraordinary African Chambers within the courts of Senegal.

8.3.1.2 Customary International Law

As was noted by the Court of Justice of the Economic Community of West African States (ECOWAS) in its ruling of 18 November 2010 in the case of *Hissène Habré v. Senegal* (No. ECW/CC/JUD06/10),⁶⁶

the implementation of the mandate of the African Union should follow the international practice which has become customary in such situations to create ad hoc or special courts. The phrase '[...] jurisdiction' contained in this term means nothing other than the establishment of a judicial ad hoc creation and powers find their low relief in the provisions of Article 15.2 of the International Covenant on Civil and Political Rights and that

⁶³ Constitutive Act of the African Union adopted by the 36th ordinary session of the Assembly of Heads of State and Government in Lomé, Togo, 11 July, 2000, http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm.

⁶⁴ Assembly of Heads of States of the African Union 2006.

⁶⁵ Assembly of Heads of States of the African Union 2012, p. 20 (in French).

⁶⁶ *Hissène Habré v. République du Sénégal*, ECOWAS Court of Justice, 18 November 2010, para 58 (in French).

Senegal is responsible for proposing the principal forms and modalities of implementation of such a structure.

In its most recent ruling of 5 November 2013 in a case between the same parties (No. ECW/CCJ/RUL/05/13) the ECOWAS Court of Justice⁶⁷ pointed out as follows:

The Extraordinary African Chambers, even if they were created within the courts of Senegal, do not thereby have any less of an international character due on the one hand to the manner in which they were created (by international agreement) and on the other hand, to their rules and regulations (the Statute of the Chambers), which differ from those applied in the national courts of Senegal; that the existence on a national territory; that the location of the Chambers in a national territory (in this case, Senegal) and the make up of these chambers- at least in part- of national judges (here, Senegalese) does not in any way detract from the international character of these chambers.

The Court then goes on to conclude that: “the agreement that created the Extraordinary African Chambers and their special rules as laid out in the Statute give the Chambers an international character”.⁶⁸

As discussed, the AU’s authority to create special courts is derived from international custom and the Constitutive Act of the African Union which reject impunity. This principle must form the basis of the African Union’s political will to move toward more prosecutions by Africa of international crimes committed by nationals of the respective African countries, no matter their rank or status within the State apparatus.

8.3.2 International Crimes Committed After the Entry into Force of Rome Statute

8.3.2.1 Crimes Committed in States that Are Not Parties or Signatories to the Rome Statute

In the name of the fight against impunity and the protection of human rights, the African Union can find a legitimate means of becoming involved in the prosecution of serious violations of international law which are ongoing in one of its Member States.

The African Union could issue a Resolution calling on the State to institute criminal proceedings or to have the African Union launch legal proceedings through the creation of an external ad hoc court or a court created with the cooperation of the State at issue.

⁶⁷ *Hissène Habré v. République du Sénégal*, ECOWAS Court of Justice, 5 November 2013, para 47.

⁶⁸ *Idem*.

8.3.2.2 Crimes Committed in States Parties to the Rome Statute

The Preamble to the Rome Statute clearly states that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. It also underscores that the International Criminal Court is *complementary* to national criminal jurisdictions.⁶⁹

In light of the principle of *pacta sunt servanda*, States Parties must respect the obligations arising from their international commitments under the treaties they have signed and ratified. Even if the Rome Statute allows for withdrawal, such withdrawal only comes into force after one year and has no suspensive effect on proceedings which have already commenced.⁷⁰

If the UN Security Council implements Article 16 of the Rome Statute as the African Union has requested, then it must only do so if it is necessary for the protection of the national security of the States and only if it is severely threatened by proceedings initiated by the International Criminal Court. Article 16 must be used only very rarely and when certain objective criteria are met so that it does not become an open door to impunity and set risky judicial precedents.

Another possible alternative to prosecution of African leaders by the International Criminal Court would be to expand the jurisdiction of the Court of Justice of the African Union so that it could prosecute international crimes itself. However, this would involve the revision and modification of fundamental instruments regarding the setup and structure of the Court so that a special criminal chamber could be established. While such an endeavor would require a permanent budget and staff, temporary ad hoc courts might provide a more economical alternative for countries whose budgets are already very tight and already have trouble paying their dues.

8.4 Conclusion

The recent outcry among certain Member States of the African Union arises within the context of the 'Kenyan affair'. Access to power is an insufficient ground for exoneration or the suspension of proceedings by the International Criminal Court. Any procedure commenced and pending before the Court must proceed in accordance with the Rome Statute, unless Article 16 is applied by the UN Security Council.

For international crimes committed in States which are parties to the Rome Statute and for which no proceedings have begun, the African Union should act prior to any action by the International Criminal Court. The African Union must encourage such States to respect their obligations under the Rome State to exercise criminal jurisdiction over those responsible for the crimes. Only in the case of failure should the Court's complementary jurisdiction be applied.

⁶⁹ Rome Statute of the International Criminal Court, Preamble (10).

⁷⁰ *Ibid.*, Article 127.

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